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BEYOND TERRITORIAL PROTECTION: MILLET AND PERSONAL AUTONOMY AS INSTRUMENTS FOR (NEW) MINORITIES IN EUROPE?

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CONTENT

CHAPTER 1

CULTURAL AUTONOMY IN CONTEMPORARY MILLET SYSTEMS: A MODEL FOR EUROPE?

INTRODUCTION

During the last fifty years, Western societies have become increasingly multicultural and have progressively adopted models of cultural autonomy for accommodating diversity. These models are extraneous to the Western conception of rights, which is entangled in the nation-State model. In October 2008, UK Minister of Justice recognized the jurisdiction of Islamic Courts as arbitrators in cases of marriage and divorce; their rulings have to be scrutinized by British courts in order to test their

compatibility with British legal standards. In 1990, the Hungarian Parliament passed a law that guarantees representation to national and ethnic minorities, in both local and national political bodies. In the 1960s, the Netherlands established complex social system, known as *verzuiling*, which provided different "pillars" of social action for Protestant, Catholic, secular citizens. This model is still considered an effective solution for the integration of Muslim citizens. During the last five years, many European countries have created consultative organs for political representation of Muslim minorities, including migrants and nationals, such as the *Consulta Islamica* in Italy, the *Conseil Français du Culte Musulman* in France, and the *Diyanet* in Turkey and Germany. These means of group-differentiated rights show a gradual shift of European legal systems toward models of minority protection uncommon in the Western tradition.

Western legal systems have long addressed the question of minorities as the response of the nation-State to claims advanced by national groups. But the nation-State model, as it has been known since the Peace of Westphalia, has faced severe crises during the 20th century. The revival of non-national identity has challenged the ability of the nation-State to organize an effective social space for minority groups. Minority rights have so far been considered as intrinsically connected to the concept of nation, insofar that a group "incorporated in a State" is entitled to differentiated rights if "it differs from them in race, language or religion" in order to "preserve the characteristics which distinguish [it] from the majority" and to "satisfy the ensuing special needs."[1]

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[1] This definition of minority rights is one of the few general hints we can find in literature on minority rights. The definition was given by the Permanent Court of International Justice in the period of

The solution to the problem of national minorities has long been territorial autonomy, for three reasons mainly. First, territorial autonomy is a form of self-determination that implies the preservation of States' integrity and, consequently, guarantees States' sovereignty. Secondly, territorial autonomy is an appropriate solution for a world in which clear borders define States' jurisdiction over a defined territory. Therefore, guaranteeing a different jurisdiction to a territory in which the population is ethnically different is an effective legal response to those ethnic claims that are limited to certain territories. Lastly, for almost one century, territorial autonomy has been the result of transnational agreements between States that aim to protect their kin-nationals living in neighboring lands. Specifically, these agreements stem from the imitation of the constitutive elements of a State—territory, population, and jurisdiction—that are replicated and conceded to a lower level of government.[2]

Recent changes in world society caused by globalization, immigration, and inter-connectedness pose new challenges and require new solutions. The differences between national minorities are blurring together with national borders, under the

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flourishing of minority rights during the 20s and 30s of the 20th century. See, *Minority Schools in Albania* (1935), PCIJ Ser. A/B, no. 64, 17. Even the OSCE High Commissioner for national minorities has never defined what a minority is because this would imply to crystallize possible future development of the concept. Moreover, this would imply that those States that are not likely to concede differentiate rights would abide so strictly by this definition, in order to exclude one or the other group. However, the definition of the PCIJ has been subsequently employed in the Covenant on Civil and Political Rights (art. 27) and used as a frame of understanding in the work of the Council of Europe. See, *Yearbook of the European Convention on Human Rights*, "Text for the Proposal to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning Persons Belonging to National Minorities," (The Hague: Martinus Nijhoff, 1993), 389-391.

[2] For instance, the South Tyrol autonomous region in Italy has a population, a territory, and a jurisdiction; these elements make of South Tyrol a special legal system within the Italian legal system. Its autonomous territory is an imitation of the State on a lower scale.

pressure of globalization and supranational integration processes, which connect States to several spheres and levels of jurisdiction. Peoples are not immune to these changes, above all because mobility and international ties are shaping States as multicultural societies without territorially defined features. In other words, the remarkable changes in the world put Western societies before a great challenge, in that

> owing to contemporary migrations, from the South of the planet and from the East of the Continent, Western European society faces a huge challenge on its capacity to find practical and political solutions and on its very theoretical and ideological traditions. Is it possible to issue a defence of equality that is able to save the world of differences? Is it possible to answer the demands and requests originating from the diverse collective identities (ethnical, cultural, and social)?[3]

For these reasons groups gather around other poles of identity, which have to be taken into account by liberal democracies that mold politics of inclusion aiming to enforce policies of social equality and justice. In Eastern societies, an effective solution to similar problems has long since been found: the *millet* system that has developed under Ottoman rule and its contemporary adaptations throughout the Middle East— including Egypt, Jordan, Israel, Lebanon, Syria, Iran, Pakistan. I argue that contemporary *millet* systems can teach important lessons on the accommodation of minority claims in the West, which at least once should look eastward.

1. THE STATE OF ART

In order to focus on the research topic, it is necessary to frame the issues related to minority protection in a perspective of political theory first, and then in a legal

perspective. It is fundamental to define the reasons why States should protect minorities through an overview of the main debate in political theory with specific reference to cultural autonomy. After having addressed the theoretical issues, the analysis will focus on the legal aspects of cultural minority grounded in constitutional law theory.

The debate in political theory on the issues of minority protection has mainly two streams: a liberal-nationalist one and a liberal-accommodationist one. According to the former, national minorities are entitled to group-differentiated rights, while other minorities, especially new minorities, are entitled to the basic level of protection provided by anti-discrimination law. According to the latter, all minorities are entitled to group-differentiated rights, which are conceded in different levels of protection as the result of political negotiation.

The debate in constitutional theory mirrors the mainstreams of political debates. While some scholars support the minimum level of protection—*i.e.*, anti-discrimination standard—others support different means of group-differentiated rights. In the latter perspective, problems arise in terms of constitutional arrangements for those minorities that are not linked to a specific territory, thus eluding the territorial autonomy model. I argue that there is no need to find new solutions to these problems, while instead it is necessary to look at other experiences, in order to adapt existing solutions to similar problems. Indeed, the circulation of models, as a result of comparative perspective, is an easy and effective means of dealing with emergent problematic situations.

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[3] Gualtiero Harrison, *I Fondamenti Antropologici dei Diritti Umani*, (Rome: Meltemi, 2002), 36-37.

1.1 Semantic issues[4]

Before analyzing the political and legal debates, it is essential to address some semantic issues related to expressions such as *minority* and *autonomy*.

The term *minority* refers to a group of people resident in a certain State that shares ethnic, linguistic, religious, or cultural characteristics, and differs from the majority of the population. The concept of minority has long been connected to territorial and temporal factors. However, the contemporary debate on minorities includes also those groups that are not connected to a specific territory, or those groups that identify as their determinant pole of identity only one specific aspect of diversity and not language, ethnicity, religion, and culture as a whole.

To give some distinctions, *national minority* has been defined as

> an indigenous and permanent settlement within a particular area of a nation-state's sovereign territory of a minority group whose members are citizens of that state and who, despite (indeed, to some extent, precisely because of) their citizenship, manifest, also implicitly, a determination to continue to belong to their own community, while at the same time resisting attempts by the majority to assimilate them.[5]

Specifically, the resistance to assimilation results in a "relation of linkage to a nation different from the one in which the minority group is actually living" and with which it

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[4] The semantic issues will be briefly treated in that I intend only to define the terminology that will be used in the dissertation. These notes to do not attempt to provide any comprehensive analysis of the terminological problems connected to the topic of this analysis.

[5] Roberto Toniatti, *Minorities and Protected Minorities: Constitutional Models Compared*, in: Michael Dunne and Tiziano Bonazzi (eds.), *Citizenship and Rights in Multicultural Societies*, (Keele, UK: Keele University Press, 1994), 199. This definition mirrors the one given by an Italian influential scholar, Capotorti, whose definition of minority has been included in several international documents, see, Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, (New York: UN, 1979).

shares "the memory of common historical origins."[6] In other words, national minorities are those groups that have a homeland abroad, which is defined as kin-State, while the State in which they reside is defined as hosting State.

Those minorities which do not have a homeland of reference are commonly known as *ethnic* minorities, defined as "communities that are characterized by a cultural, linguistic, or religious identity of their own."[7] Still, the spatial factor is determinant, in that national and ethnic minorities are concepts used in the literature with specific reference to a certain territory—for example, the Hungarian minority in Romania is a national minority, since it has a homeland abroad, Hungary; while instead, the Basque community is an ethnic minority, since it has no homeland abroad, but nevertheless it is territorially defined. By contrast, the communities of migrants or other communities that gather around single factors of diverse identity that are not connected to a specific territory are defined respectively as "new minorities" and "diffuse minorities."[8] For example, the Moroccan community in Italy is a new minority, while the Jewish community in France is a diffuse minority and, specifically, a religious minority.[9]

Definitions serve to delimit concepts and to define room for communication and intellectual exchange, but one cannot consider them so strictly that they cannot be re-organized when confronted by overlapping and complex social situations. For example,

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[6] Valeria Piergigli, *Lingue minoritarie ed identità culturali*, (Milano: Giuffrè, 2001), 62.

[7] *Ibid.*

[8] Roberto Toniatti, *Minorities and Protected Minorities: Constitutional Models Compared*, in: Michael Dunne and Tiziano Bonazzi (eds.), *Citizenship and Rights in Multicultural Societies*, 199.

[9] In Eastern Europe and in the Middle East, however, Jews are traditionally considered as an ethnic minority, since in many cultures religion and ethnicity are considered inseparable aspects of identity.

the Moroccan community may be considered as both a new minority and a religious minority, given that it is mainly composed of Muslims, and this depends on the legal status that a State is willing to concede to that group. Moreover, definitions are also connected to social or political perception. For instance, the German-speaking community in South Tyrol is usually referred to as a linguistic minority, although it has long relied on Austrian support in claiming collective rights for historical and political reason; hence, it could be considered a national minority with Austria as its kin-State.

In this analysis, the term "cultural minority" includes both diffuse minorities and new minorities. In other words, I will refer to cultural minority as a diverse group with no spatially-defined allocation inside a certain State.

The term *autonomy* refers to a set of "differentiated rights" that aim to "preserve the characteristics which distinguish [a minority] from the majority" and to "satisfy the ensuing special needs."[10] Autonomy for national and ethnic minorities, defined as *territorial autonomy*, may have different forms and degrees, including separate political bodies, systems of political representation, different educational programs, and different schools. For cultural autonomy, we intend other means of group-differentiated rights that aim to protect cultural minorities. Autonomy, in this latter sense, is "the means through which an authority, subject to another superior authority, has the power to establish, independently from that superior authority, those specific functions that have

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[10] See reference n. 1.

been attributed to it by the superior authority, in order to pursue the general interest of the whole population that is subject to it."[11]

Moreover, an essential distinction is to be traced between *territorial autonomy* and *cultural/personal autonomy*. Territorial autonomy refers to the whole population residing in a specific territory; thus, the set of differentiated rights becomes a specific jurisdiction over a certain territory, and its residents. By contrast, *cultural* or *personal* autonomy is a set of differentiated rights that are accorded to a specific group only, independently of the territory that group is resident in.

1.2 Cultural rights and cultural autonomy

Multiculturalism is a typical feature of contemporary societies that "refers to the existence of linguistically, culturally, or ethnically diverse segments in the population of a society or State."[12] This peculiarity characterizes societies as human organizations of multiple identities,[13] and may be described as " a 'mosaic' of several bounded, nameable, individually homogeneous and unmeltable minority uni-cultures, which are pinned onto the backdrop of a similarly characterized majority uni-culture."[14] Diversity generates conflicts in terms of equality between majority and minority groups and in terms of justice oriented to the inclusion of diverse groups in social life. These conflicts challenge States' commitment to manage diversity. The main challenge lies in the necessity, on the one hand, to promote equality as the basic principle of modern liberal democracies[15] and, on the other, to avoid the disrupting effects of separate institutions along ethnic boundaries. In other words,

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[11] Francesco Palermo and Jens Woelk, *Diritto Costituzionale Comparato dei Gruppi e delle Minoranze*, (Padova: Cedam, 2008), 140, citing Tim Potier, *Conflict in Nagorny-Karabakh, Abkhazia and South Ossetia. A Legal Appraisal*, (The Hague: Kluwer, 2001), 54.

[12] Conrad William Watson, *Multiculturalism*, (Buckingham: Open University Press, 2000), 2.

[13] Christos Tsironis, *Multiculturalism and Education: Dysfunctionality and Challenges in Europe*, in Arnaldo Nesti (ed.), *Multiculturalismo e pluralismo religioso fra illusione e realtà: un altro mondo è possibile?* (Firenze: Firenze University Press, 2006), 305-308.

[14] Steve Vertovec, "Multiculturalism, Culturalism and Public Incorporation," *Ethnic and Racial Studies*, vol. 19, n. 1 (1996), pp. 49-69, at 50.

[15] Nicola Matteucci, *Alexis de Tocqueville. Tre Esercizi di Lettura*, (Bologna: Il Mulino, 1990), 304.

> there is a tension between the respect for diversity or individuality and the recognition of natural right. When liberals became impatient to the absolute limits to diversity or individuality that are imposed even by the most liberal version of natural right, they had to make a choice between natural right and the uninhibited cultivation of individuality. They chose the latter …. Liberal relativism has its roots in the natural right tradition of tolerance or in the notion that everyone has a natural right to the pursuit of happiness as he understands happiness; but in itself it is a seminary of intolerance.[16]

In contemporary political thought, the commitment to manage diversity and, specifically, to protect minorities, is considered a concretization of the equality principle, which is grounded in democratic political and constitutional thought. Liberal societies that do not recognize the right to diversity and focus only on the protection of individual rights are somehow "guilty"[17] of indifference towards cultural, ethical, linguistic, religious, and gender diversity, thus preventing all citizens from enjoying their rights and exercising their right to self-determination. Charles Taylor claims that the main problem of plural societies lies in

> the awkwardness [that] arises from the fact that there are substantial numbers of people who are citizens and also belong to the culture that calls into question our philosophical boundaries. The challenge is to deal with their sense of marginalization without compromising our basic political principles.[18]

If in the first decades of the 20th century, protection of minorities has ensued from a perspective of conflict-resolution and conflict-prevention; after World War II and the spread of the human rights doctrine, protection of minorities has been also considered a development of fundamental rights. Although the conflict-resolution and -prevention rationales for protecting of minorities are still viable in many situations—for instance, in cases in which the protection of minorities aims to avoid the spread of violence, as the cases of South Tyrol, Basque territories, and Eastern Europe after the fall of the Soviet Empire,—the main rationale provided for the protection of groups is that it is a duty of liberal democracies. Contemporary liberal democracies depart from the neutrality model, according to which a State "remains neutral in the good life, and restricts itself to ensuring that however they see things, citizens deal fairly with each other and the state deals equally with all,"[19] while, instead, liberal democracies should adopt policies of inclusion of diverse members and diverse groups.

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[16] Leo Strauss, *Natural Right and History*, (Chicago: University of Chicago Press, 1953), 5-6.

[17] Charles Taylor, *The Politics of Recognition*, in Amy Gutmann (ed.), *Multiculturalism,* (Princeton: Princeton University Press, 1994), 61.

[18] *Ibid.*, 63.

[19] *Ibid.*, 57.

The aim of liberal democracies should be "citizenization," which is a set of political and legal arrangements that aim "not to suppress… differential claims, but to filter and frame them through the language of human rights, civil liberties, and democratic accountability."[20] Once taken for granted that protection of minorities is a development of equality and justice, several problems emerge in relation to the way minority groups should be protected.

On these issues, there are two main perspectives: a liberal nationalist and a liberal-accommodationist. According to liberal nationalists, only national groups would be entitled to group-differentiated rights, while other ethnic or cultural groups, including migrants, should be excluded from special rights that stem from the institutionalization of diversity.[21] According to liberal-accommodationists, these claims suffer from incoherence, in that "it becomes contradictory to privilege one source of identity versus other social identities, such as religious and familial attachments, since these other attachments may be equally important sources of identity."[22] The way in which minority protection has so far been conceived is entrapped in the nation-State model, by virtue of which national minorities, living in territories along borders of neighboring kin-States, have to be territorially protected. But the increasing importance of loyalties and poles of aggregation other than the nation should push liberal democracies out of the sovereigntist trap, in order to overcome obstacles of a

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[20] Will Kymlicka, "Multicultural Odysseys," *Ethnopolitics*, vol. 6, (2007), pp. 585-597, at 587.

[21] See Will. Kymlicka, *Multicultural Citizenship*, (Oxford: Clarendon Press, 1995), 65-6.

"methodological nationalism that needs to be complemented thoroughly by ideas about non-territorial forms of group rights."[23]

The further development of liberal democracies would be the recognition of cultural rights as collective rights.[24] In other words, liberal democracies should consider as viable targets of protection other-than-national identity poles as well; consequently, they should accommodate cultural claims through non-territorial solutions. The debate on cultural rights covers mainly two issues: the necessity to protect cultural rights and the problems posed by illiberal cultures.

As for the necessity to protect cultural rights, the main liberal-nationalist claim is that cultural rights belong to the individual realm; thus, there is no need to tackle them with cultural claims, in that civil rights protection, in the form of anti-discrimination law, is an effective protection.[25] However, "the individual right to culture stems from the fact that every person has an overriding interest in his personal identity, that is in preserving his way of life and in preserving traits that are cultural identity

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[22] Steven C. Roach, *Cultural Autonomy, Minority Rights, and Globalization*, (Aldershot England: Ashgate, 2005), 37.

[23] Oliver Schmidtke, "Bound by National Categories? The Promises and Limitations of Kymlicka's *Multicultural Odysseys*," *Ethnopolitics*, vol .6, n. 4 (2007), pp. 613-617, at 616.

[24] This is the case, for example, of those States that recognize organized Churches and, to certain extents, their jurisdictions. It is the case of the concordats and similar legal instruments by virtue of which, Churches have limited jurisdiction on specific areas within the legal systems of the States. See, Carlo Cardia, *Ordinamenti religiosi ed ordinamenti dello Stato. Profili giurisdizionali*, (Bologna: Il Mulino, 2003).

[25] Chandran Kukathas, "Are There Any Cultural Rights?" *Political Theory*, vol. 20, n.1 (1992), pp. 105-139.

components for him and other members of his cultural group."[26] Thus, there is no reason why a liberal democratic State should protect national identity and, simultaneously, reject cultural identity claims. Objections would arise with respect to the illiberal traits of some groups, such as religious or cultural restraints, which conflict with liberal democratic principles. This opposition arises primarily with reference to religious minority protection in two respects: internal restrictions and State-religion relations.

With regard to internal restrictions, which are defined as "powers wielded by a group to maintain unchanged its customs and practices," in order to "prevent members from adopting other cultural features or leaving the group,"[27] it has to be recognized that liberal democracies have to first protect general human rights. Thus, liberal democracies have to discourage illiberal practices and, then, have to maintain cultural protection as long as cultural communities leave room for personal self-determination[28]—the so called right to be left alone. However, the core-problem concerns coercive practices: while States should deny the right to autonomy to those communities that foster coercive practices to the detriment of their members, there is no tenable argument why they should *per se* deny protection, if not for their own protection, to those communities which are illiberal in nature: "while coercive cultures

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[26] Avishai Margalit and Moshe Halbertal, "Liberalism and the Right to Culture," *Social Research*, vol. 61, n.3 (1993), pp. 491-510, at 507.

[27] Will Kymlicka, *Multicultural Citizenship*, 35.

[28] Joseph Raz, *Multiculturalism: A Liberal Perspective*, in Joseph Raz (ed.), *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, (Oxford: Clarendon Press, 1994), 160-165.

are probably also cultures that do not foster the independence of some of their members, nor afford them opportunities that liberals deem adequate, the converse is not necessarily true."[29]

With regard to State-religion relations, problems arise in terms of the level of protection to be accorded to religious groups, without jeopardizing the secular principle which characterizes liberal democracies. The danger lies in the threat that organized religious groups would pose to pluralism and accepted liberal secular principles. A recent example is the violent manifestations of political Islam. This fear, which stems from century-long struggles, in the West, to divide Church from the State, could be mitigated by two arguments.

First, threats to liberal democracy stem not only from religious movements but also from secular violent or illiberal movements such as "totalitarianism, scientism, professionalism, and bureaucratic administration."[30] Secondly, a liberal democratic society should be open to dialogue with several voices that equally understand the necessity of compromise between culture identity and overarching democratic values, and between legitimate autonomy claims and reasonableness and civility.[31] Moreover, it should be considered that "practical interactions in everyday life among people of

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[29] Monique Deveaux, "Cultural Pluralism From Liberal Perfectionist Premises," *Polity*, vol. 32, n. 4 (2000), pp. 473-497, at 489.

[30] Veit Bader, *Secularism or Democracy?* (Amsterdam: Amsterdam University Press, 2007), 97-98.

[31] *Ibid.*, 117.

widely divergent religious beliefs and practices teach practices and ethos of toleration, at least under appropriate and decent regimes of toleration."[32]

If we assume that minority protection is a development of human rights doctrine, which is a founding element of liberal democratic thought, we have to admit that all minorities should be protected in virtue of the right to identity and culture. Since the protection of minorities has so far been conceived in terms of nation-State and national groups identity, new claims of ethnic and cultural revivals should be addressed by States in order to elevate the level of protection from mere anti-discrimination to substantive group-differentiated institutionalization. The threats of the illiberal character of minorities and of State-religion relations in case of religious minorities should not be addressed in terms of jeopardy of the liberal tenets; on the contrary, States should identify those cultural or religious practices that harm the members of a certain group and exclude them from protection, while they should consider a wide range of poles of identity as the basis for protecting groups.

The aim is to foster an inclusive society in which the accommodation of diversity creates room for interaction and decent self-determination, which would lead to active cohabitation with the effect of mutual influence between liberal democratic principles and traditional cultural practices. The next section regards the way in which such issues should be addressed from a legal perspective.

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[32] *Ibid.* 119, see also Michael Walzer, *On Toleration*, (New Have: Yale University Press, 1997).

1.3 Constitutional accommodation of cultural minorities

The approaches of States toward group identity are mainly two: the neutral, or diversity-blind approach, and the proactive, or promotional approach.[33]

According to the diversity-blind approach, the State is indifferent to identity issues and guarantees equality by simply implementing the principle of non-discrimination. This is the embryonic stage of equality, in that individuals are guaranteed full access to rights independently of identity issues, but they are not guaranteed their full explication when the exercise of their rights involves collective moments. For sake of clarity, it is necessary to give an example: an Occitan speaker in France is guaranteed equality in access to public offices, in that the law prohibits discrimination on the basis of linguistic identity, but she/he is not guaranteed the full explication of her/his identity as an Occitan speaker in that the State does not recognize collective rights such as education in a minority language, media broadcasting, and toponymy. The flaw of such systems consists in preventing those members of their society, who bear different identity features, from preserving their minority identity and developing it alongside with the majority one.

In the latter approach—the promotional one—it is the State itself that takes care of the promotion of diversity through various legal solutions. To clarify by another example, one can think of a German speaker in Northern Italy: not only she/he is guaranteed non-discrimination on the basis of her/his linguistic-ethnic identity, but also

full cultural rights are recognized, which are typically enjoyable in community with others, such as the right of education in the native language, or the right of information in the native language through media.

As for the instruments of managing diversity, they can be divided in two groups: one group enlists instruments by virtue of which specific rights are conferred to specific groups, while the other enlists instruments by virtue of which groups are recognized as constitutive elements of society and are delegated functions typically pertaining to the central government.[34]

To the first group belong for example the legal instrument of positive actions, whereby the legislator intervenes by commanding the preferential treatment of specific disadvantaged groups (women for instance), in order to remove those obstacles that prevent the enjoyment of substantive equality, besides formal equality.

To the second group belong for instance self-government arrangements, whereby specific recognized groups are given the authority to manage certain functions otherwise pertaining to the State. This form of promoting diversity is the most developed, in that it envisages a set of rights specifically conceived for collective enjoyment. Groups are given powers in order to exert their rights on issues of particular

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[33] Francesco Palermo and Jens Woelk, *Diritto Costituzionale Comparato dei Gruppi e delle Minoranze*, 39-66.

[34] *Ibid.*, 139-60. From a political theory point of view, methods of managing diversity can be divided in two groups: those that tend to eliminate differences, such as forced assimilation or, ultimately, genocide and ethnic cleansing, and those that manage differences, such as autonomy (territorial or non-territorial) and promotional integration. Compare, Will Kymlicka and Wayne Norman, *Citizenship in Culturally*

relevance. For example, Italy has identified, on the basis of territoriality, the German-speaking group in the region of Trentino Alto-Adige/Südtirol and has, consequently, developed a form of territorial autonomy, whereby cultural issues are managed by the group itself. These means of group-differentiated rights, collectively enjoyed, have so far been territorially devised in that the object of protection has been national minorities. However, if the need to protect cultural minorities as both a liberal democratic aim and a means of conflict-prevention and conflict-resolution,[35] then, the contemporary challenge is to find devices of specific self-government arrangements for diffuse communities, which is cultural autonomy.

The concept of cultural autonomy relies on the personality principle, "the idea that autonomous communities are organized as sovereign collectives whatever their residential collocation within a multicultural state."[36] Ultimately, through the institutionalization of diversity and the consequent full determination of group identity, the constitutional allegiance by different groups to one State is guaranteed.[37] The core issue is how the institutionalization of diversity can be constitutionally designed. At

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Diverse Societies: Issues, Contexts, Concepts, in Will Kymlicka and Wayne Norman (eds.), *Citizenship in Diverse Societies*, (Oxford: Oxford University Press, 2000) 12-18.

[35] Steven C. Roach, *Cultural Autonomy, Minority Rights and Globalization*, 91; see also John McGarry, Brendan O'Leary, and Richard Simeon, *Integration or Accomodation? The enduring debate in conflict regulation*, in Sujit Choudhry (ed.), *Constitutional Design for Divided Societies—Integration or Accomodation?*, (Oxford: Oxford University Press, 2008), 41-88.

[36] Efraim Nimni, "National-Cultural Autonomy as an Alternative to Minority Territorial Nationalism," *Ethnopolitics*, vol. 6, n. 4 (2007), pp. 345-364, at 346.

[37] James Tully, *Strange Multiplicity, Constitutionalism in an Age of Diversity*, (Cambridge: Cambridge University Press, 1995), 197-8.

least, three aspects of social life are covered by institutionalization: associational life, political representation, and autonomy of the individual.

With respect to associational life, several legal means can be identified, which aim all to grant autonomy to the cultural collective sphere. These include separate schools or specific educational courses; autonomous organizations that provide for cultural or religious services; separate associations of political aggregation at the national level (labor unions or political parties on ethnic or religious basis).

With respect to political representation, legal means to grant political representation of minorities include gerrymandering and bound seats in the legislative or executive bodies. These means, however, are proper of a national distribution throughout the territory of a country, thus other means would fit better the cultural autonomy model, such as specific bodies of representation of cultural minorities at both the local and national levels. Moreover, special procedures could be set, including veto powers on vital issues concerning minority interests and consultative procedures that co-opt minority representatives in the decision-making process.

With respect to autonomy of the individual, the possible solutions are more controversial. The Western legal tradition is based on the link between law and territory: individuals are subject to certain legal systems in that they are resident in a territory over which that legal system has jurisdiction. This is the heritage of Roman law, which only during a brief period (roughly, from the IX to the XI centuries) has accepted the principle of legal personality, because of legal barbaric influences that

imported the personality model in virtue of which individuals are subject to the law of the nation they belong to. Other legal systems, in history, such as the Islamic legal tradition and Ottoman law, and, currently, many Middle-East legal systems, have accepted the principle of legal personality as a constitutional peculiarity. In these systems, individuals, mainly in matters of family law, are subject to the legal system of the ethno-religious community they belong to.[38] Since traditional and religious laws share often illiberal prescriptions, it is highly improbable that a liberal democracy can accept them as part of State's jurisdiction. However, there are other available possibilities.

Religious and traditional laws could be applied by judicial bodies with functions of arbitration bodies in specific matters. The emergence of non-judicial solutions to disputes, from arbitration to conflict-management in family disputes or minor crimes, is an example of adoption of alternative systems of justice. These alternative means of dispute-settlement may, indeed, include traditional or religious law as well, provided that a judicial authority scrutinizes the compatibility of the non-judicial results with basic constitutional principles.[39] This does not imply a changeover in the Western legal

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[38] "The affiliation to a personal legal system is determined by race, origin, or religion. The legislation and the institutions of such systems are not linked to a specific territory of their own. They can have jurisdiction, as do the Islamic legal system, over several territories… one territory can even be the platform of different legal systems that entangle over it," Académie de Droit International de La Haye/The Hague Academy of International Law, *Recueil Des Cours*, (The Hague: Martinus Nijhoff, 1968), 74: 83-4.

[39] This is the case of UK, where in October 25, 2008 the sole proviso of Jack Straw's Ministry of Justice authorized Islamic Courts to deal with family law disputes on condition that the Islamic ruling is scrutinized by a British Court in order to test the compatibility of the decision with human rights standards recognized by common law jurisprudence. The controversy on the application of Islamic law in Britain originates from a declaration of the Archbishop of Canterbury, Rowan Williams, in February

tradition that tie up citizenship, law, and territory; simultaneously, it would certainly be a watershed in the concept of sovereignty, which is not, or no more, to be intended as the dominion of a State over a territory and its resident population, but has to be oriented towards social, political, and legal pluralism.

Personal/cultural autonomy is a form of self-government which is indeed recognized by international law,[40] but what makes States reluctant to grant cultural autonomy is the loss of sovereignty defined as "the entitlement to rule over a bounded territory."[41] The nation-State has traditionally been restive to concede autonomy to certain territories in order to prevent such autonomy from developing in a different legal system in the country.[42] If the multicultural challenge requires overcoming the "sovereigntist trap," the legal response to multiculturalism requires overcoming the legal centralism that has long characterized nation-States.

Legal pluralism is defined as a characteristic of those legal systems in which the sources of law are not centered in the State, but include beyond the State, which

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2008 in which the prelate considered that the application of Islamic law in Britain would be unavoidable. This position was shared by Lord Chief Justice Philipps and, eventually, rejected by the government that argued that the application of Islamic law would marginalize Muslim citizens. On the controversy and its developments see, http://www.rights.no/publisher/publisher.asp?id=52&tekstid=2104

[40] Article 27 of the 1966 UN Civil and Political Rights Covenant states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

[41] David Held, *Models of Democracy*, (Cambridge: Polity and Stanford University Press, 2006), 295.

[42] In this case, I refer to asymmetric federalism defined as a combination of different legal systems within the territory of one State by virtue of which some territories have more autonomy than other and can wield a more autonomous jurisdiction on the population there resident.

remains the main law-maker, other "norm-generating communities"[43] as well. Legal

pluralism concerns many branches of law, such as private and business law—recent

developments of *lex mercatoria* and the circulation of decisions in European

Community law could be valid examples—and has always been a peculiarity of certain

legal systems such as the ones of colonial and post-colonial States. As for constitutional

law, the legal pluralism paradigm could be an available response to those challenges

that emerge from a fragmented society,[44] which is divided in "social fields" many of

which "capable of generating rules and coercing or inducing compliance to them."[45] In

such systems the State would not lose its fundamental capacity of generating

overarching norms; rather, the State would devolve portions of law-making power to

certain communities for specific purposes and within defined limitations. The purposes

would clearly be the protection and the exercise of cultural rights for the well-being of

the community members; the limitations would certainly be the respect for the

fundamental constitutional principles and the protection of weak categories within the

communities from internal restrictions (for instance, gender equality within religious

autonomous communities etc.). Legal pluralism would then lead to recognize cultural

minorities as communities capable to produce law that would be applied to its members

within the limits imposed by the respect of human rights and the fundamental

constitutional principles of a State. In this logic, legal pluralism may be considered a

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[43] Martha-Marie Kleinhans and Roderick Alexander Macdonald, "What Is a Critical Legal Pluralism?" *Canadian Journal of Law and Society*, vol. 12, n. 1 (1997), pp. 25-46, at 34.

[44] Gavin W. Anderson, *Constitutional Rights after Globalization*, (Oxford: Hart, 2005), 45-49 and 54-59.

[45] Sally E. Merry, "Legal Pluralism," *Law and Society Review*, vol. 22, (1988), pp. 869-896, at 878.

value which has to find a just institutionalization in a context of "mild law,"[46] composed of statutes, rights, and articulations of the principle of justice.

Moreover, the three aspects of protection entail two different levels of enjoyment of rights. While the protection of associational rights ensures the collective enjoyment of cultural rights, they can be, nevertheless, individually enjoyed. The other aspects, political representation and autonomy of the individual pertain, instead, to the collective sphere of rights. In other words, the first aspect of protection provides groups for instruments whereby individuals can collectively enjoy certain individual rights such as linguistic, cultural, or religious rights. For example, the right to language may be individually or collectively enjoyed: individually, by exercising the freedom of speaking, learning, or reading one's language and, collectively, by organizing educational programs in a certain language. By contrast, the second and third aspects of protection provide groups for instruments that enable the enjoyment of rights that are collective in nature, including special political rights, which entail the actual involvement of minority groups in the decision-making process; and individual autonomy, which implies the possibility of being subject to a particular jurisdiction by virtue of one's identity.

In legal theory studies, these issues have been in-depth analyzed, while in political theory studies, historical examples of cultural autonomy and legal pluralistic models have been provided. This dissertation aims to concretely analyze contemporary

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[46] Gustavo Zagrebelsky, *Il Diritto Mite*, (Milano: Einaudi, 1992).

cultural autonomy models. Specifically, it focuses on Middle-East legal systems, which have adopted the cultural autonomy model of the Ottoman Empire, known as *millet*. The dissertation also focuses on the developments of some European legal systems that show a shift toward cultural autonomy and the necessity of protecting cultural minorities. Further research is necessary to compare contemporary *millet* systems in order to provide the Western lawyer for available legal solutions to the multicultural challenges of Western societies. Moreover, these Eastern solutions are to be compared with Western ones, in order to draw an available model of protection based on cultural autonomy and compatible with liberal democratic principles.

2. THE MILLET SYSTEM AS A MODEL

Among the group of instruments proper of promotional legal systems, of particular interest is the *millet* system, developed in the Ottoman Empire during the second half of the 19th century and still applied, in modernized versions, in several States of the Near and Middle East.

> The *millet* system is a

> very controversial technique of differential promotion of groups that makes legal systems which adopt it resemble multinational systems (in that it stably institutionalizes groups), although they structurally distinguish themselves from these, in that the institutionalization is limited to certain purposes. It is the creation of a system of "pillars" that provides for separated and, ultimately, self-governed communities for different groups, in sectors such as education or personal status.[47]

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[47] Francesco Palermo and Jens Woelk, *Diritto Costituzionale Comparato dei Gruppi e delle Minoranze*, 52.

This system has developed in the Ottoman Empire after the reforms during the nineteenth century, which tried to modernize the Empire and prevent its desegregation under nationalist pressure. Pluralism is a typical feature of the world of empires, which created various legal instruments for coping with the problems of administrating different peoples with different identities. Furthermore, it has survived the disjointing of the Ottoman Empire and is still constitutive part of the legal systems of Israel, Lebanon, Egypt, Jordan, Syria, and other countries. It is even applied in Iraq for the nation-building and institution-building processes. The *millet* represents one of the first attempts in history to solve the problems of minority right protection, and is one of the most structured devices in terms of rights and autonomy.

2.1 The Ottoman millet

From the 15th century, the non-Muslim subjects under Ottoman rule had been subject within a double jurisdiction: they were subjects of the Empire, thus had to comply with Sultan's law, called *kanun*, and they were non-Muslim subjects, thus they were subject to their religious law. This means that not only were they let free to practice their own cult, but they had to comply with their religion's law in certain areas of legal disciplines. Non-Muslim subjects were organized in partially autonomous bodies to which they were submitted to. These bodies "in some ways replaced the direct authority

of the Sultan's government, even though the locus of ultimate authority was never in doubt."[48]

By an act of the Sultan, to whom the legislative power appertained, the recognized other-than-Muslim groups were: the Greek-Orthodox, the Gregorian-Armenian, and the Jewish one. These three *millets*[49] dialogued with the Sublime Porte through their chiefs, who were, respectively, the two patriarchs and the Gran Rabbi, nominated by the members of the *millets* and then confirmed by the Sultan. These three groups were tolerated and guaranteed protection because of their faith, in that they were peoples of the book (*ehl-i kitab*), while they had to accept the domination of the Turks and the payment of the *cizye*,[50] the tax that infidels should pay, according to Islamic law, to the Muslim government in order to be granted protection inside Muslim societies.

In such an organization the subjects of the Ottoman Empire were identified on the basis of their religion and always in virtue of their religious identity they were subject to a certain jurisdiction, so that "each group constituted a *millet* within the empire" and "membership in the *millet* automatically followed lines of religious

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[48] Roderick H. Davison, *Reform in The Ottoman Empire 1856-1876*, (Princeton: Princeton University Press, 1963), 12.

[49] Millet is the Turkish version of the Arabic word millah, which is to be translated as ethno-religious group. Each group constituted a *millet*.

[50] See Cater V. Findley, *The Turks in World History*, (New York: Oxford University Press, 2005), 65-66; and Bat Ye'or, Miriam Kochan, and David Littman, *The Decline of Eastern Christianity Under Islam— From Jihad to Dhimmitude*, (Cranbury NJ: Fairleigh Dickinson University Press, 1996), 69-98.

allegiance."[51] The differentiation of peoples on the basis of religion was the main criterion of differentiation of the Ottoman subjects and has survived modernization until contemporary times throughout the Middle East, where religion and ethnicity have become a sort of indissoluble binomial name for identity classification. It has to be considered that "in contrast to the modern idea of territorial nationalism in Europe, Middle Eastern peoples have articulated their collective identities and organized their political lives around other ideas."[52]

The *millet* system had radically changed during the 19th century by virtue of the reforms known as Tanzimat. It develops through three main steps: two edicts of the Sultan, Hatt-ı Şerif of Gülhane and Hatt-ı Hümayun, which had substantially reformed the economic and social constitutions of the Empire, and the Constitution of 1876, which had definitely changed the shape of the Porte. The reforms brought into the Empire new concepts, which had recently developed in Europe. The main purpose of the reforms was to bring equality among Ottoman citizens, irrespectively of their religion, by creating a new pole of loyalty that would attract and fuse the different identities, so far separated, into a new concept of nationhood, which is known as Osmanlılık, "Ottomanism". This concept was the ideological basis of the reforms, "whose essential feature became… the equality of all subjects within the empire,

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[51] Roderick H. Davison, *Reform in The Ottoman Empire 1856-1876*, 13.

[52] Mordechai Nisan, *Minorities in the Middle East—A History of Struggle and Self-Expression*, (Jefferson NC: McFarland, 2002), 9.

regardless of origin, religion, or ethnicity. Tanzimat reformers aimed to inculcate an Ottoman identity and loyalty within the empire."[53]

The set of reforms introduced by the edicts changed dramatically the shape of the Empire. Not only the principle of equality was formally stated, but it was enacted through a set of provisions that granted the substantial enjoyment of the collective rights of the religious communities by the representation in both local and central governments and by the arrangement of a pluralistic model in the judicial system. Such an organization constituted a real novelty in the history of law for several reasons. First, it developed the principle of legal personality of Islamic tradition by eliminating the discriminatory provisions of the *shari'a* that put the non-Muslim in a subordinate condition. Secondly, the reformed *millet* system resulted in a balanced arrangement between collective and individual rights on the one hand, and societal unity on the other. The complex system of differentiation on the basis of collective membership is balanced by constant points of contact among collectivities in the system. Thus, this degree of division, which is necessary for a real protection of groups, does not challenge, at least in theory, the supra-group and supra-national loyalty to the State, in that it avoids the formation of sub-State systems, which would jeopardize the unity of the State.

The 1876 constitution was the last step of the reform era and constituted a real novelty in the attempt to modernize an Empire ruled by an absolute monarch and

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[53] George Walter Gawrych, *The Crescent and the Eagle—Ottoman Rule, Islam, and the Albanians 1874-*

characterized by the institutionalized subordination of non-Muslim subjects according to the Islamic tradition. It is worth noting that this attempt was directed to reinvigorate the structure of the Empire in order to restrain nationalistic demands, which had then become increasingly violent, by granting the largest range of autonomy to minorities and by creating an integrated and pluralistic society that should have found in Ottomanism a unitary factor of identity. Although much advancement entered into the general administration of the Empire, the result of the reforms was the creation of "independent national sovereignties, instead of the equality of a brotherhood of different races and creeds within one empire."[54]

The Ottoman rule succeeded in shaping a legal institution that could guarantee to the non-Muslims a form of autonomy conceived first as subordination functional to the dominion of Islam and then as the possibility of national and religious self-expression in a pluralistic society. The general purpose of the reform was to form a society in which everyone could enjoy self-determination according to her/his national-religious identity in a solidarity inter-connection that should have ultimately granted effective loyalty to the State. Substantially, the aim was to create a unitary society in which each group could enjoy full rights avoiding assimilation.

The positive evaluation of the real accomplishments of this system are challenged by many authors, who argue that, actually, the *millet* system was structured in such a way that perpetuated the Islamic rule over non-Muslim communities and the

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1913, (London: I.B. Tauris, 2006), 16.

Turkish rule over non-Turkish peoples.[55] Surely, the actual implementation of the *millet* was not in line with the principles grounding it, but what is of real interest is that it survived the fall of the Empire and is still applied in many Middle-East legal systems. This implies that there are contemporary legal systems that opt for regulating plural identities through separated and differentiated communities and that somehow arrange points of contact among their constitutive groups. These connections constitute a common solidarity that serves as the ultimate identity, which finds expression in the loyalty toward the State, the precondition of which is the freedom of personal realization and communal self-determination.

The reformed *millet* system has been a comprehensive model of protection under the three aspects of cultural rights: associational rights, political representation, and personal autonomy. Contemporary *millet* systems tend to privilege one aspect at the expense of the others, which is why the dissertation analyzes three Middle-East legal systems that cover all three aspects: Israel, Lebanon, and Iraq.

2.2 Contemporary *millet* systems

In chapter 2, the dissertation analyzes Lebanon, which is an example of political-confessional pact that institutionalized not only associational and personal autonomies, but also political representation. Indeed, Lebanon is based on a paradigm of political

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[54] Roderick H. Davison, *Reform in the Ottoman Empire 1856-1876*, 408.

[55] Benjamin Braude, *Foundation Myths of the Millet System*, in Benjamin Braude and Bernard Lewis (eds.), *Christians and Jews in the Ottoman Empire*, (New York: Holmes & Meier, 1982), 1:69-88;

confessionalism, whereby power-sharing runs through ethno-religious lines; different religious communities are united by a syncretic nationalism that is designed to keep the societal basis united.[56]

After the civil war during the 1980s, Lebanon emerged in the 1990s as a renewed confessional democracy called *taifiya*, understood as a communalism expressed at the social level by people's religious affiliation, at the institutional level by public-recognized religious associations, and at the political-administrative level by ethnic power-sharing.[57] Some authors claim that, by virtue of ethno-religious power-sharing, religious conflicts turn into political conflicts and vice versa; thus, real democracy cannot be stabilized.[58] On the contrary, others assert that the *millet* system is so embedded in the Lebanese political and legal tradition that any constitutional reform will inevitably be grounded in the confessional paradigm.[59] Besides historical and political debates on Lebanon and its ethno-confessional power-sharing, the lesson Lebanon teaches is that political representation may serve as a means for managing diversity.

Wilhelm Baum, *Die Türkei und ihre christlichen Minderheiten—Geschichte-Völkermord-Gegenwart*, (Klagenfurt: Kitab, 2005), 39-73.

[56] See, Pierre Rondot, "Lebanese Institutions and Arab Nationalism," *Journal of Contemporary History*, vol. 3, n. 3 (1968), pp. 37-51.

[57] Nawwaf Salam, *Options for Lebanon*, (London: I. B. Tauris, 2004), 80-2.

[58] See, Volker Perthes, *Der Libanon nach dem Biirgerkrieg. Von ta'if zum gesellschaftlichen Konsens?*, (Baden- Baden: Nomos 1994), 132-5.

[59] Antoine Nasri Messarra, *Le Pact Libanais. Le Message d'Universalite et Ses Contraintes*, (Beirut: Beirut University Press, 1997), 152-5.

Chapter 3 analyzes the Israeli legal system, as the only consolidated democracy of the Middle-East that has adopted the *millet* system and has constitutionally institutionalized it. Israel's 1948 Declaration of Independence states that it "will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex;" and that "it will guarantee freedom of religion, conscience, language, education and culture."[60] In order to enact the principle of equality, Israel has adapted the *millet* system by guaranteeing associational autonomy and personal autonomy to ethnic and religious communities.

The *millet* system has been deployed to guarantee the actual participation of all groups to the common good and the protection of non-Jewish minorities.[61] Israel recognizes fourteen religious groups—including Sephardic Jews, Ashkenazi Jews, Sunni Muslims, Druze, Baha'i, and several Christian confessions,—and each one has a religious court with exclusive jurisdiction over family law matters such as marriage and divorce. However, *shari'a* courts have jurisdiction also over matters of personal status in other aspects of family law covered by Islamic law, such as endowment, alimony, and affiliation. Religious judges act as public officials and, as such, they are paid salaries by the State. They are nominated by the President of Israel on the basis of lists provided by the Nominations Committee within the Ministry of Religious Affairs,

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[60] An official translation of the Declaration of Independence is available at http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Declaration+of+Establishment+of+State+of+Israel.htm

[61] Martin Edelman, *Courts, Politics, and Culture in Israel*, (Charlottesville: University of Virginia Press, 1994), 119-130.

which coordinates the activities of religious communities with parliamentary statutes and governmental actions.[62]

Religious laws applied by religious courts have been constantly harmonized with secular standards by statute provisions and by the judicial review of the Supreme Court.[63] Moreover, religious communities have separate local administrative organs, such as the Jewish Councils, the Muslim trusts (*wakf*s), the Christian-Protestant Councils, and the Catholic Prelates. These organs act, locally, within ethnically homogeneous communities and protect religious interests of their members. They are linked to local civil authorities in order to pursue communal religious interests and are coordinated and funded directly by the Ministry of Religious Affairs.[64]

In addition, Israel recognizes three main ethno-linguistic groups—the Jewish, the Arab, and the Cherkessk,—with separate schools or educational curricula in which education is carried out in Hebrew, Arab, and Cherkessk respectively. The only minority, in legal terms, would be the Cherkessk, since Hebrew and Arab both have the status of official languages throughout Israel's territory. Political representation is guaranteed by the pure proportional electoral system, including parties organized on ethnic basis.

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[62] Henry E. Baker, *The Legal System of Israel*, (Jerusalem, London & New York: Israel Universities Press,

1968), 208.

[63] Aharon Layish, *Women and Islamic Law in A Non-Muslim State: A Study Based on Decisions of the Shari'a Courts in Israel,* (New York: John Wiley, 1975), 132-133.

Finally, chapter 4 analyzes contemporary Iraq. Specifically, the analysis focuses on the accommodation of ethnic representation at local levels and on the proposals of adapting the *millet* system to the Iraqi legal system. Iraqi society is extremely diversified, although the majority of the population is ethnically Arab, and religiously Shiite Muslim. The 2005 constitution recognizes both Arab and Kurdish as official languages, and guarantees the use of Turkmen and Assyrian in the provinces in which a significant part of the population belongs to these minorities. Moreover, at the beginning of November, 2008, the national parliament passed the "Provincial Assemblies Law" on the representation of members belonging to ethnic or religious minorities at the local legislative and executive bodies. The law establishes one seat for Christians in three provinces (Baghdad, Nivehe, and Basra) and one seat each for Yazidis, Sabeans, and Shabaks in the other provinces of the State.[65]

While the constitution ensures the respect of cultural, religious, social, political, and electoral rights, it devolves their implementation to a national law, which has not yet been drafted. At this stage, many national and international civil associations, including the Minorities Council of Iraq, play an active role in the proposal of a coherent law for the protection of minorities. Among the different proposals, Kurds, Sunni Arabs, and minorities call for cultural autonomy in order to establish effective

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[64] Daniel J. Elazar, *Israel's Compound Polity*, in Ernest Krausz and David Glentz (eds.), *Politics and Society in Israel*, (New Brunswick, NJ: Transaction, 1985), 61-63.

[65] Leila Fadel, "Iraqi minorities 'insulted' by new provincial assemblies law," *McClatchy Newspapers,* 3 November 2008; available at http://news.yahoo.com/s/mcclatchy/20081103/wl_mcclatchy/3090934

protection of their rights.[66] After the rejection of their proposal for a consociational democracy in favor of the majority principle advocated by the Shiites, minority groups have gathered around the idea of cultural autonomy, although the main focus has long been the electoral process and political representation.[67]

From the analysis of the Iraqi case, two main considerations arise. First, it shows that, in a post-conflict environment, it is unlikely that a State accepts all claims of minority groups, while, instead, it may be more likely to deal with them after the phase of normalization. Secondly, Iraq shows that both territorial and non-territorial models of autonomy may coexist in the same system.

These insights highlight the extreme complexity of contemporary *millet* systems and stress how the employment of this model aim to accommodate complex diversity in non-territorial ways, in order to guarantee equality and to manage ethnic and religious conflicts. In Europe, there are at least three examples of non-territorial accommodation of diversity, which show the changing forms of minority protection toward non-territorial models. Chapter 5 analyzes selected European legal systems that have adopted forms of non-territorial protection, including the Netherlands, Hungary, and UK.

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[66] Faleh A. Jabar, *The Constitution of Iraq: Religious and Ethnic Relations*, Minority Rights Group International, Micro Study Series, December 2005, available at http://www.minorityrights.org/?lid=957

[67] See John McGarry, Brendan O'Leary, *Iraq's Constitution of 2005*, in Sujit Choudhry (ed.), *Constitutional Design for Divided Societies—Integration or Accomodation?*, 359-66.

In the Netherlands, the societal system is divided in three pillars: Protestant, Catholic, and secular. Social actions, such as media activities, labor unions, and the educational system are divided through these pillars, which gather members on the basis of identity. This system, called *verzuiling*, represents a "process of articulation of the society in groups, which arises due to the tendency of single communities (religious, ethnic, and social) to create their own political, cultural, educational or syndical organizations patterning separated 'bodies' inside a society."[68]

In Hungary, national minorities are protected through a system of representation in local and national political bodies. The Hungarian constitution defines minorities on a temporal and substantial basis: as for the first aspect, minority groups are required to be resident in the Hungarian territory for at least a hundred years, while for the second aspect, minority groups have to share features of cultural, linguistic, ethnic, or religious diversity. In this way, minority groups are given voice in the decision-making process, by holding particular rights and wielding particular powers in matters of their interest.[69]

In the UK, Islamic religious courts recognized by the State can serve as arbitrator courts in matters of family. The jurisdiction of these Islamic courts is voluntary and the application of Islamic law is subject to the scrutiny of British courts, which have to analyze the compatibility of the rulings with British jurisprudence. This mechanism guarantees a partial personal autonomy, in that people may chose to file

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[68] Vittorio Cotesta and Massimo Pendenza, *Europei Mediterranei*, (Roma: Liguori, 2004), 22.

[69] Francesco Palermo and Jens Woelk, *Diritto Costituzionale Comparato dei Gruppi e delle Minoranze*, 141-2.

petitions with Islamic courts, pursuant to their faith and will, but the application of religious law is subject to the judicial review of secular law, which will specifically focus on the respect of human rights standards.

Arguably, these examples show a shift towards methods of minority groups' protection ensuing from a cultural autonomy model, traditionally unknown to the West. It has been argued that in Europe those societies that organized themselves in order to be divided in autonomous groups have consciously and actively constructed a common nationality patterned on pacification and negotiation among them.[70] Indeed, it is inherently different to build a society that aims to protect minorities, than to concede autonomy in order to keep some groups under the yoke of a majority, as the case of the Ottoman Empire until the reforms of the 19th century.

3. THE MILLET SYSTEM AS A MODEL FOR EUROPE

A legal solution has to be found in order to balance group protection and social cohesion. Legally, States face two main challenges. The first lies in finding a mechanism that can guarantee social cohesion among divided groups. If national cohesion could be assured by negotiation, then the social link among groups has to be institutionalized by letting groups pursue their interests. Comparatively, the Ottoman experience shows that differentiated groups can live together in autonomous organizations, while the Western experience shows that guaranteeing autonomy through

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[70] Nico Randeraad, *Het geplooide land*, in J.C.H. Blom and Jaap Talsma (eds.), *De verzuiling voorbij—Godsdienst, stand en natie in de lange negentiende eeuw*, (Amsterdam: Spinhuis, 2000), 135-150.

mechanisms of 'voice' may assure social cohesion. Again, a solution was found in the reform era of the Ottoman Empire by guaranteeing political representation in administrative and judicial bodies. The second challenge is properly connected to the rule of law. In this respect, States have to guarantee human rights standards as well as minority rights. This implies, specifically in the case of protection of individual autonomy, that liberal democracies have to reconcile the rule of law with traditional and religious laws. States need to balance human rights standards and minority group rights, and this entails a great challenge to the rule of law vis-à-vis competing jurisdictions that are potentially illiberal.

An adapted version of the *millet* system guarantees both effective protection of cultural minorities and social cohesion. The three aspects of the *millet* system— associational autonomy, political representation, and personal autonomy—grant both full self-determination of groups and social cohesion through political participation and social interaction.

Historical studies of the *millet* system have already been done, as have political and legal studies on the theoretical aspect of cultural autonomy and legal pluralism. Further focus on contemporary *millet* systems is needed, in order to analyze whether cultural autonomy is an effective means of protection of minorities, and, specifically, whether models that have been developed for religious minorities can be adapted to other cultural and ethnic minorities (chapters 2, 3, and 4). Given the shift of some European countries toward non-territorial models of autonomy (chapter 5), this study

argues (chapter 6) that an adaptation of the *millet* system for liberal democracies enables effective protection of cultural minorities in terms of associational autonomy, political representation, and personal autonomy.

CHAPTER 2

THE LEBANESE MILLET: ETHNIC POWER-SHARING OR MINORITY PROTECTION?

This chapter examines the Lebanese *millet*[71] in terms of personal autonomy, associational rights, and political representation. I argue that the *millet* arrangements in Lebanon created a context of conflict growth because of the lack of social connection among the social groups and because of its rigidity in the representation system. Moreover, I show that the *millet* system still has a potential with respect to minority protection, but not with respect to multinational polities.

After a brief overview of the ethno-religious composition of Lebanon, this chapter analyzes those historical stages that led to the adoption of the *millet* arrangements.[72]

1. The religious composition of the Lebanese society

Lebanese society is constituted by a large variety of religions, confessions, and ethnicities that constitute separate sub-social groups. This characteristic has radicalized through history, legal provisions, and international arrangements, so far that

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[71] The institution "*millet*", of Ottoman origin, has been legally and historically analyzed in the first chapter. To recall its definition, the *millet* system is a form of cultural autonomy whereby a State concedes forms of self-government to groups as for personal status and cultural rights, and at the same times it guarantees their political representation.

[72] Indeed, "by dividing history into transformational sequences, a researcher can understand why groups in power prefer and use certain socio-legal forms and institutions and neglect others." Jane F. Collier and

"divisiveness has come to define that which is Lebanon."[73] Seventeen religious groups are officially recognized. The main division among citizens is determined by religion that defines three groups: Christians, Muslims, and Jews. These three groups are divided in sub-groups that are called sects.

Christians include Catholics, Orthodox, and Protestants. Catholics are divided into Maronites, Romans, Armenians, Syriacs, Chaldeans, and Latins. Orthodox include Greeks, Armenians, Syriacs, and Nestorians. Protestants, Arab or Armenian, are not recognized as separate sects though they keep different churches and institutions.[74]

Muslims include Sunnis, Shi'is, Druzes, Alawites, and Ismaelites. Jews are recognized as one single community.[75] All sects but the Nestorians are independent from a legal point of view, with judicial bodies or religious authorities that manage the affairs pertaining to personal status.[76] A different situation exists for Jews, who are officially recognized as a group and thus given autonomy for personal matters, but are

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June Starr (eds.), *History and Power in the Study of Law: New Directions in Legal Anthropology*, (Ithaca NY: Cornell University Press, 1989), 10.

[73] Thomas Collelo and Harvey Henry Smith (eds.), *Lebanon a Country Study*, (Washington DC: Federal Research Division of the Library of Congress, 1989), 76.

[74] Christian sects are not as closed as one may infer. Several inter-religious marriages are celebrated while children keep the faith of the father. Obviously, this does not exclude inter-sectarian conflict, which adds up to the general inter-religious conflict.

[75] David Levinson, *Ethnic Groups Worldwide: A Ready Reference Handbook*, (Phoenix: Oryx Press, 1998), 249-50.

[76] Nestorians do not have an independent judicial body given their small representation.

not recognized as a constituent group. Consequently, they are denied any rights in political representation.[77]

The predominant sub-group among the Christians is the Maronite, while the predominant sub-group among the Muslims is the Sunni. Certain sub-groups are either discriminated against, for historical and religious reasons, or isolated for their under-representation. This is the case of Isamilites and Alawites, who are considered heretic sects within Islam; similarly, Nestorians and Protestants are a small proportion of the population, and often isolated from other sub-groups.[78] These divisions create situations of inter-group conflict, such as between Sunnis and Shi'is, as well as inter-faith cooperation, such as between Christians and Druses. As Collelo and Smith emphasize, "sects should not be viewed as monolithic blocs, however, since strife within confessional groups is as common as conflict with other sects. Even so, the paramount schismatic tendency in modern Lebanon is that between Christian and Muslim."[79] The following section examines the constitutional historical process that determined the Lebanese polity.

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[77] After the creation of the State of Israel, the great part of Lebanese Jews fled from persecution and denial of rights, as their brethrens from other Arab or Islamic countries. Lebanese Jews fled to Israel, Italy, Brazil, and USA. Those who remained face conflict and discrimination from both Christian and Muslim sides, while they strive for identity, defining themselves as Arabs of Jewish faith and inside the Jewish world distinguishing themselves as Levantines. See, Kirsten E. Schulze, *The Jews of Lebanon: Between Coexistence and Conflict*, (Brighton: Sussex Academy Press, 2001).

[78] See, Joseph Chamie, "Religious Groups in Lebanon: A Descriptive Investigation," *International Journal of Middle East Studies*, vol. 11, n. 2, (April, 1980), pp. 175-187.

[79] Thomas Collelo and Harvey Henry Smith (eds.), *Lebanon a Country Study*, 76.

2. Historical insights

2.1 The Late Ottoman Era

When Lebanon fell under the control of the Sultan, the Ottomans introduced the *millet* system, and recognized autonomy to various Christian groups, the Jewish group, and the Muslim group. Later in the 19th century, the Porte introduced several changes and reforms[80] that aimed to stabilize ethno-religious relations in power politics, which nevertheless did not prevent inter-religious rivalries.[81]

These reforms re-settled the lines of allegiance and the forms of access to power and resources. "The system which followed… is referred to as the 'communal order', where communal membership (rather than kinship and status) became the basis of political cohesiveness."[82] Moreover, this new political order was assured by

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[80] See Chapter 1, the section "Historical Millet."

[81] It has been argued that Ottoman rulers did not understand the social structure of Lebanon, which was based, according to them, on a feudal system of allegiances and only secondary on a religious system of affiliation. In 19th century's Lebanon, "feudal political allegiance was not based on religious or ethnic considerations, nor were allegiances, and/or ethno-religious identifications important factors in shaping the Politics of the Princedom before the end of the Eighteenth century. While secularism was not consciously held as a social value, in practice feudal institutions were based on a secular spirit… Political loyalty cut across sectarian lines, and man's allegiance was first to his feudatory […] whether they were of his religious affiliation or not… The social make-up of a feudatory house was usually characterized by several cohesive elements: descent from one male ancestor, same religious affiliation, same general social class, and, finally, the historical bond of clan unity in opposition to others groupings of political opponents." See, Enver M. Koury, *The Operational Capability of the Lebanese Political System*, (Beirut: Catholic Press, 1972), 19-20. In this sense, the Lebanese feudal case constitutes an *unicum* in history, since it is different from the European feudal system, in which religion played almost no role given the fact that homogenous groups lived together, and it is different from other Eastern feudal systems, in that Christians, though autonomous, were not full citizens. See, Iliay F. Harik, "The Iqta' System in Lebanon: Comparative Political View," *Middle East Journal*, vol. 19, n. 4, (autumn 1965), pp. 405-421. Moreover, Feudal or tribal allegiances are relevant in Lebanese contemporary history as well, where the recourse to power is not only directed through communal membership, but also re-allocated within the communities through an ancient tribal order.

[82] Enver M. Koury, *The Operational Capability of the Lebanese Political System*, 25.

international intervention, with France siding the Christians and Great Britain siding the Druze, and Austria and Prussia defending their interests in the region.[83] The new system was called *mutassarifiya* and was based on autonomous governorship of local councils composed of representatives of confessional groups. Moreover, it consisted of two main features: a Christian president and a mixed government.[84]

Subsequently, on 6 September 1896, the Organic Statute, a document signed by the Sublime Porte and European Powers (France, Great Britain, Austria, Russia, and Prussia), further specified the principle of power-sharing. These arrangements were valid until the fall of The Ottoman Empire.[85] The Statute determined that the President should be a Christian, and that the Council would be composed of four Maronites, three Druzes, two Greek Orthodox, one Greek Catholic, one Sunni, one Shi'i. Moreover, the Lebanese territory was divided into seven districts, three of them with Christian governors, and the other with a Druze governor, a Greek-Orthodox, a Greek-Catholic, and a Muslim one respectively.[86] At this time, the institutionalization of power-sharing was established by an international agreement, causing shift in allegiance from tribal authority to ethno-religious forms of loyalty.

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[83] Caesar E. Farah, *The Politics of Interventionism in Ottoman Lebanon, 1930-1961*, (London: I.B. Tauris, 2000) 740-4. The Concert of Europe finally institutionalized the new political balance in the Protocol signed on 9 June 1861.

[84] Meir Zamir, *The Formation of Modern Lebanon*, (London: Croom Helm, 1985), 8.

[85] See, Joseph Abu Nohra, *L'Evolution du Système Politique Libanais dans le Context des Conflicts Régionaux et Laocaux (1840-1864)*, in Dana Haffar Mills and Nadim Shehadi (eds.), *Lebanon a History of Conflict and Consensus*, (London: I.B. Tauris, 1988), 41-4.

[86] Enver M. Koury, *The Operational Capability of the Lebanese Political System*, 55-56.

2.2 The French Mandate

By the end of the First World War, the Ottoman Empire collapsed, and its territories were divided into different areas under Western rule. France was given the Mandate to Syria and Lebanon.[87] The French tried to shape Lebanese institutions on the model of a European State.[88] This was an attempt to Europeanize Lebanon by introducing a constitution in 1926 and a civil family law code.

With regard to the constitution, adopted in 1926, it was designed to balance the principle of confessional communitarianism with the principle of individualism.[89] In other words, "it was hoped that Lebanese society could move from Confessional

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[87] France retained power on Syria and Lebanon in virtue of a mandate by the League of Nations, following the 1916 Sykes-Picot Agreement between Great Britain and France that partitioned Middle East into areas of influence. Specifically, the Mandate was conferred after the San Remo Conference, and later formalized in the Treaty of Lausanne of 1923. See, Mehran Kamrava, *The Modern Middle East: A Political History Since the First World War*, (London: University of California Press, 2005), 35-44. See also Christopher M. Andrew, Alexander Sydney Kanya-Forstner, *The Climax of French Imperial Expansion 1914-1924*, (London: Stanford University Press, 1988), 83-236.

[88] For a comprehensive work on the years of the Mandate see, Stephen Hemsley Longrigg, *Syrian and Lebanon under the French Mandate*, (London: University of Oxford Press, 1958). See also, Philip S. Khoury, "Factionalism among Syrian Nationalists during the French Mandate", *International Journal of Middle East Studies*, vol. 13, n. 4 (1981), pp. 441-69. Some authors, such as Longrigg (Stephen Hemsley Longrigg, *Syrian and Lebanon under the French Mandate*), challenge the imperialist claim, by arguing that French policies were based on a humanitarian agenda. When France decided to include within the borders of Lebanon southern territories mainly inhabited by Muslim, the precarious ethno-religious equilibrium was altered, fomenting both Arab nationalism and Armenian concerns after the genocide. See, Enver M. Koury, *The Operational Capability of the Lebanese Political System*, 57.

[89] On the one hand, the principle of confessional communitarianism was concretized in the equal representation of confessional groups both in political organs and in public employment, as stated in article 95. On the other, the principle of individualism was enshrined in article 7 that guaranteed equality before the law. Moreover, the principle of equal representation clashes with the principle of meritocracy stated by art. 12. The system thus created a social and political confusion, which supported "a clientele system of relationships, where a community seeks its voice through their local family clan or head of their particular religious body." David D. Grafton, *The Christians of Lebanon—Political Rights in Islamic Law*, (London: Tauris Academic Studies, 2003), 101. About Ottoman and later Arab clientele system, called *intisab*, see Haim Gerber, *State, Society and Law in Islam: Ottoman Law in Comparative Perspective*, (Albany: SUNY, 1994), 145-147.

Republicanism to a state where political parties represented the individual."[90] The problem of representation of religious groups was not directly solved by the constitution; however, it was solved by an agreement that became a constitutional convention, whereby

> sectarian tensions were reduced by providing that for each parliamentary seat competition would be intra- and not inter-confessional. The distribution of parliamentary seats, and for administrative posts, was to be in a ration of six (Christians) to five (Muslims). The actual distribution was made final after the census of 1932.[91]

With regard to family law, the French first reorganized the family court system, and then tried to introduce civil marriage through a series of provisions that opposed the autonomous jurisdiction of religious courts.

General civil courts were established, composed of French and Lebanese officials. These courts had jurisdiction over local religious courts in matters of family law and could overrule their decisions. Consequently, French administration tried to reduce the jurisdiction of religious courts, causing a revolt among religious leaders. In order to sedate the revolts, the French had to recognize the full jurisdiction of religious courts on family law matters, and even on apostasy.[92]

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[90] David D. Grafton, *The Christians of Lebanon—Political Rights in Islamic Law*, 100.

[91] David C. Gordon*, Lebanon: a Nation in Jeopardy*, (Beckenham, UK: Croom Helm, 1983), 20. On the census of 1932, the actual only census ever done in Lebanon, see Rania Maktabi, "The Lebanese Census of 1932 Revisited: Who Are the Lebanese?" *British Journal of Middle Eastern Studies,* vol. 26, n. 2, (November, 1999), 219-241. The main problem of the census is that no party has interest in knowing the actual proportion of each sub-group in the population since everyone fears disruptive claims in the political representation system.

[92] David C. Gordon*, Lebanon: a Nation in Jeopardy*, 99. The French had to recognize Muslim jurisdiction on apostasy, which led to the extension of *ulemas'* power over criminal law matters related to religious offenses.

Moreover, statutes on civil marriage were introduced, in the pursuit of the general goal of secularization of Lebanon,[93] which had to be withdrawn after a few weeks from the promulgation, in order to placate the enraged religious leaders. In 1930, the jurisdiction of Christians and Muslim courts was recognized, by arrêté n. 6, which eventually extended the same powers to Jewish courts.[94]

2.3 The National Pact of 1943

The National Pact is the basic constitutional act, autonomously implemented by those Lebanese who shaped the contemporary features of the Lebanese institutional order. At the beginnings of 1940s, Lebanon was conceded independence by the French, and different forces and factions came to an agreement for peaceful coexistence through a clear definition of institutional features of the State.[95]

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[93] In 1923, arrêté n. 261 introduced civil marriages, giving jurisdiction over family law matters directly to the general courts. (The laws and statutes during the French Mandate were called arrêté).

[94] David D. Grafton, *The Christians of Lebanon—Political Rights in Islamic Law*, 100. The same attempt to uproot confessional autonomy and enlarge civil jurisdiction over personal status was led in the late 1930s by another series of statutes. Again, the revolts and the protests of both religious leaders and people made it clear that the effort to make of Lebanon a secular nation-State dramatically failed.

[95] The three main forces that participated in the draft of the document were: Lebanists, Arabists, and Rationalists. See, Kais Firro, *Inventing Lebanon: Nationalism and the State under the Mandate*, (London: I.B. Tauris, 2003), 207-210. Lebanists, headed by Christian groups, advocated for independence of Lebanon from other Arab countries; Arabists, headed by Sunni Muslims, advocated for a more national and Islamic identity of the State, while rationalists, a mixed group composed of Christians, Muslims, and Druze, stood in the middle advocating for complete Lebanese independence, free of both imperialist and theocratic influences. The rationalist force eventually prevailed. The group that participated to a lesser extent to the negotiations and to the draft of the document was the Armenian group. Though communist and Catholic Armenians directly and actively engaged in the negotiations, Orthodox Armenians as well as the recent Armenian communities that settled in Lebanon after the genocide tended to "pursue intra-Armenian political confrontations" that "could hardly be stretched to the point of contributing to challenge the pillars of a political order that ultimately benefited the community. This perceived predominance of Armenian concerns resulted in recurrent accusations of non-commitment, of insincerity, if not of disloyalty, from sectors of the Lebanese and Syrian political spectrum." Nicola Migliorino, *(Re-*

In 1943, Christians, Muslims, and Druze came to an agreement called *al-mithaq al-watani*, whereby the main constitutional principles of the State were fixed. The document was not included in the constitution; however, its importance lies on the consideration of this agreement as a "constitutional shroud" both for the institutional arrangement and the social balances between the communities.

With respect to external relations, the main point of conflict between Christians and Muslims concerned the relations to the West and to the other Arab countries respectively.[96] The pact stated that Lebanese people identify with Arab identity and considered Lebanon as a bridge between Arab and Western countries.[97] This pact was the result of negotiations between the main forces of Lebanon and was defined "the legacy of the cultural traditions of the peoples of the Book which are focused on covenants and pacts."[98]

With respect to internal relations, the parties concluded two agreements on institutional arrangements. The first one established that the Presidency of the State would be held by a Christian-Maronite, the Premiership by a Sunni Muslim, and the

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)*Constructing Armenia in Lebanon and Syria: Ethno-Cultural Diversity and the State in the aftermath of a Refugee Crisis*, (Oxford: Bergahn, 2008), 93.

[96] On the one hand, Christians were backed by Western powers and thus Muslims feared of foreign imperialist intervention; on the other hand, Muslims were backed by other Arab countries—particularly those countries pursuing pan-Arabist geo-political goals—and thus Christians feared of anti-Christian influence in Lebanese politics.

[97] Muslims consequently abandoned their aims of re-unification with Syria. Pierre Rondot, "Lebanese Institutions and Arab Nationalism," *Journal of Contemporary History*, vol. 3, n. 3, The Middle East, (July, 1968), pp. 37- 51 at 47-50.

[98] Hassan Saab, *The Rationalist School in Lebanese Politics*, in Leonard Binder, *Politics in Lebanon*, 1 (New York: Wiley, 1966), 275. Muslims accepted this situation on the basis of legal scholars' interpretations of *shari'a*.

Chamber of Deputies by a Shi'i Muslim. The second one established that the electoral system would be proportional, but maintaining a Christian majority of six to five Muslims.[99]

Essentially, the Pact preserved the balance between the communities in the parliamentary representation that was introduced during the French mandate and

> created a formal tradition whereby each confession was represented by holding a specific governmental post and therefore no community was shut out of the formal power structure. This system has become known as *political confessionalism*. In addition… various cabinet posts and top civil positions were designed to specific confessions.[100]

Notwithstanding the will of the constituent peoples of Lebanon to create a system of balances and a peaceful political arena, a decade after the signing of the National Pact, another civil war broke out. Arguably, both internal old cleavages among the several groups and foreign interventions—following the logic of the Cold War—pushed different interests to a conflict stage.[101] After national reconciliation, Lebanon went through a sort of golden period, signed by social prosperity, economic growth, and

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[99] The Pact challenged directly Islamic law, in that it created a state in which the power was held by a Christian majority—that was estimated on the basis of the 1932 census—ruling over a Muslim minority. This case was historically unknown and thus legally unregulated. Lebanese Sunni and Shi'i legal scholars adjusted the *vacuum iuris* through interpretations of Islamic law, whereby the possibility of creating an Islamic State was out of question, thus Muslims should honor the Lebanese nation as long as it would permit Muslims to abide by Islamic principles and laws. *Ibid.*, 108-112. However, the idea of creating an Islamic state never vanished, and returned in the 1960s with the Islamist claims of the *al-jamiya al-islamiya* group, and in the 1980s with the political activities of the Shi'i group Hezbollah. See, Fuad I. Khoury, *Secularization and Ulama Networks Among Sunni and Shi'a Religions Officials*, in Halim Barakat (ed.), *Toward a Viable Lebanon*, (London: Croom Helm, 1988).

[100] David D. Grafton, *The Christians of Lebanon—Political Rights in Islamic Law*, 107. To give an example of other important official posts, according to the Pact the Minister of Defense was to be Druze to balance the power of Maronite representative in head of the Army.

[101] See, Kamal Suleiman Salibi, *Crossroads to Civil War: Lebanon 1958-1976*, (Beirut: Caravan, 1976).

tourist development.[102] In the 1980s, Lebanon relapsed in the tragedy of civil conflict due to Palestinian presence in the South and, later, to foreign intervention and occupation by Syria and Israel.[103]

2.4 Taif Agreements

A new Pact was proposed to put an end to the conflict, which radically changed the principle of representation. According to the proposal, issued by the Sunnis, the principle of ethnic division of major official posts was to be maintained, but the distribution of parliamentary seats would be equal between Christians and Muslims. Moreover, it called for a total de-confessionalization of all other official posts. This proposal is known as the Constitutional Document,[104] which actually envisaged little reform, and stressed the importance of equal representation.

The reforms introduced by the Taif agreement set a new order without repudiating constitutional traditions. The three major official posts were guaranteed to Christians, Sunnis, and Shi'is, as they had always been. Moreover, confessional groups were guaranteed autonomy in personal status matters. Besides, the ethno-religious

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[102] It is in this period that Lebanon became known as Switzerland of the Middle East, and Beirut as Paris of the East.

[103] Again, historical debate on the causes of the civil war is large and not free from political stances. Thus, it is preferable not to refer to the debate on the grounds of the war. First of all, it is not of direct interest to the object of this study; secondly, it is not my aim to take political stance on Lebanese politics and Lebanese history in particular, nor on Middle Eastern politics in general.

[104] The representatives of the different parties retrieved the principles of the constitutional document during the negotiations that brought to the Taif Agreement. After only one month of negotiations in Saudi Arabia, the conflicting parties achieved an agreement on the future of Lebanon. The stabilization would be guaranteed by Syrian and Israeli withdrawal from the territory, while the internal balance would be

representation was established to be equal in the parliament. Finally, the agreement introduced the principle of administrative decentralization, which aimed to improve the management of resources and the inter-communal life of citizens.[105]

The Agreement laid down the final institutional structure of Lebanon and the last reforms to the Lebanese contemporary *millet* system. However, given the last political turmoil from Cedar Revolution of 2005, it is highly probable that new reforms will be introduced and new proposals will be soon advanced, which will inevitably change Lebanese polity. The following sections analyze the Lebanese *millet* system in terms of personal autonomy, associational rights, and communal representation, in light of the constitutional history that has been now described.

3. PERSONAL AUTONOMY

Personal autonomy defines a sub-system of law governing personal status, which is systemically connected to the general legal system of a State, but naturally different from it in terms of sources, application, and even principles.[106] In *millet* legal systems, States provide for autonomous areas of law in which personal status matters, such as marriage, divorce, alimony and palimony, and custody, are regulated by a *corpus iuris* that is substantially different from the one governing the other branches of law.

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guaranteed by different reforms of the institutional bodies. See, Kamal Suleiman Salibi, *Crossroads to Civil War: Lebanon 1958-1976*, 163-164.

[105] Suleiman Tukieddine, *An Independent Judiciary for a Better Justice*, in Nawaf Salam (ed.) *Options for Lebanon*, (London: I.B. Tauris, 2004), 26-37.

[106] For a larger discussion on autonomy and personal autonomy see chapter I.

This sub-system is characterized by a difference in the nature of the applicable law, in that State law generates from a legislative process, while autonomous family law generates from traditional law or religious law. In the former, the legal authority is not the State, rather a council of elders, who interpret traditions; in the latter, legal authority is represented by religious legal experts who interpret sacred law. In terms of sources, traditional and religious laws differ from State law, in that they stem from cultural heritage and religious books, and not from acts adopted by established procedures. Although each law is expression of a certain culture and although some legal systems may include religious norms and may be religiously or traditionally inspired, State law still differs for the very fact that the State is the ultimate authority of the legal system; whereas, traditional and religious legal orders identify the ultimate authority in a transcendent entity, whose will is interpreted by a person or a group of persons that are considered repositories of wisdom.[107]

Again, this sub-system is characterized by the degree of autonomy conceded by the general legal system. Mainly, in two ways the can be connected: one legislative and one judicial. Legislatively, the parliament may sanction certain regulations and

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[107] Consequently, the difference is also in principle, in that usually States do not completely incorporate in the legislative process the cultural logic of a certain tradition or a certain religion. The question involves aspects of legal anthropology and legal theory. See, for instance, Rodolfo Sacco, *Diritto Africano-Trattato di Diritto Comparato*, (Torino: UTET, 1995); Norbert Rouland, *Legal Anthropology*, (Standford: Standford University Press, 1994), 48-55. From a sociological-legal point of view, Gurvitch gives a hierarchical definition of these legal systems: State law is the supreme legal order, in which social laws developed by groups may find place, and finally inter-personal law established by contracts. Gurvitch further develops his theory of legal sociology by classifying different polities according to the kind of law they adopt, see Georges Gurvitch, *Sociology of Law*, (London: Routledge, 1973), 173-174, 203-211, and 236-238.

disapprove others; while judicially, the courts may scrutinize the decisions of traditional or religious authorities.

In Lebanon, personal autonomy is regulated by largely autonomous legal sub-systems, which have a judicial connection to the general legal system that at any rate is quiescent in that the connection procedure has never been triggered.

3.1 The sub-system of *status personae*

Both constitutional law and statutory law regulate the legal sub-system concerning the status personae. Since the first Lebanese constitution approved in 1926, personal autonomy was introduced as a principle of the Lebanese legal system, and it has never been object of constitutional reform. Statutory law recognizes religious laws in application of the constitutional principle of personal autonomy. The constitutional provisions will be first analyzed and then the statutory enactments.

3.1.1 The Constitution

The 1926 constitution frames the issue of religion under a section dedicated to the rights and duties of the citizen. Specifically, art. 9 is dedicated to the freedom of conscience, first elaborated as freedom of religion, then as personal autonomy.

Art. 9 states that "there shall be absolute freedom of conscience,"[108] then it directly refers to God, committing the State to protect religion as a founding value of

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108　The English version of the Lebanese constitution is accessible at http://www.servat.unibe.ch/law/icl/le00000_.html, accessed in March 4th, 2010. The same source was

Lebanese society and legal principles. It states that "in rendering homage to the Most High [the State] shall respect all religions and creeds." By the wording of the provision, which refrains from using a specific expression in referring to God, the State takes both a sacred and an official commitment. Firstly, it takes a sacred commitment, in that it commits to respect all religions and creeds in front of God, by using a neutral expression such as "the Most High" able to include all faiths. Indeed,

> The State… officially believes in the existence of God and it undertakes in its acts to realize the general commandments, common to the three great monotheistic religions, while abiding by an absolute neutrality with regard to confessions… without ever preferring one of them to detriment of the others.[109]

Secondly, it takes and official commitment to respect freedom of religion as a particular aspect of freedom of conscience. The article specifically refers to freedom of religion as part of freedom of conscience, giving then a particularly privileged understanding of this principle in light of the Lebanese constitutional arrangements. The article then explicates the scope of protection: individual freedom and collective freedom.

As for individual freedom, art. 9 establishes that the State "guarantees, under its protection, the free exercise of all religious rites provided that public order is not disturbed." The expression "religious rites" is remarkable, because the article drafts a plain protection of religion at different levels. First of all, the State protects religions and creeds, equally honoring all of them, and then it commits to protect the exercise of

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used for the following quotations of the constitution. A printed version of the constitution was published in *Arab Law Quarterly*, vol. 12, n. 2 (1997), pp. 224-261.

[109] Edmond Rabbath, *La Constitution Libanaise—Origines, Textes et Commentaires*, (Beirut: Publications de l'Université Libanaise, 1982), 96.

religious rights by carrying out religious rites. This aspect pertains to the individual domain, considered as the possibility by individuals to live their lives pursuant to religious rites and traditions.

As for collective freedom, art. 9 establishes that the State "also guarantees that the personal status and religious interests of the population, to whatever religious sect they belong, is respected." On the one hand, the article designs the constitutional basis for the foundation of a legal sub-system concerning personal status—*i.e.*, the possibility of being subject to the legal system of one's religion. On the other hand, the article establishes that the State has to take account of religious groups' interests with respect to both collective and individual rights. From a collective point of view, it means that the State will protect group interests in societal and political life. From an individual point of view, it means that the State protects even those individual rights that one can enjoy in virtue of her/his belonging to a specific group.

The drafters of the constitution aimed to

> constitutionalize the customary law that governs Lebanese communities, whose existence, structure, and collective life result from a peculiar morphology, denominated in sociological terms communitarian regime and, in political terminology, confessionalism.[110]

Ultimately, article 9 sets general norms for the protection of religious freedoms that include a wide range of rights, both individual and collective, guaranteeing direct commitment of the State to its sacred task to protect religion as a collective

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[110] *Ibid.*

phenomenon and religious groups interests. However, the article is programmatic in its structure, since it does not enucleate groups, nor does it set principles for the enactment of personal autonomy. It is thus necessary to look at the application of the principle of personal autonomy in order to understand the development of the legal sub-system.

3.1.2 The statutory enactment

Art. 9 was enacted by Decree n. 60/L.R. promulgated in 13 March 1936. The decree restated the principle of personal autonomy pursuant to each sub-group religious legal tradition, as well as the importance of associational rights of religious groups.

Moreover, the decree called for the development of a civil law system of family law. This legal sub-system, which actually never came into existence, would have been applied to those people who did not want to be subject to religious law or who could not get married because of a religious prohibition. This legal sub-system would have been applied to a hypothetical secular group within Lebanese society.

Furthermore, articles 5 and 6 of the decree established a procedure of approval of religious legal sub-systems. Hence, by retaining the right of endorsement, the government would scrutinize the compatibility of the single legal sub-systems with constitutional norms and principles.[111] However, because of reluctance and opposition

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[111] Insofar, the procedure was designed to reduce possible negative effects resulting from the application of religious law, and for the same reason, the High Commissioner advocated for the adoption of a secular family law code. However, the statute met the harsh opposition of the Muslim community, and therefore the Islamic *millet* was excluded by the procedure of endorsement. After a series of clashes and negotiations, Decree n. 53/L.R. adopted in March 30th, 1939 officially exempted the Muslim *millet* from the burdensome procedure.

by the communities to abide by the procedure, the State opted for direct recognition of the legal sub-systems.

Decree 146/L.R., adopted on 18 November 1938, first recognized the three religious groups: Muslims, Christians, and Jews. Annex 1 of the Decree enumerates several confessions as religious sub-groups enjoying legal autonomy.[112] According to this decree, "each community is recognized the moral and legal personality, on condition that their organization, their jurisdictions, and their legislation is object of a legislative act."[113]

It took more than twenty years to set up the single legal sub-systems and to regulate them as part of the Lebanese system,[114] while religious authorities continued administrating family law matters within their communities.[115]

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[112] Thus, within the Muslim group, five sub-groups were recognized, which were called 'communities': Sunnis, Shi'is, Druses, Alawites, and Ismailites. Christians were divided in ten Patriarcats, the Maronite, the Roman, the Armenian Catholic, the Syriac, the Chaldean, the Greek, Armenian Orthodox, the Syriac Orthodox, and the Nestorian; while the Latin Catolic group was named "Latin Church". The Jewish community was divided into three Synagogues: the Alep, the Damas, and the Beirut.

[113] Edmond Rabbath, *La Constitution Libanaise—Origines, Textes et Commentaires*, 101.

[114] Only after Lebanon's independence, Jews and Christians submitted their codes, and they were guaranteed autonomy by the endorsement law of April 2nd, 1951. Muslims submitted their codes only after the first endorsement law, and they were guaranteed autonomy by legislative decree n. 18 adopted in January 13th, 1955. As it will be analyzed the vicissitudes of the Muslim community are quite complicated since their legislation underwent an internal reform in 1967 and, in the same year, the State recognized a separate statute of autonomy to the Shi'i community. The Druze community had to fight to achieve independence as a separate community from Muslims, since they are considered a heretic sect, and therefore they could not find protection under the Muslim millet. Only in 1962, the Druze community becomes independent by two state laws adopted in July 13th.

[115] The initial reluctance to draft codes and to follow the procedure was arguably due to the reasonable concern that State authorities would have interfered with the internal logics, traditions and ultimately with the internal interests of the groups. Mainly, the staple matter of concern was the intent by the French administration to render Lebanon a Western-like society with secular law dominating the system. This would have dramatically diminished religious authorities powers in inter-communitarian affairs as well as

The recognition of the legal sub-systems has increased the complexity of the legal frame-work, the basis of which is constituted by the recuperated Ottoman civil family law, largely based on *shari'a*, as general Lebanese law on family matters. Art. 3 of Legislative Decree n. 242, adopted in 4 November 1942 revived the forgotten and never adopted Ottoman Family Law of 1917, which did not "break free of the conceptual rules of Islamic family law."[116] This law is Islamic law, though partially modified, enacted by the State, to be applied to the Muslim sub-group as well as to the cases that do not fall under a legal sub-system for lack of jurisdiction.

The following sections analyze how the single sub-systems were approved and their relations with the general system.

3.2 Problems and conflicts

The problematic aspects of the *millet* arrangements are fundamentally of two: conflicts between the sub-systems and the general legal system, and problems among the sub-systems due to the enactment of religious norms.

With regard to conflicts between State law and sub-groups laws, considerable problems originate from State's role and degree of intervention, whereby differences emerge between Christian and Jewish legal systems on the one side, and Muslim legal systems on the other.

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their fundamental importance in intra-communitarian affairs and, ultimately, in the general political life of Lebanon.

[116] June Starr, *Islam and the Struggle over State Law in Turkey*, in Daisy Hilse Dwyer (ed.), *Law and Islam in the Middle East*, (New York: Bergin and Garvey, 1990), 79.

"For Christians as well as for Jews, family law is essentially the outgrowth of religious doctrines."[117] Moreover, State's intervention is totally inexistent with respect to the formation of religious courts, their functioning, and their application of the law, since "Christian and Jewish religious courts are formed and dissolved by religious authorities, while the expenses incurred are met by the funds… held in common by each religious sect."[118] The abstention of the State has created independent and extraneous jurisdictions, whereby "family law matters have been appealed to religious courts outside the country,"[119] bypassing completely the State legal and jurisdictional system.

The situation is essentially different for Muslim law which is "religious law legislated by the State," in virtue of the adoption of the Family Code of 1942, largely based on the *shari'a*. Therefore, the parliament has the authority to legislate on family law matters, by changing, modifying, or enacting directly Muslim law, in that it is the law of the State. Moreover, "Moslem religious courts are established and dissolved by the Parliament, and as such, they are part of the political system of the State."[120] This odd situation created by the double nature of the law, secular and religious at the same time, was typical in the Ottoman Empire, where the ruler—*i.e.*, the Sultan—was the leader of the Muslims and the head of the State, wielding both political and religious powers. This legal characteristic of religious family law sub-systems enacted by the

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[117] George M. Dib, *Law and Population in Lebanon*, 13.

[118] *Ibid*.

[119] *Ibid*.

[120] *Ibid*. Similarly, the budget for the judicial system expanses, including judges' income is part of the State's budget.

State is typical of other Muslim States, where Islam is the official religion of the State or where the majority of the population is Muslim. In such cases, the State "is able to introduce progressive changes into [its] system of family law, as for example the abolition of polygamy and the raising of minimum marriage age."[121] However, Lebanon is not an Islamic State and no authority has been able to introduce any major change. Those modifications that were accepted were already set by the Ottoman code concerning mainly divorce, which brings us to the next aspect of the question.

With regard to conflicts among sub-groups, the main problematic matters are two: inter-religious marriages and children born out of these relationships, and the termination of marriages. Inter-religious marriages are usually prohibited, with some exceptions in Christian law (for men and women alike) and in Islamic law (for men only). Both Christian and Muslim traditions command that the children born out of mixed marriages should be educated in the respective religions. The dramatic situation is lived by children born out of a Muslim father and of a Christian mother: they are automatically recognized as Muslim and could incur in apostasy, if they decide to follow their mother's religion. Any Muslim who decides to convert to another religion lives the same dramatic situation, in that conversion is considered apostasy in Islam and

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[121] George M. Dib, *Law and Population in Lebanon*, 14. It is the case, for instance, of Morocco, where in February, 2004 a new Family code was been adopted bringing radical changes to Muslim family law by limiting polygamy, introducing judicial scrutiny in repudiation, recognizing women the right to initiate divorce procedures, and by reforming the general language of family law with the elimination of any degrading reference to women in the wordings of the provisions. See, Human Rights Education Associates, "The Moroccan Family Code (Moudawana)", February 5th, 2004 www.hrea.org/moudawana.html.

punished with death.[122] This is not directly recognized by Lebanese law, but however often times respected by Islamic sub-groups, constituting cases of honor killings.[123]

Divorce is the second problem, since it exists only in the form of repudiation in Muslim law, and is highly limited by Christian laws. In this respect, the 1942 Family Code introduced the validation of repudiation by a judicial act.[124] This novelty was introduced in the Shi'i statute as well.[125] Christian laws strictly regulate cases of divorce, and, especially in Catholic law, it is really difficult to comply with the requirements that entitle a couple to terminate a marriage. Lebanese law does not intervene in these legal systems at all.

3.3 Minority protection or rule-of-law?

Two are the ways through which the sub-systems connect to the general legal system: one is administrative, that is the registration of marriages, and the other is judicial, that is the scrutiny of religious courts decisions by the Court of Cassation.

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[122] David D. Grafton, *The Christians of Lebanon—Political Rights in Islamic Law*, 175-8.

[123] Honor killings are not caused only by apostasy, but also by other behaviors considered shameful, such as premature sexual relationships, homosexual intercourses, and even rapes. See, for the case of Lebanon, and about women in specific, Mirna Lattouf, *Women, Education, and Socialization in Modern Lebanon: 19th and 20th Centuries Social History*, (Boulder CO: University Press of Amrica, 2004), 22-26.

[124] This is an example of modification of Islamic law introduced by the Ottoman code (articles 108-109). The judicial procedure may be initiated by women as well.

[125] George M. Dib, *Law and Population in Lebanon*, 28. Art. 337 of the Shi'i Community law of July 16th, 1962 enumerates the cases in which a woman can ask for divorce, which are: impotence of the husband, contagious disease, full loss of mind, and continuous absence of the husband. These four cases give legitimacy to women to ask for divorce, and they are borrowed by Greek Orthodox law, which is among Christian laws the most permissive in terms of termination of marriages.

As general rule, marriages and divorces have to be registered in a list held at the offices of the Ministry of Interior in virtue of the "Registration of Personal Status Law," adopted on 7 December 1951. People have to notify marriages and divorces within a month from the date of celebration to the Ministry of Interior, who will verify the validity of celebration vis-à-vis law requirements (including legitimate authority and free will of the persons). In this way, the government can control the acts of religious authorities supervising polygamy among Muslim groups. However, this procedure is highly weak, in that it establishes a control after the conclusion of marriage or divorce and, moreover, it is limited only to administrative questions. A more effective scrutiny would be the judicial control over religious courts acts, which is the possibility to challenge the decisions of the religious courts in front of the Court of Cassation. However, the jurisdiction is limited to monitoring the respect of public order.[126] Hence,

> a huge judicial sector still remains outside the scope of the concept of the rule of law because it is confined to religious laws and courts. This segment of the judiciary falls outside any judicial control and any criteria for a just trial, in its modern sense.[127]

This "apart judicial polity" is perpetuated by the structure of the *millet* system also with respect to associational rights and of political representation, which will be analyzed in the next sections.

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[126] In honor of the mandate of article 9 of the constitution, the judicial system provides for this procedure of control of public order requirements but not of scrutiny of the decision itself.

[127] Suleiman Takieddine, *An Independent Judiciary for a Better Justice*, in Nawaf Salam (ed.), *Options for Lebanon*, (Oxford: The Center for Lebanese Studies, 2004), 34.

4. Associational rights

Associational rights are structured in constitutional and statutory provisions that constitute communal autonomy. In Lebanon, communal autonomy has developed under three aspects: associational, cultural, and political.

4.1 Associational autonomy

The constitutional institutionalization of associational rights is rooted in two articles: article 9, which has been previously analyzed, and article 10. They refer to two overlapping aspects of communalism, which are the associational and the cultural.

With respect to associational rights, communalism is encapsulated in the last part of article 9, which states that the State "guarantees … religious interests of the population, to whatever religious sect they belong." This provision was enacted for granting each community the possibility to organize its internal affairs independently from other communities and from the State, which resulted in the constitution of separate social bodies. The enacting legislation consists of one general decree, adopted under the French Mandate, and of the other decrees and laws recognizing the single communities.

Article 14, of decree n. 60, adopted on 13 March 1936 establishes that once the communities are recognized, they become legal bodies with the authority to "organize and administrate freely their affairs, in the limit of the civil legislation."[128] By the

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[128] Edmond Rabbath, *La Constitution Libanaise—Origines, Textes et Commentaires*, 100.

dictate of the decree, the right to protect group interests guaranteed by article 9 became the right to autonomously organize the life of the communities, further interpreted as the rights to manage internal affairs and to set internal disputes. The general structure of autonomy was already set, but the right definition of powers was outlined by the laws of recognition of the communities.

With respect to the organization, these laws establish for each group a legal representative,[129] who wields legislative and administrative powers sided by community councils that are elected or nominated according to each community organization. Internally, the representatives and the councils are the legislative, the executive, and the judicial bodies of the groups; externally, they are the referees of community interests, which are advanced and defended in front of the State. In light of these arrangements, Lebanon appears as a pyramid: on the top there is the State with its bodies, in the middle, there are the single communities, and at the basis single individuals.

Furthermore, the laws of recognition confer to communities the power to manage the *wakfs*, which are trusts regulated by Islamic law as "permanent dedication of property" by donation or endowment, "delivered to …beneficiaries" who are entitled to "administer it"[130] without retaining interests, but in a pious and charity spirit. In Lebanon, the *wakf* institution ultimately encompasses all properties which are held in

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[129] The patriarchs for the Christian Orthodox communities, the Bishop for the Latin Catholic community, the Pastor for the Protestant community, the Imam for the Shi'i community, and the Mufti for the Sunni community

common by groups, administered by communal bodies to the interest and profit of all group members. To this aim, communal bodies may even levy taxes on group members.

Through *wakf* administration, groups can rely on a financial and economic basis by acting as entrepreneurs that guarantee services to their members, such as cultural activities.

4.2 Cultural rights

Article 10 of the constitution, dealing with cultural and educational rights, encompasses principles that are directly connected with the idea of cultural autonomy. In the first part, it establishes that "education is free insofar as it is not contrary to public order and morals and does not interfere with the dignity of any of the religions or creeds." By the wording of the text, it emerges that education is strictly connected to religious communities, for it refers to the dignity of religions and creeds as the main limit to freedom of education. The legislator wanted to assure a sort of social stability through cultural respect, while the principle of autonomy stands clear as the second basic principle of the cultural rights arrangements.

Indeed, the article further states that "there shall be no violation of the right of religious communities to have their own schools provided they follow the general rules issued by the state regulating public instruction." Autonomy seems to be taken for granted for two reasons. First, the article declares that "there shall be no violation of the

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[130] Jamal J. Nasir, *The Islamic Law of Personal Status*, (London: Graham&Trotman, 1990 2nd edition), 275. The notion of *wakf* is quite broad and may also include real estate properties and activities, such as

rights of communities," which then results prominent in regulating instruction. In other words, the State does not concede autonomy to the groups with regards to education; by contrast, autonomy is the reality, by which the State abides. Secondly, the provision imposes a limit of general rules, issued by the State, that have to be respected by educational organizations. The State is relegated, on the one hand, to the role of 'coordinator' of the educational system, in that it is the State that provides those general rules and, on the other, of 'supervisor,' in that it presumably ensures their respect.

The autonomous organization of the educational system is a distinctive feature of Middle-East States that dates back to the period of Ottoman domination.[131] In Lebanon particularly, a plethora of institutions was introduced by the French during the Mandate, who set up a public school system as well.[132] The *status quo* of educational arrangements was maintained and constitutionalized by independent Lebanon.[133]

The dramatic result of this situation is the spread of ideologies inside the schools that often times enhance divisions, rather than unity. For instance, Christian schools spread a sense of nationalism that was more connected to Europe than to the Middle East; while in Islamic religious schools, a sense of disloyalty to the Lebanese Christian

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cultural, educational, and hospital.

[131] Under the Ottoman Empire, several charity institutions set up schools for their communities of reference that eventually became open to everybody without distinction of faith. See Chapter 2 that analyzes the historical development of the *millet* system in the Ottoman era.

[132] Asher Kaufman, *Reviving Phoenicia: In Search of Identity for Lebanon*, (London: I.B. Tauris, 2004), 110-3.

[133] Actually, it showed the same balances of power with a certain prominence of the Jesuit educational institutions. *Ibid.*, 116.

establishment was at the basis of pupils' education.[134] Moreover, foreign intervention in the educational system increased the sense of division and hindered a general Lebanese identity from being developed through coherent and unified educational programs, so that "the evident result of this unlimited freedom" is that "it transformed Lebanon in a sort of cultural kaleidoscope."[135]

In principle, the variety of educational organization does not endanger social stability in an economical frame-work of free market, where many entrepreneurs offer different possibilities suitable for different categories of people. However, the situation in Lebanon is sensitive for two reasons. Firstly, the social structure of Lebanon is frail, thus this variety of educational organizations does not contribute to strengthen social ties, and helps, instead, to increase social disunity. Secondly, the variety of educational organizations would not be objectionable, if the education that they provide is strictly connected to common civic principles and historical narratives, and shared political myths. The diverse and sometimes incompatible historical, geographical, and political perspectives endanger the creation of a stable and common social space, while this freedom of education

> through the languages in use, the ideas that are conveyed, the mentalities that it foments,… could not contribute to an unshakable harmony among the communities, within which [this freedom] meets an ideal space of

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[134] *Ibid.*, 117-20.

[135] Edmond Rabbath, *La Constitution Libanaise—Origines, Textes et Commentaires*, 117. Indeed, many schools are run by Italians, Germans, French, and Russians, as well as, recently, by Iranians and Saudis, mainly of religious inspiration.

penetration and expansion, exacerbating… the spiritual rift, from which the country suffers.[136]

The last aspect of associational rights, which drafts the even more complicated frame of Lebanese instability, relates to political rights that will be analyzed in the next section.

5. POLITICAL REPRESENTATION: ETHNIC POWER-SHARING

In drafting the constitutional history of Lebanon, the basic political agreements on political representation were characterized by a strict division of powers according to ethno-religious identity.

The National Pact of 1943, modified by the Taif Agreements of 1989, is a political agreement that is not included in any legal act. It could be defined as a constitutional act, or as a political act with constitutional effects, but in its nature it is non-legal, because it has not been adopted by any official legal procedure. However, it affects Lebanese politics, by shaping the asset of political powers and, hence, by patterning the Lebanese polity.

This agreement establishes a system of ethnic power-sharing in virtue of which the division of powers and offices has to run along ethnic lines: equal representation of Muslims and Christians in the parliament, and assignment of offices to religious sub-groups. Ethnic representation is guaranteed both at the central and at a local level.

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[136] *Ibid.*

5.1 Representation in public offices: the Constitution

The Constitution slightly refers to the ethnic distribution principle in two articles.

Article 95, paragraph 3, letter 'b' of the Constitution states that

> The principle of confessional representation in public service jobs, in the judiciary, in the military and security institutions, and in public and mixed agencies are to be cancelled in accordance with the requirements of national reconciliation; they shall be replaced by the principle of expertise and competence. However, Grade One posts and their equivalents are exempt from this rule, and the posts must be distributed equally between Christians and Muslims without reserving any particular job for any confessional group but rather applying the principles of expertise and competence.

The nature of the article is transitory, as it is highlighted by the spirit of this section of the constitution, titled "Abolition of Confessionalism" and further pinpointed by paragraph 1 and 2. Basically, the legislator wanted to maintain the confessionalist option in order to keep harmony among the groups, in view of a progressively decreasing relevance of confessional affiliation and in direction of neutral representation.[137]

The contradiction stands clear in the second part of the article; indeed, the legislator accurately excepts the major political posts from this rule, in that they are considered the most sensitive in the political arena and thus more likely to be object of

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[137] Historically, the participation in public offices of mainly Muslims during the Ottoman period and of a large majority of Christians during the French Mandate caused deep rivalries. Therefore, the transitory clause of ethnic-religious representation aimed to include all citizens in public offices until their affiliation would have lost any importance.

contention between the groups. Moreover, article 95 is in open contrast with article 12 of the Constitution, which holds an affiliation-blind orientation based on meritocracy.[138]

The enactment of the representation principle in public offices followed the principle of representation of Christians and Muslims in the Parliament.[139] The Head of State Chehab explicated that the principle of representation was two-fold: first, it ensures the equal representation of Christians and Muslims as the two main communities in Lebanon; secondly, it ensures the representation of the single communities inside the two groups.[140]

However, the President did not take into account intra-group power relations and rivalries, so that the only communities that actually gained representation were the Christian-Maronite and the Sunni, while the others had presumably to reach compromise with the main elites that managed power.

After decades of Christian majority over Muslims, a communal balance was established between the two groups in 1989. By the constitutional compromise of the Taif Agreements, the Parliament shall be composed equally of Christians and Muslims, while leaving untouched power-sharing arrangements for governmental posts.

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[138] Article 12 states that "every Lebanese has the right to hold public office, no preference being made except on the basis of merit and competence, according to the conditions established by law. A special statute guarantees the rights of state officials in the departments to which they belong."

[139] Edmond Rabbath, *La Constitution Libanaise—Origines, Textes et Commentaires*, 120. As a matter of fact, President Fuad Chehab, elected in 1958, announced that if the equal representation principle was valid for the legislative body, it should be applied also to any public office.

[140] Eventually, the application to public offices of this principle became law in 1959, by the promulgation of Legislative Decree 112, in June 12th.

These arrangements lie outside the written constitution, by revising the social pact through elite bargaining. However, the 1989 revision of the social pact persists in maintaining a double division of the society, which is reflected in the power-sharing arrangements. At the legislative level, society is divided in two dominant groups, Christians and Muslims; whereas, at the governmental level, sub-groups are given direct consideration and granted a specific post in the range of powers. This two-level communalism, or double consociationalism, creates intra-group conflict in order to achieve representation in the Parliament, while endures the rigidity of the system by keeping fixed posts that hinders the political structure from responding to changing realty.

5.2 Representation at the local level

Political representation of different ethno-religious groups at local level represents the second important aspect of power-sharing arrangements in Lebanon. Historically, the issue of local representation is divided in two periods: during the French Mandate, when State organization was characterized by a high degree of centralization, and after the Taif Agreement that introduced a certain degree of decentralization. This issue is of central importance because local representation lies at the first level of access to power, and as such, it is the first arena of possible contention in the distribution of power among groups.

5.2.1 Centralization

The general administrative division of Lebanese territory was introduced by the French during their Mandate, and it provides for *muhafaza*, regions, further divided in *qada'*, districts. The first period of Lebanon was characterized by a high degree of centralization for two reasons. First, the French model reversed on Lebanon French principles of administration, whereby centralization was historically considered the most effective way to assure political stability by deep State control over both central and local administrative issues.[141] Second, elites preferred relying on bargaining occasions offered by central power arrangements, rather than deferring their powers to a complete democratic system in which they would have been held accountable for each choice facing the risk of being dismissed by elections.[142]

On the basis of this principle, provinces and districts were designed by Municipality Law of 1963, after the independence of Lebanon, so as to be ethnically homogenous; this prevented ethnic contestation in the access to power and permitted harmonic distribution of power among the sub-groups that tended to live homogenously in Lebanese territory.

Legislative Decree n. 118, promulgated in 30 June 1977 promoted federations of municipalities and increased the minimum number of inhabitants needed to establish a

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[141] Several studies in literature highlight historical causes of French tendency to centralized authority. A quite old analysis by Gaetano Salvemini gives the clear historical perspective of how France opted for centralization and why it was maintained through the years. See, Gaetano Salvemini, *French Centralization*, in Luigi Ballerini and Massimo Ciavolella (eds.), *Civilization and Democracy—Salvemini's Anthology of Cattaneo's Writings*, (Toronto: University of Toronto, 2006), 87-88.

municipality, on the basis of the principle of effective management.[143] The main result was the upheaval of ethnic balances, which led to a *de facto* stagnation of local affairs management.

5.2.2 Attempts of Decentralization: the Taif Agreements

The Taif Agreements readdressed power relationships among sects, by reforming the system of local representation.

During negotiations, proposals of federalization were advanced, but the actual fear of disunity and of possible further division clamped down the attempts of a federal distribution of power. Although the wording of the text clarifies this position,[144] article 3 introduces and regulates decentralization. According to article 3, paragraph 2, "the powers of the governors and district administrative officers shall be expanded and all state administrations shall be represented in the administrative provinces at the highest level possible so as to facilitate serving the citizens and meeting their needs locally." The aim is to increase local powers through a sort of subsidiary principle, so that people's needs should be addressed at the lowest level possible. Moreover, following paragraph 3 stresses the necessity to design provinces so as that they would be ethnically mixed.[145] Basically, the political restraints on decentralization move from the

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[142] Adnan G. Iskandar, *Bureaucracy in Lebanon*, (Beirut: American University of Beirut, 1964), 22-23.

[143] Fadia Kiwan, *Decentralilzation: Choosing a Model*, in Nawaf Salam (ed.), *Options for Lebanon*, 57.

[144] Expressions such as "unity of the nation," "national unity," and "integrity of the land" are frequent.

[145] It states that "the administrative division shall be recognized in a manner that emphasizes national fusion within the framework of preserving common coexistence and unity of the soil, people, and institutions."

fear of creation of a federation of ethnically homogenous cantons shared by political elites, which feel threatened in the exercise of their powers by "a return to local democracy and to people directly."[146]

The result was the unaltered division of provinces, which served also as electoral district.[147] Moreover, the sectarian principle of seat distribution was maintained, according to three principles: first, equal representation of Christians and Muslims was required,[148] secondly, equal representations of the several denominations within the two groups,[149] and finally, proportional representation according to the district.[150]

Therefore, seats were fixed for each group according to the population of districts. For instance, three seats are assigned to one district, where the majority of the population is Christian and the minority is Muslim. Thus, two of the seats will be assigned to Christian candidates and only one to Muslim candidates. If the Christian population is half Maronite and half Greek-Orthodox, the electoral system requires that each sect will have a seat. While if the majority of the Muslim population is Sunni, and only a minority is Shi'i, the Muslim seat will be held by a Sunni. The rest of the sects will be free to support one of the three candidates. A certain degree of collaboration is

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[146] Fadia Kiwan, *Decentralilzation: Choosing a Model*, in Nawaf Salam (ed.), *Options for Lebanon*, 57-61.

[147] This is established by article 2, letter A, paragraph 4 of the Taif Agreement.

[148] Taif Agrrement, article 2, letter A, paragraph 5, point a.

[149] Taif Agrrement, article 2, letter A, paragraph 5, point b.

[150] Taif Agrrement, article 2, letter A, paragraph 5, point c.

thus encouraged by this electoral system that, however, "militates negatively toward blurring issues and obfuscating programs, but positively it obliges inter-communal cooperation and compromise."[151]

As a matter of fact, the Agreements did not bring any novelty nor did they introduce any major change in the Lebanese system except for equal representation of Christians and Muslims in the Parliament. Actually, the Agreements called for a complete abolition of the sectarian system, which brings into question the *millet* system in its entirety.

The main contradiction lies in the results of the arrangements and its inspiring principles. In theory, the principles of ethnic power-sharing aimed to create a system in which each group had a representative in public offices and power-wielding bodies, while in reality, the results tragically show an overturn of the ethnic balances through simple elite bargaining. The main cause of failure of the Lebanese system has been identified with the *millet* system itself that allegedly perturbed Lebanese polity and politics by triggering a "pathologic development from political confessionalism" originating from "the communitarian regime, to a form of metastasis that has overrun mentalities and institutions."[152]

Yet, the confessional system has not been dismissed. The law of abolition of the sectarian arrangements has not been promulgated and the only achievement toward a

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[151] David C. Gordon, *Lebanon—The Fragmented Nation*, (London: Croom and Hoover, 1980), 102.

[152] Edmond Rabbath, *La Constitution Libanaise—Origines, Textes et Commentaires*, 517.

neutral State was the abolition of the sectarian specification in identity cards by way of a memorandum issued by Minister of Interior Ziad Baroud on 12 February 2009.[153] This cannot be considered mere inactivity of the legislator; on the contrary, it may be considered the lack of will to dismantle the sectarian system or the lack of political will to comply with the Agreements. It is thus the case to address these issues in light of the in-depth analysis of the Lebanese *millet* as a whole.

6. ETHNIC BARGAINING IN CONFLICT POLITIES: WHAT DOES THE LEBANESE *MILLET* TEACH?

Both political and legal literatures on Lebanese confessionalism generally reject the sectarian political arrangements *in toto*.[154] However, a combined analysis of political theories and legal evidence of the causes that lead ethnic conflict to outburst may readdress the issues and shed new light on the validity of the *millet* system in general, and on the negative aspects that have to be corrected. I argue that the main problematic aspect of the *millet* system is political representation. In particular, I claim that local representation is still an effective tool to achieve ethnic equilibrium. Moreover, I argue that cultural rights and personal autonomy still represent effective protection of groups in a context of high ethnic tension, where collective identity represents the basis of power relation and interests' negotiation.

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[153] See, *www.usaid.gov/lb/newsroom/photo_archive.html*

[154] See, for instance, the conference paper by Maurus Reinkowski, *Ottoman 'Multiculturalism?—The Example of the Confessional System in Lebanon*, (Orient Institute of the Deutsche Mörgenländische Gesellschaft, Beirut: 1999), 19-21, where the author claims that Lebanon may solve its problems living aside both multiculturalism and "milletism".

Theories about conflict can be divided in two categories: conflict theories and general political theories applied to conflict. The first category, conflict theories, focuses on the nature of the conflict as a peculiar relation between human beings or groups. The second category, general political theories applied to conflict, focuses on the causes of conflict. I will start with the first category.

6.1 Conflict Theories

Galtung formulated three interconnected stages of conflict: personal, inter-group, and inter-State. The whole branch of conflict studies focuses on conflict management, how to reduce violence to prevent war, and how to manage conflicts by non-violent means.[155]

Studies on inter-group conflict mainly focused on ethnic conflicts, specifically on the role of actors in the conflict, their interests, and their behavior. While major contributions have been made on pure ethnic conflicts, minor contribution has been made on ethno-religious conflicts. According to these authors, possible legal solutions are autonomy or power-sharing, or other legal-political arrangements.[156]

Assuming that conflicts may be solved through models of autonomy, it is not yet clear how multi-factor conflicts can be managed. On this aspect, Fox contributed to research by theorizing ethno-religious conflicts as relations in which religion is not the

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[155] See, Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization*, (London: Sage, 1996), 75-80.

[156] See, Ted Robert Gurr, *Minorities at Risk: A Global View of Ethnopolitical Conflicts*, (Washignton, D.C.: United States Institute of Peace Press, 1993).

main cause of conflict, but it may be the cause of its embitterment.[157] The analysis of

actors' behavior in the conflict shows that

> another factor that influences the process of ethno-religious conflict is
> the interest of religious elites as they exercise… the control of religious
> institution and religious legitimacy. They influence the grievance
> formation process through the use of religious legitimacy. When religion
> is not an issue in the conflict, religious legitimacy facilitates the
> formation of grievances over non-religious issues.[158]

If then religion is a collateral element of grievance, and if autonomy is one of the

possible solutions to conflicts, then the negative potential of religion could be lessened

by complete satisfaction of religious group interests through autonomy. Still, autonomy

can bring potential disruptive elements by separating groups and creating isolated

mono-blocs prone to delegate inter-relations to higher level of social life. In other

words, cultural segregation would mean to postpone the moment of interaction to the

sphere of political action, where group interests are negotiated by group representatives.

This lack of a communal social basis and the absence of a neutral space of interaction

among groups shift the arena of relations to the political realm, where relations are

based on a logic of negotiation that does not imply cultural collaboration.

In Lebanon, the *millet* arrangements aim to satisfy groups' demands for

autonomy. In theory, the *millet* arrangements with respect to personal autonomy and

cultural rights are preordained to meet religious groups' demands. The laws that

guaranteed autonomy to ethno-religious groups created legal bodies capable of

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[157] Johnatan Fox, *Ethnoreligious Conflict in the Late Twentieth Century*, (Lanham, US: Lexington Books, 2002), 110-115.

legislating over their members on religious and cultural matters. Moreover, autonomy is constitutionalized by the principles of cultural autonomy and personal autonomy, which thus confirms the hypothesis formulated by Fox.

The disruptive aspect of the *millet* system is represented by two gaps of the legal arrangements. First of all, there is no real connection between the legal sub-systems of the sub-groups and the general legal system of the State. A connection between the two legal spheres would enable the development of a common legal basis that would be directly connected to cultural issues, in that those sub-systems deal with family law, part of the cultural heritage of a people.

Secondly, the *millet* arrangements failed to develop a common Lebanese culture. By relegating culture to the sphere of group autonomy, the *millet* system again impedes the development of a common neutral space able to include all citizens.

The current organization of the *millet* system hinders general rule-of-law from developing, which could be, in legal terms, the general legal basis of the Lebanese system and serve, in socio-political terms, as that neutral platform in which social interests combine.

Given the negative and positive aspects of the *millet* system in conflict management, it remains unclear whether the *millet* itself is to be considered a cause to

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[158] *Ibid.*, 180.

the conflict; hence, it is necessary to analyze political theories that deal with the causes of conflict.

6.2 Political theories applied to conflicts

Those political theories that focus on ethnic conflict pertain mainly to institutionalist and rationalist approaches.

According to the institutionalist approach, a rigid political system is more likely to collapse when facing ethnic conflicts, because of its inability to redress ethnic claims in the governance system.[159] This argument is based on the assumption that flexible systems are designed to include all actors, *i.e.* to be "integrative," and leave open the option for complete separation of conflicting parts.[160] However, these claims lack of adequate consideration of identity as the main factor of political action. In other terms, these theories analyze cases in which identity is considered a justification for conflict, while the main cause is political representation and the inability of the system to adequately accommodate actors' demands.

According to the rationalist approach, collective identity is a fixed aspect of group identity. Groups behave as elites, whose political action is considered in terms of power relations. Rationalists claim that conflict outbursts when elites fear to lose power

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[159] Velerie Bunce, *Subversive Institutions: The Design and the Destruction of Socialism and the State*, (NY: Cambridge University Press, 1998).

[160] Stefan Wolff, *Complex Autonomy Arrangements in Western Europe: A Comparative Analysis of Consociationalism in Brussels, Northern Ireland and South Tyrol*, in Marc Weller, Stefan Wolff (eds.), *Autonomy, Self-Governance and Conflict Resolution: Innovative Approaches to Institutional Design in Divided Societies*, (Oxon: Routledge), 119.

or when groups fear to be excluded from power in future political arrangements.[161] This approach does not explain why cooperation and coexistence occur, failing to consider the social and institutional aspects of a certain polity, and, power relations within a certain group.

As for Lebanon, both approaches are testable in front of constitutional arrangements. The institutional system of ethnic representation in Lebanon is dramatically rigid. Ethnic power-sharing was considered as a way towards pacification among the various ethno-religious groups by granting to each sect a certain sector of power. However, the ethnic division of posts is so rigid that the system is unable to respond to social changes. The periodical frustration of the will to abolish the *millet* system in political representation augmented the disruptive potential of the latent ethno-religious conflict.

Moreover, ethno-religious power-sharing arrangements are inconsistent: in the Parliament, ethno-religious balance is conceived only between Christians and Muslims, while letting the two groups alone in dealing with internal conflicts among the single denominations; in the executive, ethno-religious balance is considered among the various sub-groups. The system thus fails to address the question of a two-fold conflict: between Christians and Muslims on the one hand, and between the single sects within these two groups, on the other.

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[161] David A. Lake and Donald Rothschild, "Containing Fear: The Origins and Management of Ethnic Conflict," *International Security*, vol. 21 n. 2, (Fall 1996), 41-75.

Both the institutionalist and the rationalist approaches fail to consider two aspects. First, they do not take into consideration the social aspect of collective identity as a potential realm for satisfactory management of identity issues through cultural autonomy arrangements. Secondly, both approaches focus on the central level of political systems to address the questions of ethno-religious conflict and do not consider the possibility of redressing power-sharing arrangements at the local level through political representation.

6.3 Legally arranged coexistence: local representation

It is possible to recognize the failures of this system in order to think of a possible re-organization of the *millet* in Lebanon and consider its potentials. One may trace at least two points of failure, and two corresponding potentialities: the first pertains to political representation and the second to cultural autonomy.

With regard to political representation, confessionalism is not a system of equal representation but should be considered a system that channels possibilities to access power by virtue of ethno-religious affiliation. Indeed, legal arrangements of political representation were first oriented to guarantee Christian supremacy over Muslim citizens, and then to guarantee equal representation of Christian and Muslims. Still, it cannot be considered satisfactory representation for two reasons.

On the one hand, governmental posts are strictly divided among the sects, thus political and administrative appointment is not the result of negotiation among the groups, but a given. The rigid provisions about ethno-religious power-sharing do not

mirror power relations, but crystallize them and leave no room for negotiation. Equal representation of all sects can be guaranteed in various flexible ways that permit rotation of posts among the groups and sub-groups and give all of them actual power. By fixing posts, the system impedes any development of constitutional customs that depend on social bargaining and becomes, instead, the legal justification for perpetuation of inter-communal conflict.

On the other hand, confessionalism does not guarantee equal representation because it focuses only on the main division between Christians and Muslims, while intra-group conflicts are even more complex and dangerous than between the two of them.[162]

Assuming that conflict of moderate level contributes to developing a political atmosphere more favorable to the formation of consociational arrangements,[163] then legal arrangements may help to establish the ground for bargaining. Since inter-communal conflict is rooted in society, then the legal focus for the arrangements should be over-all participation with no fixed division of seats. Rather, a general constitutional command of equal representation of all sects will improve inter-communal bargaining for the division of both governmental posts and Parliament seats. This could simultaneously lead sub-groups to join the bargaining arena as well as exacerbate the danger of under-representation of small communities that do not have actual power in

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[162] For instance, Druzes, who belong to the category of Muslims, are historically more prone to cooperate with Christians than with other Islamic sects. Again, Ismaelites, who also belong to the Muslim category, are denied any participation by Muslim fellows.

political negotiation.[164] The issue then shifts to other possible arrangements that focus locally, on the lowest level of administration.

On a territorial basis, legal arrangements of fixed rules at the local level could be applied most effectively. Local administrations wield less competitive power and focus on basic needs of the population. At this level, it is possible to take into adequate consideration questions of identity in politics. Hence, a set of arrangements of ethno-religious representation would, first, be easier to be managed, and, secondly, it would constitute real representation of all social forces.

Conflict management through local representation would mean ethno-religious power-sharing at the local level, satisfying the demands of access to power by all actors. The combination of territorial decentralization and political representation would enable a more practical management of ethno-religious conflicts, because it would permit to control ethno-religious-power relations rightly from the lowest institutions. Moreover, Lebanese history shows that under Ottoman rule local representation properly addressed

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[163] Arend Lijphart, *Democracy in Plural Societies*, (New Haven: Yale University Press, 1977), 81-83.

[164] As it has been previously noticed, cooperation among sub-groups occurs often times to achieve political aims, mainly in the struggle for representation in power. Thus, groups and sub-groups cannot be considered monolithic units inside the groups, and may be willing to cooperate more than to mobilize towards conflict if rightly stimulated. As demonstrates the Druze-Christian cooperation, "the state's various intra-communal actors, in their efforts to maximize their own attainments, attempted to represent their groups and dissuade or outbid their competitors, thus promoting inter-communal coexistence but also enhancing inter-communal discord. The advantages of this approach are that it underscores ethnic mobilization as a dynamic process, avoiding the pitfall of essentialism-that is, of regarding ethnic groups as rigid, homogeneous, and unchanging entities-and that it helps explain the motives for inter-communal conflict and cooperation." See, Oren Barak, "Intra-Communal and Inter-Communal Dimensions of Conflict and Peace in Lebanon," *International Journal of Middle East Studies*, vol. 34, n. 4 (November, 2002), 619-644, at 638. With adequate constitutional arrangements establishing satisfactory balance between rigidity for sub-groups representation and elasticity in groups power-sharing, the *millet* system would be still an available solution for Lebanon.

actors' demands for recognition, until the introduction of those arrangements that granted Christian supremacy in the Parliament.

Power-sharing is itself a compromise that aims to avoid risky conflicts by setting guarantees through rigid rules. However, a certain degree of flexibility should be maintained in order to make the system capable of responding to social changes, and of creating those opportunities for inter-action that may develop cooperation through continuous negotiation among actors. In the Lebanese case, the rigidity of equal representation of the two constituent groups in Parliament could be associated with certain flexibility in the representation of sub-groups in the government. Thus, by guaranteeing the division of seats through a fifty-fifty formula, Christians and Muslims are equally represented as the constituent groups of Lebanon. Whereas, by leaving to the constituent groups the task of achieving representation in the government, the system would create a certain degree of intra-group conflict that leads elites to negotiate compromises for power-sharing. This degree of elasticity would surely endanger social stability since inter- and intra-group conflicts would remain at an acceptable level only if actors share a common political culture disposed to compromise. This willingness defines the Lebanese nation, in that social divisions would be unified by a common disposition to coexistence[165] and to reach political compromise, which shifts the focus to the social side of coexistence.

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[165] The notion of nation is defined as the "will of the people to live together" as Marko paraphrased Renan's concept of daily plebiscite. See, Joseph Marko, "United in Diversity?: Problems of State- and Nation-Building in Post-Conflict Situations: The Case of Bosnia-Herzegovina," *Vermont Law Review*, vol. 30, n. 3 (Spring 2006), pp. 503-550, at 510.

With regard to the social dimension of collective identity, the failure of the *millet* system in Lebanon lies in the lack of connection between the single sub-groups, which live autonomously, and prevent the development of a general Lebanese identity. Those societies in which collective identity plays the main role in social participation have to grant a certain degree of autonomy to groups. By granting this, States take into consideration the social satisfaction of identity claims, and "enable [groups] to make compromises and concessions without having to fear out-bidding and out-flanking by ethno-centric radicals."[166] For this purpose, the elements of personal autonomy and of cultural autonomy are still valid tools for accommodating identity demands and ethno-religious claims. However, these tools have to be oriented to the creation of a supra-sectarian identity. In other words, autonomy arrangements must not lead to total disruption of social ties among groups. Therefore, constitutional arrangements have to create a public common ground, where single identities combine and find their appropriate place in a general citizenship.

In Lebanon, the main failure of the system consists of the lack of ties between confessional groups, calling into question the rule-of-law and social stability.

With regard to the rule of law, the legal system affects the rights of those categories that are not protected or even directly discriminated against by religious

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[166] Stefan Wolff, *Complex Autonomy Arrangements in Western Europe: A Comparative Analysis of Consociationalism in Brussels, Northern Ireland and South Tyrol*, 118.

law.[167] Supposing that a legal system can opt for a pluralistic nature of its sources, it may accept different legal traditions within a general common framework that serves as legal basis for any component of the system. This legal framework should establish a series of effective connections between the sub-systems and the general system, so as to keep the system together by monitoring procedures that guarantee unity. In Lebanon these connections are too weak, with the result that the sub-systems live separately. Secondly, the general framework has to guarantee the minimum bunch of basic rights that may not be recognized or may be deliberately breached by the single legal traditions. Again, in Lebanon, basic rights are not guaranteed in that there is no common authority that fills the gap of the legal sub-systems, and that adjusts the defects of the legal traditions.[168]

With regard to social stability, the necessity of a general framework is of deep importance not only for the respect of human rights but also for the social stability of the State. A basic civil legislation in family law matters helps to guarantee the respect of those rights that do not find adequate protection in religious law and contributes to develop a system of law applicable to those cases that fall outside the jurisdiction of the single sub-groups. This space of jurisdiction can help to create a further social group: the 'others.' This group, void of direct specific affiliation, would develop a supra-group

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[167] See, Lamia Rustum Shehadeh, "The Legal Status of Married Women in Lebanon," *International Journal of Middle East Studies*, vol. 30, n. 4 (November, 1998), pp. 501-519.

[168] For instance, illegitimate children and Muslim women willing to divorce, Christian men or women willing to divorce cannot exercise their correspondent basic human rights, which are not envisaged by the legal traditions which are the only enacted in the country.

identity regulated by ethno-religious-blinded laws and secular jurisdiction with possible effects on other societal realms.

Moreover, a common education in civil law and history helps to develop a sense of belonging which transcends the single sub-groups. To achieve this goal, it is necessary that all actors are willing to compromise and to contribute to the building and development of common society. This assumption, which is rooted in Galtung's conception of primacy of culture in conflicts,[169] whereby culture is the starting point for resolving conflicts, calls into question the will of the constituent groups of Lebanon to participate and share societal and political life.

This willingness to compromise cannot be uniquely regulated by law and originates from historical and political frameworks. However, law can support compromise by creating spaces of interaction, precisely through the balance between the necessity of unity and demands for autonomy.

The central problem of the Lebanese *millet* is that it shaped Lebanon as a consociational democracy through communal arrangements between Christian and Muslim groups at the central level, while it protects sub-groups through communal and personal autonomy. The first aspect, which may be defined as 'consociationalism through *millet*,' is not sustainable. However, this sustainability is not put into question by the *millet*, but rather, it is consociationalism itself that is politically and legally

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[169] See, Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization*, (London: SAGE, 1996).

debatable as a long-term sustainable choice. This claim is based on the consideration of other consociational legal systems, such as Belgium, South Tyrol, and Bosnia-Herzegovina. In the last case, it has been noted that "confessional identity does not per se exclude coexistence with other confessions in one State," while nationalist claims of supremacy over other national groups makes coexistence unlikely.[170] Thus, it is not the *millet* itself, but its application as a means to set consociational arrangements that proves to be inadequate. As previously argued, a territorial application of political representation would be a satisfactory option since the devolution of ethno-religious power-sharing "at the lower levels often does not have serious political overtones, while at the same time such a division of the body politic into autonomous ethno-religious groups cannot dominate and paralyze the power of the whole nation."[171] The territorial option of political communalism is an appropriate solution in terms of conflict management properly because "it manages at least to emasculate the frictions and frustrations of conflicting ethno-religious groups at the national level by restricting them to the local scene."[172]

Moreover, the *millet* choice in Lebanon could be the adequate solution to protect those sub-groups that are reduced to the status of minorities within the constituent

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[170] Florian Bieber, "Bosnia-Herzegovina and Lebanon: Historical Lessons of Two Multireligious States," *Third World Quarterly*, vol. 21, n. 2 (April, 2000), pp. 269-281, at 278-279.

[171] Catherine D. Papastathopoulos, "Constitutionalism and Communalism: Cyprus," *University of Toronto Law Journal*, vol. 16, n. 1 (1965), pp. 118-144, at 129. Previously in the article, the author distinguishes among three kinds of communalism: national, whereby ethnic power-sharing is applied to central government, territorial, whereby power-sharing is set at local government entities, and total or fused communalism, which results from a combination of the previous ones.

[172] *Ibid*.

groups. As diffuse minorities, no other solution could be available to protect cultural claims through autonomy arrangements. Yet, if the aspects of communal and personal autonomies are not called into question as proper means of protection, the question of political representation is controversial in terms of temporal sustainability. Political representation in Lebanon was introduced by the French as a temporary arrangement. This was reintroduced during the Taif negotiations. Still, ethno-religious power-sharing is the main feature of Lebanese polity. Given that "in the long-run its usefulness is highly questionable because it crystallizes and perpetuates communal differences,"[173] the first step to dismantle the complex ethno-religious structure would be decentralizing political representation.[174]

Political *millet* arrangements in consociational polities have proven to be unsustainable, but cultural and personal *millet* arrangements still prove to be satisfactory means of protection of diffuse minorities. This argument is developed in the next chapter, which analyzes the Israeli case, where no power-sharing arrangements exist, and the structure of the *millet* serves as effective protection of minorities.

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[173] *Ibid.*

[174] Decentralization as introduced in the 1970s may effectively reduce conflict not simply by mere federalization, but it rather should be understood in terms of ethnic power-sharing tools. See, Richard Hrair Dekmejian, "Consociational Democracy in Crisis: The Case of Lebanon," *Comparative Politics*, vol. 10, n. 2 (January, 1978), pp. 251-265.

CHAPTER 3

BETWEEN SECULARISM AND RELIGION, BETWEEN COMMUNITARISM AND INDIVIDUALISM: THE ISRAELI GESELLSCHAFT

The *millet* system in Israel is the basic system of group rights and operates in addition to the liberal model for protecting individual rights. This combination results in a complex system that envisages both the principle of communitarianism, which links communal identity to the exercise of rights, and the principle of individualism, which guarantees the right to be left alone.

Historically, the Israeli system is unique because it is the only case of application of the *millet* system in a society where Jews are the majority. Moreover, the dual nature of Israel as a Jewish and democratic State makes the purpose of protection of non-Jewish groups more challenging. Indeed, what is their place in Jewish society? Even within the Jewish majority, however, the ruling elite is a minority group—Orthodox Jews,—who impose their view of Judaism over the objection of other non-religious and non-Orthodox group.[175]

Besides the debates over the relationship between religion and State, between religiosity and secularity in Israel, between Orthodox and non-Orthodox Jews, the main concern lies in the treatment of the Arab minority.[176] This politically charged issue, may be addressed by the following question: what is the place for Arab and other non-Jewish minorities in a Jewish State?

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[175] Recently, the non-Orthodox opposition has increased in light of significant episodes. For instance, the annulment of a conversion conducted by a non-Orthodox rabbi, due to the convert's decision to embrace secular life and the proposed bill, advanced by the Russian new-comers' party Israel Baytenu, which would transfer significant competences on conversion issues to the Chief Rabbinate.

[176] It is worth clarifying that this chapter analyzes only the Israeli legal system and not the Palestinian one, which has jurisdiction over the territories under the rule of the Palestinian National Authority. Thus,

This chapter analyzes the Israeli *millet* in terms of personal rights, associational rights, and political representation. Particularly, it focuses on the struggle between religion and secularism in family law, on the protection of non-Jewish minorities under the Orthodox establishment, and on political representation, which is based on *de facto* guarantees. The chapter also discusses the combination and conflicts of communitarian and individualistic approaches in the protection of rights.

I claim that the combined system of communitarianism and individualism provides effective protection for both group and individual rights. Moreover, I argue that, as in the case of Lebanon,[177] minority protection models are effective when negotiations for group inclusion are based on mutual trust, which excludes the possibility of imposing a particular social view by one group. Specifically, Israel was established as a Jewish State; therefore, any politics of inclusion would be invalid if minority groups try to subvert the Jewish and democratic essence of the State. This holds true from the Arab point of view that considers the Jewish State ontologically incompatible with Arab national aspirations and from the Orthodox point of view that considers the democratic State partially incompatible with Jewish halakhic aspirations.

1. ISRAEL: MINORITIES in A JEWISH DEMOCRACY?

The Declaration of Independence in 1948 defines Israel as a Jewish State, giving to Judaism a privileged place in the definition of the nature and the essence of the State

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by Arab minority, I refer to Arabs citizens of Israel, who may be Muslim, Christian, or Druze. I use the expression "Arab Israelis," which stresses both their nationality and citizenship.

from a historical and cultural point of view. The Declaration does not have the rank of law, though it has legal binding effects and legal influences. It is the document that expresses the exercise of constitutional power in the establishment of the State of Israel and, consequently, it has legal binding effects.[178] In general, it serves as a source for inspiration in the interpretation of Israeli legislation.

The Declaration considers freedom, justice, and peace as the basic principles of the State, with a direct reference to Biblical prophetic tradition, while it ensures social and political equality with no respect to religion, race, or sex.[179] Immediately after the establishment of the State, the Jewish nature of Israel became controversial between the religious and secular establishments. Indeed, their views differed over the interpretation of the Jewish nature of the State: the secular establishment referred to the Jewish cultural heritage combined with modern Western secular culture, while the religious establishment has progressively advanced the transformation of Israel into a Jewish religious State.[180]

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[177] See Chapter 2.

[178] The exercise of constitutional power—*pouvoir constituant*—was internationally supervised in virtue of the 181 Resolution adopted by the General Assembly of UN on 29 November 1947. This document, known as the Resolution on Partitioning of Palestine, established that Palestine would be divided in two States, one Jewish and one Arab. The two peoples were given the authority to exercise constitutional power in order to establish two States provided they would respect minority rights. The Arabs did not recognize the partition and, consequently, refused to establish their State. See, *supra*, sections 4 and 5.2.

[179] See par. 13 of the Declaration of Independence of the State of Israel, available at http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Declaration%20of%20Establishment%20of%20State%20of%20Israel

[180] The idea of the secular founding fathers stemmed from the *haskalah* movement (the Jewish Enlightenment.) Legal scholars even tried to revive Jewish law in combination with modern principles, which eventually did not work. However, Zionism aimed to create in both social and legal terms a Jewish State that would synthesize modern legal principles and life-style with Jewish tradition. See, Assaf

In order to stress the democratic nature of the State already established by the Declaration of Independence, the Israeli Parliament passed a law in 1985 that amended the Basic Law: The Knesset 5718-1958 (the Israeli Parliament), introducing the word "democratic" after "Jewish" when referring to the State. This definition was further used in the Basic Law: Human Dignity and Liberty 5752-1992, the Israeli Bill of Rights, and it is the basis of the jurisprudence of the Supreme Court. Indeed, the dual nature of the State is subject to continuous development in both public and legal discourses.

In *The Central Election Committee v. MK Ahmad Tibi and Azmi Bishara,*[181] Justice Barak outlined the basic understanding of the definition "Jewish and democratic State," whereby "Jewish" is explained, par. 12 and 13, in terms of Zionism and heritage (thus, immigration to Israel from the Diaspora, the revival of the Hebrew language, Jewish festivals and symbols, and Jewish religious sentiment), while "democratic" is explained, par. 14, in terms of rule of law, human rights protection, separation of powers, freedom and egalitarianism in elections, and independence of the judiciary.

While Jewish citizens can find their full place in the society and become fully involved in the conflict discourse between religion and secularism, it may seem that non-Jewish minorities are somehow displaced from the social realm. However, since its

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Likhovski, "The Invention of 'Hebrew Law' in Mandatory Palestine," *The American Journal of Comparative Law*, vol. 46, n. 2 (Spring 1998), 339-373. During the 1960s, 1970s, and 1980s, religious leaders have progressively strengthened principles originating directly from Jewish law—*i.e.*, *halakhah*. A secular slogan, which often occurs in stickers, recites: "*medinat halakhah, halkhah ha-medina*"—a halakhic country is the end of the State.

foundation, Israel has recognized the existence of non-Jewish minorities and has progressively enacted policies of protection.

The Declaration of Independence directly appeals to the "Arab inhabitants of Israel" and exhorts them to participate in the building of the Israeli State and then guaranteeing them political representation in the institutions.[182] Although the moment of foundation was solely Jewish, the constitutional power was open to non-Jewish actors, namely Arabs. The request of peace and cooperation and the guarantee of representation are the elements of recognition of non-Jewish minorities by the Jewish State. Thus, the Jewish State does not exclude non-Jewish citizens from full enjoyment of rights, and envisages a model of protection that eventually developed over the years.

This recognition was followed by the preservation of the *status quo* in matters of personal status by the adoption of the *millet* system that was in force in Mandate Palestine. The Palestine Order in Council,[183] which was issued by the British Government, may be defined as the constitutional provision of Mandate Palestine. It recognizes jurisdiction of religious courts in matters of personal status (arts. 47 and 51) and specifically refers to Muslim courts (art. 52), Jewish courts (art. 53), and Christian

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[181] High Court of Justice, 11280/02, *The Central Election Committee v. MK Ahmad Tibi and Azmi Bishara*, available in English at www.court.gov.il

[182] Par. 16 of the Declaration of Independence states: "WE APPEAL—in the very midst of the onslaught launched against us now for months—to the Arab inhabitants of the State of Israel to preserve peace and participate in the upbuilding of the State on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions."

183 The Order was issued on international and national legal bases: the Mandate, conferred to Britain on Palestine according to art. 22 of the Statue of The League of Nations, gave international legitimacy, and the Foreign Jurisdiction Act of 1890 gave internal legitimacy.

courts (art. 54). Moreover, the preamble of the Order, in recognizing the British commitment to the creation of a Jewish national home in Palestine, states that "nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine."[184]

The understanding of minority protection in terms of self-rule was a historical heritage of the Ottoman Empire, but while the preservation of the *millet* system stems from the Order and the Mandate, the commitment to protect non-Jewish minorities stems from the UN Resolution for Partitioning Palestine and the Declaration of Independence. The Mandate guarantees the respect of nationality principles as understood in the Ottoman tradition (art. 7); moreover, it recognizes the *millet* system in terms of both jurisdictional and cultural communal autonomy (art. 9).[185]

UN Resolution 181 of 1947 recognized the right to self-determination of both Jews and Arabs and clearly conditioned the exercise of constitutional power on the respect for minority rights. Chapter 2 of the Resolution[186] is dedicated to minority rights and adopts both liberal individualistic perspective—*i.e.*, protection of freedom of consciousness and religion—and communal approach, by compelling protection of collective rights and self-governing autonomy. Thus, based on a cultural understanding

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[184] The text of the Order is available at:
http://unispal.un.org/UNISPAL.NSF/0/C7AAE196F41AA055052565F50054E656

[185] The text of the Mandate for Palestine is available at http://www.mideastweb.org/mandate.htm

[186] The text of UN/RES/181 of 1947 is available at http://www.yale.edu/lawweb/avalon/un/res181.htm

of social organization, the *millet* system has become the object of an obligation of international law due to UN recognition.

The adoption of the *millet* system in Israel ha been conditioned by international factors. The following three sections focus on the development of the Israeli system as both Jewish and democratic.

2. PERSONAL AUTONOMY

Israel inherited the *millet* system of personal autonomy from Mandate Palestine. The Israeli system differs from other *millet* systems for two reasons: the State recognizes communities with different scopes of autonomy and it limits religious jurisdiction through legislative activity, while the High Court of Justice scrutinizes religious jurisprudence.

The religious and secular legal systems have struggled to enlarge their respective jurisdictions, by claiming authority over matters out of exclusive jurisdiction. While this struggle reflects historical developments and ideological positions, the novelty of the Israeli system is the mutual influence of religious and secular laws by parliamentary imposition on religious courts to enact secular norms, and by the judicial acquisition of religious-traditional principles as the interpretative standards of secular norms.

This section analyzes the system of religious courts as part of the communitarian approach, particularly focusing on the relations between secular and religious jurisdictions and on the issue of protection of fundamental rights in religious law.

2.1 The Jurisdiction of Religious Courts

Israel recognizes thirteen religious communities other than the Jewish, twelve of which have religious courts. Jewish, Muslim, and Druze courts are an integral part of the State's judicial body and thus subject to its control, while Christian authorities lie outside of the State judicial body and their function is restricted to the notification of marriage to governmental authorities in charge of registration.

The legal framework that establishes both the scope of jurisdiction and the applicable law is complex and relies on several legal bases. The first is the Palestine Order in Council, which regulates the functioning of Christian courts. The second is State law, which intervened to regulate Jewish, Muslim, and Druze courts. Moreover, State law has progressively imposed on religious courts the application of secular principles, mainly by guaranteeing equality and protection of weak categories, such as women and children. The third legal basis is the jurisprudence of the High Court of Justice on matters related to religious judicial decisions: the approach of the Court has been cautious in the first decades of the State, while in recent years, it has progressively supported equality principles to the detriment of religious jurisdiction.

2.1.1 Statutory Law: Palestine Order in Council and Israeli legislation

Art. 54 of the Palestine Order in Council defines the jurisdiction of Christian religious courts, which is exclusive in matters of marriage and divorce. Israel recognizes nine denominations: (Eastern) Orthodox, Latin (Roman Catholic), Gregorian-Armenian, Armenian (Catholic), Syrian (Catholic), Greek Catholic, Maronite, and Syrian Orthodox; each denomination has its own judicial authority and conduct marriage and divorce according to its own law. Christians enjoy the largest degree of autonomy since they do not belong to the State judicial system and, consequently, they are not appointed nor funded by State authorities, as other judges are.

On the other hand, Jewish, Muslim, and Druze religious courts are regulated by State law enacted after the foundation of the State.

The Rabbinical Courts Law of 1955 establishes exclusive jurisdiction on matters of marriage and divorce (sec. 2) and states that *halakhah* (sec. 4) is the applicable law. The law requires mutual consent of the parties to hear other matters related to family law, but if no other petition is filed with a concurrent civil judge, then the matters are automatically included in the petition in front of the rabbinical judge.

Rabbinical courts also have jurisdiction on other matters not related to family law that are equally important in social life, such as *kashruth* certificates (alimentary norms), Jewish burial issues, and conversion procedures, particularly relevant to the

legislation that grants automatic citizenship to Jews according to the Law of Return.[187]

Through the jurisdiction on these issues and the activity of the Chief Rabbinate, the

Jewish religious leadership—*i.e.*, the Orthodox community—has progressively

succeeded in imposing their view of Judaism and excluding other Jewish narratives.

The Qadi Law of 1961 regulates Muslim courts, which have the broadest

jurisdiction in the religious court system: indeed, they have jurisdiction on all matters

relating to personal status and not only marriage or divorce. Consequently, qadis—*i.e.*,

Muslim judges—also hear petitions on financial support of wives and maintenance,

child custody, and property division. The applicable law is the Ottoman *shari'a* law as

applied in Israel before the creation of the State.

Until 1963, when Druze Religious Court Law was enacted, Druze used to apply

to the Muslim court or, more rarely, to the Civil Court.[188] The law establishes and

regulates Druze courts on the patterns of other religious courts laws by conferring

exclusive jurisdiction over matters of marriage and divorce. It requires mutual consent

of the parties for other matters to be heard in front of the religious judge (called, as in

Lebanon, *qadi madhhab*). The law establishes first instance and appellate courts, which

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[187] The Law of Return 1950/5710 entitles Jews, by birth or conversion, their spouses, and those of Jewish descent up to the third generation the right to automatically gain Israeli citizenship. This law represents the direct connection between Israel and the Jewish Diaspora, by implementing the Jewish character of the State. Moreover, it constitutes the legal commitment to "Jewish rescue." Indeed, the rights provided by the law of return are conferred not only to Jews, but also to non-Jews of Jewish descent or married to Jews, who were as well object of persecution in history. This special connection to Jewish Diaspora and the commitment to Jewish rescue are challenged by post-Zionism, which considers Zionist values already implemented by the existence of the State of Israel. See, Danny Ben-Moshe, *Post-Zionism in the Oslo Era and the Implications for the Diaspora*, in Efraim Karsh (ed.), *Israel: The First Hundred Years—Israel in the International Arena*, Vol. 4, (London: Frank Kass, 2004), 305-326.

are composed of judges appointed by the Head of the State on the basis of a list offered by an appointing committee.

Druze courts apply Druze religious law, which is essentially similar to Lebanese Druze law but modified by Israeli statues. The same law, for example, requires the act of divorce to be validated by the Druze religious court, which will decide on the matter and on other related matters only as post-divorce petitions.[189]

2.1.2 Civil Family Courts and Civil Law

Until 1995, all matters that did not fall under the exclusive jurisdiction of religious courts were heard by civil courts, when family law courts were established. Their jurisdiction is exclusive in matters of personal status of foreign marriage contracts and in matters of mixed couples, while on other matters they have competent jurisdiction with religious courts. In those cases in which mutual consent of the parties is required, such as child custody, one may have primary jurisdiction of civil courts parallel to religious jurisdiction subject to mutual consent by the parties.

In general, to avoid overlapping decisions, the principle of first jurisdiction applies: therefore, the first judge with whom a petition is filed hears the case, while according to the principle of continuity, future revisions of that petition will be heard in front of the same judge.

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[188] Aharon Layish, *Marriage, Divorce and Succession in the Druze Family*, (Leiden: Brill, 1982), 293.

[189] *Ibid.*, 12.

The establishment of specific family courts was a political achievement of secular forces that aimed to reduce the negative effects stemming from the application of religious law. The first step in this process was the establishment, at the beginning of the 1980s, of a Committee headed by Justice Sheinbaum, which recommended the creation of a separate judicial body with jurisdiction over family law matters.[190] The Sheinbaum Committee found that notwithstanding the efforts of imposing secular parameters on religious judges, the Israeli judicial system needed a separate judicial body to deal with family law matters in order to guarantee the effective protection of rights through specialist professional training of judges and rapidity of judicial response. The goal was achieved only after fifteen years, in that the issue was at the center of the conflict between religious and secular parties in the Parliament.

As pointed out by the Committee, Israel has adopted a series of laws that aim to secularize religious jurisdiction. In front of the clear inequality between men and women stemming from the application of religious law, the Knesset has enacted a series of laws that compel religious judges to abide by the principle of equality and non-discrimination between the sexes. The first law enacted was the Women's Equality Rights Law of 1951-5711, which required religious judges to treat women equally in judgment and in family law matters. Apart from some provisions such as the minimum age for marriage, however, this law contains general provisions of equality, while it does not provide specific restrictions that judges should respect.

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[190] See, Elisha Sheinbaum, *Report of the Commission to Probe Implementation of Family Law in Israel*, (Jerusalem: Ministry of Religious Affairs and Ministry of Justice, August 1981), available only in

In the 1960s, the Knesset enacted other two relevant laws: the Legal Capacity and Guardianship Law of 1962-5722 and the Succession Law 1965-5725. Both laws intervened in order to guarantee women their rights in child custody and in inheritance in case of infringement by religious law. However, women still suffer from discrimination under the religious regime and although these interventions, "in practice, there are differences in interpretation and emphasis which may lead to different decisions," therefore, "men prefer to litigate in the rabbinical court" while "women prefer to litigate in the civil court."[191]

Several aspects remain problematic in the case of application of religious law. In Muslim law, for instance, child custody is preferably accorded to the father. In Jewish law, a man can refuse to divorce a woman preventing her from re-marrying, while for a man it is easier to get free of his wife's refusal to divorce by declaring her rebellious. Moreover, under religious law, maintenance and alimony issues are decided in favor of the man, to the detriment of women's rights to equal economic treatment after divorce. The same can be said for inheritance law. Inequality is even clearer when one considers that women are prevented from becoming religious judges, although the Equality Rights Law bans discrimination in the access to professions.

The most effective limitation of negative results stemming from the application of religious law is the supervision of the High Court of Justice. In Israel, religious

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Hebrew at http://www.dat.gov.il/.

[191] Susan R. Zaidel, *Divorce With Respect—A Guide to Divorce and Divorce Mediation in Israel*, (Haifa: Haskamot, 1990), 45.

courts are integral part of the judicial system, and provide for two instances of litigation, while the decisions of the appellate religious courts can be challenged in front of the High Court of Justice, which has the power, according to sec. 7(a) of Courts Law 5717-1957, to annul religious courts acts contrary to secular norms and to perform acts that religious courts refuse to perform.

2.2 The High Court of Justice and Family Law

The jurisprudence of the High Court of Justice has long been quiescent with religious courts decisions, while in the 1980s it started to set limits of principle, and definitely started to overturn religious courts decisions in the 1990s.

The High Court of Justice (HCJ) has repeatedly complied with religious courts jurisdiction in many cases. In *Leah Kahane v. Eliezer Kahane*,[192] the Court was asked to annul the decision of a rabbinical court, by which the rabbinical judges declared null the marriage of the petitioner and her husband, which according to *halakhah* is null in that celebrated between a *cohen* (belonging to the religious stock) and a divorcee. The High Court upheld the decision on the basis of exclusive jurisdiction. Again, in *Radintzki v. Rabbinical Court of Appeal*,[193] the High Court drew a distinction between norms that regulate relationships among human beings and norms that regulate the relationship between Man and Divinity, and declared that the former category of norms, even if coercing, does not violate freedom of religion and consciousness. Subsequently, in

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[192] S.C. 571/69, in 24 (2) P.D. 549.

[193] H.C. 51/69, in 24 (1) P.D. 704.

Rogozinski v. State of Israel,[194] a case of request for civil marriage advanced by a non-believing couple, the Court clearly stated that the religious jurisdiction has precedence over freedom of consciousness.

The same position was held in front of Muslim courts jurisdiction. Remarkable is the decision held in *Halima Bria v. Qadi of the Shari'a Moslem Court et al.*,[195] whereby the petitioner asked the High Court to order the *qadi* to abstain from hearing a petition of cancellation of guardianship directed against the petitioner as a re-married widow. The Court held that there was no discrimination of women's rights and suggested that equality should be guaranteed within the application of religious law by wise interpretation.

In the 1980s, the Court has adopted an inverse approach. Although the principle of exclusive jurisdiction is always guaranteed, the Court aims to limit the expansion tendencies of religious jurisdiction. In *Cohen v. Rehovot Regional Rabbinical Court*,[196] the Court upholds the reasoning of the rabbinical court, which maintained jurisdiction over a civil marriage between two Jews, but limited it to the matters of personal status, and declared that other related matters should be litigated in a civil court. The leading case is *Bavli v. Rabbinical Court of Appeals*,[197] by which the HCJ annulled a rabbinical decision and imposed rabbinical courts to abide by the principle of equality, as

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[194] C.A. 450/70, in 26 (1) P.D. 129.

[195] HCJ 51/55, in 9 (1) P.D.1193.

[196] HCJ 51/80, IsrSC 35 (2) 8.

[197] HCJ 1000/92, 48 (2) P.D. 221.

enshrined in the Women's Equality Rights Law of 1951, in issues of property division. This case is the first attempt of the Court to ensure the application of secular principles in religious courts.

Recently, the Court held that civil marriage cannot be a basis to guarantee facilitated divorce in front of religious judges, where they may have jurisdiction,[198] and repeatedly affirmed the restrictive principle of interpretation of the norm that guarantees the binding of ancillary matters to the divorce petition with a rabbinical judge, in case no other petition has been filed.

There is, however, no clear division of jurisdiction and, although major changes have been introduced, basic legal considerations of religious law are still far from achieving modern secular standards of equality. While secular critiques of this system focus mainly on the infringement of gender equality rooted in religious traditions,[199] religious supporters of personal autonomy argue that, first, religious jurisdiction is voluntary in all matters except marriage and divorce, and, secondly, that the secular legal discourse bears the main responsibility of the low reputation of religious judges.[200]

The novelty of the Israeli system lies precisely in the secular influence over religious law. The imposition of secular legal standards through legislative intervention

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[198]   *A   v.   Tel-Aviv   Rabbinical   Court*,   HCJ   2232/03   available   at http://elyon1.court.gov.il/eng/home/index.html.

199 Nira Yuval-Davis, "The Bearers of the Collective: Women and Religious Legislation in Israel," *Feminist Review*, n. 4 (1980), 15-27.

[200] Rav Dichovsky, "A Critique of Rabbinical Court Decisions," *Diné Israel*, n. 13-14 (1986-1988), 7-19 [Hebrew].

and the judicial correction of constitutional deficits cause a secularly-oriented development of religious law. However, religious jurisdiction remains exclusive in some fundamental matters such as marriage and divorce, and applies parameters that impinge on the freedom of consciousness. Therefore, an effective solution would be to create a system of completely competent jurisdictions, whereby the adjudication is based on the free will of the litigants. Moreover, religious authority could serve also as arbitrator and mediator in pre-divorce phase, a diffuse practice in Israel,[201] which guarantees both the maintenance of the religious moral authority within society and the full respect of fundamental rights standards in judicial activity.

The inverse process, that is religious influence over secular norms, cannot be considered in the sense of a "theocratization" of Israeli society. Indeed, the unclear separation of religion and State, specifically in family law, did not prevent, for instance, the development of a comprehensive protection of same-sex couples, which are recognized as cohabiters and guaranteed rights as couples that contracted marriage under common law. Moreover, the High Court has recently recognized the right to same-sex couples' unity in the case of foreign partner[202] and the right to adopt by lesbians.[203]

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[201] Susan R. Zaidel, *Divorce With Respect—A Guide to Divorce and Divorce Mediation in Israel*, 53-55.

[202] HCJ 3045/05, *Ben-Ari* v. *Director of Population*, 2 IsrLR 2006, 283-328.

[203] CA 10280/01, *Yaros-Hakak* v. *Attorney-General*, 59(5) PD 64.

The coexistence of traditional-religious and contemporary-secular realms of rights also reflects in the system of protection of associational rights, which is analyzed in the next section.

3. BETWEEN COMMUNITY AND INDIVIDUAL

The protection of rights stemming from ethno-religious identity takes a double track. The Ottoman *millet* has been adapted in order to guarantee collective rights in form of self-governed groups, while individual rights are protected as part of freedom of religion and consciousness.

Thus, there exists a dual approach, communitarian and individualistic, and citizens are free to live the social realm they prefer. However, these two legal-social dimensions sometimes clash, and again the judicial intervention of the Supreme Court balances among recognized social interests.

Minorities live in a State that recognizes both Jewish and democratic values as part of its constitutional principles; thus, cultural and national self-determination is limited and conditioned on the acceptance of Jewish values as constituent principles of the State. Conditioned existence in a Jewish society is considered by some authors the major impediment to the free development of Arab national aspirations in Israel,[204] which is, in their opinion, controlled and discriminated.[205] According to Yiftachel,

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[204] This position is the basic argument in favor of a bi-national Jewish-Arab State.

[205] Nadim N. Rouhana, *Palestinian Citizens in an Ethnic Jewish State: Identities in Conflict*, (New Haven: Yale University Press, 1997).

Israel social space is divided in different spheres: the center is occupied by the dominant the Jewish-Ashkenazi establishment, while at the periphery lie Arabs and Oriental Jews.[206]

According to these authors, Israel, by considering Jewish values as constituent principles of the State, systemically discriminates against non-Jewish minorities, in that they would be constitutionally excluded from the development of their cultural and social narratives.[207] However, these positions do not consider the complexity of Israeli society and share a theoretically biased position.

First, these authors do not give enough consideration to the enormous complexity of the operational development of the Jewish nature of the State. Israel is by and large a secular democracy, which refers to Jewishness as part of its national and social narrative. The Jewish character is differently enacted by State institutions. On the one hand, there is the Supreme Court, which in its jurisprudence refers to Judaism as a sum of values and principles to be balanced with democratic values and principles.[208] On the other, Jewishness is promoted by the main religious institution—*i.e.*, the Chief Rabbinate—which provides religious services (including synagogues and ritual baths), administrates rabbinical judiciary (such as marriages, divorces, and kashruth

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[206] See, Oren Yiftachel, *Ethnocracy—Land and Identity Politics in Israel/Palestine*, (Philadelphia: University of Pennsylvania Press, 2006), 163-8 and 215-21.

[207] See, Sami Smooha, "Minority Status in an Ethnic Democracy: the Status of the Arab minority in Israel" *Ethnic and racial Studies*, vol. 13, n. 3 (July 1990), 389-413.

[208] This view is epitomized by Justice Barak's words in the ruling 11280/02 (HCJ), *The Central Election Committee* v. *MK Ahmad Tibi and Azmi Bishara*, available in English at www.court.gov.il, see *supra*, section 1.

certificates) and is in charge of rabbis ordination and appointment.[209] The Chief Rabbinate promotes Orthodox Judaism, although Orthodox Jews constitute a minority both in Israel and the Jewish world. Thus, since Orthodox Jews are minority, the institutional position that they occupy is the result of the minority protection arrangements and the communal legal system of Israel.

Secondly, the theoretical framework within which the abovementioned arguments are developed is narrowed to the point that it denies the possibility of minority groups to self-determination in an ethnic State. This position would be tenable, if Israel denied both group autonomy and individual protection of fundamental rights, but, since Israel recognizes cultural autonomy and to some extent communal autonomy, the argument lacks constitutional and historical support. The following section focuses on the legal organization of the Israeli *millet*.

3.1 The Israeli *millet*

In Israel, collective rights assume two forms of communal arrangements: traditional-communal autonomy, which originates from the historical Palestinian millet, and cultural-religious autonomy, which originates from State arrangements. In addition, the Israeli legal system provides for protection of fundamental rights based on an individualistic approach.

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[209] Powers and obligations of the Chief Rabbinate of Israel are regulates by the Chief Rabbinate of Israel Law of 1980.

Legally, it is possible to draw a distinction between the two dimensions of cultural rights. Communal autonomy is regulated by statutory law, and considered part of pre-Israeli historical heritage, while individual rights are direct part of the constitution. Although no constitutional provision regulates it, communal autonomy can be considered part of Israeli unwritten constitution for two reasons: the traditional millet is an adaptation of the legal-historical heritage of Ottoman origin, and institutional behavior shows abidance by the pre-State *de facto* situation and tendency not to subvert it but to adapt it to new standards.

The Israeli legislator has progressively introduced norms for adapting traditional arrangements to modern standards. In this sense, communal autonomy can be considered as a constitutional custom, thus part of Israeli unwritten constitution.

3.1.1 Traditional Communal Autonomy

In the Ottoman *millet*, ethno-religious communities were recognized managerial autonomy and movable or immovable property rights. After the collapse of the Ottoman Empire, the *millet* system was adopted by the British mandatory authorities and regulated by the Palestine Order in Council according to obligations imposed by the Mandate.

Art. 9, part.2, of the Mandate recognizes the principle of both personal and communal managerial autonomy. Specifically, it recognizes communal funds, called *wakfs*, to be administrated "in accordance with religious law and the dispositions of the founders." Charitable funds were established for charitable purposes, such as

educational, religious, or health assistance activities. The *wakfs* also administrated Holy Places. The Mandate recognizes these forms of communal property, and introduced new principles of governance.[210]

Arts. 13 and 15, part 2, recognize autonomy in management of Holy Places and educational autonomy respectively. However, the right and the duty to interfere with communal management are imposed on the basis of the principles of good governance and public order. Again, art. 16 recognizes "religious" and "eleemosynary bodies" as part of communities' internal affairs, but retains the right to supervise *wakfs* activities in order to guarantee the respect of good governance and public order.[211]

The Palestine Order in Council endorsed these principles and recognized Christian ecclesiastic leaderships (the Patriarchates and the Latin Archbishop), the Chief Rabbinate, and the Supreme Muslim Council as the authorities in charge of administrating communal affairs and, specifically, communal property.[212] Moreover, the High Commissioner used to appoint special committees of supervision of *wakfs* governance. This system eventually collapsed after the War of Independence, in 1948-1949, which caused many Arabs to flee from Mandatory Palestine.

After the war, Israeli authorities appointed Muslim Commissions that, "resembling… *wakf* committees, but without their powers, [helped] channel

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[210] Yitzhak Reiter, *Islamic Institution in Jerusalem—Palestinian Muslim Organization under Jordanian and Israeli Rule*, (Dordrecht: Kluwer, 1997), 23-6.

[211] *Ibid.*, 5.

[212] David Kretzmer, *The Legal Status of the Arabs in Israel*, (SF: Westview, 1990) 167-8.

government funds, [supervised] education and welfare, and [oversaw] holy sites."[213] Moreover, the government allocated funds for the preservation and construction of mosques and cemeteries, and for training *qadis*. Despite these favorable policies, the situation remained blurred, in that the old *millet* system collapsed after religious authorities fled.

Subsequently, the Knesset approved the Absentees' Property Law of 1950, which empowered the Ministry of Religious Affairs to appoint a custodian to manage the Muslim *wakfs*. The appointed custodian was a non-Muslim Israeli, which caused resentment among Muslims, and often declared acquirable lands and properties that could not be managed by Muslim commissions for reasons of historical importance or internal incapability of governance.[214]

Subsequently, Israel restored the *millet* system by introducing new principles that restricted communal autonomy of management. Two kinds of agreement can be outlined, which differ according to the degree of State intervention in internal affairs of the communities. Christians and Baha'is enjoy the largest degree of autonomy, while Muslims, Druze, and Jews are directly controlled by the government. All communities are, however, subject to Israeli legislation that deals with religious and historical heritage protection. In virtue of the Law for the Protection of Holy Places of 1967 and

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[213] Robert H. Eiseman, *Islamic Law in Palestine and Israel: a History of the Survival of Tanzimat and Shari'a in the British Mandate and the Jewish State*, (Leiden: Brill, 1978), 225.

[214] *Ibid.*, 240-243. Subsequently, the Land Acquisition Law 1953 was passed, which guaranteed equitable compensation for lands acquired out of negotiation with the custodian or on the basis of governmental decisions.

the Antiquities Law of 1978, Israel commits to protect holy places and archaeological sites and goods.

The Israeli Baha'i community is composed of volunteers, who reside in the State but are not citizens and take care of Baha'i holy places.[215] In 1987, an international agreement was signed between the Israeli Government and the International Baha'i Community, which guarantees to world Baha'is the right to pilgrimage. By this agreement, Israel commits to protect Baha'i holy places and guarantees a certain degree of autonomy in property administration.[216]

A different statue regulates Christian communities, which are entitled to full communal autonomy, including the power to levy taxes, as it was during the Ottoman Empire, in virtue of the Religious Committees Ordinance of 1926, issued by the British authorities during the Mandate. As Kretzmer points out, Christian communities have

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[215] Baha'i faith has developed in the 19th century from Shi'i Islam. Its fundamental principle lies in the concept of relative and progressive revelation: while there is one God, His humanly manifestations are different and embodied in several prophets, including Abraham, Moses, Buddha, Krishna, Jesus of Nazareth, Mahomet, and Bab, who founded and independent religious movement in Iran, from which Baha'is developed their faith. The Baha'i doctrine can be summarized in the motto "Unity in Diversity," with a pedagogic vocation toward peace and coexistence, which explains Baha'is devotion to social causes and their commitment to cooperation activities. The internal structure of the Baha'i community, based on local elected councils, reflects their views on international relations, which envisage the abolition of national armies and the constitution of an international federated army with goals of enforcement of laws and statues adopted by an international parliament of the nations. Baha'is have faced persecution in Islamic countries for accusation of apostasy and polytheistic worship. In Iran, Iraq, and Egypt, legislative provisions directly discriminate against Baha'i followers. In Haifa, Northern Israel, there is the World Baha'i Temple, which makes of Israel reference State for Baha'is. See William S. Hatcher and J. Douglas Martin, *The Baha'i Faith: The Emerging of a Global Religion*, (New York: Harper & Row, 1998); on the persecution of post-Islamic creeds, see Bernard Lewis, *The Jews of Islam*, (Princeton: Princeton University Press, 1984).

[216] Moreover, the Baha'i sites in Israel have been recently included in the World Heritage List of UNESCO, for their central relevance in Baha'i culture and religion. See the UNESCO World Heritage Commission decision 31 of 2007.

never established communal organs, by relying on ecclesiastical hierarchies, which are the referees to Israeli governments.[217]

Christian denominations still enjoy communal autonomy and are represented by their ecclesiastical authorities as in Ottoman times, whereby they have property rights, arrange educational and religious activities, and manage health institutions. However, the arrangements of the Mandate period have been subject to general legislation, such as the principles of preservation and inalienability of archaeological properties, and the principles issued by the Ministry of Education as for school curricula.

A special statue is reserved to the Catholic Church, in that it enjoys the protection of an international quasi-state body: the Holy See. Israel and the Holy See signed a Fundamental Agreement in 1993, whereby Israel guarantees the Catholic Church to freely administrate educational, religious, and health institutions according to Israeli governmental guidelines (arts. 3 and 6), and both parties commit to respect the *status quo* as far as holy places are concerned (arts. 4 and 5). Particular emphasis is given to property rights of the Church (art. 10), which can be exercised in harmony with Israeli legislation.[218]

Although these arrangements originate from a legal tradition rooted in the *millet* system, the international guarantees of the Baha'i and the Catholic communities are

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[217] David Kretzmer, *The Legal Status of the Arabs in Israel*, (SF: Westview, 1990), 168.

[218] See, FUNDAMENTAL AGREEMENT BETWEEN THE HOLY SEE AND THE STATE OF ISRAEL, singed on 30 December 1993, available at:
http://www.mfa.gov.il/MFA/MFAArchive/1990_1999/1993/12/Fundamental%20Agreement%20-%20Israel-Holy%20See

enshrined in international law, specifically, in international agreements concluded by the State of Israel and international bodies that represent those communities.[219] On the contrary, Muslims, Druze, and Jews enjoy rights and are subject to obligations directly part of the Israeli legal system. In other words, their autonomy derives from the fact that they are Israeli citizens who belong to specific communities, to which the State accord self-government freedom.

In 1957, Israel recognized the autonomy of the Druze community. Besides the provisions for autonomous jurisdiction over personal status, the State accorded self-government arrangements for religious services and for managing communal properties. The representative body is the Druze Religious Council, composed of male members of notable families appointed by the Ministry of Religious Affairs, which allocates funds for religious and educational services and supervises the implementation of the budget.[220]

Muslim self-government was recognized in 1966, by the Wakf Law, which recognized the Islamic institution of charitable funds, but established a series of restrictions such as the inalienability of mosques properties and cemeteries lands. The principle of destination is particularly relevant. The Wakf Law restored the system of pre-existing Islamic funds and permitted the creation of new ones, but with only for

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[219] These arrangements resemble the Concordat, such as the one signed by Italy and the Holy See. See, Carlo Cardia, *Ordinamenti Religiosi e Ordinamento dello Stato*, (Bologna: Mulino, 2003), ch. 2.

[220] Socially, the Druze community is privileged within the Arab minority since they are loyal to the State and serve in the army. In a context of external, and, since recently, also internal threat, this group is fully

purposes of education, religious services, or health services. In this way, the Ministry of Religious Affairs maintains a direct control over the community and prevents the possibility of acquiring external funds for non-religious purposes.[221]

Finally, Jewish religious councils depend on the Chief Rabbinate as direct emanation of the Ministry for Religious Affairs. They organize religious services by administrating synagogues, ritual baths, and religious ceremonies; moreover, they are committed to spread Jewish education, in particular by funding and managing Talmudic academies (yeshivas).[222] As for the other communities, the Chief Rabbinate depends on the Ministry of Religious Affairs for allocation of funds, budget approval and supervision.

These communities pursue self-determination within the framework of limited autonomy guaranteed by the State, which anyway retains the ultimate control of communal activities. By recognizing communal autonomy, Israel gave continuity to the *millet* system, thus including communitarianism in the Israeli constitutional system. However, autonomy is consistently reduced by general legislation, to which all communities are subject, and by the direct control of the government.

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accepted rightly because it has recognized Israel as a Jewish and democratic State, compromising tradition with modern Israeli life-style.

[221] See Aharon Layish, "The Muslim Wakf in Israel," *Asian and African Studies*, vol. 2, n. 1 (1966), 41-76.

[222] The Chief Rabbinate organizes different yeshivas according to the target such as children, high school youngsters, and young married men, Orthodox men who accept to serve in the army, girls, converts, and newly religious persons.

Indeed, the role of the Ministry of Religious Affairs is not only of coordinating religious communities, but also of controlling communal activities. The main power of control remains financial, whereby funds are allocated by the Ministry, which retains the power of supervising implementation. By this doing, the Ministry can influence internal life of the communities and indirectly decide the activities that it considers worth pursuing. Two problems stem from the arrangements, which are related to both inter-communal and intra-communal discrimination.

Inter-communal discrimination originates from governmental power to allocate funds. Since the ruling elite of the Ministry of Religious Affairs is Orthodox or ultra-Orthodox, Jewish institutions are preferred in the funding procedure. Claims of discrimination in fund allocation have been treated by the Supreme Court, which after a period of self-restraint, decided to intervene. In *Kaadan* v. *Jewish Agency*, the Court found that the allocation of funds to Jewish institutions was disproportionate and consequently ordered the Ministry of Religious Affairs to equally re-allocate funds among the religious communities.[223]

Intra-communal discrimination is related to the clash between the general principles of the State and the religious principles that inspire communal activities. Specifically, the principle of gender equality is the most contested. Again, the Supreme Court intervened in order to protect the principle of equality over the principle of

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[223] See HCJ 6698/95, *Kaadan* v. *Jewish Agency*, in Dinim 57, 573. Previously, in *Adalah* v. *Ministry of Religious Affairs* (HCJ 240/98, in 52 (5) P.D. 167), the Court dismissed the claim of discrimination in fund allocation claiming that the argument was too vague.

religious freedom and the principle of autonomous government. In *Shakdiel*,[224] the Court ruled against the decision of the Ministry of Religious Affairs to dismiss the appointment of a woman to a religious council. The Court found that the reason of the dismissal was that the appointee was a woman, and this constitutes a gender discrimination sanctioned by Israeli law. Again, in *Poraz*,[225] the Court ruled that a woman cannot be excluded from the committee for electing local rabbis on the basis of her gender.

Communal autonomy in Israel is thus subject to a three-fold control. First, the Ministry guarantees the existence and the operability of communal institutions by coordinating and supervising communal activities. Secondly, communities are subject to the legal principles of the State and statutory legislation, and, finally, the Supreme Court reviews institutional decisions in accordance with fundamental legal principles.

This system of control guarantees both group autonomy and social cohesion, in that communities are free to pursue their goals, and at the same time are prevented from constituting separate social bodies. Particularly, this system effectively works because, besides communal autonomy, individual protection of rights is guaranteed, so that to enjoy certain religious or cultural rights one has not to be subject to communal authority; although cultural and religious activities are organized by communal

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[224] See, HCJ 153/87 *Shakdiel* v. *Minister for Religious Affairs et al.,* 42(2) P.D. 221.

[225] See, HCJ 953/87 *Poraz* v. *Lahat, Mayor of Tel Aviv et al.* 42(2) P.D. 309.

institutions, the individual dimension is equally respected and enforced by judicial intervention.

3.1.2 The individual dimension: between law and judiciary

Individual rights coexist in Israel together with collective rights. Historically, the right to diversity in rooted in the Declaration of Independence and sanctioned by the Bill of Rights.

Freedom of religion and freedom of consciousness are enshrined in the Declaration of Independence and constitute basic principles of the State, which inspired anti-discriminatory legislation and special provisions for enabling the exercise of rights. It is the case of Employment Service Law 5719-1959 and the Succession Law 5725-1965, which guarantee equality conditions in employment and in heritage controversies. Moreover, Defamation Law 5725-1965 enables judicial actions against speeches or texts considered defamatory of one religion or tradition.

These principles not only are at the basis of anti-discrimination approaches, but also grant particular rights that are enjoyable rightly because one belongs to a certain group. For instance, Hours of Work and Rest Law 5711-1951 guarantees the possibility for Muslims and Christians to respect the rest day on Fridays and Sundays respectively, while the State follows the Jewish calendar. Similarly, the Law of Return 5710-1950 and Nationality Law 5712-1952 directly accord Israeli citizenship to Jews and their relatives. This particular right recognized to Jews is often cited as direct discrimination against non-Jews.

However, as Lapidoth and Ahimeir emphasize,

> this privilege does not involve proper discrimination on religious grounds for several reasons… When a people attains statehood in fulfillment of its aspirations for national liberation it is common and natural that all members of that people are permitted and invited … to live in that country.[226]

Legally, States are allowed to establish preferences in attaining citizenship as long as this does not involve discrimination of a particular group.[227] Indeed, Israel accords this preference only to Jews and their relatives, while anyone else undergoes the same procedure established by the Nationality Law.

In addition to these specific provisions, the Knesset approved a bill of rights in the 1990s, the Basic Law: Human liberty and Dignity 5752-1992, as a result of negotiations between religious and conservative parties on the one hand, and the secular and liberal parties on the other. This law, together with the principles of freedom, justice, equity, and peace of Israel's heritage contained in the Foundation Law of 5740-1980, serves as parameter for the judicial review. The Supreme Court asserted its power to review Israeli legislation and institutional acts in light of these fundamental principles.[228]

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[226] Ruth Lapidoth and Ora Ahimeir, *Freedom of Religion in Jerusalem*, (Jerusalem: Jerusalem Institute for Israel Studies, 1999), 17.

[227] See art. 1, par. 3, of the UN Convention on Elimination of Racial Discrimination.

[228] The main legal problem stems from the fact that Israel does not have a mono-act written constitution; on the contrary, it is spread in different legal acts, such as the basic laws. In *United Mizrahi Bank Ltd., et al*. v. *Migdal Village,* 49 (4) P.D. 221 (1995), the Court first ruled that it is among the powers of the Supreme Court to operate judicial review. On the development of the judicial review in Israel see, Yoram Rabin and Yuval Shany, "The Case for Judicial Review over Social Rights: Israeli Perspectives," *Israel Affairs*, vol. 14, n. 4 (October 2008), 681-703.

The importance of religious sentiment notwithstanding, the Supreme Court has adopted a narrow approach in interpreting the scope of religious rights, while its judges constantly balance among equally relevant interests.[229] For instance, in *Lior Horev et al.* v. *The Minister of Transportation*,[230] the Court withheld the decision of the transportation authority to close a street during Shabbats, in order to protect the interest of religious resident of a neighborhood. The judges found that there was no balance between the religious interest to Shabbat observance and the secular interest to free circulation.

After decades of specific legislation, the general level of protection of individual rights has consolidated in the progressive constitutionalization of fundamental rights. By the assertion of judicial review, the Supreme Court operates as the main guardian of individual rights in the legal system.

Individualist-liberal approach and the traditional-communal approach of self-government coexist with a further model of protection, which focuses on cultural collective rights.

3.2 Cultural Collective Rights: Education and Languages

The protection of cultural rights shows a different approach in the recognition of group identity. Israel recognizes collective rights to the Arab group, which is considered as a linguistic-cultural minority as a whole, while in the communal system, the State treats

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[229] Ruth Lapidoth and Ora Ahimeir, *Freedom of Religion in Jerusalem*, 5-9.

ethno-religious groups separately. In other words, Israel emphasizes different aspects of identity according to the form of protection that is guaranteed to the groups. Consequently, in communal autonomy, Israel recognizes the variety of ethno-religious identities, while in cultural autonomy Israel recognizes linguistic-cultural identities.

Two main linguistic groups are recognized: Hebrew, spoken by Jews, and Arabic, spoken by Arabs, Christians, Muslims, Bedouins, and Druze alike. In addition to these two main groups, Israel recognizes cultural autonomy to the small Circassian community.

Both Hebrew and Arabic are official languages of the State, as established by art. 82 of the Palestine Order in Council, though Hebrew enjoys particular status in connection with the Jewish nature of the State. Place names, currency, stamps, and emblems bear both Hebrew and Arabic writings, but Hebrew is the language of the institutions. Indeed, the Parliament, the Courts, and the Government use Hebrew as the main language of communication. However, Arabic and other immigrants' languages, such as Russian and Amharic, are intensively used in social life and media communication.[231]

Legal recognition of cultural autonomy stems from statutory law that has been enacted after the independence as well as from the policies adopted by the Ministry of

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[230] HCJ 5016/96, 51 PD (4) 1, 34.

[231] Bernard Spolsky and Elana Goldberg Shohami, *The Languages of Israel: Policy, Ideology and Practice*, (Trowbridge, GB: Cromwell, 1999), 128-37, and 234-48.

Education, which functions as a coordinator of both public and private educational institutions.

The principle of cultural autonomy was endorsed in the Compulsory Education Law of 1949, which establishes schools of both Arabic and Hebrew languages, and lets citizens free to choose what school to attend.[232] In addition, State Education Law of 1953 establishes different curricula for non-Jewish minorities in order to empower minority cultural preservation. This law conditions educational curricula on the approval of the Ministry of Education.

Finally, the Schools Control Law of 1969 allows private institutions to administrate educational programs and schools, always under the control of the Ministry of Education.[233]

Traditional cultural autonomy in communal self-government has not been completely reversed by new provisions. The Israeli system can be considered as a combination of both cultural and communal autonomy. On the one hand, the public system gives the possibility to choose the language of instruction as in other legal systems, such as Italy with German language schools in South-Tyrol; and on the other,

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[232] The choice of which school to attend is somehow socially driven. Arabs are expected to attend Arab schools and Jews are expected to attend Hebrew schools. However, there are many cases of "inverted choice," such as the Arab-Israeli writer and journalist Sayed Kashua, who was educated in Hebrew schools and works mainly for Hebrew press. Kashua is seen as a sort of collaborator by the Arabs in that he turns to the Jewish audience, while his assimilation is incompatible with the Jewish majority being an Arab. See, Livne Neri, "The Wandering Arab" *Haaretz*, 9th January 2004 [Hebrew]. Many Jewish families decide to send their children to Arab schools for primary education, as it sometimes happens in Jaffa, or to bi-lingual (both Hebrew and Arabic) schools.

the State allows private organizations to manage educational institutions as in the traditional *millet* arrangements.

Private schools are run by ethno-religious institutions, such as Christian churches, Islamic *wakfs*, and ultra-Orthodox foundations. This system resembles the Ottoman communal arrangement, with the main difference that these communities do not constitute separate societal bodies, in that all educational institutions are subject to the central control of State authority.

This mixed system empowers minorities to perpetuate their cultures even when the community is small. For instance, the Circassian population in Israel amounts to 3000 citizens,[234] who share traditions and language of Caucasian origin.[235] The autonomous educational system allows this small community to perpetuate traditions and language both in Arab and Hebrew schools. The same holds true for Druze and Christians. Moreover, each school can follow a specific calendar of festivals in virtue of the Hours of Work and Rest Law 5711-1951.

Similarly, Ultra-Orthodox Jews opt for separate private schools in order to keep particular social rules, such as a strict division of sexes in public life, and to prevent

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[233] Private schools are mainly run by Christians and ultra-Orthodox Jews. David Kretzmer, *The Legal Status of the Arabs in Israel*, 170.

[234] The data was collected from the Israeli Minister of Foreign Affairs, http://www.google.com/search?ie=UTF-8&oe=UTF-8&q=circassian&btnG=Google+Search&domains=http%3A%2F%2Fwww.mfa.gov.il&sitesearch=http%3A%2F%2Fwww.mfa.gov.il

[235] See, Isabelle Kreindler, Marsha Bensoussan, Eleanor Avinor, and Chen Bram, "Circassian Israelis: Multilingualism as a Way of Life," *Language, Culture and Curriculum*, vol.8, n.2 (1995), 149-162, available at www.circassianworld.com/Israel.html.

their kids from speaking Hebrew as daily life language, while they prefer to speak Yiddish.[236]

While cultural autonomy serves as a tool for protecting minorities, separate educational bodies may concur to create diverse social units, which stress diversity rather than unity. However, the danger of desegregation is avoided by the central control wielded by the Ministry of Education.

Central control over educational curricula is realized in coordination with professional commissions for cultural minorities within the Ministry of Education. In the case of the Arab Commission, for instance, a new curriculum for Islamic studies was issued in the 1980s, in order to permit pupils of all levels to conciliate between Arab-Islamic identity and Israeli citizenship.[237] The same system of autonomy allows educational institutions to enjoy cultural rights by following a specific religious calendar and celebrate festivals.[238]

On the contrary, State control over private educational institutions and educational curricula in public institutions is considered as a restriction of cultural self-determination. By regulating educational curricula, the State exerts control power over the cultural development of those groups to which educational policies are directed. Specifically, Israel "is unwilling to contribute to the memorialization of the Arab-

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[236] On the use of Yiddish by ultra-Orthodox Jews see Michal Tannenbaum; Netta Abugov; and Dorit Ravid, "Hebrew-language Narratives of Yiddish-speaking Ultra-Orthodox Girls in Israel," *Journal of Multilingual and Multicultural Development*, vol. 29, n. 6 (November 2006), 472-490.

[237] Ruth Lapidoth and Ora Ahimeir, *Freedom of Religion in Jerusalem*, 25.

Palestinian past. In the Jewish State the meaningful past should be Jewish only because it is believed that 'history' should legitimize Zionism."[239]

A claim of discrimination can be argued on the basis of systemic discrimination against a minority group—*i.e.* non-recognition. By recognizing both communal and cultural autonomies, Israel does not directly discriminate against minorities. However, a further claim of discrimination can be argued in front of State policies toward minorities. In other words, minorities can face indirect discrimination when a State enacts policies that aim to restrict the space of minority culture in favor and to impose the majority culture. Indeed, a State can guarantee cultural autonomy by simultaneously imposing the majority culture to its minorities: that State discriminates against minorities since it impedes their self-determination.

The question then shifts from recognition to State policies toward minorities. For instance, linguistic rights can be guaranteed, but schools are compelled to teach a certain view of history or to adopt certain ideological visions that result incompatible with minority cultures. Hence, a State can discriminate against a minority not only by non-recognition, but also by impeding the preservation, the expression, and the development of minority cultures.

Specifically, claims of direct or indirect discrimination against Arab minorities in Israel are not tenable. Separate schools and specific educational curricula are

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[238] *Ibid*.

appropriate means of preservation and expression of minority cultures. On the other hand, one may argue that the space of development is reduced by State control over cultural expression.

However, it is necessary for the State to guarantee social cohesion, which envisages also a common ground of principles that unify people belonging to different groups. One may argue that, in Israel, the space of cultural development of non-Jewish minorities is *per se* reduced, being Israel a Jewish State. The question is then not direct or indirect discrimination, but the free development of minority cultures within a State that embraces a specific culture and ideology.

Indeed, ultra-Orthodox Jews face the same problem; while Arabs argue that their social space of cultural development is reduced due to the Jewish nature of the State, ultra-Orthodox Jews are impeded to further develop their cultural views that reject Zionism, while Israel is based on Zionist ideology.

The issue of basic principles and ideology of a State can be considered from a political and a legal point of view. Politically, the space of development of minority cultures can broaden if minority elites effectively negotiate with State authorities, which may confer more rights or guarantee a deeper, more effective exercise of those rights. A State is more likely to concede broader autonomy as long as it does not consider the development of minority group as incompatible with its vision and principles. However,

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[239] Gad Barzilai, *Communities and Law—Politics and Culture of Legal Identities*, (Ann Arbor: University of Michigan Press, 2003), 110.

this possibility remains a political issue that depends on elite-bargaining and minority political mobilization.

The role of law does not cease once a State constitutionally accommodates diverse groups by guaranteeing cultural preservation and expression. On the contrary, legal protection of rights can still serve to protect minority interests through anti-discrimination. Again, the individualistic approach of protection of rights can effectively address those issues that a State refuses to accommodate. In other words, when the State refrains from actively protecting minorities, then, the individual dimension of cultural rights emerges as an effective tool to claim accommodation.

In Israel, the Supreme Court has defended the linguistic rights of the Arab group against the hegemonic use of Hebrew. In this sense, the Supreme Court, by endorsing a perspective of individual right to language use, broadened the social space of expression of Arabs. In *Reem Engineering Ltd.* v. *Municipality of Natzrat-Yilit*,[240] the Court ruled in favor of a building company that wanted to advertise house selling in Arabic only. The judges found that since the advertisement was directed mainly to Arab audience, on the basis of freedom of expression, there was no point of imposing a Hebrew version. In a previous ruling, *Adalah* v. *Ma'atz*,[241] the judges obliged local authorities to guarantee Arabic toponyms in road sign by restating the status of Arabic as official language. The

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[240] C.A. 105/92 *Reem Engineering Ltd.* v. *Municipality of Natzrat-Yilit*, 47 P.D. (5) 189.

[241] HCJ 4438/97, *Adalah* v. *Ma'atz*, 98 *Takdin* (1) 11.

Court, by adopting an individualistic approach, intervenes to restrict the overwhelming hegemony of majority culture, and thereby reasserts collective interests.

The collective and individualistic dimensions of cultural rights can both concur to achieve effective accommodation of minority claims. However, the combination of these two dimensions in the same system causes continuous negotiations between minority groups and institutions, so that the development of minority cultures is in constant evolution. Moreover, this evolution is necessarily connected to their national identity, which finds expression in active political life. Political representation is analyzed in the following section.

4. VOICE TOOLS IN CONFRONTATIONAL SOCIETY

The highest degree of "citizenization"[242] is the participation of minority groups in political life. Indeed, their involvement in the decision-making process not only characterizes institutional openness to diversity, but guarantees the possibility to advance claims and protect interests from within the institutions.

The forms of involvement vary from guaranteed seats in institutional bodies, special commissions, or ethnic power-sharing, which originate from constitutional arrangements. However, it is not necessary to guarantee political representation through formal procedures, in that a State can opt for *de facto* representation, which is nonetheless relevant in legal and political terms.

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[242] See, Will Kymlicka, "Multicultural Odysseys,"*Ethnopolitics*, vol. 6, n. 4 (2007), 585-597.

Israel does not guarantee political representation of minorities through formal procedures, while it opts for *de facto* representation, which stems from statutory provisions and judicial supervision. Electoral law is relevant to this topic, while no statutory provision deals with minority representation in other branches of power, which is guaranteed through constitutional custom.[243]

The Basic Law: the Knesset 5718-1958 regulates the parliamentary system and includes electoral principles. Art. 4 establishes that "The Knesset shall be elected by general, national, direct, equal, secret and proportional elections." The proportional system in Israel has a constitutional value since it is established by a basic law, and it provides equal representation of all political parties participating in elections according to the votes that they receive.

The proportional system was inherited from the pre-State institutional organization, which aimed to involve the plethora of social voices. After independence, minorities enjoyed this freedom and organized themselves into ethnic parties that also mirrored different political views. Thus, Israeli parties have both ethnic and political

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[243] Israeli institutions have progressively included Arab citizens even in upper political positions, such as diplomacy. In the Supreme Court, one of the judges is Arab, and even in the government Arab citizens are active and occupy high positions (such as the ministry of education, the ministry of regional development etc.). This involvement is not always beneficial to Arab Israelis' identity, which in hung between Arabeness and Israliness. See, Yochaman Peres and Nira Yuval-Davis, "Some Observation on the Identity of Arab Israelis," *Human Relations*, vol. 22, n. 3 (1969), 219-233.

identification. Given the high degree of conflict that characterizes Israeli society, the problem of anti-system parties[244] has dramatically emerged in the 1970s and 1980s.

For the purpose of limiting anti-system forces in the Parliament, in 1989, an amendment of the Basic Law: the Knesset introduced severe limitations to participate in elections. Art. 7 (a) of this law establishes three principles to ban parties from participating in elections: the denial of the existence of Israel as the State of the Jewish people, denial of the democratic character of the State, and incitement to racism. These principles were included in the Parties Law of 1992, which includes two additional principles as reasons for disqualification: support to armed struggle of enemy States and terrorist organizations, and illegal activities conducted by the party as goals of its agenda.

The authority to disqualify parties from elections lies with the Central Election Committee, composed of parliament members and headed by a judge of the Supreme Court, as established by the Knesset Election Law of 1969. The same law establishes that parties should organize in lists that have to submit their applications to the Committee, which authorizes or denies participation on the basis of the principles and the agendas of the parties.

These statutory provisions are the legal basis of the Supreme Court's jurisprudence on the decisions of the Electoral Committee. The Court's activism on

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[244] See, Giovanni Sartori, *Parties and Party Systems: A Framework for Analysis*, (Cambridge: Cambridge University Press, 1976), 133-137.

political participation illustrates Israel's attitude toward minority involvement in politics and addresses the broader issue about the attitude of a State toward minorities with which it has confrontational relationships.

After decades of political non-involvement, the Court has progressively increased its degree of intervention in political issues, both because of the internal necessity to deal with problems concerning the Arab-Israeli conflict and because of the international pressure on Israeli policies towards Palestinians and its Arab citizens.[245] Since the 1980s, the Court has postulated its guardianship of the rule of law in political issues that touch the core constitutional principles of the State,[246] including parliamentary rules, immunity of parliament members, and political participation. Ultimately, the Court rulings aspire to be indicators of justice, by taking into account social debate and institutional behavior.[247]

The problem concerning the recognition of Israel as a Jewish and democratic State by non-ruling minorities has existed since the foundation of the State. Both institutional and judicial approaches have developed a restrictive interpretation of freedom of association in favor of the basic value of existence of Israel as both Jewish and democratic. In this sense, the free development of minorities is limited and restricted by the prevailing principles of eternal existence and secure life. As Barzilai

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[245] Orna Ben Nafatli and Keren Michaeli, "The Universal Judgment Authority and the State Judicial Discourse," *Hamishpat*, vol. 9, (2004), 141-63 [Hebrew].

[246] HCJ 652/81 *Sarid* v. *Chairman of the Knesset*, 36(2) PD 197.

[247] See Daphne Barak-Erez, "Broadening the Scope of Judicial Review in Israel" *Indian Journal of Constitutional Law*, vol. 3 (2009), 118-37, at 131-4.

points out, Israel's "security-oriented liberalism" affected the social space of minorities by reducing their confrontational attitudes and contributed to increase liberal values within these communities.[248]

The restrictive interpretation of the principle of association is shown in *Sabri Jiryis* v. *District Commissioner*, where the Supreme Court was asked to rule about the denial of a local authority to register the association El-Ard. This Arab association was based on Nasserist ideology, which spread nationalist and socialist ideas incompatible with the existence of Israel. The Court ruled that the denial of registration was per se legal but not because of the national aspirations of the Arab-Israeli citizens. On the contrary, the Court found that national aspirations incompatible with the existence of the State of Israel may theoretically be legitimate within a democratic context. According to the judges, it is the identification with a political movement that fomented warlike ideology by professing the physical destruction of the State that is not legitimate.[249]

The doctrine of "physical destruction" as the parameter for restricting freedom of association was repeated in cases relating to political participation and only eventually was it broadened to include subversive goals in terms of denying Israel's

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[248] The author claims that "Israel has experienced a security-oriented liberalism. This means that national security as State violence has been used as a criterion for preserving, eliminating, and granting rights. Therefore, interaction between liberalism and the security mentality have had various effects on non-ruling communities... These interactions have elevated and empowered the State's pressures on nonliberal communities to change their practices and reduce their level of autonomy. On the other hand, the decline in the ethos of national security due to liberalism has enhanced liberal members of nonruling communities to better mobilize State law." Gad Barzilai, *Communities and Law—Politics and Culture of Legal Identities*, 95.

Jewish and democratic nature. Indeed, in *Yardor* v. *Central Election Committee for the 6th Knesset*,[250] the Court was asked to rule on a case of disqualification of the Arab Socialist List due to its denial of the existence and integrity of the State. The Court upheld the decision by reasserting the illegitimacy of destructive goals and defined the existence of Israel as a fundamental constitutional fact.[251]

Following the same line of reasoning, the Court annulled the decision of the Central Committee for the 11th Knesset to disqualify the Jewish Kach party due to its racist ideology and the Arab Progressive List for Peace because its members adhered to the El-Ard movement. The Court found that no restriction of freedom of association was possible in these cases since both parties did not envisage the physical destruction of the State.[252] The danger of increasing anti-democratic and anti-Zionist political activism led to the amendment of electoral law, by introducing those principles that recognize the "physical destruction" doctrine and broaden the possibility of ejection from active political life due to the denial of Israel's Jewishness and democracy.

On the basis of these new principles, the Court upheld the decision of the Central Election Committee for the 12th Knesset to disqualify the Kach party, which had been admitted to the previous elections, in that incompatible with the democratic nature

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[249] HCJ 253/64, *Sabri Jiryis* v. *District Commissioner*, (1964) 18 PD (4) 673.

[250] HCJ 1/65, *Yardor v. Central Committee for the 6th Knesset*, (1965) PD 19(3) 365.

[251] In this decision, the Court even referred to Jewishness and democracy as basic features that characterize the credo of the Israeli people, but then reasoned in terms of the existence of the State as the main parameter of discretion in approaching questions of freedom of association.

[252] E.A. 3/84 *Neiman* v. *Chariman of Central Election Committee for the 11th Knesset* (1984) 39 PD (2) 233.

of Israel.[253] In *Ben Shalom* v. *Central Election Committee for the 12th Knesset,*[254] the Court upheld the decision to allow the participation of the Arab Progressive List for Peace. The Court interpreted the Jewish nature of Israel in terms of the Jewish majority of the State, the privilege accorded to Jews by automatic citizenship, and the special relationship with Diaspora Jews. This interpretation added new points of view to the definition of Israel's Jewishness given by Justice Barak.[255] However, the most important point consists of the interpretative test outlined in the decision.

The judges found that the formal statement whereby the list commits to pursue anti-system principles is not a sufficient rationale for disqualification. On the contrary, the test should follow a factual rationale, whereby the anti-system aim has to be central in the political agenda of the list and it has to be pursued in actual political life, specifically by participation in the elections. In this specific case, the list in question did not meet the requirements for its exclusion from political life.

Subsequently, the Court applied this test also to the decisions of the electoral committee about disqualifications of propaganda methods. In other words, even though the party is allowed to participate in the elections because it does not meet the requirement for disqualification, its political propaganda is restricted according to the same principles of disqualification.

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[253] The decision, known as Neiman II, is the first decision about the disqualification of lists on the basis of the principles introduced by the amendment. See, E.A. 1/88 *Neiman* v. *Chariman of Central Election Committee for the 12th Knesset* (1988) 42 PD (4) 177.

[254] E.A. 2/88, Ben *Shalom* v. *Central Election Committee for the 12th Knesset*, (1988) PD 43(4) 221.

[255] *Supra*, section 1.

Accordingly, in *Herut—The National Jewish Movement* v. *Chairman of the Central Election Committee for the 16th Knesset*,[256] the Court ruled that freedom of speech in political propaganda should be limited when it exceeds the tolerance threshold of public sentiment. In that case, the judges found that that propaganda passed the threshold in that it praised Islamist martyrdom and denied the existence of Israel by preaching the banishment of Jews from Israel's territory, and contemptuously used the national anthem and flag.

By contrast, in *Association for Civil Rights in Israel* v. *Chairman of the Central Election Committee for the 16th Knesset*,[257] the Court overturned the decision of the Committee to ban propaganda broadcast showing the Palestinian flag and identifying the list with Arafat's party. The argument of the Committee was based on the identification of that Arab list with hostile nationalist groups, whose actions are incompatible with the existence of the State. However, the Court established that freedom of speech was in this case superior in that it did not involve any direct offense to public sentiment—as it did in the previous case with reference to victims of terrorist attacks.

By and large, it is difficult to trace a general approach of the Court with regard to political participation. However, after the endorsement of constitutional principles as parameters for disqualification, the doctrine of "physical destruction" was broadened to

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[256] HCJ 212/03 *Herut—The National Jewish Movement* v. *Chairman of the Central Election Committee for the 16th Knesset*, 57 PD (1) 750.

include also the constitutional reversal of essential State principles. The Court has adopted a restrictive approach, allowing disqualification in cases of real and actual danger of destruction or subversion.

Nevertheless, some authors claim that conditioning the participation in elections to the acceptance of Israel as a Jewish State is *per se* a discrimination against non-Jewish minorities.[258] As argued above, discriminatory attitude of State institutions should be based on systemic exclusion, which is not the case, or on impediment to social and political development of a group. In the case of Israel, two main principles can be drawn from the limitations imposed on the participation in political life: the acceptance of the physical existence of the State, deriving from the "physical destruction" doctrine, and the acceptance of distinctive constitutional features of the State, stemming from the "constitutional reversal" doctrine.

Can a State impose certain essential visions on its minority communities? Are minority communities obliged to refrain from pursuing their national aspirations that are basically incompatible with essential constitutional features of the State? Besides historical and political questions specifically connected to the Arab-Israeli conflict, the core problem regards the operational scope of political rights in a context of confrontational relations between the majority and non-ruling minorities.

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[257] HCJ 651/03, *Association for Civil Rights in Israel v. Chairman of the Central Election Committee for the 16th Knesset*, IsrSC (57) 2 62.

[258] See, Yvonne Schmidt, *Foundations of Civil and Political Rights in Israel and the Occupied Territories*, (Doctoral Dissertation, Norderstedt, Germany: GRIN, 2001), 284-286.

While recognizing the necessity to defend the existence of a State and its democratic nature, some authors deny the possibility for a State to embrace a certain ideological view to the extent that it becomes the parameter for enjoying political rights. For instance, Kremnitzer recognizes the necessity to limit active political rights to anti-democratic movements and to parties that support hostile and terrorist groups, but he rejects the possibility that Israel's Jewishness can become a parameter for guaranteeing or restricting political life.[259]

The interpretation that the Court has given over the years of Israel's Jewishness involves cultural issues such as language, traditions, historical heritage, and political goals such as the connection with the Jewish Diaspora. As Gavison emphasizes, although "principled commitment to the idea of Israel as the State of the Jewish people does not follow from, and is not mandated by, any conception of democracy," nevertheless, "such commitment is allowed" before the law, therefore, "it may be justified to place certain limits on formal democracy" that aim to protect that commitment.[260] This characterization does not forcibly discriminate against diverse groups. Indeed, States' identification with a majority culture or even with a majority

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[259] Mordechai Kremnitzer, *Disqualification of Lists and Parties: The Case of Israel*, in Andras Sajo (ed.), *Militant Democracy*, (Utrecht: Eleven, 2004) 161-8. See also, Peter Cumper, Europe, *Islam and Democracy—Balancing Religious and Secular Values under the European Convention on Human Rights*, in *European Yearbook on Minority Issues*, EURAC & European Center for Minority Issues, vol. 3 (Leiden: Martinus Nijhoff, 2003-4), 163-80.

[260] Ruth Gavison, *Twenty Years after Yardor: The Right to Stand for Election and the Lessons of History*, in: Ruth Gavison and Mordechai Kremnitzer (eds.), *Essays in Honor of Shimon Agranat*, (Jerusalem: Graf Press, 1986), 160 [Hebrew], the English translation is quoted in Yoav Peled, "Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State," *American Political Science Review*, vol. 86, n.2 (June, 1992), 432-443, at p. 441, note 9.

political goal does not imply incompatibility of minority social life with majority culture. Moreover, the constitutional justification for denial of political rights lies in the extreme rationale of defending the existence of the State.

Yet, the accomplishment of minority national aspirations within an ethnic context remains the first confrontational aspect between minorities and the ruling community.

5. MULTI-LEVEL MILLET: MINORITIES IN A CONFRONTATIONAL CONSTITUTIONAL SPACE

Israel's model of minority protection synthesizes both *millet* and Western traditions: it guarantees personal and communal autonomy and it guarantees both collective and individual rights. Although the individual sphere prevails in anti-discrimination law, the communal sphere infringes in those individual rights that exclusively pertain to personal autonomy arrangements. Moreover, two problems arise from the realm of collective rights: the degree of cultural freedom under State's control and the degree of political freedom in a confrontational political context.

5.1 Personal Autonomy and opportunity to opt-out

Personal autonomy arrangements provide religious courts for exclusive jurisdiction on matters of marriage and divorce. Although religious jurisprudence is subject to judicial supervision by the Supreme Court, the core of exclusive jurisdiction remains untouched.

Therefore, marriage and divorce rights pertain to religious jurisdiction only, which implies that this system does not provide citizens for secular individual protection.

Therefore, citizens are subject to religious jurisdiction without an opt-out possibility. This is far too much than what a secular democracy should recognize since the legal system denies the protection of specific rights. On the contrary, religious jurisdiction should be confined to pre-judicial phase, as in the case of family disputes mediation,[261] or it should be subject to mutual will of the parties in arbitration courts.[262] In this way, religious and secular systems would coexist and all constitutional rights could be protected unless the parties decide to turn to religious jurisdiction.

5.2 State's control over minority cultural narratives

As for collective rights, the main problem lies in State's control over cultural expression of minorities. By controlling educational curricula, the State retains the power to approve certain cultural practices or to disfavor them. Ultimately, this means that the State has the power to establish the borders of the social space within which a minority group lives. Theoretically, it is not illegitimate for a State to control minority societal groups, in that the State has to guarantee both social cohesion and unity. On the other

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[261] This system has been adopted by Malaysia, where qadis and religious authorities work as counselors for settling family disputes. In this context, religious authority is not belittled by secular establishments, and, at the same time, the State retains the ultimate control over religious population that considers religious morality impelling over secular norms. See, Sharifah Zaleha Sye Hassan and Sven Cederroth, *Managing Marital Disputes in Malaysia: Islamic Mediators and Conflict Resolution in Syariah Courts*, (Richmond, UK: Routledge, 1997), 71-84 and 228-38.

[262] See, Abu Taher, "Revealed: UK's First Official Sharia Courts," *The Sunday Times*, 14th September 2008.

hand, this ultimate control can turn into indirect discrimination of minority practices and in the imposition of majority narratives.

However, the Israeli legal system guarantees protection against institutional discrimination in two ways. First, individual protection of rights limits practices of discrimination against a minority, which concretize in the infringement of individual rights such as the right to expression and association.[263] Secondly, institutional behavior is subject to judicial control of the Supreme Court. Hence, petitions with the Supreme Court become tools for preventing discrimination and for pursuing accommodation claims.

Moreover, the inclusion of minorities into the institutions gives minorities an opportunity for bargaining claims, which can avoid confrontational attitudes and the resort to court. Institutional inclusion of minority members could be developed as effective mediation between minority claims and majority necessities.[264] Indeed, the participation of minority members in the decision-making process could guarantee continuous bargaining among non- and ruling elites, and it would favor the exploitation of State institutional options to pursue collective goals. In this way, resort to court would remain the last solution to address social conflicts.

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[263] Gad Barzilai, *Communities and Law*, 77-8.

[264] See, Ronald Weitzer and Badi Hasisi, "Does Ethnic Composition Make a Difference? Citizens' Assessments of Arab Police Officers in Israel" *Policing and Society*, vol. 18, n. 4 (December, 2008) 362 - 76.

5.3 Political rights: State's interests and national aspirations of non-ruling communities

Israel does not recognize collective political rights, which are the largest form of inclusion in the decision-making process. The State guarantees *de facto* political participation through proportional elections, but it retains the control over the participation in elections. The Supreme Court developed the "physical destruction" doctrine and the "actual and real danger" doctrine, both of which constitute tests to rule about the exclusion of lists from elections. Yet, the reason why to restrict political rights of minorities involves debatable issues about democracy rules.

Minority protection aims to accomplish three aims: cultural preservation, cultural expression, and group development. Cultural preservation involves avoiding assimilation by guaranteeing the maintenance of certain traditional or linguistic features—such as the possibility to use minority languages and to follow traditional practices. Cultural expression is a further stage, whereby minority culture not only is protected through specific arrangements but also becomes part of the national common good—including separate schools or educational curricula, official status of minority language, and minority members' inclusion in the institutions. Finally, group development pertains to the national aspirations of a minority group.

Free development is subject to negotiation between the State and the minority group, which advances claims to be accommodated within a constitutional space. However, a State can limit this development when minority claims are perceived as

incompatible with its constitutional foundations. Hence, the legal problem relies in the modality and limits within which a State is entitled to deny or to restrict political rights of groups in order to guarantee State unity, cohesion, and its very existence.

This problem covers two aspects: the definition of those core constitutional principles that constitute the essence of the State and the interpretation of incompatibility between the State's constitutional foundation and minority group claims. Both aspects involve ideological-political issues that result, in legal terms, in the decision to exclude a certain political party through administrative proceeding or judicial decision.

The legal elaboration of those principles serves as the parameter to restrict or broaden political rights, and it establishes the border of tolerance toward the national development of minority groups. Specifically, the legal development of these principles lies in constitutional law, which evolves in constitutional jurisprudence.

In order to avoid the "tyranny of the majority," which results in the systemic impediment of minorities to affirm their political visions,[265] pluralism should be interpreted not only as a cultural value, but also as a political value.[266] The major challenge lies in the attitude towards a minority group whose visions are considered incompatible with the fundamental principles of the State. It is the case, for instance, of

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[265] Francesco Palermo and Jens Woelk, *Diritto Costituzionale Comparato dei Gruppi e delle Minoranze*, (Padova: CEDAM, 2008), 47-8.

[266] As Hannah Arendt argued, in "Was Ist Politik," the essence of politics is the inclusion of diversity. See, Hannah Arendt, *Was Ist Politik*, in Ursula Ludz (ed.), *Was Ist Politik—Fragmente aus dem Nachlass Hannah Arendt*, (Munich: Piper, 1993), 9-12.

both Kurdish and religious parties in Turkey, of Batasuna Basque Party in Spain, and of ethnic or religious parties in Bulgaria and Romania.

In these States, banning legislations are justified by the rationale that political organizations should recognize and share basic principles of the State. This notion varies according to the legal system and can include secularism, as in Turkey, ethnic-blindness as in Romania and Bulgaria, and physical integrity of the State as in Spain. By contrast, the Court of Strasbourg has argued that although minority parties may advance claims that the State considers incompatible with its basic principles, they cannot be denied political rights, in that those principles may be however compatible with general democratic principles.[267]

The Israeli Supreme Court protects both active political rights and freedom of expression in electoral propaganda. It approves the exclusion from election on the basis of actual and real danger of subversion, while it conditions the freedom of expression in political propaganda on the respect of public sentiment.

Political rights are connected to other legal spheres such as freedom of expression and the constitutional foundations of a State. If these basic principles express the physical existence of the State, it has to be recognized to a State the opportunity to defend itself even to the detriment of political rights that may be exploited for subversive purposes. Again, is it legitimate for a State to restrict political rights of a

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[267] See, ECtHR *United Communist Party of Turkey and Others* v. *Turkey*, Reports 1998-I, par. 55-7.

group that advances identity claims incompatible with the vision of the ruling community?

The challenge of an inclusive society lies precisely in the danger that non-ruling communities may subvert the system structured by the ruling community. States' identification with a majority culture may assume different features such as the official language, the official calendar, and privileges in acquiring citizenship accorded to a specific group. In order to guarantee equality, the State has to guarantee appropriate means of voice to diverse groups, and this implies the possibility to express cultural visions incompatible with the majority culture. Yet, when this cultural expression endangers the existence of the State, then the restriction of political rights may be justified, particularly in a context of conflict in which the existence of the State is at stake.

Two considerations arise. First, the treatment of minority groups in the whole has to be analyzed. Secondly, the degree of precision in the exclusion from political life has to be regarded as fundamental. With regards to Israel, the general status of minorities does not imply systemic discrimination, and the exclusion procedure is based on precise principles and judicial supervision. It is the judicial review of institutional behavior that ultimately guarantees the protection of the equality principles by protecting both collective and individual rights.

The specific characteristic of the Israeli system is the coexistence of both communal and individualistic approaches, which empowers minority groups to enjoy

collective rights and to bargain the broadening of their social space within the constitutional framework of the State. On the other hand, the coexistence of both approaches enables opt-out, which is the decision of citizens not to take part into the communal conflict, but to be subject only to the individualistic regime.

Moreover, the individualistic regime serves also as a channel for advancing collective claims, through the protection of freedom of expression and of association. In a confrontational social context, a State is more likely to concede autonomy and to include those diverse groups that are not perceived as incompatible with majority culture and with the existence of the State, such as Druze and Circassians in Israel. The clearest position a minority has on fundamental issues such as the existence of the State of residence and its fundamental constitutional principles, the more it can gain from the inclusive processes. However, when a minority considers its existence in a certain constitutional space ontologically incompatible with its national aspirations, then the possibility of accomplishing claims of accommodation dramatically lessens, in that mutual distrust between the ruling community and the non-ruling community affects any agreement between the parties.[268]

The incompatibility among principles stems from social and ideological visions and narratives. However, law can provide for rules of coexistence even in an ethnic majority context. Israel offers an example of elasticity in minority protection and of precision in the imposition of limits. Since most of the claims advanced by minority

groups find their expression in judicial confrontation, the living constitution of minority groups in Israel is developed by judicial review. In the words of Stella, it is the judiciary that becomes the guardian of diversity, in both its individual and collective aspects, through the protection of individual rights.[269]

Minorities do not always find their space within the social space defined by the majority. Moreover, where minority claims are not taken in due account, the accommodation of diversity itself becomes incompatible with the principles of the State. As an example, the next case-study, Iraq, shows a return to the territorial model of protection and the rule of majority culture to the detriment of minorities.

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[268] Sammy Smooha, *Autonomy for Arabs in Israel?* (Ra'anana: The Institute for Israeli Arab Studies, 1999), 51-56 [Hebrew].

[269] Federico Stella, *La Giustizia e le Ingiustizie*, (Bologna: Mulino, 2006).

CHAPTER 4

LOST IN CONSTITUTIONALIZATION:

THE CLAIMS OF IRAQ'S MINORITIES AND THE FEDERAL-TERRITORIAL BIAS

Iraq inherited the *millet* system from the Ottoman Empire, and has adapted it in terms of

personal and cultural autonomies. The question of political representation of groups has

emerged after the fall of Saddam's dictatorship ended with the US-led invasion in 2003. The consequent institution-building process, which formally ended with the adoption of the constitution in 2005, shows remarkable concern about minority claims in terms of religious rights, cultural rights, and political participation rights. However, the process of constitutionalization shows a strong federal bias for accommodating the claims of ethnic groups that are territorially defined (Kurds and Turcomans). Although they took part in the drafting of the constitution, non-territorial ethnic, religious, and ethno-religious groups lost the opportunity to advance their claims because of the institutional approach that has been adopted. Indeed, Kurds' and Turcomans' claims were accommodated through territorial autonomy instruments, in order to compensate historical discrimination and ensure their security in the new State, while religious minorities such as Christians, Baha'is, and Yezidis are denied appropriate protection despite a constitutional prohibition of discrimination.

The federal system of the new Iraq addresses the claims of the main groups that have been involved in internal conflicts—*i.e.*, Sunni Arabs, Shi'i Arabs, and Kurds—by dividing the country in eighteen ethnically homogenous provinces. Other ethnic and ethno-religious minorities are dispersed in these provinces and the lack of bargaining power impedes them from pursuing group interests in terms of cultural rights and political representation. Moreover, the constitutionalization of Islam as the official religion of the State questions the capability of the legal system to provide non-Islamic minorities for adequate protection in terms of religious and cultural rights.

This chapter analyzes the constitutional framework of the minority protection regime in post-war Iraq. After a historical overview of the legal status of minorities under both monarchist and Saddam's regimes, this chapter focuses on the opportunities of the constitutionalization process. Institution-building activities, instead of reconnecting to the Middle-Eastern tradition of non-territorial protection of minorities known as the *millet* system, applied the Western model of territorial protection.

I argue that this model may be an appropriate means of protection in cases in which ethnic and ethno-religious conflicts can lead to the collapse of civil society. Moreover, the territorial model properly suits those groups that are territorially defined and whose bargaining power is strong enough to threaten territorial disintegration of the State.

However, I claim that non-territorial minorities should be treated with equal concern in a pluralistic society that aims to protect human rights, and that their claims can be adequately accommodated through the adoption of non-territorial devices of minority protection. Specifically, I claim that the combination of territorial and non-territorial instruments of minority protection may be the adequate institutional approach to complex diversity, which derives from the existence in one State of several different groups, defined by identity (religious, ethnic, linguistic, or overlapping) and territory, which compete for power and recognition by pursuing autonomy. To this respect, the *millet* system, part of Iraqi legal tradition, constitutes an effective means of protection

of dispersed minority groups by guaranteeing them both cultural rights and political representation.

The chapter focuses on what lessons can be drawn from the Iraqi experience in terms of minority protection in a complex diversity system and as a means of conflict-management.

1. Iraq's Melting-Pot of Ethnic, Religious, and Ethno-Religious Diversities

Although the majority of Iraqis are Shi'i Arabs, large communities that constitute Iraqi society differ in terms of ethnicity and religion. Ethnically, Kurds and Turcomans are the largest minorities in Iraq and live in the north-eastern parts of the country. They are Sunni Muslims except for a small group of Shi'i Kurds. In addition, a small Christian Armenian community lives mainly in the area of Baghdad.

Religiously, the main minority is composed of Sunni Muslims, including Arabs, Kurds, and Turcomans. In addition, a variety of religious communities are historically resident in the country. The largest community is Christian, which includes Latin and Syriac Catholics, Protestants, Chaldeans, Syriac-Orthodox, and Assyrians, who consider themselves an ethnic and religious minority. Moreover, there are three religious minorities of ancient origin: Baha'is,[270] Yezidis,[271] and Sabians.[272] The small number of

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[270] Baha'i faith has developed in the 19th century from Shi'i Islam. Its fundamental principle lies in the concept of relative and progressive revelation: while there is one God, His humanly manifestations are different and embodied in several prophets, including Abraham, Moses, Buddha, Krishna, Jesus of Nazareth, Mahomet, and Bab, who founded and independent religious movement in Iran, from which

Jews represents the last vestage of the Iraqi Jewish community, most of who fled from

Iraq after the creation of Israel in 1948.[273]

Religious and ethnic identities sometimes overlap, as in the case of Turcoman,

who are Sunni Muslims, and Armenians, who are Catholic or Orthodox Christians.

Nevertheless, some general relationships between these groups are identifiable.

Baha'is developed their faith. The Baha'i doctrine can be summarized in the motto "Unity in Diversity," with a pedagogic vocation toward peace and coexistence, which explains Baha'is devotion to social causes and their commitment to cooperation activities. The internal structure of the Baha'i community, based on local elected councils, reflects their views on international relations, which envisage the abolition of national armies and the constitution of an international federated army with goals of enforcement of laws and statues adopted by an international parliament of the nations. Baha'is have faced persecution in Islamic countries for accusation of apostasy and polytheistic worship. In Iran, Iraq, and Egypt, legislative provisions directly discriminate against Baha'i followers. See William S. Hatcher and J. Douglas Martin, *The Baha'í Faith: The Emerging of a Global Religion*, (New York: Harper & Row, 1998); on the persecution of post-Islamic creeds, see Bernard Lewis, *The Jews of Islam*, (Princeton: Princeton University Press, 1984).

[271] Yezidis are an ethnically Indo-Iranic who settled in the regions of nowadays Iraq, Syria, Turkey, and Armenia. The Yezidi religion is syncretic and originates from ancient Persian religions, monotheistic cosmogony, and Shi'i Sufi doctrine. According to their faith, God created the world and gave it to the care of seven angels; among them, the most prominent is the Peacock Angel, whom they revere as a powerful entity, which distributed blessings and misfortunes. This figure, for the role it plays in cosmogony, is associated by both Christians and Muslims to the fallen archangel Satan, whereby Yezidis are considered as worshipers of the devil. For this reason, they are persecuted. Moreover, their particular rules on purity isolate them from other communities, the contact with which is perceived as polluting, which exacerbates negative prejudices against them. See, Birgül Açikyilidiz, *The Yezidis: The History of a Community, Culture and Religion*, (London: I. B. Tauris, 2010). The biggest community of Yezidis outside Iraq is in Germany, where they have preserved their identity and culture with peculiar forms of cultural re-qualification within German society. See, Celalettin Kartal, "Yeziden in Deutschland—Einwanderungsgeschichte, Veränderungen und Integrationsprobleme," *Kritische Justiz*, vol. 40, n. 3 (2007), 240-257.

[272] Sabians, also referred to as Mandaeans, are a Gnostic and Baptist religion, which has developed from the followers of John the Baptist and had Oriental platonic influences. Sabians believe in dualism, which is the division in dual concepts such as good-bad, right-left, mother-father, inherited from Manichaeism. Despite the fact that they are monotheistic, Mandaeans are persecuted as worshipers since they believe in the active role of angels in daily life. According to them, angels dwell in stars, so that astrology plays an important role in their faith. See Jorunn Jacobsen Buckley, *The Mandaeans—Ancient Texts and Modern People*, (Oxford: Oxford University Press, 2002).

[273] See Michelle Zumofen, *Irak: Situation von religiösen Minderheiten in den von der KRG verwalteten Provinzen Sulaimaniyah, Erbil und Dohuk*, Themenpapier der SFH-Länderanalyse, (Bern: Schweizerische Flüchtlingshilfe, 2008) 2.

Historically, Iraq has been dominated by Sunni Arabs, with institutional discrimination against non-Arab citizens during Saddam's dictatorship. Moreover, discrimination targeted non-Sunni Muslims, and specific groups such as Baha'is, Yezidis, and Sabians. These historical discriminations and the genocidal practices of Saddam's regime toward the Kurds created strong grievances characterizing groups' claims in post-war Iraq. Sunnis feared backlash and discrimination by the Shi'i majority, while Kurds and Turcomans feared discrimination by Arabs, and Christians feared discrimination by Islamic activists.

While Shi'is, Sunnis, Kurds, and Turcomans succeeded in advancing their claims even by guerrilla attacks, other minorities suffer not only from institutional discrimination but also from intimidation, assimilation, and physical attacks. Moreover, Baha'is are excluded from political rights since they are considered a heretical sect of Islam, while Jews voluntarily keep out of public life for fear of physical injuries.[274]

In this plethora of ethnic, religious, and ethno-religious diversity those groups that are territorially defined have pursued their interests with more success, because of effective control over the territory of residence, while non-territorial minorities are left to their destiny and try to survive discrimination and attacks, often by choosing exile.

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[274] See Preti Taneja, *Assimilation, Exodus, Eradication: Iraq's Minority Communities Since 2003*, Minority Rights Group International Report (Minority Group Rights International, 2007) available at www.minorityrights.org

Beyond the analysis on the collapse of civil society,[275] and the studies of the Iraqi civil war,[276] this chapter focuses on the process of constitutionalization, and identifies in it the moment in which non-territorial minorities were excluded from protection. Far from analyzing the consequences that this exclusion has had or that it still has on the collapse of Iraq's civil society, this chapter addresses the issue from a legal point of view.

2. The Iraqi Millet

2.1 Between Monarchy and Ba'athist Dictatorship

Iraq achieved independence in 1932, fourteen years after the British Mandate over the territory that once belonged to the Ottoman Empire. The new State system was a constitutional monarchy, which inherited the Ottoman system of groups' self-government.

The Constituent Assembly in charge of drafting the Iraqi Constitution had both Christian and Jewish representatives, who were eventually guaranteed seats in the Parliament.[277] The constitution of 1925 recognized the arrangements of personal

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[275] See James D. Fearon and David D. Latin, "Ethnicity, Insurgency, and Civil War," *American Political Science Review*, vol. 97, n. 1 (February 2003), 75-90; Mary Kaldor, Denisa Kostovicova, and Yahia Said, "War and Peace: The Role of Global Civil Society," *Global Civil Society Yearbook*, (2006/7), 94-121.

[276] See Toby Dodge, "Iraqi Transitions: From Regime Change to State Collapse," *Third World Quarterly*, vol. 26, n. 4-5 (2005), 705-721.

[277] Nigel G. Davidson, "The Constitution of Iraq," *Journal of Comparative Legislation and International Law*, vol. 7, n. 1 (1925), 41-52, at 43.

autonomy, whereby each person is judged on matters of personal status and family law according to the legal tradition of the group he/she belongs to.

Part V of the Constitution, dealing with judiciary, recognized civil courts, courts of first instance, and Islamic courts. Non-Muslim citizens and foreigners were subject to the jurisdiction of civil courts and were judged in matters of family law according to the religious law of the people they belonged to. Muslim citizens were subject to the jurisdiction of *shari'a* courts,[278] which applied Ottoman law first and *shari'a* law that was developed in the draft of a civil code in 1951, which synthesized all Islamic legal traditions, including Shi'i schools.[279]

After the 1958 revolution, which was led by the general Abdul Karim Qassim, Iraq became a Republic, where the power was wielded by revolutionary institutions, such as the National Assembly, and was eventually centered in the hands of the President. Subsequently, in the late 1960s, Constitutional amendments were introduced in order to establish, politically, the supremacy of the Arab Socialist Ba'athist party, based on Ba'ath ideology,[280] and, ethnically, the supremacy of Sunni Arabs over other

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[278] *Ibid.*, 49-51.

[279] Sayed Hassan Amin, *Middle East Legal Systems*, (London: Royston, 1985), 168.

[280] The Ba'ath Party, which in Arabic means renaissance, was founded in 1940 in Syria by Arab intellectuals influenced by French Positivism and European nationalism. Eventually, it associated pan-Arabism, in the sense of a cultural nation (as originating from the concept of *Kulturnation* developed by Herder), and socialism in the sense of anti-imperialism and freedom from external intervention. The secular orientation helped Muslim-Christian cooperation in political activities, while pan-Arabism expressed the idea of unity of the Arab people free from Western domination or Western intervention, which was alternatively identified with British administration during the late mandate period, with the creation of the State of Israel within Arab lands, and, lastly, with American international policies. The Party opened national sections in Egypt, where it influenced Nasser, in Syria, where it came to power in the late 1960s, and in Iraq, where it developed an anti-Persian racist ideology under Saddam's control.

groups. Discriminatory legislation targeted specific groups such as Baha'is, Kurds, and citizens of Persian origin.[281] In the 1970s, Saddam Hussein started his career within the party, which eventually came under his full control in 1979, when he became Iraqi President after having stricken his political rivals.

Although Ba'athist ideology was essentially secular, the system of personal autonomy was maintained, with partial modifications. For instance, religious authorities had to be recognized by State officials and the acts of marriage and divorce, carried out by communal religious authorities, had to be validated by the government.

Moreover, Islamic substantial law was modified by the introduction of judicial permission for polygamous marriages, which could be eventually used by the existing wife as a rationale for requesting divorce.[282] The legal system also recognized Islamic endowments, the *wakfs*, the arrangements of which fell under the jurisdiction of the Court of Personal Status, and were regulated by Islamic law.

By focusing on the adaptation of the *millet* system in Iraq and, consequently, on the partial autonomy that minority communities enjoyed, one may infer that this system created spaces of freedom even under Saddam's dictatorial regime. Yet, the

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See Abbas Kelidar, "The Wars of Saddam Hussein," *Middle Eastern Studies*, vol. 28, n. 4 (October 1992), 778-98; and John F. Devlin, "The Baath Party: Rise and Metamorphosis," *American Historical Review*, vol. 97, n. 5 (December 1991), 1396-1407.

[281] For instance, Revolutionary Command n. 61 of 1964 imposed limitations on political and civil rights of Kurdish and Persian citizens, such as access to public offices, both active and passive political rights. Moreover, the Ba'athist nationalization policy targeted in particular Kurdish, Baha'i, Jewish, and Persian properties, which were dispossessed in name of social interest. See, Sayed Hassan Amin, *Middle East Legal Systems*, 173.

[282] See, Sayed Hassan Amin, *Middle East Legal Systems*, 190-191.

discriminatory practices and policies of the Iraqi establishment, which targeted specific groups such as Shi'is, Kurds, Baha'is, and Yezidis, clarify that the Iraqi *millet* was a mere legal tradition, which was inherited from the Ottoman era.

The Kurdish case may clarify the point. In 1974 autonomy was recognized to Kurdish regions at the border with Iran and was limited to educational rights and to the recognition of Kurdish as the official language alongside with Arabic. However, the Iraqi regime maintained the economic control of the areas due to the presence of natural resources, mainly of oil.[283] After Saddam took power, the regime tried to subvert the ethnic composition of the region first, and then, in the early 1990s, physically targeted Kurdish villages, in the attempt of ethnic cleansing. After the Gulf War, and the subsequent condemns on Iraq due to ethnic cleansing of Kurdish citizens, Iraqi sovereignty was severely limited by prohibiting Iraqi aircraft from flying over certain areas in the northern and southern parts of the country, the so-called no-fly zones.[284] International institutions, including the UN, the EC, and USAID, started managing post-

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[283] See, "Iraq and Kurdish Autonomy," *MERIP Reports*, Middle East Research and Information Project, n. 27 (April 1974), 26-27 and 30.

[284] No-fly zones can be defined as prohibited areas in the sky. This doctrine was specifically developed in order to prevent Saddam's aircraft from flying over Kurdish regions and from protracting attacks on civilian population. The prohibition to fly over the Northern and Southern areas of Iraq was imposed by the US, France, UK, and Turkey by interpreting Security Council Resolution n. 688 of 1991, which called for the termination of the repression practices and demanded the removal of the threat to international peace and security constituted by civilians' targeting. The interpretation that led to the creation of no-fly zones is contested since the UN Security Council resolution did not refer to fly zones. See, Michael Byers, *War Law: Understading International Law and Armed Conflict*, (Toronto: Douglas&McIntyre, 2005), 41. The controversial interpretation of this document is linked to the controversy over the use of force in the Iraqi crisis and the consequent US policy, which interpreted UN Security Council Resolution 678 of 1990 as allowing the use of force against Iraq's breach of international law. See Jules Lobel and Michael Ratner, "Bypassing the Security Council: Ambiguous Authorization of the Sue of Force, Cease-Fires and the Iraqi Inspection Regimes," *American Journal of International Law*, vol. 93, n. 1 (January 1999), 124-54.

conflict relief programs in the Kurdish regions as separate projects from the rest of the country. At the same time, Kurdish inhabitants organized an institutional framework that, although it was not recognized by the international community, made of Kurdish regions a *de facto* State within Iraq.[285]

Both *de facto* autonomy and historical grievances gave the Kurds enough bargaining power to support the federalist option in post-Saddam Iraq. The accommodation of Kurdish claims through territorial autonomy seems to reflect the historical development of the region, whereby pre-existing territorial autonomy was constitutionalized. Moreover, this territorial accommodation also reflects the ethnic composition of majority Kurdish regions. Yet, those minorities that do not fit in the territorial model are not protected.

The next section focuses on the contemporary *millet* system in Iraq. After a brief description of the transitional period, it assesses the existence of a *millet* system by analyzing its constitutional arrangements.

2.2 The Post-War Iraqi Millet: Minorities in an Islamic Republic

After the 2003 US-led invasion of Iraq, State powers were held by the Coalition Provisional Authority (CPA), under the administration of Paul Bremer, which was

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[285] Michael M. Gunter, "A *de facto* Kurdish State in Northern Iraq," *Third World Quarterly*, vol. 14, n. 2 (1993), 295-319; Ronald Ofteringer and Ralf Bäcker "A Republic of Statelessness: Three years of Humanitarian Intervention in Iraqi Kurdistan," *Middle East Report*, n. 187-8 (Mar.-Jun. 1994), 40-5.

"vested with legislative, executive, and judicial authority."[286] The CPA conducted the State-building process, by defining the legal framework of Iraq through the adoption of the Transition Administrative Law (TAL) in March 2004, which may be considered the *interim* constitution, and a series of statutes which established the three phases of the institution-building process.

2.2.1 The period of transition: stabilizing Iraq

During the first phase, from the military occupation in March 2003 to the appointment of the *interim* governing bodies in June 2004, the CPA has focused its work on the economic and institutional reconstruction of the country, with particular regard to the dismantlement of the dictatorship institutions. During the second phase, from June 2004 to the elections in January 2005, the *interim* governing bodies worked for the institutional building of the country, with particular regard to the settlement of civil conflicts. During the third phase, from January 2005 to December 2005, powers were held by transitional governing bodies elected in January 2005, focusing their work on the draft of a constitution which was eventually ratified in October 2005 after a referendum. With the constitutionally-based elections, which were held in December 2005, Iraq has been considered a full sovereign State, despite the on-going conflict and foreign military presence.

The TAL is to be considered the *interim* constitution in that it was the non-amendable law that regulated the distribution of powers as well as the *interim*

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[286] See Regulation n. 1 of 16 May 2003, art. 2. The documents are available at the web site of the

institutions and established the phases of the constituent process. In this law, Iraq is defined as a republican, federal, democratic, and pluralistic State (art. 4). It recognizes Islam as the official religion (art. 7, first part), while it guarantees religious freedom of all individuals (art. 7, second part). Moreover, it recognizes Arabic and Kurdish as official languages and guarantees linguistic rights to minorities (art. 9).

The TAL is concerned with political representation at the legislative body, the National Assembly, and establishes that the electoral law should guarantee fair representation of Iraqi communities (art. 30, letter C, second part, which directly lists Turcomans and Chaldo-Assyrians) and reserves one quarter of the seats to women (art. 30, letter C, first part). The concern for political representation of Iraq's diversity was further expressed by the CPA in the appointment procedures of the *interim* bodies, with particular regard to the Interim National Council, which served as a consultative body for the Interim Government policies and had veto powers on decrees and regulations proposed by the Interim Government. The Interim National Council was composed of 100 members appointed by the National Conference and gathered Iraqi notables, representatives of the tribes, and of other Iraqi communities who were involved into the institution-building process by the CPA.[287]

The *interim* bodies had governed Iraq until the election of January 2005, whereby the powers were transferred to transitional bodies, which included the National

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Coalition Provisional Authority, http://www.iraqcoalition.org/

[287] See the fact-sheet, issued by the CPA in January 2004, "Iraqi Interim Government" p. 3-4, available at http://www.iraqcoalition.org/

Assembly, the legislative body elected in January 2005, the transitional executive body composed of the Presidency Council,[288] and the Council of Ministers with its Prime Minister. Moreover, the National Assembly was invested of the constituent power by art. 60, which imposed cooperation with societal groups during the drafting process through public debates and press discussion. The draft had to be ready by August 2005 (art. 61, letter A), which would be subject to referendum after two months. No other provision of the first and second phase deals with minority protection in terms of cultural rights or political representation. Notwithstanding the TAL provision on equal representation, neither the Electoral Law, issued by CPA Order n. 96 of 15 June 2004, nor the Political Parties and Entities law, issued by CPA Order n. 97 in the same day, deal with representation rights of ethnic and religious minorities. As for gender representation, the latter law establishes that electoral lists should contain female candidate in a proportion to their male colleagues of two to six.

2.2.2 The post-war Constitution: the role of Islam in Iraqi divided society

The post-war Constitution was approved by a referendum in 25 October 2005 in a context of violent civil conflict.[289] The referendum required the consent of two thirds of the provinces and of 65% of the population in each province. Electoral data show that Sunnis opposed the new constitution, since they feared to lose power because of new

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[288] The President was Kurd, and the two vice-presidents were one Arab Shi'i and one Arab Sunni.

[289] See, Edward Wong, "Final Tally Shows Iraqi Voters Approved New Constitution," *New York Times*, 25 October 2005.

ethnic balances, while Kurds and Shi'is campaigned in favor of federal arrangements.[290] The new Constitution aims to balance the Islamic identity and diversity of Iraqi society; indeed, it recognizes the prominent position of Islam in the public sphere, but also guarantees the protection of minorities as part of Iraqi historical-cultural heritage.

With respect to the role of Islam in Iraq, the new Constitution refers to Islam as the funding religion of the State. The preamble appeals to God by the traditional invocation "*In the name of God, the Most merciful, the Most compassionate,*" and encompasses the Islamic tradition into the constituent principles. For instance, par. 1 describes the Iraqi glorious past, by referring to the saints and companions of the Prophet who lived in the country. Moreover, the preamble gives official status to Islam by involving religious leaders into the institution-building process. Indeed, par. 2 acknowledges God's authority over Iraqi citizens, and describes the institution-building process as the response to religious leaders' requests for stability as well as to the requests of the international community and the ethnic communities of the country.

Besides the general declarations of the preamble, the constitution gives prominence to Islam in two provisions. Art. 2, first part, declares Islam as the official religion of the State; particularly, it establishes that Islamic law is a source of law in the Iraqi legal system, and that positive law cannot be enacted in contradiction to Islamic principles. Art. 92 establishes that the Federal Supreme Court, which is the judicial

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[290] See, "Irakische Verfassung ist Angenommen," *Der Spiegel*, 25 October 2005.

body at the top of the judicial hierarchy, shall be composed of legal scholars and Islamic experts.[291]

Although the constitution does not define Iraq as an Islamic republic, Islam is part of its constitutional foundations and Islamic principles are part of the basic principles of the State. However, several provisions limit this Islamic rienttation by ensuring the protection of diversity.

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[291] The Constitution does not specify the composition of the Court, authorizing the legislator to regulate the matter. However, the law on the composition of the Federal Supreme Court has not yet been adopted, and the its nine members were appointed by the Presidency Council on the basis of a list, which included three nominees for each vacancy and was issued by the Higher Judicial Council (*i.e.*, the independent body which supervises the judiciary branch). This procedure was established by the Transitional Administrative Law (art. 44, letter E), and has never been changed. Therefore, it is not yet possible to assess the functioning of the Federal Supreme Court as designed by the new Constitution, while it is possible to compare the constitutional provisions for its composition with parallel bodies in other countries where religion plays an important role in State politics and in the public sphere. With reference to the case-studies previously analyzed, neither Israel (chapter 3) nor Lebanon (chapter 2) include religious legal expert in their Supreme Courts, and this is not the case of Western liberal democracies. Thus, Iraq may incur in the risk of theocratization not only because of religious activists in politics, but also because of the constitutionalization of Islam in prominent constitutional organs. As far as politics is concerned, Islamic activists are both Sunni (particularly Sunni Salafists) and Shi'i, but given the Shi'i majority, the major push toward theocratization comes from Shi'i parties. Traditionally, Shi'i Islam refrains from direct political involvement and considers religious leaders as spiritual guides for political leaders in terms of ethics, public morals, and legal issues; however, the 1979 Iranian Revolution, based on Khomeieni's ideology, changed this traditional view and established a new tradition within Shi'i Islam, whereby religious leaders directly engage in political life in order to establish the authority of legal jurists. This doctrine was developed by Khomeini in his *Velayat-e Faqih* (The Authority of Legal Jurists), where he elaborates a platonic political doctrine, whereby republic is the best form of State for Islam communities, and Islamic legal experts have to bear the ultimate authority on legislation and political life. In Iraq, the religious leader Sayyid Ali Al-Hussayni Al-Sistani shares the traditional view of Shi'i Islam, whereby his indirect participation in Iraqi political life is characterized by disposal to compromise with diverse views (such as the ones of Sunnis and of secular political leaders) and with perceived enemies (such as American military authorities in the country). However, other Shi'i religious leaders, such as Moqtada al-Sadr (leader of the Sadrist Movement), and other Shi'i politicians, including Ammar al-Hakim (leader of the Supreme Islamic Council of Iraq), Muqdad al-Baghdadi (leader of the Kurdish Shi'i faction called Islamic Fayli Group), Kasim Muahammad Taqi al-Sahlani (leader of the Dawa Party), share the post-revolutionary views, whereby they supported the 1979 revolution in Iran and aim to transform Iraq into another Iran. Eventually, these political parties and movements gathered in the National Iraqi Alliance list, to which the first Prime Minister of new Iraq belongs, Nouri al-Maliki. Therefore, the inclusion of Islamic legal experts in the Supreme Court may be considered the feature of a potential authority of the jurists or at least of their strong influence within the legal system.

With respect to the protection of diversity, the constitution declares that Iraq is a democratic State (art. 109), and that also democratic principles are the basis for the annulment of contrary legislation (art. 2, part 1, letter B). Moreover, several provisions refer to diversity as a social feature that the legal system shall protect. In this respect, art. 2, part 2, recognizes the rights of religious minorities "such as Christians, Yazidis, and Mandean Sabeans," while art. 3 defines Iraq as a multi-national, -religious, and – sectarian State. Moreover, by directly recalling the discriminatory and genocidal practices of the dictatorial regime, par. 2 bans the principle of sectarianism and calls for the creation of inclusive State and society.[292]

Iraq's commitment to the values of co-existence and diversity is stated in the preamble as well (par. 4);[293] specifically, par. 3 refers to Iraqi civil war and condemns its ideological grounds, which include sectarianism, racism, terrorism, and accusation of being infidel. Again, national unity and peaceful coexistence are considered as basic principles of the new regime. Paragraph 2 directly refers to ethnic discrimination against Kurds and Turcomans, and to religious discrimination against Shi'is, which characterized the policies of Saddam's regime, while paragraph 3 calls for national unity and religious coexistence, and condemns sectarian violence, which dramatically

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[292] Par. 2, last part, states: "we sought hand in hand and shoulder to shoulder to create our new Iraq, the Iraq of the future, free from sectarianism, racism, complex of regional attachment, discrimination, and exclusion."

[293] Par. 4 states "We, the people of Iraq, who have just risen from our stumble, and who are looking with confidence to the future through a republican, federal, democratic, pluralistic system, have resolved with the determination of our men, women, elderly, and youth to respect the rule of law, to establish justice and equality, to cast aside the politics of aggression, to pay attention to women and their rights, the elderly and their concerns, and children and their affairs, to spread the culture of diversity, and to defuse terrorism."

targets minorities.[294] Although the preamble does not directly refer to minorities, the inspiring provisions are to be understood in the sense of both peaceful coexistence among individuals and positive acceptance of diversity.

Iraq, as other countries of the Middle East such as Lebanon and Israel, has a particular relationship with religion. It is not a theocracy, but the religious discourse acquires particular significance in the public sphere. Not only Iraq identifies with Islamic history and religion, but Islam acquires a particular status in terms of legislation. Islamic law is a source of law alongside with the law enacted by the Parliament, and Islamic experts are part of the highest judicial body. Hence, Islam is one of the constitutional bases of post-war Iraq together with the democratic principles of freedom, equality, and protection of minorities.

The constitution regulates the status of minorities under the new Iraqi regime. This section analyzes the constitutional *millet* arrangements, which show that contemporary Iraq constitutionalized the *millet* system in terms of personal autonomy, communal autonomy, and political representation.

2.3. PERSONAL AUTONOMY

Art. 41 states that "Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices, and this shall be regulated by law." The

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[294] Mumtaz Lalani, *Still Targeted: Continued Persecution of Iraq's Minorities*, Minority Rights Group International Report (Minority Group Rights International, 2010) available at www.minorityrights.org, and Preti Taneja, *Assimilation, Exodus, Eradication: Iraq's Minority Communities Since 2003*, 8-16 and 29-30.

principle of personal autonomy is thus constitutionalized according to the Iraqi legal tradition, which originates from the Ottoman *millet* system.

However, the vague formulation of this provision may lead to different interpretations. Citizens' freedom to commit to their personal status according to the legal or traditional heritages of the group to which they belong also entails the freedom to abstain from religious or traditional rulings. In other words, the article implies the "right to be left alone," which is the freedom to opt-out from the communal system.

The legal system should then provide citizens with a dual legal framework, which should envisage both a secular judicial body and different religious judicial bodies for the sects. However, contemporary Iraq has maintained the pre-war arrangements. The pre-constitutional legislation of the *interim* period gave continuity to the *millet* tradition of the legal system; the Iraqi Governing Council Resolution 137 of 2003 recognized the validity of the Personal Status Code of 1959, whereby religious sects have judicial autonomy in matters of personal status, while general family law applicable to all citizens is the Islamic law codified in the Personal Status Code of 1959. Two problems arise in terms of minority protection and individual rights.

With respect to minority protection, Iraqi law limits the jurisdiction of minority courts in favor of Islamic law, which is applicable to all citizens through the Personal Status Code. Therefore, Islam becomes not only the official religion of the State but its legal tradition, the *shari'a*, becomes also its main source of law in matters of personal

status. *Shari'a* is given prominence over other legal traditions, including the secular tradition, and, consequently, minority rights are limited.

With respect to individual rights, Iraqi law conflicts with international human rights standards, particularly, with reference to women's rights under Islamic law. As it has been emphasized, "the Code, the Shari'a, and customary traditions and practices affect the realization of women's rights in both the private and public domain;" specifically, "conservative interpretations of Islamic norms, patriarchal traditions, economic factors and tribal customs [place] the most severe constraints on women's rights and autonomy."[295] Specific aspects of personal law are prone to the infringement of women's rights, such as the economical aspects of divorce, polygamy, transitional marriages, child custody, and minimum age for marriage.[296]

Although the constitution is committed to the respect of human rights,[297] it does not envisage clear procedures for assuring democratic principles. Art. 45 limits communal autonomy by prohibiting those practices that are contrary to human rights, and it calls for the advancement of clans and tribes. However, the lack of procedures or

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[295] American Bar Association, *The Status of Women in Iraq: Update to the Assessment of Iraq's* De Jure *and* De Facto *Compliance with International Legal Standards*, (American Bar Association, Iraq Law Development Program: 2006), 105, available at www.aba.org.

[296] *Ibid.*, 106-9.

[297] The commitment to the respect of human rights appears in three provisions: both art. 9, letter E, and art. 84, second paragraph, establish that the Intelligence Service shall operate according to Iraqi law and human rights principles; art. 45, second paragraph, prohibits tribal practices that conflict with human rights principles. Moreover, art. 102 establishes an independent commission, called High Commission on Human Rights, with competence of inquiry on breaches of human rights. Since the Constitution does not provide any catalogue of recognized human rights, these provisions have to be interpreted with reference to the bill of rights within the Constitution and to the human rights principles as recognized in international law with specific regard to the international treaties to which Iraq is party.

judicial bodies that supervise and scrutinize religious courts' decision, as the Supreme Court in Israel,[298] leads to two negative consequences. First, it impedes religious courts from complying with certain secular human rights standards. Secondly, it denies the unity of the legal system, since the latter is composed of separate units, which do not have any connection to constitutional principles. Moreover, the absence of any connecting body between the religious legal systems and the general legal system of the State prevents the clear definition of the dual nature of Iraq as an Islamic and democratic State.

As in Lebanon, where judicial autonomy of religious communities is not limited by any supervision procedure,[299] these arrangements endanger the legal unity of the State, and, consequently its stability. In terms of social sustainability, the Iraqi legal system runs the further risk of theocratization: by giving prominence to *shari'a* in family law, the legal system may be transformed in a subsidiary body of Islamic courts to the detriment of both minority and human rights protection.

2.4. COMMUNAL AUTONOMY

The traditional *millet* system developed communal self-government in terms of communal property arrangements and collective cultural rights. Ethno-religious communities were entitled to property rights for handling both real estate and religious

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[298] See chapter 3, on Israel.

[299] See chapter 2 on Lebanon.

sights. Moreover, each community had the right to manage educational, health, and charitable institutions.

Iraq's new constitution has adapted the traditional version of communal self-government through programmatic provisions, whereby an effective accommodation of minority claims cannot develop without an adequate statutory regulation.

With respect to communal property arrangements, art. 43, first part, point B, recognizes the right of religious communities to govern its internal affairs, to run institutions, and to manage *wakfs*. Point A of the same article establishes religious freedom in terms of rituals, and commits the State to the protection of holy sights. The same commitment is previously stressed at art. 10 and art. 35, which focuses on Iraq's historical heritage.

In addition, the Constitution recognizes through the right of association (art. 39, first part) the possibility to run health institutions under State supervision (art. 31, second part). The stress on State supervision also recurs in endowments regulations, since they are subject to the control of a specific commission included in the government (art. 103).

With respect to collective cultural rights, the Constitution highlights the value of diversity and the necessity to protect minority cultures (art. 125). Indeed, art. 34, fourth part, and art. 114, sixth part, recognize private education. By considering the State's commitment to protect cultural and religious diversities, one may infer that educational rights of minorities can be enjoyed even in public education through separate curricula.

However, private associations, and specifically religious associations, can run educational institutions in light of the provisions that grant them autonomy.

The constitution focuses mainly on linguistic rights and regulates the use of languages through a three-ranked hierarchy: art. 4 recognizes five official languages, which are subject to territorial limits, while it gives the possibility to local use of other idioms. The second part of the article defines the official status of a language in terms of use in public domains such as the official gazette, institutional and official documents, including passports and coinage, schools, and both public and private speeches.

First, the first part of the same article states that both Kurdish and Arabic are official languages of the State throughout the country. However, the third part bans the sole use of Kurdish in the Kurdish regions and implicitly obliges the joint use of Arabic. Secondly, the fourth part recognizes Turcoman, Syriac, and Armenian as further official languages in those "administrative units in which they constitute a density of population." No explanation of "density" is given, and it has to be understood as a prescriptive provision to be regulated by statute. Finally, the fifth part recognizes the official use of other local languages on the condition of people's approval through referendum.

As it has been stressed, these arrangements "preserve a formal monoism through a common federal citizenship (one), but qualifies it through a pluralistic recognition of multiple nationalities (many) and the practical treatment of (two) Kurds and Arabs as

the most significant linguistic communities."[300] The linguistic regime reflects the general orientation of the Iraqi constitution toward minority protection, which is based on the recognition of diversity and the preservation of a common supra-sectarian identity that originates from Iraq's Islamic and Arab majority population.

"Iraq is in actuality pluri-national and bilingual:"[301] the constitution recognizes and protects diversity, while it builds a solid national unit. According to the different poles of identity, the constitution limits pluralism and stresses unity. For instance, language is a pole of identity that is recognized in substantially pluralistic terms. Religion and ethnicity are two poles of identity that, on the contrary, are limited, while unity is stressed. The main problem that stems from this approach is rooted in possible coercive practices of the dominant culture. The persecution of non-Islamic minorities, as well as the violence among the different Islamic communities, shows that, ideally, the constitution aims to create a pluralistic society and a supra-communal identity, while practically, two poles of identity are dominant over the others: ethnicity, with Arab supremacy, and religion, with Islamic-Shi'i supremacy.

The vagueness in addressing minority claims is also reflected in political rights, as the next section shows.

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300 Brendan O'Leary, John McGarry, and Khaled Salih, *The Future of Kurdistan in Iraq*, (Philadelphia: University of Pennsylvania Press, 2005), 49.

[301] *Ibid.*

2.5. POLITICAL REPRESENTATION

Political representation arrangements constitute the highest degree of minority protection, since minority groups are guaranteed voice in the decision-making process. A State is more likely to provide minority groups for political representation if the group is perceived loyal to the State. However, in a situation of confrontational relationships among the dominant groups, minority protection issues are not perceived as relevant to the legal and political system.

The Iraqi constitution does not recognize representation rights in political institutions, although article 9 calls for ethnic balance in the recruitment of armed forces. The importance given to ethnic diversity in armed forces is reflecting the main problem regarding minorities: loyalty. Minorities are often perceived as potentially disloyal groups because they pursue communal interests considered incompatible with the overarching national interest. The constitutionalization of ethnic inclusion in the armed forces is remarkable in that the army has been in Iraq the principal means of ethnic persecution. Thus, the inclusion of diverse groups in the army is an effective tool of integration, "as part of the process of citizenship building"[302] and an adequate means of conflict prevention.[303] With respect to ethnic representation, this is the only reference contained in the constitution.

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[302] Giuseppe Caforio, *Handbook of the Sociology of the Military*, (NY: Springer, 2006), 301.

[303] Peter J. Rowe, *The Impact of Human Rights Law on Armed Forces*, (Cambridge: Cambridge University Press, 2006), 23.

The reorganization of armed forces aims to legitimize those institutions that are perceived as corrupted and in which citizens do not trust. Moreover, armed forces bear a symbolic power of security in that they should guarantee security from both external threats—*i.e.*, attacks to the State—and internal disorder—*i.e.*, violation of laws. As highlighted in the case of Northern Ireland,

> in post-conflict societies where the institution of the police has been discredited, it is an essential component of police reform that the composition of the police service be changed to both represent the community which the police is serving and to reflect the attitudes and behaviour of the reformed institutional culture. The composition and representativeness of the police service becomes a critical barometer of the level at which different communities within society identify and engage with the police.[304]

The same may be said of the Israeli case, where the inclusion of the Arab minority into police forces stresses institutional accountability in a conflict between the ruling community and minority groups.[305]

With respect to political representation, the Constitution also deals with gender equality. Art. 20 states that all Iraqi citizens have equal political rights in terms of both active and passive electoral rights, and of capability to be appointed to an office,[306] but no reference is made to ethnic representation arrangements.

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[304] See Jane Gordon, "Post-Conflict Trasnformation: The Process of Institutional Legitimization of the Police in Northern Ireland," *Ethnopolitics*, vol. 7, issue 1 (March 2008), 137-57.

[305] See the chapter 3 on Israel.

[306] The article stresses the gender-blind principle of representation by the expression "men and women." Being Arabic a sexist language, it is not always clear when the expression "all Iraqis" refer to men only or whether it is intended to include also women. For instance, doubts arise with respect to interpretative aspects of article 42, which guarantees freedom of travel.

Although the constitution is silent on this issue, the electoral law regulates the question of political representation. The Election Law for the 2010 Council of Representatives Elections,[307] largely based on the 2005 Election Law, establishes that elections for the federal legislative body shall be conducted according to the proportional system (point 2), which represents a political guarantee of representation. Moreover, it envisages a legal guarantee of representation through a complicated system, which is based on reserved seats to Yezidis, Sabians, Shabaks, and Christians.

Point 6 establishes that eight seats out of 325 are reserved to minorities, and articles 8 and 9 establish that seats have to be linked to one governorate. Of these seats, five are reserved to Christians, who compete for representation on a national basis, although each seat has to correspond to a different governorate.[308] The other free seats are reserved for the Yezidi, the Sabian, and the Shabak communities, each one linked to a different governorate.[309]

The system of linkage between seats and governorates can guarantee adequate representation of societal groups if those units are ethnically homogenous, so that each seat will represent the population of a certain area. Moreover, the proportional system guarantees adequate representation of the different lists that participate in the elections. However, in the case of diffuse groups that do not constitute majority in any

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[307] The text of the law is available at the internet site of the Independent High Commission for Elections in Iraq, www.ihec.iq.

[308] See par. 10 of the explanatory note to the election system of the Independent High Commission for Elections in Iraq, www.ihec.iq.

[309] *Ibid.*, par. 9.

administrative unit, the link between seat and territory can lead to detrimental effects. Indeed, in such systems, seats represent only the minority population of the administrative unit to which the seat corresponds, and the rest of the minority population resident in other units is not represented.

Finally, although the system of reserved seats constitutes the highest guarantee of representation, the mere presence of minority deputies does not guarantee effective participation in the political process. The under-representation of minorities can be effectively mitigated by establishing particular voice tools such as guaranteed participation to parliamentary commissions of relevance for the minority groups and veto power in fields of high interest to minorities. In Iraq, although representation is guaranteed, neither the electoral nor the parliamentary codes provide minority representatives with specific guarantees for representation in those commissions that deal with aspects of minority interest such as the Committee for Religious Affairs and Endowments, the Committee for Education, and the Committee for Human Rights.

In a social-political context of confrontational relationships among dominant groups, minorities risk to be underrepresented and, consequently, their claims risk to be excluded from the inclusive goals of the State. The competition for power among the dominant groups is detrimental to minorities, since they have to join one of the dominant groups in order to pursue their own interests, and this may lead to the exacerbation of inter-ethnic conflicts, particularly if minority groups are not territorially concentrated. In this case, they have to deal with further problems that arise from any

political compromise with a dominant group, since they would face critical relationships with other groups with which they did not compromise, and that constitute the majority in the area where the minority group is resident.

On the contrary, adequate voice tools for minority interests, such as special powers in the decision-making procedures about education, religion, language, or culture, could guarantee, on the one hand, the national relevance of minority protection, and, on the other, the possibility to locally pursue minority interests with different dominant groups.

The political arrangements show that the main focus of the State-building process was the settlement of the disputes among the dominant groups: Arabs and Kurds on the one hand, and Shi'is and Sunnis on the other. The settlement of conflicts among these dominant groups leads to the under-qualification of minorities' interests and their under-representation in the institutions. As in Bosnia-Herzegovina, territorial arrangements have resulted in ethnic federalism, whereby ruling communities, defined as constituent groups (Croats, Serbs, and Bosniaks),[310] are guaranteed autonomy over ethnic homogeneous territories. Federalism is combined with ethnic power-sharing, whereby the representation of constituent groups is guaranteed in the institutions at the central level. Ethnic federalism and power-sharing protect the interests of the ruling communities and guarantee their participation in institutional life, while minorities,

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[310] The definition was given by the Constitutional Court of Bosnia Herzegovina in the Judgement U 5/98-III, see Jens Woelk, *Federalism and Consociationalism as Tools for State Reconstruction? The Case of*

including minority groups and individuals who do not belong to one group exclusively, are excluded from actual protection.[311]

The next section analyzes the federal system that resulted from the negotiation process.

3. Kurdistan and Shi'istan: Minorities in a Federal (Islamic) Republic

The 2005 Constitution created a federal State, which is divided in regions and governorates. Administrative units have those competences which do not fall within federal exclusive authority such as foreign policy, armed forces, citizenship, federal fiscal policy, and distribution of water resources (art. 110). Out of these exclusive competences, local authorities can issue legislation even in contrast to national law (arts. 115 and 121.2).

Federalism was considered the only available choice for Iraq since it provided for an immediate solution of the two main conflicts that still lacerate Iraqi society: between Kurds and Arabs, and between Shi'is and Sunnis.

With respect to the Kurdish-Arab conflict, Kurds' demands for autonomy were rooted in past discrimination. Their main focus was economic and cultural autonomy in the Northern regions (also known as Iraqi Kurdistan) where, through autonomous government, they would avoid systemic isolation and genocidal attempts. Moreover, as

Bosnia and Herzegovina, in G. Alan Tarr, Robert F. Williams, and Josef Marko (eds.), *Federalism, Subnational Constitutions, and Minority Rights*, (Westport, CT: PRAEGER, 2004), 188-91.

Byman emphasizes, Kurdish demands are similar to those of Scots in UK, or of Catalans in Spain. The Northern regions achieved de facto autonomy in the 1990s,[312] and their self-government constituted a strong precedent in the advocacy of federalism. From Kurdish autonomy, two main problems arise: the first is connected to economic consequences of federal arrangements and the second is related to minority rights.

Kurdish territorial autonomy affects both use and management of natural resources such as oil and gas. However, the negotiation between Kurdish and Arab leaders led to the federalization of oil issues; art. 111 establishes that natural resources belong to all Iraqis, and art. 112 establishes that oil utilization competes to federal authorities and its revenues shall be distributed among all administrative units.

Moreover, Kurdish autnomy endangers the respect of minority rights. On the one hand, Kurdish autonomy compensates past discrimination and represents a sustainable solution for the Arab-Kurdish conflict, but, on the other, it jeopardizes the status of other minorities, if the local government does not commit to minority protection. This holds true with particular reference to the Turcoman minority, which has confrontational relationships with Kurds. Turcomans' claims on the city of Erbil, for instance, and the claims of ethnic and ideal connections to Turkey create conflicts in

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[311] Jens Woelk, *La Transizione Costituzionale della Bosnia ed Erzegovina—Dall'Ordinamento Imposto allo Stato Multinazionale Sostenibile?*, (Padova: CEDAM, 2008), 98-9.

[312] Daniel Byman, "Constructing Democratic Iraq: Challenges and Opportunities," *International Security*, vol. 28, no. 1 (summer 2003), 47-78.

Iraqi Kurdistan, where Turcomans are underrepresented and excluded from government.[313]

With respect to the Sunni-Shi'i conflict, Shi'is' numerical majority at the national level was mitigated by federal arrangements, which guarantee Sunni autonomy in three governorates (Salah ad-Din, Niwana, and Al Anbar). However, Sunnis rejected the 2005 constitution for fear of future under-representation at the national level. Sunnis favored consociationalism, in order to guarantee their actual representation both in the institutions and in political life, but this solution was rejected and the federal option prevailed.

While Kurdish autonomy seems to have positive effects in institutional and economic terms, the rest of the country is developing as an Arab-Shi'i State, with a strong Arab-Sunni minority. Insecurity and violence still is the major cause of instability in mixed areas, such as the governorate of Baghdad. In this framework, diffuse minorities lost the opportunity to define their institutional space in new Iraqi citizenship. "In theory, federalism and other arrangements that guarantee minority rights reduce incentives for conflict,"[314] but then the question is: what minorities were considered in the constitution-building process?

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[313] Vahram Petrosian, "The Iraqi Turkomans and Turkey," *Iran & the Caucasus*, vol. 7, no. 1/2 (2003), 279-308.

[314] Daniel Byman, "Constructing Democratic Iraq: Challenges and Opportunities," *International Security*, vol. 28, no. 1 (summer 2003), 47-78, at 55.

While local autonomy rule was considered a valid solution to avoid Shi'i tyranny, the communities that benefit from ethnic federalism are Kurds and Sunni-Arabs, both of whom are guaranteed autonomy in three regions each, and Shi'i Arabs, who are the majority in the nine remnant regions and turn to be the dominant group at the national level. These three groups are to be considered the constituent peoples of Iraq, while ethnic and religious minorities hardly find a place in the federal arrangements.

Minorities are indeed guaranteed protection by the constitutional provisions that have adopted the *millet* system, but their validity is limited to the federal level. Indeed, political representation is guaranteed only at the federal parliament, and article 125, which guarantees "the administrative, political, cultural, and educational rights of the various nationalities, such as Turkomen, Chaldeans, Assyrians," has not yet been enacted.

Moreover, communal cultural autonomy arrangements correspond to areas of shared authority between the federal and the regional governments, such as the management of tribal uses, health policy, and educational policy (art. 114.1, 114.5, and 114.6 respectively). These provisions would ensure the application of the constitutional *millet* at the local level; nevertheless, the results rely on the political will of local authorities for two reasons. First, the constitution does not oblige local authorities to enact the constitutional *millet*; secondly, an appropriate application of communal cultural arrangement would be ensured by active participation of minority

representatives at both the federal and local levels. At the federal level, minorities are under-represented, and, at the local level, no political representation is provided, therefore, the actual protection of minorities relies mainly on local authorities.

To this respect, Anderson and Stansfield proposed a territorial division into five regions, equal in number of inhabitants and roughly homogenous in ethnic composition.[315] These authors argue that "when a minority community fears the cultural, linguistic, ethnic, or religious hegemony of the majority community, inter-communal tension can be avoided by allowing the minority rights of self-government within its own communal enclave."[316] During the early institution-building phase, the rights of minorities were hardly considered in the attempt to settle inter-ethnic and inter-religious conflicts through territorial arrangements.

The constitutional space recognizes the existence of ethno-religious minorities and establishes a model of protection, which results from the adaptation of the *millet* system. However, the protection of these minorities, which focuses particularly on linguistic issues, is contradicted by the territorial arrangements that settle the conflicts among the main ethno-religious groups. As a consequence, at both the federal and the local levels, minorities do not find appropriate protection.

At the local level, the federal option mitigated Shi'i majority rule by creating ethnically homogenous regions. However, the replication of the State model in terms of

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[315] Liam Anderson and Gareth Stansfielf, "The Implications of Elections for federalism in Iraq: Toward a Five-Regional Model," *Publius*, vol. 35, (Summer 2005), 359-82, at 373 and ff.

territorial division into autonomous areas does not solve the problem of minority protection, but just localizes it. In other words, at the local level, majority groupings of Shi'is, Sunnis, and Kurds constitute ethno-religious supremacy with no guarantees for minorities. Indeed, art. 125 of the constitution, which requires local administrative bodies to respect minority rights, has not yet been enacted nor is it included into regional constitutions.

The lack of arrangements for the political representation of minorities and the territorial autonomy provisions absorb the constitutional *millet*. Hence, the potential of the *millet* system in terms of minority claims accommodation and of conflict settlement was neutralized by the federal option. The constitution tries to combine territorial and non-territorial autonomy models, which are not mutually exclusive since they address different issues and questions, but in Iraq territorial provisions and the powers of regional entities invalid the non-territorial approach. Then, the main problem is the combination of territorial and non-territorial arrangements in terms of constitutional-engineering and social sustainability.

4. Back to the Territorial Model: structural and contingent Minorities

Territorial and non-territorial accommodations answer to different claims for protection of minority rights. Territorial arrangements are suitable for minority groups that reside in a defined territory and that constitute the majority population of that area; whereas, non-territorial arrangements are suitable for minority groups that are dispersed in the

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[316] *Ibid.*, 364.

territory of a State. In the first case, minority groups become the majority in an area, where the residents that represent the majority of the State population become a contingent minority in that region. In the second case, diffuse groups are to be considered structural minorities. Thus, constitutional engineering should foster appropriate solutions for both structural and contingent minorities.

As Woelk emphasizes with reference to Bosnia Herzegovina, constitutional transitions in ethnically confrontational areas imply "the institutionalization of the ethnic element," which "is often implemented by the use of territory, both because of the historical importance of the territorial element… and because of the claims advanced by different groups that are preordained to the control of a certain part of the territory."[317] In other words, the institution-building of post-conflict areas cannot adopt an ethnic-blind approach without the risk of exacerbating ethnic divisions. Moreover, the use of territory in constitutional engineering is an appropriate solution in presence of a claim by a certain group over a specific area.

4.1 Combining territorial and non-territorial tools of minority protection

In Iraq, this is the case of both Kurds and Sunnis, who represent the majority population in specific areas of the country and who have proposed territorial self-government rules in order to directly access natural resources and to avoid the risk of Shi'i supremacy at the central level. However, in these areas, Arabs and Shi'is become contingent

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[317] Jens Woelk, *La Transizione Costituzionale della Bosnia ed Erzegovina—Dall'Ordinamento Imposto allo Stato Multinazionale Sostenibile?*, 73-4.

minorities, while Turcomans, Christians, and Yezidis remain structural minorities. The use of territory in addressing the claims of structural and diffuse minorities, as well as those of contingent minorities, does not solve the problem of co-existence, but just reverses it. A minority becomes the majority in an autonomous region, while other minorities are not protected. Hence, additional instruments have to be applied in order to accommodate diverse interests. In this respect, a local application of the *millet* that could guarantee minority rights implies the combination of territorial and non-territorial models of protection.

In the case of Iraq, a combination between non- and territorial models of protection would imply the regional application of the *millet* system. The example of cultural communal autonomy could clarify this point. Cultural communal autonomy implies the collective exercise of cultural rights, such as the use of language and the preservation of minority cultures in educational curricula and social practices. The Iraqi constitution recognizes these rights, but does not provide for tools of regional implementation. For instance, a representative committee of minority groups could elaborate, at the federal level, general educational policies in cooperation with the central government, while at the local level it could implement those policies in cooperation with the regional governments. This would lead minority groups to cooperate with both central and federated governments, while the general model of protection would be locally applied by taking into adequate consideration the specific needs of each area.

In this respect, the basic condition for the implementation of minority rights is political representation, in order to preserve multiculturalism and to prevent occasions of further conflict. Political representation aims to include diverse groups into the decision-making process through institutional means that guarantee participation rights. Töpperwien defines participation rights "as a guaranteed and institutionalized special influence on the decision-making process of the state…" that "promise to promote the democratic integration of [diverse] groups." Ultimately, "having a guaranteed influence on the decision-making process promises to enhance the loyalty to and identification with the state and prevents the alienation inherent in the feeling of being a perennial loser."[318]

However, this does not mean that minorities should be involved in all decision-making processes. On the contrary, different groups could be guaranteed participation in different areas of interest and levels of governance. The inclusion of minorities in different political processes varies according to their bargaining power and their will to participate in political life. The basic needs of any minority group are physical survival and cultural preservation, which correspond to the interests of security and non-assimilation.[319]

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[318]Nicole Töpperwein, *Participation in the   Decision-Making Process as a Means of group Accommodation*, in G. Alan Tarr, Robert F. Williams, and Josef Marko (eds.), *Federalism, Subnational Constitutions, and Minority Rights*, 42.

[319] This chapter does not deal with security issues of Iraqi minorities, since it is not of direct interest of this study. However, appropriate protection of minority groups can enhance the chances of security in two ways. First, by including minority members into armed forces, effective protection of diverse groups can be established, since the actual interests and needs of the minority group will be adequately taken into account by its representatives in the armed forces. Secondly, the inclusion of minority members in all

With respect to areas of influence, cultural preservation can be appropriately guaranteed through special participation rights in political bodies that deal with cultural issues, such as the Ministry of Education, or through special representation procedures, such as educational committees in charge of drafting educational curricula; financial committees in charge of defining the budgetary funds of educational institutions; and special committees for minority rights in media broadcasting. The more bargaining power a groups has, the more it can influence the political process in different areas. An economically powerful group, for instance, may advance claims for directly participating in the economic process, like, for instance, the Kurds, who control the oil-rich areas in their autonomous regions.

With respect to levels of governance, different instruments of accommodation may be adequate for different levels of governance, particularly in federal States, where autonomy at the local level jeopardizes the rights of both structural and contingent minorities. Here, combinations of different instruments of minority protection may result into the so-called "complex power-sharing,"[320] which originates from the "conflict-settlement approach that resorts to territorial self-government as the main tool, and to further mechanisms for respecting diversities in divided societies."[321] While, at

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spheres of social, labor, and political life of a State enhances the chances of cultural inter-change and mutual knowledge, so that, by knowing each other, diverse groups come into direct contact and can develop strategies and forms of coexistence.

[320] See Stefan Wolff, *Complex Power Sharing as Conflict reoslution: South Tyrol in comparative Perspective*, in Jens Woelk, Francesco Palermo, Josef Marko (eds.), *Tolerance Through Law—Self-Goevrnance and Group Rights in South Tyrol*, (Leiden: Martinus Nijhoff-Brill, 2008), 329-70.

[321] Jens Woelk, *La Transizione Costituzionale della Bosnia ed Erzegovina—Dall'Ordinamento Imposto allo Stato Multinazionale Sostenibile?*, 61.

the local level, a minority group may represent a consistent number of the population, it may be a small group at the national level. Therefore, different claims and different tools for representation should be established to accommodate the claims of groups according to their status at a specific level of governance.

In Iraq, for instance, Turcomans are a small minority at the national level (roughly the 2% of the population), but they are mostly concentrated in the Kurdish regions, where they are more active in political activity. Therefore, two different forms of protection could suit Turcomans: at the national level, they could be involved in educational policy-making, while at the local level they could be involved in other areas of influence. The lack of data about local ethnic and religious percentages shows the indifference toward both local relationships among groups and toward possible local forms for accommodating minority claims.

4.2 Governance-oriented conflict settlement: conflict subsidiarity and national unity

The main focus of the Iraqi institutional frame remains the central level for the necessary reconstruction of the State after the prolonged conflict, and federal arrangements do not address all the issues connected to minority protection. Federalism does not settle conflicts among other ethno-religious groups and impedes structural minorities from achieving self-determination. The governance-directed solutions for accommodating minority claims would be valid tools for addressing minority issues in terms of conflict-settlement and national unity.

With respect to conflict-settlement, the diversification of accommodation tools in addressing minority claims at the different levels of governance leads to diverse perspective of conflicts. At the central level, where small groups would have specific areas of influence, the government would be involved in framing institutional policies toward minorities and in settling general conflicts of interests. At the local level, where minority groups face actual problems and basic needs related to the protection of their rights, regional governments would be involved in the direct implementation of national policies, and would deal with actual and practical issues connected to minority protection. In this way, minority members would be guaranteed adequate protection through direct participation in political life. Hence, minorities would have actual say in the protection of their interests, and, at the same time, they would participate in the general political life of the country, by pursuing their interests in cooperation with other groups.

With respect to national unity, the local management of diversity aims to create possibilities of cooperation among groups, by managing communal conflicts at the lowest level of governance. This approach leads to a "conflict subsidiarity," whereby each level of governance deals with communal conflicts according to its capacities, and leads to the preservation of the supra-communal interests at the higher level of governance, where groups are already used to pursuing interests through cooperation rather than engaging in conflict. The subdivision of communal conflict in different levels of governance permits the implementation of policies that take into account actual needs of minority groups at the local level, by establishing the most suitable

solution in terms of social, economic, and political sustainability. Higher levels of governance would benefit from this fragmentation in that the incentive to cooperate locally aims to enhance chances of co-existence.

Consequently, the national level would take into account minority issues from a general perspective, by formulating policies in accordance with minority groups representatives. The system of conflict subsidiarity would preserve national unity, by avoiding political fragmentation along ethnic lines at the central level. However, the central government cannot invalidate such a system by identifying the country with the majority culture solely.

In Iraq, the constitutionalization of the multicultural approach is contradicted by the provisions that regulate the status of Islam in both the social and legal realms. Socially, Islam is the official religion of the State, while legally, Islamic law is the parameter for invalidation of contrary legislation and is the basis of family law. Therefore, the problem of individual rights emerges in terms of their democratic implementation. Religion in Iraq is not an abstract element for building identity; it is not just a socio-political myth, but it is part of the institutional and legal systems. Religion, then, is not only an element of identification of the majority population, but is imposed in every aspect of social and institutional life. No opt-out possibilities are provided by the legal system, and this gap dramatically impinges on the protection of individual rights as well as on the accommodation of minority claims.

Iraq can be defined as an Islamic federal republic, where the three constituent groups, Shi'i Arabs, Sunni Arabs, and Kurds achieved a constitutional consolidation of their status in post-Saddam's Iraq by guaranteeing autonomy to Kurds and Sunnis on the one hand, and Shi'i supremacy at the national level on the other. Iraqi federalization shows a territorial bias that disregards the possibility of adopting different tools for accommodating the diversity that is not territorially definable; as a consequence, Iraqi smaller minorities "got lost" in constitutionalization. This territorial bias originates from the European tradition, but Iraq could have been, and maybe could still be, a laboratory of new ideal solutions by using different approaches and different tools. This holds particularly true, when one considers the convergence of European and non-European necessity of managing diversity, as the next chapter shows.

However, existing constitutional law recognizes a general model of non-territorial protection of minorities—*i.e.* the Iraqi version of the *millet* system—which could be adopted alongside with federalism and territorial autonomy provisions in order to address the claims of both structural and contingent minorities.

The combination of different approaches, territorial and non-, as well as of different tools, could differently manage inter-communal relationships according to the level of governance in terms of opportunity for negotiation and area of influence. Since no legal instrument is universally sustainable, each situation should be treated differently, but the only territorial option just denies the rights of non-territorial minorities. Moreover, no "tailor-made" solution can expectedly solve inter-communal

conflict; on the contrary, negotiated and agreed upon solutions can not only settle conflicts, but also meet requirements of sustainability in terms of time—*i.e.*, peace in the long run—and socio-economic conditions—*i.e.*, State institutional structure and social response.

CHAPTER 5

DE-CONSTRUCTING TERRITORIALITY IN MINORITY PROTECTION APPROACHES: TOWARD EUROPEAN MILLET?

Western models of minority protection are based on different forms of territorial self-government because the understanding of minority group is rooted in territorialism. Ethnic, national, and linguistic minorities are defined in terms of cultural homogeneity that differentiates a group from the rest of the people that lives in a country.[322] These minority groups usually reside in a certain territory, to which the State accords forms of self-government, by replicating the social organization of the State. However, those minorities that are not territorially definable remain unprotected. Moreover, States' commitment to protect minorities is linked to the historical presence of the minority group in a country. Consequently, two kinds of minorities remain unprotected: diffuse and new minorities.

Diffuse minorities are groups dispersed in the territory of a country, for which the territorial self-government model does not fit.[323] New minorities are the result of migrations, which originate from causes such as economic depression, political instability, and violence. Both diffuse and new minorities do not fit in the historical-national model that Europe has developed since the birth of the nation-State. The Westphalian State is the institutional result of the organizational efforts of one single

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[322] See, Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, (New York: UN, 1979).

people,[324] and the natural way to deal with minority aspirations is the establishment "of spatial foundations for the perpetuation of group distinctiveness."[325]

Post-modern studies in political theory show how globalization affects nation-States, by disproving territory as the principal factor of identity that links States and peoples. As a consequence, since States are increasingly multi-ethnic and multi-cultural, other poles of identity have progressively become relevant in defining communities and peoples' sense of belonging. This process of de-territorialization

> refers to the way in which people now feel they belong to various communities despite the fact they do not share a common territory with all the other members… This attention to the way communities are connected, despite being spread across considerable distances, and redefined through exchange across multiple borders, has challenged the classical ethno-graphic assumptions that cultures could be mapped into autonomous and bounded spaces.[326]

How may Europe, which traditionally conceives identity in nation-State terms, face the new challenge offered by post-modernity? Theoretically, the appropriate answer is "to treat the different differently," and, practically, it means to establish forms of non-territorial protection of diverse groups.

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[323] See, Roberto Toniatti, *Minorities and Protected Minorities: Constitutional Models Compared*, in: Michael Dunne and Tiziano Bonazzi (eds.), *Citizenship and Rights in Multicultural Societies*, (Keele, UK: Keele University Press, 1994), 199.

[324] M. Crawford Young, *Cultural Pluralism in the Third World*, in: Susan Olzak and Joan Nagel (eds.), *Competitive Ethnic Relation*, (Orlando, FL: Academic Press, 1986), 113-135.

[325] Marvin W. Mikesell and Alexander B. Murphy, "A Framework for Comparative Study of Minority-Group Aspirations," *Annals of the Association of American Geographers*, vol. 81, n. 4 (Dec., 1991), 581-604, at 583, citing David B. Knight, *The Dilemma of Nations in a Rigid State-Structured World*, in: Nurit Kliot and Stanley Waterman (eds.), *Pluralism and Political Geography: People, Territory and State*, (London: Crrom Helm, 1983), 114-137.

[326] Nikos Papastergiadis, *The Turbulence of Migration*, (Cambridge: Polity Press, 2000), 115-116.

Historically, at least two forms of non-territorial autonomy were introduced in the West: in the Austro-Hungarian Empire and in Estonia, both in the early 1900s. However, new forms of non-territorial autonomy are developing in different European legal systems. Thus, cultural autonomy is not totally unknown to the West, and it is possible to compare European examples and the *millet* system as the most organized form of non-territorial autonomy is possible.

After a brief description of the historical examples of cultural autonomy in Europe, this chapter analyzes the forms of non-territorial autonomy that have been recently adopted by European legal systems. I argue that it is possible to identify non-territorial protection in terms of personal autonomy, cultural communal autonomy, and political representation. I claim that the non-territorial solution has become the new paradigm of minority protection, and, consequently, "Europe is going Eastward" by organizing its own adaptation of the *millet* system.

1. Non-Territorial Autonomy in European History: Eastern Europe and the Hapsburg Empire

Since the Peace of Westphalia, ethnic and national homogeneity have emerged as the main characteristics of the nation-State model. Subsequently, the need to protect collective rights within the framework of human rights has constituted the central focus of the international community between the two World Wars.[327] The model of minority

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[327] Silvia Beatriz Blumkin, *Protection of Minorities: For Individuals or Groups?* in: Satish Chandra (ed.), *International Protection of Minorities*, (Delhi, India: Mittal, 1986),18-21.

protection entailed by both international and bilateral agreements was territorial, whereby a State guaranteed the protection of its nationals, who resided in another State.[328]

Territorial autonomy is a direct consequence of the dominant political vision for which ethno-national homogeneity was a feature of social organization, and ethno-national diversity was confined into specific areas of a country as a result of border change and territorial sovereignty alteration.

However, Europe experienced also a different approach in protecting minorities that did not fit into the ethno-national model. Three historical cases, which are the Lithuanian-Polish Commonwealth, Estonia, and the Austro-Hungarian Empire, show Europe's attempt to manage diversity in terms of collective rather than national identity. The necessity to protect groups in non-territorial forms originated from the contact with different forms of social organization, such as the Jewish minority in Eastern Europe, or the Ottoman heritage in Central Europe.

During the 15th-17th centuries, the Lithuanian-Polish Commonwealth conceded collective self-government to the Jewish community, which had fled from Germanic kingdoms. Collective autonomy conceded to Jews included both cultural and personal aspects. Therefore, Lithuanian-Polish authorities recognized the Jewish educational system based on religious studies with Yiddish and Hebrew as languages of instruction,

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[328] Emma Lantschner and Roberta Medda, *Bilateral Approach to the Protection of Kin-Minorities*, in: European Commission for Democracy Through Law (ed.), *The Protection of National Minorities by Their Kin-State*, vol. 4, (Strasbourg: Council of Europe, 2002), 107-109.

and the Jewish judicial system in matters such as personal status and internal affairs of the community.[329] Following the dissolution of the Commonwealth, Jews lost their autonomy.

In 1925, Estonia approved the Law on Cultural Autonomy, whereby communities of at least three thousand members were entitled to constitute Self-Government Councils with fiscal, communal, and legislative autonomies. With respect to fiscal autonomy, the Councils could levy taxes from their members in order to implement their policies. With respect to communal autonomy, each community had property and real estate rights, whereby they could own and purchase goods for benefit of the community. With respect to cultural autonomy, Councils could run schools, educational institutions, and communal activities, under the control of the central government, which supervised possible anti-system activities.[330]

During the late 19th century, a more revolutionary idea was introduced in the Hapsburg Empire, which already conceded large autonomy to the Hungarian regions in both religious and cultural matters. The proposal for introducing a cultural autonomy system was advanced by Karl Renner and Otto Bauer, who believed in cultural democratization in an Austro-Marxist perspective. Specifically, Renner proposed a combined system of territorialism and communalism, whereby both the State and the

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[329] Shmuel Arthur Cygielman, *Jewish Autnomy in Poland and Lithuania until 1648 (5408)*, (Jerusalem: Shlomo Nathan, 1997).

[330] Asbjørn Eide, Vibeke Greni, and Maria Lundberg, *Autonomy: Concept, Content, History and Role in the World Order*, in: Markkus Suksi (ed.), *Autonomy: Applications and Implications*, (The Hague: Kluwer, 1998), 253-255.

ethno-national communities supplied citizens' needs in different areas of competence. With respect to the State, regionalization was considered as the most appropriate means to deal with citizens' needs in terms of economy, justice, and representation. With respect to ethno-national communities, communalism was considered the most effective approach to deal with cultural and personal issues.[331]

Renner's main argument focused on the status of minority. He claimed that territorial arrangements inevitably created new minorities, such as the members of the dominant group who live in an autonomous region, or left minorities unprotected, such as minority groups within autonomous regions. Hence, according to him, the appropriate solution to the national question is personal autonomy, whereby autonomous rule does not apply to an area but to a group of people, irrespectively of their residence within the country.[332]

Moreover, Renner argued that political representation on ethnic basis was necessary at the local level, in order to pursue the inclusion of all groups into the decision-making process. Whereas, at the federal level, he despised ethno-national representation arrangements, in that the federal government did not require any ethnic

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[331] Karl Renner, *State and Nation*, in: Ephraim Nimni (ed.), *National Cultural Autonomy and Its Contemporary Critics*, (London: Routledge, 2005). The original version, translated by Jospeh O'Donnell, was written under the penname Synopticus, *Staat und Nation: Zur österreichisten Nationalitätfrage—Staatrechtliche Untersuchung über die möglichen Principen einer Lösung und die juristischen Vorasusetzungen eines Nationalitätsgesetzes*, (Wien: Eigenverlag, 1899).

[332] Jonh McGarry and Margaret Moore, *Karl Renner, Power-Sharing and Non-Territorial Autonomy*, in: Ephraim Nimni (ed.), *National Cultural Autonomy and Its Contemporary Critics*, 81.

contribution since it dealt with matters such as the army, finances, economy, and health.[333]

Besides the historical example of the Lithuanian-Polish Commonwealth, the cases of Estonia and Austro-Hungary show that non-territorial autonomy was developed in terms of personal autonomy, communal autonomy, and political representation. These three features characterize the *millet* system as well and, therefore, it is not inappropriate to advance the hypothesis of a European *millet*.

Cultural autonomy is not completely unknown to Europe, but, until recently, it has not been developed. However, the analysis of new approaches toward minority issues shows that non-territorial arrangements have been often introduced in European legal systems to respond to quest for protection, to solve ethno-national conflicts, and to protect new minorities. As it will be shown in the next section, different legal systems within Europe have adopted forms of non-territorial protection that guarantee personal autonomy, cultural autonomy, and political representation.

2. Dispersed and New Communities: Personal and Communal Cultural Autonomy

The non-territorial devices for protecting minorities change according to the aspect on which the protection focuses. Indeed, States recognize minorities on the basis of a political choice, and, consequently, they accord a specific form of protection. For

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[333] Asbjørn Eide, Vibeke Greni, and Maria Lundberg, *Autonomy: Concept, Content, History and Role in the World Order*, 266.

instance, States may focus on the linguistic aspect and, accordingly, protect the preservation and the use of minority languages. Such is the case of Italy, where the constitution (art. 6) recognizes linguistic minorities and commits to their protection. Similarly, States may focus on the religious aspect and, therefore, protect religious group, such as art. 8 of the Italian constitution.

However, there exists no comprehensive model of protection. Each State recognizes a minority group to which it accords a form of protection on the basis of a specific aspect of identity, such as language, religion, or ethnicity. As a consequence, a certain group may be protected under one aspect and at the same time it may be denied protection under others. For instance, the Jewish community is considered in Italy as a religious minority, and it is accorded specific protection through an Agreement with the State. This approach stresses the religious aspect of the Jewish community, while it denies the cultural and linguistic dimensions of Jewish identity.

Despite this segmentation in the recognition practice of States, three approaches can be identified. The first pertains to religious minorities, whereby States recognize religion as a value to be protected. The second pertains to cultural-linguistic minorities, whereby States focus on language and, consequently, on cultural heritage of minority groups. Finally, some legal systems provide minority groups for mechanisms of representation, in order to enable them to pursue their interests within the institutional framework of the State.

This section analyzes in comparative perspective some examples of non-territorial devices that have been adopted by European legal systems for protecting minorities.

2.1 Religious Communities and the Personal Status: Concordats, Agreements, and Religious Courts

The relationship between State and religion in Europe is traditionally confrontational. While the concept of secularism has developed in the sense of "diminishing of the role of the clerical elite in the life of state and society,"[334] religious communities has increasingly advanced claim for recognition and protection of their rights, because "at a time when the 'nation-state' is in crisis religion is growing in strength as an integrative factor."[335] The result of the promotional approach is a compromise between the accommodation of religious needs and public order necessities, mainly understood as the respect for fundamental rights. The accommodation of religious communities may vary from a basic degree of recognition of religious freedom to the recognition of autonomy.

2.1.1 Concordats and Agreements

By and large, European legal systems defend the secular nature of the State and accord different forms of protection to religious communities in order to avoid discrimination

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[334] Aleksandr Morozov, "Has the Postsecular Age Begun?" *Religion, State and Society*, vol. 36, n.1 (2008), 39-44, at 43.

[335] *Ibid.*, 40

against religious minority groups and the dominant religious community. Three legal mechanisms can be identified: the Concordat, the Agreement, and the Registration.

Historically, the Concordat is an agreement or a treaty signed by the Catholic Church and a State. The tradition of the Concordats started in the 12th century and has continued until recent times: the Concordat with the Italian Kingdom of 1929, part of the Lateran Treaty, later modified in 1984, the Concordat with Portugal of 2004, the Concordats with German Länder in the late 1940s and early 1950s, and the Concordat with Poland of 1993. The Concordats contain provisions for regulating the relationship between Catholic-religious authorities and civil-State authorities, as well as the financial aspect of Church's properties.

With respect to the relationships between Church and State, the Concordats define the status of Catholicism in the signing State, while it may contain special provisions for the civil recognition of religious marriages. With respect to the financial aspect, the Concordats recognize the right of the Church to own properties and define the fiscal treatment, while they may recognize preferential treatment for citizens' donations to the Church. The peculiarity of the Concordat lies in the partnership between the Church and a State. In other words, it is not the religious community of one State that bargains with governmental authorities, but the Church in its legal capacity as international subject and in its historical-spiritual task to represent the worldwide Catholic community.

Other religious groups, such as Evangelicals, Jews, Muslims, and Buddhists, which are not represented by international bodies, have to bargain directly with governmental authorities in order to achieve recognition. For instance, Germany signed an Agreement with the Jewish Communities in 2003, and Italy signed an Agreement with the Lutheran Church in 1995 and with the Buddhist Union in 2000. These agreements are statutorily enacted, and contain both aspects of regulation that are contained in the Concordats. They regulate the status of religious communities in the State and the fiscal treatment of communal properties. Moreover, these agreements may accord special rights in virtue of community membership. For example, Sikhs in Britain are dispensed with the obligation to wear a crash-helmet in that they are subject to the religious obligation to wear a turban.[336] Similarly, Italian Buddhists are dispensed with the obligation of serving in the army in virtue of their religious-philosophical belief.[337] The degree of autonomy may vary according to the agreement and largely depends on negotiations between the communities and the State.

The degree of autonomy and, consequently, the internal freedom of religious communities depend on States' will to interfere with their internal affairs. As for the recognition processes of other minorities, a State is more likely to concede autonomy when it does not perceive potential anti-systemic threats from the community. The

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[336] See, section 16, par. 2 of the 1988 Road Traffic Act, which dispenses Sikhs who wear a turban with the obligation to wear a helmet.

[337] See art. 3, par. 1 of the Agreement between the State of Italy and the Union of the Italian Buddhist Communities, which dispenses Italian Buddhists from the obligation to serve in the army. The article specifies that, even if such an obligation does not exist anymore, this dispense will be valid even in case

lowest degree of autonomy is guaranteed by the registration procedure, which is adopted by many Central- and Eastern-European countries, such as Latvia,[338] Slovenia,[339] Poland, Lithuania[340] and Hungary.[341] These legal systems recognize religious communities on the basis of their registration to governmental lists. Certain countries, such as Hungary, impose numerical requirements, whereby religious communities are entitled to start the registration procedure if they include a minimum of one hundred members. Moreover, the registration procedures may discriminate against non-traditional cults, by according privileges to those religious communities that are part of the historical heritage of the country. As Angeletti emphasizes, this mechanism is likely to discriminate against both non-dominant and non-traditional religious communities.[342] Nonetheless, it has to be stressed that the ultimate decision about according protection and defining its form is a political decision, which depends on negotiation processes between the parties and perception of mutual interests and threats.

Despite the differences of these approaches, some similarities can be identified. The recognition of religious groups as autonomous communities implies two aspects: a certain degree of self-government and personal autonomy. With respect to self-

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of future revival of the service in the army. Par. 2 assures that even the Buddhists who served in the army may enjoy the right of exemption in cases of recall to arms.

[338] See the 1995 Law on Religious Organizations.

[339] See the 1976 Law in the Legal Status of Religious Communities.

[340] See the 1995 Law on Religious Communities and Associations.

[341] See the 1990 Law n. 4 on Freedom of Consciousness and Religion and on the Churches.

[342] Silvia Angeletti, *Fattore Religioso e Minoranze Etniche Naizonali—L'esperienza dei Paesi dell'Europa Centro Orientale di Nuovo Ingresso nell'Unione Europea*, in: Giuseppe Leziroli (ed.), *La Chiesa e l'Europa*, (Cosenza: Pellegrini, 2007), 172-179.

government, States' recognition of autonomy implies internal management and property rights. In other words, irrespective of the form of recognition, religious communities enjoy a certain degree of freedom in the management of institutional and organizational aspects. Protected communities also enjoy property rights and a favored fiscal treatment. Moreover, those provisions that recognize civil effects of religious rituals of marriage may be considered as limited personal autonomy, in that the State recognizes the religious legal system of the community that it protects, although with only reference to marriage law.

The features of autonomy originated from these agreements are not different from the ones of the *millet*, in terms of communal traditional autonomy and personal autonomy. Indeed, communal traditional autonomy in *millet* arrangements confers property rights to communities and a certain degree of internal self-government. In addition, personal autonomy guarantees the application of religious legal systems in family law matters. To this respect, two other examples have to be mentioned: the Greek and the British legal systems.

2.1.2 Personal autonomy: the cases of Greece and Great Britain

Greece recognizes both personal and traditional communal autonomy to the historical Muslim minority in Thrace. The special arrangements that regulate the status of Thracian Muslims are contained in the 1914 Act n. 145 and in the 1920 Act n. 2345, both included in the agreements with Turkey that followed Greek independence.

Greece recognizes the same autonomy that was guaranteed to ethno-religious groups under Ottoman rule, and it includes both exclusive jurisdiction of Islamic courts in family law matters and internal self-government. However, Greek authorities imposed some restrictions including Greek nationality of religious leaders (muftis), governmental control on muftis' appointment, and the use of the Greek language in official documents.

Nevertheless, from a substantial legal perspective, the Greek *millet* causes "legal segregation" of Thracian Muslims and, moreover, it denies those "remedies of control that are guaranteed by both Greek law and the European Convention on Human Rights."[343] In theoretical terms,

> what should be in consideration is the social balance between legal imposition of norms, which are alien to minority society and avoidance of creating social ghettos. In effect, what determines the point of balance between the two opposite positions is the grade of real freedom for the minority members; first to choose the legal modalities of their national and religious identity; second to move socially within the broader Greek society.[344]

This system is the vestige of the Ottoman *millet* system, which governed the accommodation of minority groups in the Ottoman Empire. Besides the validity of the system in order to protect the old Islamic minority in Thrace, it has to be stressed that perplexities arise with respect to its compatibility with both domestic and international human rights standards. Indeed, the Greek system denies Thracian Muslims the

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[343] Konstantinon Tsistselikis, *Personal Status of Greece's Muslims: A Legal Anachronism or an Example of Applied Multiculturalism?* in: Roberta Aluffi and Giovanna Zincone (eds.), *The Legal Treatment of Islamic Minorities in Europe*, (Leuvent: Peeters, 2004), 117.

possibility to opt for civil litigation in family law matters as well as the possibility of civil scrutiny or appeal of Islamic courts' decisions.

Similarly, in October 2008, the British legal system has recognized Islamic courts as courts of arbitration in family law matters. The decision of Lord Chief Justice Phillips followed the proposal by Dr. Rowan Williams, archbishop of Canterbury, who deemed the recognition of Islamic law by the British legal system unavoidable.[345] As arbitration courts regulated by the 1996 Arbitration Act, Islamic courts can rule over family law matters by applying Islamic law. However, the arbitration act has to be sanctioned by a civil court, which after a legal scrutiny can uphold or withhold the decision.

The system of Islamic arbitration seems to be a balance between the demand for institutionalizing autonomy and the parallel need of the system to guarantee the respect for fundamental rights. However, perplexities of the liberal world still focus on the inadequate protection of individual rights based on the mere scrutiny of civil courts as well as on the danger of legal collapse, by the enlargement of sources of law consequent to the recognition of Islamic courts. As MacEoin emphasizes, this recognition creates

> a dichotomous legal system that holds Muslims and non-Muslims to different standards... It is a challenge to what we believe to be the rights and freedoms of the individual, to our concept of a legal system based on what parliament enacts, and to the right of all of us to live in a society as free as possible from ethnic-religious division or communal claims to

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[344] *Ibid.*, 131.

[345] Steve Doughty, "Britain has 85 Sharia Courts: The astonishing Spread of Islamic Justice behind Closed Doors," *Daily Mail*, 29th June 2009, available at http://www.dailymail.co.uk/news/article-1196165/Britain-85-sharia-courts-The-astonishing-spread-Islamic-justice-closed-doors.html

superiority and a special status that puts them in some respects above the law to which we are all bound.[346]

This opinion is based on the argument of respect for human rights standards, which represents the main goal of democratic judicial systems. Sbai describes British Islamic courts as "an anomaly for the West, because they deny the recognition of the most basic rights: they disregard both the principle of inviolability of human rights and the values of liberty and equality, which are the basis of European democracies."[347] This opinion is convincing with respect to those legal systems that "segregate" citizens in legal sub-systems by denying adequate protection of fundamental rights standards, such as the case of Greece with reference to Thracian Muslims. Nevertheless, when legal systems offer a plurality of opportunities to their citizens, they guarantee individual liberty by leaving the choice of the jurisdiction to their citizens, who are free to opt for the litigation system of the State or other litigation systems that may infringe basic rights.

2.1.2 Personal Autonomy and opt-out opportunities

A further distinction may be identified between those legal systems that offer a mere "starting option" and those that offer a plurality of opt-out possibilities. In the first case, States provide citizens for the opportunity to choose between civil or religious jurisdictions, but once they made their choice no other remedy is envisaged by the system. These systems do not adequately protect fundamental rights, in that the decision

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[346] Dannis MacEoin, *Sharia Law or 'One Law for All'?* (London: Civitas, Institute for the Study of Civil Society, 2009), 73.

[347] Souad Sbai, *L'Inganno—Vittime del Multiculturalismo*, (Firenze: Cantagalli, 2010) 37-8.

to opt for religious jurisdiction may be based on social pressure, inadequate considerations, limited knowledge of the consequences.

On the contrary, those systems that guarantee a plurality of opt-out remedies establish constant procedures for protecting fundamental rights in the judicial process. The first decision to opt for one of the available jurisdictions may have been reconsidered, or may have proved to be unsatisfactory; therefore, the system has to guarantee further opt-out remedies, such as legal supervision, as in the British system, or appeal procedures, as in the Israeli system.[348] In this way, citizens are free to choose the law according to which they aspire to be judged in conformity with their will and belief. At the same time, the possibility for the general legal system to prevail over minor legal systems is guaranteed.

2.1.3 Foreign legal decisions and the validation of religious law

Religious law is further recognized by European legal systems through the recognition of foreign decisions; specifically, it is the case of decisions on family law matters taken in Israel and in Muslim countries where Islamic law regulates personal status.

The European judge cannot simply disregard the foreign decision on the ground that it is based on religious law, since in certain legal systems religious law is the only applicable to family law matters. This is the reasoning of the Italian jurisprudence in cases of recognition of Israeli divorce decisions, which fall under the jurisdiction of the

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[348] See chapter 3.

religious judges.[349] On the other hand, automatic recognition would endanger the respect for fundamental rights of the recognizing legal system and the European public order.

The case of Germany is emblematic, since the judges have increasingly adopted a case-to-case approach, whereby they are open to recognition provided that the original jurisdiction is not in contradiction with the fundamental principle of the German and the European legal system. For instance, in some cases of divorce, the judge has simply recognized the act of repudiation, provided that the proceeding was compatible with German law, including adequate information of the wife and separation of the spouses for more than one year.[350] However, other courts simply rejected instances for recognition on the ground that Islamic law does not guarantee equality between the sexes in legal proceedings, in particular when women are denied the rights connected to the due process of law.[351]

The courts adopt a more restrictive approach to recognition when different interests are at stake, such as the interest of the child in decisions over custody and guardianship. In a condition of legal uncertainty, the German judges tend to recognize

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[349] Specifically, the Italian judges were repeatedly requested to recognize divorce decision given by rabbinical judges. The general approach in international private law on the matters of divorce is to accept the personal status of the foreigner as a fact that originates from the foreign decision. Hence, the question is not whether the foreign decision is compatible with the national public order or with the European public order. However, those decisions that deal with ancillary questions of divorce, such as child custody, are subject to supervision and, therefore, recognition may be limited to those parts of the decision that are considered compatible with the fundamental principles of the recognizing State. See, Carlo Rimini, "Il ripudio innanzi ad un Tribunale Rabbinico Italiano e la Sua Rilevanza come Divorzio Ottenuto all'Estero," *Rivista di Diritto Internazionale Privato e Processuale*, vol. 43, n. 1 (2007), 55-66.

[350] See OLG Köln, FamRZ (1996)1147 and OLG Düsseldorf, FamRZ (1998) 1113.

foreign decision in order to preserve the rights acquired under the foreign legal system as long as they are compatible with the fundamental principles of the European and German legal systems.[352]

In order to assess the validity of a system in terms of minority protection and human rights protection, personal autonomy has to be considered in relation to other aspects of self-government, such as cultural autonomy and political representation.

3. The European Communal Model

European legal systems have experienced forms of communal autonomy in consociational democracies such as the Netherlands and Belgium. In these legal systems, forms of territorialism were combined with forms of communal organization in specific areas of management. Moreover, limited self-government in educational policies has been introduced in many States in virtue of agreements between the State and religious or ethnic minorities as, for instance, in Italy, Germany, and France. Although these forms of communal self-government underwent processes of revision, consolidation, or obsolescence, the renewed interest in communal cultural autonomy has recently increased with respect to the protection of Muslim minorities residing in Europe and their demands for recognition and protection.

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[351] See AG Frankfurt am Main, NJW (1989) 1434.

[352] For a detailed analysis of the application of Islamic law in German courts see, Mathias Rohe, *The Application of Islamic Family Law in German Courts and Its Compatibility with German Public Policy*, in: Jürgen Basedow and Nadjma Yassari (eds.), *Iranian Family and Succession Laws and Their Application in German Courts*, (Tübingen: Mohr Siebeck, 2004), 19-34.

The two European approaches, traditional communal self-government and minority groups' autonomy, find their basic similarity in the focus on linguistic rights and on the enforcement of minority rights in educational policies.

3.1 European communal self-government: the Netherlands and Belgium

With respect to traditional European self-government, the literature refers to the Dutch and, partially, to the Belgian cases as "pillarized systems." The system of "pillarization", in Dutch "*verzuiling*," refers to the institutionalization of pluralism in every stage of social life, whereby educational, health, economical, media institutions are divided according to the group of belonging.[353] For instance, in the Netherlands, until the late 1960s, there existed three groups: Catholics, Protestants, and Seculars. Social, media, educational, health, and public economical lives were divided according to the group one belonged to.

The institutionalization of social pluralism was considered functional to the post-war reconstruction period, when the need of diversification and the necessity to remark collective identity did not prevent elites from conducting a prosperous and compromising political life. Although society was divided along religious lines, elites were oriented to reach compromise, but, often, confrontational positions based on mutual exclusive perceptions paralyzed the negotiation process.[354] This is the reason

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[353] See, Francesco Palermo and Jens Woelk, *Diritto Costituzionale dei Gruppi e delle Minoranze*, (Paodva: CEDAM, 2008), 53. See also, chapter 1.

[354] Willem Frijhoff and Marijke Spies, *Dutch Culture in a European Perspective*, (London: Palgrave, 2004), 224-30.

why the pillarization system was considered strong and, at the same time, weak, in that it offered the opportunity to pursue politics of identity, but it simultaneously jeopardized the unity and stability of the political system by creating separate social blocs under elites' control.[355] Growing secularism has eventually led to the decline of this system due to the decreasing importance of religious leaders and identity, until the total dismantlement caused by the constitutional revision of 1983 and the consequent exclusion of religion from the public sphere.

The *verzuiling* system is still applied in Belgium, where the constitution establishes a mixed system of government, which includes both territorial and communal elements. With reference to the communal elements, art. 115 establishes three linguistic communities: the French, the Flemish, and the German; each community has councils (arts. 115 and 116) and governments (art. 121). The Councils have competence on cultural and educational issues as well as on personal issues (arts. 127 and 131), and their legislative power has limited territorial and institutional scope. In other words council legislation has force within the region inhabited by people belonging to that linguistic community or with respect to the institution belonging to that community (arts. 128, par. 2 and 131, par. 2, respectively). Although the constitution calls for inter-communal cooperation, the sustainability of this system has in several occasions been questioned.[356] Indeed, the institutionalization of linguistic

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[355] J. A. A. van Doorn, "Verzuiling een eigentijds systeem van sociale controle," *Sociologische Gids*, vol. 3, (1956), 41-49.

[356] Robert Mnookin and Alain Verbeke, "Persistent Nonviolent Conflict with no Reconciliation: the Flemish and Walloons in Belgium," *Law and Contemporary Problems*, vol. 72 (2009), 151-186.

diversity has polarized several conflicting aspects of Belgian economy, society, and politics into what appears a mere linguistic conflict among communities.[357]

The pillarization model is an example of institutionalized diversity, whereby the State recognizes diversity as a structural element of its society. On the contrary, those States that recognize diversity as a marginal societal characteristic find other solutions for the accommodation of collective identity claims. Forms of cultural autonomy exist in Europe through minority protection models, which can be established by the constitution (as in Italy for linguistic and religious minorities, or in Germany for religious minorities) or by statutory law (as in Lithuania, Estonia, and Hungary).

3.2 Autonomy and the right to culture

Cultural autonomy models focus on two issues: linguistic rights and educational policies. With respect to language, promotional systems, which recognize and protect diversity, allow the use of minority language in local institutions, in the media, and in toponomy. By this doing, the State encourages the preservation and the social development of minority groups through the revival of minority languages, which serve as means for spreading minority culture. With respect to educational policies, promotional systems allow separate schools where the working-language is the minority language and where special curricula are taught for preserving minority culture. For economic, financial, and numeric reasons, a State may prefer not to establish separate

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[357] Peter Hans Nelde, *Languages in Contact and Conflict: the Belgian Experience and the European Union*, in: Sue Wright (ed.), *Languages in Contact and Conflict: Contrasting Experiences in the Netherlands and Belgium*, (Avon, UK: Multilingualism Matters, 1995), 65-82.

schools but to allow separate educational curricula for minority members within the State's school system.

The specific arrangements on State's control over educational curricula, the degree of autonomy, and State's financial support to minority policies are regulated by the laws that implement recognition. For instance, the Concordats, the agreements, and their statutory enactment establish parameters and procedures for the actualization of constitutional programmatic provisions. In the case of diffuse minorities, these provisions apply not to a territory but to a community. Therefore, in the case of the Jewish minority in Italy, the 1987 Agreement between the State and the Union of the Jewish Communities guarantees Italian Jews the right to abstain from receiving Catholic religious education in public schools (art. 11) and the right to establish Jewish schools and Jewish educational institutes (art. 12). Moreover, art. 13 recognizes the rabbinical degree, given by rabbinical institutions that are managed by the Union of the Jewish Communities, as license to perform religious duties as rabbi. These provisions do not apply to a specific territorial area of the country, but to the Jewish community as a whole.

This system of communal autonomy has developed for protecting diffuse minorities. Some States, such as Germany and Hungary, impose a historical requirement, whereby minorities are entitled to autonomy only if they are historically resident in the State. For instance, Germany recognizes those communities that have been resident on German soil for at least 30 years. By this restriction, which was

imposed by the Ministry of Interior in 1954, one can identify those communities that are entitled to autonomy under the regime of public law organizations (*Körperschaft des öffentlichen Rechts*).[358] In Hungary, the 1993 Act on National and Ethnic Minorities (n. LXXVII) requires for a minority group a 100 year-long residency on Hungarian soil to be entitled to protection. Given that the restrictive requirements to achieve special protection are the result of a political decision by the State, nevertheless, new minorities have succeeded in acquiring recognition.

3.2.1 Designing a social space for Islam in Europe

Specifically, Islamic minorities have acquired in several European States a considerable degree of autonomy, and are accorded similar rights to which diffuse minority are entitled.

   In the Netherlands, for instance, the Muslim community has settled in the pillarized society as a further group alongside Protestants, Catholics, and Seculars. Although the rise of Islam as a group claiming recognition has emerged during the same years in which the pillarization system was declining, the Muslim community "pulled in opposite direction."[359] Indeed, the pillarization practices were embedded in society, and they continued through local authorities' arrangements and institutional behavior even

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[358] See, Hermann Weber, "Änderungsberdarf im deutschen Religionsrecht?" *Neue Juristische Wochenschrift*, vol. 63, n. 34 (2010), 2475-2480.

[359] Jan Rath, Rinus Penninx, Kees Groenendijk, and Astrid Meyer, *Making Space for Islam in the Netehrlands*, in: Roberta Aluffi and Giovanna Zincone (eds.), *The Legal Treatment of Islamic Minorities in Europe*, (Leuvent: Peeters, 2004), 166.

after the constitutional revision of 1983.[360] Similarly, in Belgium, cultural rights of the Muslim community are guaranteed by the institutionalized procedures and practices of the linguistic communities. In other States, such as Germany and Austria, Muslim communities enjoy the same rights of other religious minorities that are recognized and protected by the State.

On the contrary, in States such as Italy, where an official agreement has not yet been reached, Muslim communities act within the legal space that derives from freedom of association, and they enjoy the rights recognized by the anti-discrimination regime.

The peculiar situation of Islam in Europe is connected to the third aspect of minority protection, which is political representation. Several legal systems in Europe recognize representation rights to minority groups, through which minority leaders can more effectively pursue communal interests. As the next section shows, the Islamic minority in Europe have progressively changed the system of minority protection even in those States that do not directly recognize Muslim minorities as well as in those systems that do not envisage forms of political representation.

3.3. Political Representation: Minority Councils and the Institutionalized Dialogue with Islamic Communities

The above-mentioned models of cultural autonomy in European legal systems are based on institutionalized practices of representative participation. The first model, which is cultural autonomy in pillarized systems, is based on stable institutions of representation,

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[360] *Ibid.*, 170-172.

such as in Belgium. Here, cultural communities enjoy autonomy in specific areas of competence and have institutions, which are constitutionally recognized and statutorily regulated. The second model, on the contrary, which is cultural autonomy in promotional systems, is based on representative means during the negotiation processes.

While the general approach of these States is to deny political representation, some remarkable exceptions have to be considered. Eastern European States, such as Estonia and Hungary, recognized stable institutions for minority representation, the so-called minority councils; whereas, Western European States recognized forms of institutionalized dialogue with the Islamic communities, although they do not recognize Islam as a structural minority.

3.3.1 Minority Councils: Estonia and Hungary

Minority councils have competence on a variety of issues and have different powers and degrees of autonomy according to the legal framework.

Estonia, for instance, regulates the functioning of Minority Councils by the 1993 Law on Cultural Autonomy for National Minorities.[361] This law guarantees the right to form ethnic institutions for supporting educational, religious, and cultural activities (arts. 3, 4, and 5). Moreover, this law provides minorities for representative bodies, the national minority council and the national minority boards (arts. 11 and 12). These national institutions of representation are elected by the members of the minority group (art. 13) and have the power to establish representative bodies at the local level, in

counties and municipalities (art. 11, par. 2). These national representative bodies superintend the functioning of all cultural institutions and exercise their powers within the scope defined by the law (art. 5)—which deals mainly with cultural issues, including educational institutions and policies, inter-ethnic cooperation, use of minority language in media, and support of minority language in cultural events (art. 4). The State monitors cultural organization activities through the procedure of registration (art. 7), in virtue of which a minority group acquires legal recognition, and through the supervision of elections within the bodies that represent minority groups (art. 13).

This system of representation constitutes a valid means of self-government; nonetheless, it has a remarkable weakness in the scope of application of cultural autonomy. Estonia recognizes minorities and protects them through self-government arrangements, but the degree of autonomy is limited to cultural issues and is focused on internal aspects. In other words, the State recognizes minorities' self-government, but refrains from actively participating in monitoring its actual implementation. On the contrary, other systems, such as Hungary, provide minorities for a wide range of protection procedures, in order to guarantee the effective exercise of autonomy rights at all levels of governance.

The Hungarian legal system establishes a three-fold system of protection. First, the constitution establishes a special body at the Parliament (art. 32, letter B), the Ombudsman for the Rights of National and Ethnic Minorities, which deals with

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[361] The text of the law, in English translation, is available at http://www.einst.ee/factsheets/cult_auton/

complaints regarding violation of minority rights, serves as legal advisor, and reports to a parliamentary *ad hoc* committee.[362] Secondly, the 1993 Act on the Rights on National and Ethnic Minorities n. LXXVII states that minorities can establish councils at both local and national levels. Finally, the same law absorbs cultural autonomy in territorial autonomy in areas in which the minority group represents the majority of the resident population. Besides this last case of territorial autonomy, the specific interest of this chapter is the functioning of cultural autonomy, which guarantees both local and national representation.

Local minority councils work parallel to local institutions, and serve as consultative bodies in areas such educational and cultural policies, media, and use of minority language. Moreover, they can establish specific committees that pursue independent policies in their areas of interest.[363] In addition, minorities have a national representative body, the General Assembly on National and Ethnic Minorities, which is composed of 53 members elected by local Minority Councils. The General Assembly serves as an advisory and monitoring body for all State's institutions dealing with minority issues; furthermore, it has a special veto power on statutory legislation and governmental decrees that affect minorities' interests, which include preservation of

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[362] See Niamh Walsh, "Minority Self-Government in Hungary: Legislation and Practice," *Journal of Ethnopolitics and Minority Issues in Europe*, (Summer 2000), 26-27; on-line journal available at http://ecmi.de/jemie/

[363] See National Democratic Institute Assessment Report, "The Hungarian Minority Self-Government System as a means of Increasing Romani Political Participation," September/October 2006, 15-7, available at http://www.ndi.org/files/2163_hu_roma_self_assessment_100106.pdf

cultural heritage, museums, use of language, educational issues, implementation of cultural policies, and budgetary funds for local minority councils.[364]

This special system combines monitoring bodies, the Ombudsman, with actual representative bodies, local Minority Councils and the General Assembly. Moreover, it provides for elastic as well as rigid procedures, according to the level of governance. At the local level, Minority Councils serve mainly as consultative bodies and have powers to implement policies within specific areas of interest. This elastic system empowers minorities with enough bargaining power to cooperate with local institutions and, simultaneously, impedes the paralysis of local administration that may stem from the exercise of too incisive power.

At the national level, on the contrary, minorities enjoy veto power in areas of their interest. This rigid procedure enables minorities to affect national policies in those areas that relate to communal interests. The opportunity to dismiss laws that may violate minorities' rights empowers minority groups with actual bargaining power, in that State institutions are more likely to cooperate by pursuing agreement with the General Assembly rather than permitting them to vote against proposed legislation. Moreover, in cases of lack of cooperation, minorities can defend their rights through veto powers and not through mere claims on alternative forms of accommodation. Finally, such a system limits this incisive power to those areas of interest to minorities such as culture, education, and language use, while other sectors of institutional activity are untouched

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[364] *Ibid.*, 19-20.

by possible inter-communal grievances and State-minority conflicts. Hence, by restricting consistent powers of minorities to specific areas of interest, States can pursue ethnic-blind politics and act through ethnic-blind institutions, while actual accommodation of ethnic interest is guaranteed by special procedures established for certain areas and by parallel institutions.

The Hungarian system is applicable to both consistent and small minorities, and to both territorially-concentrated and dispersed minority groups. Moreover, the aim of this model is to balance the right to diversity and national stability, by relegating ethnic conflict at the local level and by empowering even smaller minority groups with means of protection that are not necessarily linked to the territory. Indeed,

> even though some of the national minorities use the system of minority local governments in a way that approaches a system of territorial autonomy, these local-level territorial autonomies do not in fact come to take the form of a parallel societal culture at the national level. Smaller groups, not having the opportunity to use the territorialised version of minority settlement-level self-governments, can still establish a regular minority self-government which will have a say in cultural issues, will have an amount of money for organising cultural events but will not take over any of the administrative functions of the settlement-level local government.[365]

This flexible system of accommodation applies to recognized minorities, whereby groups are entitled to protection if they meet the requirements established by the law, such as numeric consistence and historical presence in the country.

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[365] Andrea Krizsa, "The Hungarian Minority protection System: A flexible Approach to the Adjudication of Ethnic Claims" *Journal of Ethnic and Migration Studies*, vol. 26, n. 2 (2000), 247-62, at 260.

3.3.2 Muslim Councils toward Euro-Islam?

Another model of protection is emerging in Western Europe, which applies mainly to the Islamic communities and guarantees political representation of a non-recognized minority. The "Conseil Français du Culte Musulman" in France and the "Consulta Islamica" in Italy are examples of institutionalized dialogue with a non-recognized minority, while the "Comisión Islámica de España" in Spain is a representative body that was recognized by statutory law.

Both in France and in Italy, the Islamic representative bodies conduct institutional dialogue with the governments and other institutions in order to spread the knowledge about Islam and favor integration. Moreover, they serve as consultative bodies on issues regarding Islamic communities, such as religious rituals, religious institutions, and the building of mosques. These representative institutions include different voices of Islam in terms of belief and nationality, and are active in different levels of governance; nevertheless, the difficulty to reach an agreement with the Islamic community is due to the lack of a unitary referee, in that these bodies do not represent the totality of the Islamic groups. These representative institutions defend the interests of Islamic minorities providing, within the weak framework of negotiation, for religious education, education of religious leaders, religiously supervised food, and places of worship.

The institutional dialogue started both in France and in Italy in the aftermath of 9/11 and the birth of an "Islamic question," whereby problems of integration caused the

rise of islamophobic sentiments in Europe. The institutionalization of State-minority dialogue has so far served to pursue communal interests in a social and legal void in terms of minority protection and communal recognition. In France, where, traditionally, minority rights are not recognized, the Islamic Council served as an institution for claiming the accommodation of collective rights; whereas, in Italy, where the State has not yet concluded an agreement with Islamic organizations, the Islamic Consultative Body has so far served as the referee of the variety of Islamic organizations and associations active in the country. Most likely, this model of institutionalized dialogue will end in the recognition of the group as a minority.

The Spanish case is an example. The Islamic Commission was recognized by Spain in 1992, after separate negotiations of two Islamic representative organizations, which have eventually merged into the Islamic Commission. This institution serves as a consultative body for issues concerning the Islamic communities and supervises religious education in schools, the education of religious leaders, religious rituals, and places of worship. In sum, the Islamic Commission has similar competences to the other representative bodies, but it gained State's recognition of the Islamic community as a minority.[366]

The analysis of these forms of political representation in different European legal systems shows that Europe has its own tradition of cultural autonomy that guarantees, although through different models, political representation of minorities at

both local and national levels. Moreover, Europe has progressively changed its approach in recognition: from the inclusion of historical minorities only, many legal systems have increasingly included new minorities into their systems of protection. This leads to a further question, which considers the system of cultural autonomy as a whole: is Europe shifting from territorial to non-territorial autonomy?

4. Toward a European Millet?

The analysis of the models for non-territorial protection of minorities highlights the necessity for accommodating both dispersed and new minorities. Eastern European models of cultural autonomy as well as Western European models for protection of religious minorities were introduced to appropriately accommodate the claims of diffuse minorities. Other States, such as Belgium, adopted non-territorial arrangements of autonomy in order to settle conflicts among ethno-linguistic communities. Again, forms of non-territorial autonomy were introduced in many legal systems to tackle with the claims of new minorities.

The claims of diffuse minorities and the quest for protection advanced by new minorities are increasingly challenging Western traditional concepts of nation-State and individualism. Since the end of the Cold War, the "ethnic question" has dramatically gained central importance in both international and domestic conflicts and, at the same

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[366] Joaquín Montecón, *Islam in Spain*, in: Roberta Aluffi and Giovanna Zincone (eds.), *The Legal Treatment of Islamic Minorities in Europe*, (Leuvent: Peeters, 2004), 214-218.

time, it has consistently challenged States' ability to guarantee integration and prevent assimilation of ethnic and religious minorities.

The clash of civilizations theory, formulated by Huntington,[367] describes the post-modern world as a community divided on ethnic lines. In other words, after the end of the war between big ideologies in which collective identities merged in favor of macro-areas of identification, ethnicity remains as the micro-area of identification for individuals. Although this theory has been strongly criticized with respect to its validity in minority issues,[368] the importance of ethnicity is demonstrated by its centrality in both domestic and international discourses over collective rights and claims.

Moreover, the discourse over identity is the main focus of new minorities' claims for protection. Migration constitutes the major challenge to the supremacy of dominant groups because it questions the validity of ethnic-blind policies in those States that pretend to be indifferent to ethnic issues, such as France.[369] Similarly, migration constitutes a dramatic challenge to those States that adopt promotional policies toward minorities but restrict protection to those groups that historically reside in those countries, such as Italy. In both cases, the problems of integration stem from different traditions of social organization; for instance, the Islamic tradition considers society,

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[367] Samuel P. Huntington, "Clash of Civilizations?" *Foreign Affairs*, vol. 72, n. (1993), 22-49.

[368] Jonathan Fox, "Ethnic Minorities and the Clash of Civilizations: A Quantitative Analyses of Huntington's Thesis," *British Journal of Political Science*, vol. 32, n. 3 (July, 2002), 415-434.

[369] Roland Hsu, *The Ethnic Question—Premodern Identity for a Post-Modern Europe?* in: Roland Hsu (ed.), *Ethnic Europe: Mobility, Identity, and Conflict in a Globalized World*, (Stanford, Stanford University Press, 2010).

law, and religion as a whole body of social organization, which inevitably affects Europe's societal and institutional practices.

What both old and new minorities share is the quest for participation in State's politics without blurring their cultural heritage in social life, in other words the problematic aspect of Europe's challenge is to separate identity from politics, to detach citizenship rights from national identity, which can be described as the problematic transformation of the nation-State into a citizenship-State where multiple identities can coexist through groups' acceptance of shared values and practices and through the institutional acceptance of diversity.

Multi-level governance should combine with multi-area governance. Beyond the institutional organization of economics, services, and public goods, States may foster identity-oriented governance in areas of ethnic concern, such as education, linguistic rights, and religious rights. In this sense, Renner's model of multi-cultural polities implies the conceptualization of the State as a body constituted by territory and people. With respect to the territory, multi-level governance would provide citizens for services, organize economic life, and arrange administrative tasks. With respect to people, multi-area governance would guarantee communities the possibility to preserve, practice, and develop cultural, linguistic, and religious heritage without affecting State's governance and, simultaneously, preventing assimilation.

In legal terms, the political debate over multiple identities can be readdressed by analyzing the means of constitutional engineering that can serve as instruments for

guaranteeing sustainable arrangements in the accommodation of collective rights. Many European legal systems have increasingly approached the non-territorial model, by recognizing diversity and establishing different forms of non-territorial self-government in order to accommodate ethnic claims. The analysis of the different models shows that non-territorial autonomy establishes forms of self-government in terms of personal autonomy, communal autonomy, and political representation. These three areas of autonomy correspond to the three-fold partition of the *millet* system.

4.1 Personal autonomy and legal pluralism: the circulation of judicial decisions within and from outside Europe

With respect to personal autonomy, Europe faces a conceptual revival and a practical challenge. The novelty introduced by those systems that recognize, although limitedly, the principle of personal autonomy is the opposition to the dominant principle of territoriality of law. In the West, since modern times, law is linked to a territory and binds its residents. On the contrary, personal autonomy is based on the principle of "*iure suo uti; sua lege vivere*," *i.e.* to apply its own law, to live according to its own legal tradition, which constituted the basic principle of Roman law as for conquered people, and that was later adopted by the Franks during the early Middle Ages.[370] As a consequence, many legal systems coexist in one State and apply to its citizens according to their identity, which is the basis of legal pluralism.

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[370] Johannes Wilhelmus Wessels, *History of Roman-Dutch Law*, (Clark, NJ: Lawbooks Exchange, 2005), 45-49, original (Grahamstown, Cape Colony, South Africa: 1908).

Legal pluralism poses two main challenges; on the one hand, there exists a procedural aspect of co-existence, such as degree of autonomy of the legal systems, borders of their jurisdictions, and connection to the general legal system of the State, on the other, there is a substantial aspect with regards to the application of the different laws, with regards to the respect of fundamental rights recognized by the general system. These theoretical issues will be analyzed in the following conclusive chapter, but what interests here is the novelty of personal autonomy in European systems.

Arguably, the concept of territoriality of law is challenged by the rapid development of legal changes that were introduced in response to social change. At least, two examples can prove the gradual erosion of the territoriality concept. First, the circulation of legal models challenges the usual link between territory and State, and, secondly, the direct incorporation of different legal traditions into s State's legal system disproves the absolute validity of the territoriality principle.

Legal systems have dramatically evolved in the last years by the circulation of models, mainly because of the developing European law. The EU, as a supranational institution, has radically changed the idea of territorial application of the law by facilitating the circulation of legal models among the member-States. This holds true with reference to any branch of law affected by European integration, and, particularly, to family law, whereby a judge, in certain cases, has to apply foreign law.

Similarly, migration has put European authorities in front of problematic choices and solutions when they had to recognize alien legal institutions. The main critique of

personal autonomy detractors relies in the consideration that the circulation of models leads to question the respect for fundamental rights in other legal systems. For instance, when a European judge is asked for recognition of an Islamic divorce, s/he may deny recognition on the basis of the fundamental rights argument, whereby the Islamic divorce, being a repudiation confirmed by a judge, does not respect the principles of due process of law and has negative consequences on the woman, denying her those rights that the European legal traditions recognize.

The fundamental rights argument has a sharable position: a legal system should not recognize practices that it considers incompatible with its basic principles. However, the same problem is faced within the EU in other terms. For instance, a same-sex couple that got married in Sweden cannot file a petition for recognition of the marriage with an Italian judge, in that the legal institution of same-sex marriage is unknown to the Italian legal system, and, in certain ways, disregarded. Thus, the fundamental rights argument should be corrected or, at least, developed.

Moreover, many European legal systems recognized alien institutions such as polygamy or repudiation, when celebrated abroad, in order to preserve individual rights, on the basis of the argument that in those legal systems there is no other choice for individuals, due to religious, social, or legal constraints (a woman cannot refuse repudiation, or is obliged to comply with her husband's decision to take a second wife). According to this second argument, which may be defined the freedom argument, personal autonomy could create further possibilities to infringe fundamental rights in

that people cannot choose among the legal systems. This holds true for those systems that do not recognize any opt-put possibility, whereby an individual is obliged to be subject to the law of his/her ethno-religious group.

However, legal systems can foster opt-out and correction mechanisms in order to fill in the legal gaps and redress issues mistreated by the religious or traditional legal systems. In this sense the Israeli and the British cases are emblematic. Israel recognizes the possibility to "correct" the decisions of religious judges when the parties find that fundamental rights are infringed by the application of religious law. The UK recognized Islamic courts as courts of arbitration and imposed civil judicial supervision over their decisions. In this way, people can choose the way they want to be treated, and are given further possibilities to opt-out from their group and adhere to the State's system of right. Hence, the fundamental rights argument is tested, in that the legal system recognizes ways to correct traditional fallacies, whereas, the freedom argument still clashes with this model.

The degree of individual freedom in one system has to be balanced with the necessity to guarantee a certain level of fundamental rights, whereby States have to discourage anti-democratic practices. However, the controlled development of traditional practices may encourage their democratic development. For instance, the supervision of Islamic courts' decision and their validation by a civil judge may give the opportunity for a European development of Islamic law and its democratic-oriented interpretation.

Given the presence of new minorities and their quest for recognition, Europe may follow two ways. It may follow the French example, and consequently deny collective rights including personal autonomy, but the evidence of ethnic and religious collective violence demonstrates that this option could be inappropriate in terms of sustainable integration. The under-consideration for certain situations does not imply their termination. On the other side, it may follow the British way and recognize diversity by fostering clear borders within a legal framework.

Ultimately, one cannot be sure about how free individual decisions are. Social constraints may push for turning to religious authorities and disregarding civil ones against one's own will, but once the legal system provides citizens for possibilities of opt-out, individuals should be let free to decide what is good for them according to their beliefs, creed, and faith.

4.2 Communal autonomy and political representation: the need of a European *millet*

With respect to communal autonomy, the main problematic aspect is the recognition of the collective dimension of rights. The adjudication of collective claims through communal self-government implies the recognition of collective rights, and the commitment by the State to foster mechanisms that permit groups to find their space in the social order.

Detractors of this approach claim that minority protection endangers individual rights and questions the ability of States to face possible growing quests for protection

to the detriment of dominant groups. However, the freedom argument test could be passed by those systems that guarantee enough balance between collective and individual rights. In cases such as Lebanon, where individual rights are enjoyable only in virtue of communal membership, it is clear that the overarching communal dimension impinges on individual rights. On the contrary, elastic arrangements such as the ones adopted by Hungary, Estonia, Italy, and Germany may serve as appropriate means for settling ethnic conflict and as valid responses to growing communal claims.

The simple denial of a collective identity question in Europe does not contribute to settling possible conflicts, and the Belgian case is emblematic in this sense. While not only violent conflicts are to be considered the only danger for social stability, communal conflict may also question States' ability to keep inter-communal confrontational relationships on a low level and to foster tools for settling them. The same holds true with respect to political representation, to be considered in strict connection with communal autonomy. The more inclusive States' policies are toward the collective dimension of politics, the more groups feel they have an actual say in the management of the *res publica*. To this respect a further consideration arises in consideration of elasticity as the basic element for sustainable arrangements that regulate ethnic questions.

In matters of representative arrangements, elasticity should combine with rigorous selection of the areas to which representative arrangements apply. In other words, if the State adopts mechanisms for including diverse groups in all political areas,

the sustainability of the system would be questioned in that constant inter-communal conflict would lead to paralyze the political system.

On the contrary, by guaranteeing representation of diverse groups in those areas of communal interest, as the Hungarian case teaches, a two-fold goal would be achieved. On the one hand, this would permit groups to directly manage the issues of their concern by negotiating directly with State's institutions; on the other, this would exempt other areas from communal affiliation and, consequently, prevent State's polity to be dragged into the spiral of intra- and inter-communal conflicts.

As previously noticed, many European legal systems have adopted models of non-territorial autonomy. Nevertheless, these models are incomplete, or applied to tackle with different communal requests and collective needs. In this sense, the *millet* system could serve as a valid model for a comprehensive protection of minority groups and collective rights through non-territorial arrangements. A European *millet* could correct the negative potentials of its contemporary versions that are applied in the Middle-East. Roughly, one could identify at least three negative potentials pertaining to the three aspects of the system.

Under the aspect of personal autonomy, contemporary *millet* systems do not provide citizens for opting-out opportunities. In this sense, a modernized version of personal autonomy, such as the British, could be an appropriate solution. Under the aspect of communal autonomy, contemporary *millet* systems do not guarantee enough elasticity in the contact among groups and disfavor mutual knowledge; therefore, a

more sustainable arrangement could take into consideration more elastic regulations, such as the Hungarian system of minority protection. Under the aspect of political representation, the *millet* system advances questions that pertain to broader debates on representation and consociational democracy theory. In this respect, the restriction of representative arrangements to specific areas and the development of agreements between States and groups through negotiation and constitutional customs could be valid solutions for sustainable regulations.

Due to the increasing importance of non-territorial forms of minority protection, the *millet* system is a model of reference for Europe and it could serve as an example for settling European internal conflict and for adjudicating integrative and non-assimilative claims. Arguably, Europe is developing its own form of *millet*, but by a more attentive analysis of the Middle-Eastern experience, European States could learn lessons about diversity management. A "look Eastward" could be useful for Europe to acquire further instruments to tackle with diversity and the settlement of communal conflicts. The next conclusive chapter will comparatively analyze the different systems in order to readdress the various issues covered by this study in terms of constitutional theory, and to build an ultimate model of non-territorial protection of groups in terms of social and legal sustainability.

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CHAPTER 6

DE-TERRITORIALIZING MINORITY RIGHTS IN "MULTIPLE DEMOI" EUROPE: A LOOK EASTWARD

The traditional instruments for protecting minorities, which link rights to a certain territory, inadequately address the claims of non-territorial minorities, create contingent minorities in autonomous regions governed by a minority group and inhabited by members of the State's dominant group, reject the claims of new minorities, and exacerbate conflict in multi-ethnic areas. The current challenge of Europe is to address the demand for recognition and protection of groups that are dispersed and not

concentrated in one territory, such as Roma and Sinti; of migrant groups, such as North-Africans; and of religious communities that are not yet recognized, such as Muslims. A further challenge for Europe lies in its capacity to manage inter-ethnic conflicts within the territory of the EU, such as in Belgium, and outside, such as in Bosnia-Herzegovina.

A non-territorial option has to be offered as an effective solution for those situations in which territory is not a constitutive part of group identity or may even cause ethnic mobilization. As Markusse emphasizes, "in general, by utilizing the non-territorial approach, the inherent problems of the imperfect overlapping of national or ethnic identity groups with populations of territories can be effectively avoided."[371]

The demands for non-territorial protection that are currently being advanced should be understood in light of the political-historical context in which the State, traditionally conceived as the institution that organizes political life, is questioned. Specifically, the nation-State conceived as the political result of one people is challenged by emerging multi-cultural societies whose members aim to preserve diversity by actively defining their social space within a majority culture.

As has been pointed out in the previous chapter, European States are progressively adopting non-territorial models of protection, while there is not yet a clear approach regarding the policy of recognition and the degree of autonomy that should be guaranteed. Having analyzed contemporary adaptations of the millet system, as models

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[371] Jan Markusse, *Territoriality in National Minority Arrangements: European-Wide Legal Standards and Practices*, in Gertjan Dijkink and Hans Knippenberg (eds.), *The Territorial Factor—Political Geography in a Globalising World*, (Amsterdam: Vossiuspers, 2001), 151.

of reference for self-government arrangements, a general model of non-territorial protection can be outlined in terms of personal autonomy, cultural autonomy, and political representation.

1. Personal autonomy and legal pluralism

The problems of non-European cultural practices by migrants in Europe that include legal institutions unknown to the West, as well as the circulation of judicial decisions on specific legal institutions that are not recognized by all European States, question the capability of the territorial application of law to cope with current conflicts among different legal systems. Particularly, the application of family law is problematic, since foreign legal institutions, such as polygamy or same-sex marriage, involve moral considerations rooted in the fundamental principles of social organization.

This problem is not a novelty in legal literature, which has analyzed the conflict of laws in family law matters in cases of colonial legal systems and their effects on the colonized legal practices.[372] Neither is this issue a novelty in countries characterized by high degree of immigration, where territorialists, who argue in favor of the supremacy of the law of the land, oppose internationalists, who, on the contrary, argue in favor of partial recognition of foreign institutions. These disputes are based on the conflict of laws, which regulates both the place of adjudication and the applicable law, and on the notion of public order, whereby States impose restrictions on recognition of foreign

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[372] See, Michael Barry Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws*, (Oxford: Oxford University Press, 1975).

legal institutions based on constitutional values and moral considerations (*ordre public*). However, even in the US during 1920s, it has been pointed out that "all problems in the Conflict of Laws reduce themselves in the last analysis to the question whether under a particular set of circumstances sound policy demands that the forum apply the local or some 'foreign' rule of law."[373]

Beyond the question of appropriateness stemming from the recognition of legal institutions regulating cultural practices considered incompatible with fundamental principles, such as polygamy, the problem of individual protection of weak categories still remains. What about the children of the second wives in case of succession? What about child custody in cases of divorce between same-sex partners? While no general approach has been developed, "continental writers have attempted to bring the cases arising from polygamy within their general theories concerning the application of "foreign" law and their notions of "public order," but no agreement exists in the results reached." These issues

> cannot be determined by any general formula, but demand a careful consideration of the facts of each particular case and of the conflicting policies involved, with a view of discovering whether the recognition of the "foreign" law can be brought into harmony with the legal order of the forum.[374]

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[373] E.G.L., "Polygamy and the Conflict of Laws," *The Yale Law Journal*, vol. 32, n. 5 (Mar., 1923), 471-477, at 473.

[374] *Ibid.*, 477.

So far, two approaches seem to emerge: direct recognition of foreign legal systems, preordained to their integration within the national legal space, and selective recognition of foreign legal institutions, preordained to the protection of weak categories.

1.1 Direct recognition of foreign legal systems: the UK model

With regard to direct recognition of foreign legal systems, the UK example is emblematic. After decades of refusing and then partially recognizing foreign legal institutions of family law, the British legal system has increasingly adopted a positive approach toward the ethnic minorities of Muslim faith. Both statutory law and jurisprudence on immigration issues vacillated over the recognition of polygamous marriages, but this has not impeded the Muslim minority from perpetuating legal traditions that are considered repugnant to the Western eye. As Shah has shown in analyzing the attitude of the British legal system toward polygamy as practiced by Muslim immigrants,

> ethnic minorities have not remained passive recipients of official dictates. Rather, there is evidence of their reliance on their own cultural resources to secure acceptable outcomes for themselves, and they are often able to negotiate between different legal levels in order to do so, thereby calling into question the claims about the dominance of the official legal system.[375]

The resistance of ethnic minorities to the banning of certain cultural practices, as well as other policy considerations, has led to the decision to integrate Islamic law into the British legal system. This situation resembles the cases of Lebanon and Israel, where

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[375] Prakash A. Shah, "Attitudes to Polygamy in English Law," *International and Comparative Law Quarterly*, vol. 52, n. 2 (Apr., 2003), pp. 369-400, at 398.

ethno-religious communities are autonomous in regulating family law matters according to their legal traditions. However, while in Lebanon and Israel religious laws are law of the State, in Britain Islamic law operates at the arbitration level. This difference is fundamental in considering practical consequences related to the application of religious law and the respect of human rights. Moreover, the degree of autonomy accorded to groups defines the State as multi-national or multi-ethnic. By recognizing religious courts as State courts, all groups are equal members of society in terms of legal parity, whereby religious law is the law of the State, which considers the values of the single groups as its own values. On the contrary, the minor status of religious law by recognizing religious courts as arbitration courts qualifies the State as promotional, but the difference between the groups lies in the relationship between the majority, which recognizes group autonomy, and the minorities, which enjoy limited autonomy.

The Lebanese case shows that a high degree of autonomy freezes legal sub-systems into mono-blocs that are indifferent to any external influence; therefore, arrangements based on total autonomy exclude the possibility of the general legal system correcting those practices that are incompatible with the fundamental principles of the State. In this respect, the Israeli legal system shows that the supervision of a higher judicial body that scrutinizes the decisions of religious courts may intervene in the infringement of fundamental rights that stems from the application of religious law. Moreover, the co-existence of secular and religious laws on family matters provides the opportunity to choose which court is considered more convenient to the belief of the applicants—secular or religious judges—guarantees the principle of personal autonomy

and respect for fundamental rights. Yet, the status of religious courts as States' court, thus of equal rank as civil courts, gives a certain prominence to religious legal systems, which is enshrined in the provision that guarantees exclusive jurisdiction to the religious judge in matters of marriage and divorce. This prominence may lead to the legitimization of those internal restrictions that the secular legal system aims to disqualify. Hence, the UK model may be considered an improvement of the cases analyzed, since it guarantees supervision by scrutinizing the decision of religious courts, and recognizes religious jurisdiction as a pure option by recognizing Islamic courts as arbitration courts and not as State courts.

Such an arrangement would be a general option apt to guarantee the opportunity to Islamic minorities to refer to a religious court, and then to perpetuate traditional cultural practices; simultaneously, it would guarantee State's supervision over judicial decisions and correct the contradictions of the system in terms of respect for fundamental rights.

The necessity to connect between the religious sub-system and the general legal system of the State is confirmed by the development of religious law toward liberal standards. The recognition of Islamic courts as arbitration courts is a further step in the process of legitimization of Islam in Great Britain, where Islamic law, *shari'a*, is applied in mediation disputes over family law matters. As Pearl and Menski argue, this practice has led to the creation of "a new form of shari'a, English Muslim law or *angrezi shariat*" as the result of "individual and community strategies" that "have led to

the development of a new hybrid"[376] which seeks legal solutions within the Islamic law framework that are simultaneously compatible with British social standards.[377]

Notwithstanding this tendency to Europeanization, it remains debatable how convenient is for European States to open the borders of their jurisdiction to other legal traditions. At least three problems stem from this change: the risk to legitimize internal restrictions, the scarce degree of familiarity of Islamic judges with European legal standards, and the paradox of the multicultural migrant, who re-discovers cultural practices often banned in his/her country of origin.[378] As for internal restrictions, the legal system that accepts different legal traditions has to set clear limits on what it is likely to recognize and what it is likely to ban according to its fundamental principles. It is impossible to set general standards, since certain practices may conform to human rights and consequently permitted, whereas, others may be disregarded as violations of fundamental freedoms. A case-to-case approach based on mutual understanding and

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[376] David Pearl and Werner Menski, *Muslim Family Law*, (London: Sweet&Maxwell, 1998, 3rd edition), 58.

[377] This idea fosters the creation of "national versions" of Islamic law, which stem from the adaptation of *shari'a* to the legal systems of the States. In this respect, the local adaptation of Islamic law is a consequence of the development of what Bassam Tibi defines Euro-Islam, which combines Islamic culture with European tradition and principles. European versions of Islam are developing in different countries, and a historical example is Albania, where, in 1923, the Islamic Congress decided to reform Islamic principles by banning polygamy and the compulsory use of the veil. See, Bassam Tibi, *Europeanizing Islam or the Islamization of Europe: political democracy vs. cultural difference*, in: Timothy A. Byrnes and Peter Katzenstein (eds.), *Religion in an Expanding Europe*, (Cambridge: Cambridge University Press, 2006).

[378] It is the case, for instance, of Turkish, Tunisians, and Moroccans who re-discover in Europe polygamous marriage, an institution of Islamic law that has been banned by national legislations of Turkey, Tunisia, and Morocco. Indeed, it would be a paradox if migrants could contract polygamous marriage in Europe, when the States where they come from do not recognize this institution. It would mean that European Islamic law is more radically Islamic than Islamic law practiced in Turkey, Tunisia, or Morocco.

compromise seems to be the best option in order to adapt new legal traditions to Western values and let them re-elaborate cultural practices in a liberal-democratic sense. To enable this process, not only States have to define principles for opening their jurisdictional frontiers, but also minority leaders have to be acquainted with the culture of the State of residence. As for the familiarity of Islamic judges with European legal standards, the necessity of educational programs on constitutional and human rights laws is confirmed by some State initiative, such as in Spain and Germany.

Finally, the recognition of Islamic law may lead to the paradox of multiculturalism, whereby certain cultural practices, banned in countries where migrants come from, are revitalized in Europe in virtue of the right to cultural diversity. As Sbai argues, "if we consider what happens in the countries of origin, we notice modernization and change, even within the institutions; these novelties clash with the traditionalism attached to the past proper of immigrants on the European Continent, who are isolated and unaware of the evolution in their countries."[379]

1.2 Non-recognition, is it an available solution?

The rejection of foreign legal tradition does not imply the conformation to European standards by new minorities that are reluctant to abandon their traditions. Furthermore, non-recognition may lead to discrimination against those weak categories that are oppressed by traditional cultures and not protected by Western legal systems that do not recognize the legal nature of the institutions that infringe their fundamental rights,

including the succession rights of the second wife, immigration rights of polygamous children, and patrimonial rights of repudiated women. As a consequence,

> official bans on social practices such as polygamy are ill-advised and drive the phenomenon underground. The risk of abuse here is great, as is the potential vulnerability of women and children who may simply be abandoned without a divorce recognized under the personal law of the parties and without recourse to official legal fora for remedy. If anything, the official law exacerbates the weaker legal position of women and children, often dividing families across continents by disrespecting their choices.[380]

If the recognition of traditional legal systems in a model of personal autonomy is not desirable for the abovementioned reasons, the situations that result from the legal acts produced in different countries or in virtue of different legal traditions cannot be disregarded by Western legal systems when this leads to neglect the protection of fundamental rights. Hence, non-recognition is not an available solution.

1.3 Selective recognition of foreign legal institutions: the German model

With regard to selective recognition of foreign legal institutions, the case-to case approach seems to be the most appropriate for protecting weak categories, including women, children, and sexual minorities, who risk to be discriminated against even in promotional legal systems that do not recognize certain legal institutions of their original countries.

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[379] Suad Sbai, *L'Inganno—Vittime del Multiculturalismo*, (Siena: cantagalli, 2010), 87.

[380] Prakash A. Shah, "Attitudes to Polygamy in English Law," at 398.

As it has been reported, this is the case of Germany, where *shari'a* is applied by civil courts in processes of recognition of foreign judgments and in private law, including family law contracts, or commercial contracts.[381] Specifically, German civil courts do not directly recognize foreign legal institutions, but recognize the factual situation that they ensued, in favor of the individuals whose rights are infringed by these institutions. For instance, succession rights were recognized to the second wife as well, or a second wife was permitted reunion with her husband on humanitarian basis, and a man was sentenced to pay a divorce bill on the basis of Shi'i law that regulated the matter.[382]

This option avoids the problem of legitimization of cultural practices contrary to fundamental rights, in that international private law permits to "filter" legal institutions compatible with the European legal systems through the notion of public order. Simultaneously, the process of recognition of foreign decisions cannot simply disregard foreign legal institutions considered as repugnant to European legal culture. The duty to respect fundamental rights should also apply to those situations in which the violation of human rights originates from foreign legal institutions that European systems do not recognize. The higher interest at stake here is the protection of weak categories, such as

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[381] See the previous chapter on Europe and for a detailed analysis of the application of Islamic law in German courts see, Mathias Rohe, *The Application of Islamic Family Law in German Courts and Its Compatibility with German Public Policy*, in: Jürgen Basedow and Nadjma Yassari (eds.), *Iranian Family and Succession Laws and Their Application in German Courts* (Tübingen: Mohr Siebeck, 2004), 19-34. Some cases have also reverberated in the press; see, "Familien- und Erbrechtsfälle Deutsche Gerichte wenden Scharia an." *Spiegel Online*, 9. October 2010.

[382] See, Cosima Schmitt, "Auch die Zweitfrau darf bleiben. Muslimische Zweitfrauen fallen oft durch Gesetzeslücken. Denn grundsätzlich wird die Polygamie in Deutschland geächtet. Nun hat ein rheinland-

women and children, who have to be guaranteed protection even though the legal system does not recognize the foreign norms that violated their rights. It is the case of polygamous children, or polygamous wives, whereby the simple non-recognition would prejudice their already weak position by letting them bereft of any right. Moreover, this option would solve the problems that stem from recognition of foreign legal institutions within the European legal space, such as same-sex marriages.

However, this option does not answer the question about the limits of recognition and the way recognition is conducted. The judges with whom such petitions are filed may not be acquainted with Islamic law or with the implications of their possible decisions. Therefore, education on Islamic law and training on this specific topic of relation between Islamic and European laws is necessary. Education and training on this topic may be carried out in a dialogic perspective with Islamic legal experts in Europe. This "task-force" of legal dialogue would increase the possibilities of mutual understanding on values and norms and could be the first step that foreshadows the institutionalization of Islamic law in religious arbitration courts as in UK. As Rohe highlights,

> *sharīʿa* in Europe would mean to define *sharīʿa* rules for Muslims here in accordance with the indispensable values of democracy, human rights and the rule of law governing European legal orders. Within the framework of these orders, Muslims have to be enabled not only theoretically to practice their believes. Thus, all Europeans should remember that freedom of religion and therefore religious pluralism is an integral part of the liberal European constitutions, and that everybody

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pfälzisches Gericht einer irakischen Zweitgattin Aufenthaltsrecht zugesprochen - aus humanitären Gründen" *Tageszeitung*, no. 7322, 30 March 2004.

who is willing to respect the rule of the land should enjoy this freedom.[383]

In this sense, legal pluralism has to be considered as a process and not as a defined solution to be introduced into European legal orders. Before States are ready to open their legal frontiers to different legal systems, they have to be acquainted with the foreign values and norms and, particularly, they have to understand the implications of such a change. To this respect, a legal dialogue may lead to legal exchange and to the institutional legal differentiation within the European systems. The consideration on desirability of this radical change is not a question anymore, since the process has already started, what, on the contrary, has to be inquired is the way this process is developing and the goals to be desirably attained.[384]

2. Communal Cultural Autonomy

The principle of legal dialogue leads to the issue of bridging cultural communities in terms of coexistence, compromise, and shared values and principles. In this respect, a variety of solutions adopted by European legal systems show that the promotional attitude toward minorities prevents political mobilization of groups. Moreover, as the Iraqi case shows, this approach can protect minorities from discrimination in situations of conflict with the dominant communities. The territorial solutions that have traditionally been adopted should be integrated with non-territorial solution.

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[383] Mathias Rohe, "Application of *Sharī'a* Rules in Europe: Scope and Limits" *Die Welt des Islams*, New Series, vol. 44, no. 3, *Sharī'a in Europe* (2004), pp. 323-350, at 348.

[384] Felix Ekardt, "Weder Leitkultur noch multikultureller Relativismus—Gerechtigkeit und gutes Leben in der Migrationsgesellschaft," *Kritische Justiz*, vol. 38, n. 3 (2005), 248-259.

The Estonian model of autonomous communities resembles the communal cultural autonomy of *millet* systems, in that communities can act as legal persons in order to pursue their interests by a special regulation of their legal personality that differs from the one of private associations. The introduction of non-territorial instruments for protecting minorities can guarantee appropriate protection of cultural communities according to the number of members and financial capabilities. For instance, as for educational policies, separate schools may suit large communities, while small communities can be accommodated through separate curricula. Again, large communities could run their own institutions and support small communities in order to guarantee the enjoyment of collective rights.

The reference to *millet* legal systems leads to the negative potential of autonomy in terms of segregation and incompatibility with the dominant community. Autonomy is preordained to the preservation and the development of non-ruling communities, but it cannot turn into a means of self-determination of minorities when this is incompatible with the existence of the State and with the fundamental values of the ruling community. The case of Lebanon clearly shows that an excessive degree of autonomy leads to the isolation of communities and creates, as Tibi argues, a multicultural society, which not a melting-pot, but the coexistence of different cultures that live parallel and separate.[385] This lack of connection among groups, Tibi claims, creates instability in

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[385] Bassam Tibi, *Islamische Zuwanderung—Gescheiete Integration*, (München: Deutsche Verlags-Anstalt, 2002), 178-181.

that communities do not identify themselves with a supra-communal identity that constitutes common membership to civil society.[386]

The need to protect minorities as a duty of liberal democracy and as a means of conflict prevention has to be balanced with the necessity of preserving a neutral public space in which communities act as members of a common society. Linguistic, religious, ethnic, and cultural specificities cannot be crystallized in identities that are impermeable to adaptation. Hence, the promotional attitude of States has to correspond to a genuine will of integration on minorities' side, which pursue the goal of cultural preservation in self-governing arrangements, but are ready to share values and principles of the dominant community. This mutual compromise on both sides, of the dominant and the non-ruling communities, can be attained by an agreement on common values and principles that constitute the social pact of the State, which is the result of negotiation and dialogue.

Practically, dialogue means active participation of the State in cultural issues of interest to minorities, such as supervision of the Ministry of Education on educational curricula in Israel, and the inclusion of minorities into the decision-making process. This means that States should guarantee political participation of minorities, the third aspect of the *millet* system. While this issue is the focus of the next section, one more question arises regarding negotiation: the involvement of elites and leaders.

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[386] *Ibid*.

In the negotiation process, minorities are represented by leaders, who advance the interests of their groups. In order to conduct effective negotiations among groups, leaders should have an in-depth knowledge of the ruling community's culture, and should be acquainted with the constitutional values and principles of the State of residence. To this purpose, the educational training of minority leaders and elites is the first step toward compromise. In this sense, Germany provides Islamic clerics for education in universities,[387] so that their knowledge of German constitutional and religious cultures may lead to a better mutual understanding and, as a consequence, to clarify the limits within Islam can express and develop.

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[387] See, "Imam-Ausbildung—Uni Frankfurt startet Studiengang für Islam-Gelehrte" *Der Spiegel*, 21 October 2010, available at http://www.spiegel.de/unispiegel/studium/0,1518,724524,00.html; see also Anna Reimann, "Erste Deutsche Uni startet Seminare für Imame" *Der Spiegel*, 7 October 2010, available at http://www.spiegel.de/unispiegel/studium/0,1518,721672,00.html. In English see, Tom Heneghan, "German Universities to Train Muslim Imams, Teachers" *Reuters*, 14 October 2010, available at http://www.reuters.com/article/idUSTRE69D36820101014.The training courses aim to develop the critical approach in Islamic theological studies. This approach has developed in German faculties of theology during the nineteenth century, as a result of rationalist theories of the Enlightenment. This new method privileged the critical and rationalisy approaches to study the Bible, in contrast with dogmatic theological theories, which ultimately supported Christian supremacy. Moreover, university training is thought as a free heaven for those Islamic theologians who already apply this method outside Europe, and are persecuted in obscurantist countries under the accusation of modernization, hypocrisy, heresy, and apostasy. As Heneghan reports, "the 'historical-critical method' of theology emerged in Germany in the 19th century as a rigorous academic examination of the Bible. It debunked many myths about Christian history and doctrine and explained how its holy book was constructed. The few theologians who apply this method to Islam keep a low profile because their findings are considered heretical by mainstream Muslims. Some have been threatened with violence." Other attempts to create training curricula for imams within European universities, such as in France and in the Netherlands, were unsuccessful because the programs were run by Christian theology departments. As a consequence, these educational programs were perceived as means for proselytizing, rather than specific programs on Islamic theology.

3. Political Representation: multi-level governance and conflict subsidiarity

The analysis of contemporary *millet* systems (Lebanon, Israel, and Iraq) shows that appropriate representation of minority groups is necessary to attain effective protection of cultural rights. In other words, the recognition by the State of minority groups is not per se sufficient if they do not have an actual say in the management of policies that they can influence in order to achieve their goals. The Iraqi system is in this sense emblematic, since the constitution recognizes collective rights, but the legal systems practically bereaves minorities of rights since they are not guaranteed representation in those institutions in charge of implementing policies connected to minority rights.

The inclusion into the decision-making process can be attained in different ways, including ethnic power-sharing, as in Lebanon, or *de facto* representation and particular forms of representation in specific areas of interest, as in Israel. The former case shows that non-elastic provisions exacerbate conflict because groups are prone to maximize their goals rather than seeking compromise. On the contrary, the latter case shows that, although the system of protection guarantees specific representation in areas of interest to minorities, including the educational system and the management of linguistic and religious affairs, in addition to *de facto* representation of minorities at the legislative, the executive, and the judiciary bodies, this cannot hinder conflict from exacerbating if the relationship between minority and majority is confrontational. Specifically, representation cannot meet the demands of a minority that does not identify with the State, either because it feels the existence of the State incompatible

with its national aspirations or because it effectively pursues national goals that are not in conformity with the constitutional principles of the State of residence.

In this respect, the historical model of de-localization of minority councils in pre-independent Lebanon resembles the Hungarian model of a representation system patterned on Renner's national cultural autonomy, whereby minorities are guarantees representation in institutions through incisive instruments such as power-sharing at the local level, whereas, at the central level, they are guaranteed selective representation in specific areas of interest. This model is based on the fragmentation of governance within the institutional hierarchy,[388] which leads to two results in terms of conflict management and diversity management.

3.1 The *millet* as a means of inter-ethnic conflict management: conflict subsidiarity

With regard to conflict management, the system of multi-level governance can be adopted even in the institutional management of conflicts. The division of competences in different institutional levels is considered as effective in terms of accountable and effective administration. The same could be applied to conflict management, whereby conflicts would be fragmented among the institutions so that each level of administration can deal with controversial issues that belong to its area of competence. For instance, local institutions can deal with practical solutions of educational curricula

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[388] Armin von Bogdandy, "Die Minderhaitenpolitik der Europäischen Union—Zugleich ein Beitrag zur rechtswissenschaftlichen Fassung überstaatlicher Governance," *Kritische Justiz*, vol. 40, n. 3 (2007), 224-239.

in schools, use of minority languages in the media and in public offices, symbols of collective identity in the public sphere, and religious needs such as particular alimentation and festivities. On the contrary, the central level would deal with the definition of policies and the principles of implementation.

The subdivision of conflict in conformity with institutional competences is the accomplishment of what I defined as "conflict subsidiarity," whereby controversial issues are managed at different levels of governance, according to each level's administrative competence and legal jurisdiction. If the local level should deal with practical solutions to controversial issues, the central level would deal with the general relationship between State and minorities, or ruling group and non-ruling groups, which leads to the question of diversity management.

3.2 The *millet* as a means of diversity management

With regard to diversity management, various European legal systems have opted for the institutionalization of dialogue between States and minorities. In some cases institutionalization is formal, and minority representatives negotiate with State's institutions without legal means that guarantee them actual power, such as the Islamic Councils in Italy and France. On the contrary, other legal systems have entitled minorities with veto powers in areas of vital interest to collective rights, such as in Hungary and Slovenia. These veto powers makes it necessary for non- and ruling groups to meet and negotiate their interests by pursuing goals that may seem incompatible, otherwise veto rights cannot be overcome. The institutionalization of

dialogue would lead to mutual knowledge and comprehension, empowering minorities to influence central institutions and ruling groups to prevent minorities from pursuing goals that are incompatible with coexistence or not conform to the fundamental principles of the State.

This model constitutes an option for minorities that have engaged in confrontational relationships with the States of residence. Indeed, such institutions offer the possibility to mutually define vital interests and to compromise negotiable positions. It is not by chance that Islamic councils have developed in the historical context of Islamic mobilization *vis-à-vis* hosting States.[389] In addition, these institutions would hinder groups from pursuing autonomously their interests by paralyzing political life. The only instrument of dialogue, or the limited powers guaranteed to minority groups are incentive to negotiation and avoid the exploitation of legal institutions for pursuing communal interests, as in Lebanon and Belgium.

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[389] A further problem arises with regard to the partner for dialogue. Who should be included in these institutions? Should radicals be isolated, or should they be included in the negotiation processes? As Tarek Haggy argues, the problems that European States face with their Islamic minorities originate from the forms of dialogue they opt for. European States, according to Haggy, turned to a large varierty of Islamic associations and Islamic leaders, including the radicals, who are legitimized as representatives of Islam. This all-inclusive approach hinders Islamic communities from developing a Europeanized version of Islam, in that Europe does not give prominence to moderate representatives, who are more likely to negotiate and find compromise. While dialogue is necessary even with those who engage in confrontational relationship with hosting States, the institutions for dialogue should be composed for the mahority of moderate leaders, so that radicals would be isolated. See the essays by Tarek Heggy available at http://www.tarek-heggy.com/index.html On dialogue and the necessity to give prominence to moderate leaders, see Tarek Heggy, *Le Prigioni della Mente Araba*, (Milan: Marietti, 2010) a collection of the author's essays on open society and Islam, integration of Islamic minorities in Europe and democracy.

3.3 Institutionalizing dialogue: a solution for negotiating (apparently) incompatible interests?

Still, the focal issue is: why should State be likely to negotiate with minorities that are perceived as anti-system groups? Reversely, why should a minority that does not identify itself with the State of residence should be likely to dialogue with State's institutions? One answer is, again, conflict subsidiarity: collective rights find actual implementation at the local level, which would lead to collective satisfaction, and, consequently, would consolidate the disposal to negotiation. Another answer is, again, the institutionalization of dialogue: in constitutional terms, the instruments of representation constituted the actual exercise of constitutional power, conceived as the power to create and revise constitutional acts and facts. The first constitutional fact is the social pact, whereby citizens accept to live in a community that guarantees certain rights and imposes certain duties. In a post-modern sense, minority representation should be considered as the exercise of political participation rights by minorities, which can pursue their interest by directly defining the terms of the social contract and, consequently, of the societal space (*Gesellschaft*).

The empowerment of minorities in terms of defining the constitutional-social contract requires, however, a partial modification of the notion that defines a State as the institutional expression of one people, and as the homeland, protected by borders, of one nation, according to the principle of external self-determination. Particularly, this holds true under the current pressure under which borders are, and their consequent increasing incapability of defining legal, economic, and political spaces that are

detaching themselves from spatial territories causing a progressive process of de-territorialization.

4. Conclusion

The process of de-territorialization is not simply a sociological phenomenon that affects economic systems through the migration of workers that created international job markets and influences transnational economy; it is also a political and legal process that challenges national legal systems by introducing foreign elements into the geo-legal spaces of States. This phenomenon surely influences national identities by creating undefined social spaces for de-rooted people, who do not identify with the identity of the hosting State and preserve their identity by introducing new cultural elements. This process of cultural transformation and economic trans-nationalization has affected the realm of law as well, in that law is the means through which economic relations are defined and that establishes forms of coexistence.

Specially, the de-territorialization of law is an on-going process in Europe, which is affected by two phenomena of de-nationalization. One is migration, whereby the presence of migrants challenges the process of cultural re-qualification of original cultures within a European framework. Indeed, European States have to find appropriate solutions to the problem of recognizing foreign legal cultures which challenge the duty of the State to maintain certain legal standards as set by human rights law and constitutional law. The other is European integration, which created a novel legal system that originates from supra-national institutions and directly affects the

national legal systems, within which it is integrated. Moreover, the principle of freedom of circulation created a legal European space within which individuals and companies act according to the law to which they are subject by virtue of birth and not by virtue of residence.

Therefore, both migration and European integration are constantly challenging the principle of territorialization of law. The case of the Italian judge who is compelled to apply Austrian law in a divorce case does not differ from the case of the German judge who has to apply Islamic law in the process of recognition of a foreign judgment. The refusal of the Italian judge to recognize homosexual marriages does not differ from the refusal of the French judge to recognize polygamous marriages. Since European integration and migration breached the territorial homogeneity of law based on the presumed homogeneity of society and nation, autonomy in the law of personal status is increasing, whereby the right of individuals to be judged according to their legal system is emerging.

As a consequence, European States face the challenge of regulating the degree of autonomy and the relation between the autonomous legal space within which individuals live and the legal space of the States where these individuals reside. In other words, the problem originates from the integration of foreign institutions within a legal system in which they may not be recognized because they are contrary to the basic or fundamental principles of the legal space into which they are trying to settle. This problem may be solved by non-recognition of foreign institutions or by integration,

which implies a mutual process of opening geo-legal frontiers by legal systems and of a re-elaboration of traditional legal cultures in accordance with European principles. The risks of legitimizing practices contrary to fundamental rights cannot be avoided by simple non-recognition, which causes self-segregation. If States reject the possibility of recognizing different cultural traditions, including legal institutions, communities barricade themselves in order to perpetuate traditional cultural practices and exploit individual rights that guarantee basic freedoms to the detriment of weak categories. On the contrary, a process of recognition may avoid the creation of separate bodies, but both sides have to accept reasonable limits: traditional cultures have to accept that certain cultural practices are incompatible with European standards of human rights and European States have to actively participate in the process of cultural re-qualification by firmly asserting fundamental rights in order to eradicate internal restrictions, and, simultaneously, by accepting new diversities into their social and legal spaces.

The opening of geo-legal frontiers implies the questioning of the nature of States as institutional expression of one dominant people—*i.e.*, the concept of nation-State. If European integration challenges the organization of nation-States by creating supra-national institutions that limit States' sovereignty, minority protection challenges the cultural mission of the States that are the homeland of one culture. In this respect, the idea of Europe constitutes a life-line for nation-States. As Weiler emphasizes, Europe is not about the creation of a new nation; therefore, being European does not imply leveling down particular cultures, but rather, creating a new form of aggregation of

States and peoples that identify in a common citizenship.[390] It is "the decoupling of nationality and citizenship" that "opens the possibility, instead, of thinking of co-existing multiple demoi."[391] The concept of multiple demoi within a European political and legal space is conceived in terms of multi-level belonging. In Weiler's words,

> One view of multiple demoi may consist in what may be called the 'concentric circles' approach. On this approach one feels simultaneously that one belongs to and is part of, say, Germany and Europe; or even Scotland, Britain and Europe. What characterizes this view is that the sense of identity and identification derives from the same sources of human attachment, albeit at different levels of intensity. Presumably the most intense (which the nation, and state, always claim to be) would and should trump any other in normative conflict. The view of multiple demoi that I am suggesting, one of truly variable geometry, invites individuals to see themselves as belonging simultaneously to two demoi, based, critically, on different subjective factors of identification …. On this view, the Union demos turns away from its antecedents and understanding in the European nation-state.[392]

A more effective protection of non-territorial minorities and the recognition of different cultural practices do not directly jeopardize the existence of the nation-State, since an umbrella of identification exists and is constituted by the European identity.[393] A

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[390] JHH Weiler, *Demos, Telos, Ethos and the Maastricht Decision*, in Peter Gowan and Perry Anderson, *The Question of Europe*, (London: Verso, 1997) p. 287. Weiler explains that the idea of Europe is not about nations but about peoples. The author compares European identity with American Republicanism and with Habermas' notion of constitutional patriotis. On the one hand, European identity differs from American Republican identity since the former does not aim to build a melting-pot nation or a new nation united by flag or language. On the other, it goes beyond Habermas' constitutional patriotism since unity is not only based on civic values and overarching rights and principles, but also on shared cultural practices as well as on common cultural history.

[391] *Ibid*.

[392] *Ibid*., 287-8.

[393] On this issue, it is remarkable to highlight that supranational institutions, such as the Council of Europe, have coped with the problem of defining the concept of "nation," "national community," and "ethnic community." Specifically, the Council of Europe was called to define the concept of nation during the debate on the Hungarian LXII Law, named "Hungarian Status Law" or "Law on Hungarians Living in Neighboring Countries," issued on 19 June 2001. The dispute that this adoption caused

concerned ethnic-oriented legislation, in that "the law offered certain benefits to ethnic Hungarians living in the successor states, like access to the labor market in Hungary and to educational opportunities, on the basis of their being ethnically Hungarian. These benefits were offered, therefore, to citizens of countries other than Hungary, that being the central controversial proposition, because these people defined themselves as ethnically Hungarian." See George Schöpflin, *Citizenship and Ethnicity: The Hungarian Status Law*, in Zoltán Kántor, Balázs Majtényi, Osamu Ieda, Balázs Vizi, and Iván Halász (eds.), *The Hungarian Status Law: Nation Building and/or Minority Protection*, (Sapporo, Japan: Slavic research Center of Hokkaido University, 2004) 93; the content of the entire book is avalable on-line at http://src-h.slav.hokudai.ac.jp/coe21/publish/no4_ses/contents.html. Legally, this dispute was based on the argument that this law guaranteed a preferential treatment on ethnic grounds and, consequently discriminated against people belonging to other ethnic groups. Politically, the dispute concerned nationalist or ethnic policy pursued by Hungary that applied across territorial borders. As Stewart emphasizes, "the law expresses a transformation of an older set of concerns to recreate (if only symbolically) a homology of demographic distribution and 'nation,' and in so doing offers a kind of symbolic revision of territorial space." See Michael Stewart, *The Hungarian Status Law: A New European Form of Transnational Politics?* in Zoltán Kántor, Balázs Majtényi, Osamu Ieda, Balázs Vizi, and Iván Halász (eds.), *The Hungarian Status Law: Nation Building and/or Minority Protection*, 122. Hungary, by adopting the Status Law, urged the Council of Europe to adopt a series of recommendations in order to prevent possible negative developments of nationalist ideology. Recommendation 1735 of 26 January 2006, adopted by the Parliamentary Assembly of Council of Europe, reports the findings of the Legal Committee, requested by the Assembly on an existing common definition of nation within European legal and political cultures. The Recommendation points out that there is no common legal definition; furthermore, it stresses the impossibility of clearly defining what "nation" is. However, the Assembly finds two definitions of "nation" that correspond to two different conceptual frameworks. First, there is the concept of "civic nation," which "is used to indicate citizenship, which is a legal link (relation) between a state and an individual, irrespective of the latter's ethno-cultural origin" (par. 5). Secondly, the concept of nation is used, "in some other member states… in order to indicate an organic community speaking a certain language and characterized by a set of similar cultural and historic traditions, by similar perceptions of its past, similar aspirations for its present and similar visions of its future" (par. 5). While some member States base their legislation on one of these concepts, both may ground different legislations in virtue of different duties upon the States. As established by various international norms, including the ones enshrined in the Framework Convention for the Protection of National Minorities (ETS No. 157) and in the European Charter for Regional or Minority Languages (ETS No. 148), minorities have to be protected by States since they belong to the civic nation of that State. In this sense, their rights originate from citizenship, which fosters a common legal ground for all its citizens and different legal grounds in the management of diversity (see, par. 11 of the 1732 Recommendation). Moreover, States fostering protective legislation of minority groups that belong to their nation but are not their citizens have to respect neighboring countries' legislations and internal affairs (on this issue, see the Bolzano/Bozen Recommendations on National Minorities in inter-State Relations, adopted by the High Commissioner for National Minorities of OSCE on 2 October 2008). What is of interest here is the recognition by the Council of Europe of trans-border legislation concerning the protection of minorities. Indeed, it has been recognized that State's legislation protecting minorities is not severely linked to its borders, provided that it aims to create a trans-national legal space for minorities, and not to destabilize inter-State relations. The evolution of the nation-State does not imply its disappearance, nor does it cause the merging of nations into a new nation. Rather, it means the co-existence of cultural and ethnic nations in the building of a common legal framework, which represents a civic supra-national community. In this supra-national legal space each and every national community finds its appropriate location in that its participation is based on citizenship, which guarantees certain rights within the States' legal frameworks. Indeed, these rights "are not territorial or connected to territory and their recognition and protection must be legally organized both at the level of each nation-state concerned and at transnational (international) level" (par. 10).

minority group may have no territory of reference, may be recognized and guaranteed autonomy and may still not be identified with one nation, but the general identification with Europe remains. As a consequence, this general identification overcomes the problem of national identification within States, while it goes beyond the paradigm of the nation-State itself.

In this respect, legal pluralism is the solution to overcome the "nationalist trap," since each group can preserve its cultural traits and, meanwhile, merge into a general European identity, while the peculiarity of the nation-State is maintained in terms of identification with the dominant culture. Legal pluralism seems to be the key to the partial de-nationalization of the Westphalian State, but this does not imply the transformation of nation-States into multi-national States according to an "ideologization" of pluralism.

Beyond legal pluralism, the other forms of non-territorial protection of minorities—communal cultural autonomy and political representation—guarantee the inclusion of minority groups in the society. States may maintain their role as "homelands of dominant cultures," but the breach into the geo-legal spaces in terms of non-territorial protection of minorities opens the possibility for diverse communities to create their own social space that does not challenge the identification of one State with one dominant culture, since, ultimately, both dominant and minority cultures identify with one supra-identity.

To conclude, I recall the words of Hannah Arendt, who dealt with the *Minderheitsfrage*, the minority question, when Nazism was devastating Europe. Speaking of European Jews during the 1940s, and more broadly of all minorities, which she called "small peoples," Arendt eloquently observed:

> Our only chance—indeed the only chance of small peoples—lies in new European federal system. Our fate need not and dare not be bound up with our status as a minority. That would leave us devoid of all hope. Our fate can only be bound up with that of other small European peoples. The notion that nations are constituted by settlement within borders and are protected by their territory is undergoing a crucial correction. Spaces that can truly be maintained economically and politically are constantly expanding. There may soon come a time when the idea of belonging to a territory is replaced by the idea of belonging to a commonwealth of nations whose politics are determined solely by the commonwealth as a whole. That means European politics—while at the same time all nationalities are maintained. Folkloristics would no longer be a danger within such a comprehensive arrangement. Until we have reached that stage, it makes no sense for us to return to the issue of minority arrangements—if only to prove that nationality does not perish when separated from soil.[394]

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[394] Hannah Arendt, *The Minority Question*, in Jerome Kohn and Ron H. Feldman (eds.), *The Jewish Writings—Hannah Arendt*, (New York: Schocken, 2007), 129-130.

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METHODOLOGY

This study argues that the cultural autonomy model is an effective way to protect minorities in a multicultural world beyond the nation-State paradigm. Legally, solutions to similar situations have been developed in the Middle-East. Since it is not necessary to find novel solutions, but rather it is useful to look at other experiences in order to understand how legal solutions can be adapted for other legal systems. This study uses the comparative method as the fifth method of legal interpretation beyond the literal, analogical, the teleological, and the historical.[395] As a legal methodology, comparison requires the analysis of different legal systems with two main aims: comparison may aim to make different legal systems understandable to lawyers of diverse backgrounds, or it may aim to analyze legal institutes for enabling the circulation of models. In the former perspective, comparison focuses on the grammar of a legal system,[396] while in the latter, comparison aims to propose a legal transplant.[397] Especially for the first purpose, comparative legal methodology may be assisted by historical and political analysis.[398]

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[395] Peter Häberle, „Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat – Zugleich zur Rechtsvergleichung als „fünfter" Auslegungsmethode," *Juristenzeitung*, 1989, 913 and ff. See also, Alessandro Pizzorusso, *Comparazione Giuridica e Sistema dell Fonti del Diritto*, (Turin: Giappichelli, 2005).

[396] James Bryce, *Studies in History and Jurisprudence*, (Boston: Adamant Media, 2002), 188-189.

[397] Alan Watson, *Legal Transplant*, (Athens, Georgia: University of Georgia Press, 1993).

[398] James Bryce, *Studies in History and Jurisprudence*, 190-192.

This study has both aims. First, the analysis focuses on the mechanisms of contemporary *millet* systems, then on the possible adaptation of this system in Europe. The analysis is based on statutory law, jurisprudence, and legal literature on the relevant matters to the argument.[399]

However, in order to assess the effectiveness of the models that are analyzed and their compatibility with liberal democratic standards, this study also uses legal, political, sociological, and historical analyses on related matters including multiculturalism, minority rights, nationalism, and social cohesion.

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HCJ 153/87, *Shakdiel* v. *Minister for Religious Affairs et al.,* 42 P.D. (2) 221

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[399] Since the research is a comparative study of three Middle-East legal systems, one of which of Hebrew language and the other two of Arabic language, I base the analysis on Hebrew sources directly and on Arabic sources in English, French, and German translation. The historical research on the *millet* system has been partially based on German studies and extensively based on English studies. As for the references to the Hungarian and English legal systems, I will rely on English, French, Spanish, and German literatures and translations, while as for the Dutch legal system is concerned, I will directly analyze Dutch sources by help of language support.

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