

De-Territorializing Minority Rights in Europe: A Look Eastward

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The increasing mobilization of non-territorial groups raises questions about European states' ability to cope with collective claims that cannot be categorized under the traditional instruments of minority protection developed under the nation-state system. By investigating other legal traditions in which territory is not an element of protection, such as the Ottoman *millet* system, Europe can find other available solutions to its current dilemmas. Specifically, this article refers to Lebanon, Israel and Iraq, together with some European experiences of non-territorial self-government, and suggests a model for a modern *millet* system in terms of personal autonomy, cultural autonomy, and political representation. Personal autonomy implies the introduction of the legal pluralistic paradigm and the selective opening of geo-legal frontiers to foreign legal traditions and institutions, as in Israel, the UK, and Germany. Cultural autonomy involves the devolution of competences to local minority self-government bodies and the involvement of minority members into decision-making organs vital to their interests, such as in Iraq, Estonia, and Hungary. Political representation requires the combination of both rigid and flexible tools for guaranteeing effective representation and preventing conflict exacerbation.

Keywords: millet system; personal autonomy; cultural autonomy; self-government

The traditional instruments for protecting minorities, which link rights to a certain territory, inadequately address the claims of non-territorial minorities. These instruments 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 facing Europe is how to address the demand for recognition and protection by groups that are dispersed and not concentrated in one territory, such as Roma and Sinti, by migrant groups, such as North Africans, and by religious communities that are not yet recognized, such as Muslims.

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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’ (Markusse, 2001: 151).

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 (Harrison, 2002: 36-7).

During the last fifty years, some European states have progressively adopted non-territorial models of protection in response to the increasingly multicultural composition of society. In October 2008, the UK Minister of Justice recognized the jurisdiction of Islamic courts as arbitrators in cases of marriage and divorce. In 1990, the Hungarian Parliament passed a law that guarantees representation for national and ethnic minorities in both local and national political bodies. In the 1950s, the Netherlands established a complex social system, known as *verzuiling* (van Doorn, 1956), which provided different “pillars” of social action for Protestant, Catholic, and secular citizens and is still considered an effective solution for the integration of Muslim citizens (Rath *et al.*, 2004). Given the significant level of Muslim immigration, many European countries have created consultative organs for political representation and dialogue with Muslim minorities, including migrants and nationals, such as the *Consulta Islamica* in Italy, the *Conseil Français du Culte Musulman* in France, the *Comisión Islámica de España* in Spain, and the Muslim Council of Britain. However, there is not yet a clear approach regarding the policy of recognition and the degree of autonomy that should be guaranteed to non-territorial groups.

The literature on non-territorial protection of minorities has analyzed theoretical and practical solutions of cultural autonomy (Nimni, 2005), with historical consideration of the *millet* as the major system of non-territorial autonomy developed in the Ottoman Empire (Braude and Lewis, 1982). However, less heed was given to

contemporary adaptations of the *millet* system in Middle Eastern countries, which can represent a potential source of inspiration for European legislators.

Contemporary adaptations of the Ottoman *millet* system, including Lebanon, Israel, and Iraq mentioned in this article, identify three aspects of protection: personal autonomy, whereby one is subject to the legal system of the ethno-religious group s/he belongs to; cultural autonomy, whereby groups can collectively exercise cultural rights; and political representation of minority groups (Quer, 2010). Non-territorial forms of protection that have been recently adopted in the West can be similarly categorized: British Islamic courts are an example of personal autonomy, cultural and minority councils in Estonia and Hungary are examples of cultural autonomy, and minority councils in Hungary and Islamic councils in other European countries are examples of political representation.

As Palermo and Woelk observe, 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’ (Palermo and Woelk, 2008: 47). The *millet* developed under Ottoman rule to secure Islamic hegemony over non-Muslim minorities under Ottoman sovereignty. Historically, this system did not envisage the positive political inclusion of minorities into Ottoman society; rather, it perpetuated traditional Islamic tenets of domination onto groups of different faiths. Precisely because it emanates from the Eastern legal tradition—where identity is defined in terms of religion rather than ethnicity, and familial allegiance rather than national (Lewis, 2010)—the *millet* is a system constructed on identity and not on territory. Hence, the *millet* has evolved as a system of non-territorial management of diverse groups, which unitarily addresses personal autonomy, cultural autonomy, and political representation. Moreover, it has survived Ottoman rule and is still applied in contemporary Middle Eastern legal systems. By comparing selected contemporary *millet* systems¹ and European examples of non-territorial autonomy as models 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.

With regard to personal autonomy, the UK's recognition of Islamic courts has dramatically changed the long-established Western legal tradition of territoriality by introducing the idea that one may be subject to a legal system produced by an authority other than the state (MacEoin, 2009: 73) whereas, in Middle Eastern and African countries, the coexistence of multiple legal systems is a feature of legal pluralistic systems. Moreover, the judicial recognition of legal institutions that originate from other legal systems, through what this paper defines as "selective recognition", also shows that Western legal systems are increasingly becoming plural (Shah, 2005: 43-66).

With regard to cultural autonomy, European and Middle Eastern solutions show that the accommodation of collective rights through cultural autonomy models may lead to group segregation, while it is at the same time necessary that the system keeps societal unity by institutionalizing a neutral over-communal space with which all groups may identify in order to guarantee citizens' loyalty to the state (Tully, 1995: 197-8).

With regard to political representation, the necessity to guarantee minority groups a certain role in the decision-making process often diverges from societal conflict management and prevention (Töpperwein, 2004: 40-2). Rigid solutions, such as ethnic power-sharing or fixed seats in decision-making institutions, are disputably sustainable in the long term (Woelk, 2008: 97-9), while more flexible solutions may not satisfy communal claims for protection (Wolff, 2008).

As has been noted, a number of European systems have introduced models of non-territorial accommodation for managing diversity that, nonetheless, do not comprehensively address the claims of minorities for protection regarding personal autonomy (advanced mainly by new minorities), cultural autonomy and political representation. Hazardous as it may appear for its apparent extraneousness to Western legal and political traditions, the *millet* system as a model of diversity management offers available solutions to contemporary multicultural Europe in terms of both collective rights accommodation and formulation of minority and majority groups' interests. Indeed, the *millet* originates from a different legal and political tradition and therefore comprises aspects that may be incompatible with the Western democratic tradition. However, as this article shows, this system is a model that could be adapted in Europe for the systemic accommodation of non-territorial claims for communal

protection. Moreover, this article considers the complex debate on the concept of nation-state and the extent to which it can enact effective minority policies by maintaining a majority culture. It argues that multiple identities (group/nation/state/Europe) can be institutionalized through the adaptation of the *millet* system by creating a multi-level identification system (communal/national/supranational) in which majority and minority groups' interests ultimately converge.

1. Personal autonomy and legal pluralism

Among recent claims for protection, the demand advanced by Islamic communities in the UK, Belgium and Germany to recognize *shari'a* (Islamic law) courts roused controversial reactions. 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, 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 colonized legal practices (Hooker, 1975); nor is this issue a novelty in countries characterized by a high degree of immigration—where territorialists, who argue in favour 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 the recognition of foreign legal institutions based on constitutional values and moral considerations (*ordre public*). However, even in the US during the 1920s, it was 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’ (E.G.L., 1923: 473).

Simple non-recognition of foreign legal traditions does not seem to be an available solution either, since their rejection does not imply conformation to European standards by new minorities that are reluctant to abandon their traditions. Furthermore, non-recognition may lead to discrimination against those vulnerable groups 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—such as 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 (Shah, 2003: 398).

If the recognition of traditional legal systems in a model of personal autonomy is not desirable for the above-mentioned 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 of the protection of fundamental rights. Hence, non-recognition is not an available solution.

Beyond the question of appropriateness stemming from the recognition of legal institutions regulating cultural practices considered incompatible with fundamental principles, such as polygamy, the fundamental problem consists of individual protection of vulnerable groups—*e.g.* polygamous children's succession rights. 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' (E.G.L., 1923: 477). Indeed:

[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 (*ibid.*).

So far, two approaches seem to emerge: the direct recognition of foreign legal systems, which are integrated within the national legal space; and selective

recognition of foreign legal institutions, which are employed for the protection of society's vulnerable groups.

1.1 Direct recognition of foreign legal systems: the UK model

With regard to the 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 towards Muslim communities. 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 towards 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 (Shah, 2003: 398).

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 (Dib, 1975: 13-28) and Israel (Edelman, 1994: 48-99), where ethno-religious communities are autonomous in regulating family law matters according to their legal traditions. However, while in Lebanon and Israel religious laws are an integral part of the 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 for 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, when the status of religious law is treated as inferior, and religious courts are (only) arbitration courts, the state qualifies as 'promotional', in the sense that it actively promotes minority rights, through the adoption and implementation of policies that recognizes a special status for the minority.

The Lebanese case shows that a high degree of autonomy freezes legal sub-systems into mono-blocs that are indifferent to any external influence (Takieddine, 2004: 34); 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.

A further singular case is the Greek sub-system of personal autonomy in Thrace. As a vestige of the Ottoman *millet*, the Greek system recognizes both personal and traditional communal autonomy for the historical Muslim minority in Thrace. The special arrangements that regulate the status of Thracian Muslims are contained in the 1914 Act no. 145 and in the 1920 Act no. 2345, both included in the agreements with Turkey that followed Greek independence. The Greek case has been criticized for creating “legal segregation” and for banning Thrace Muslims from civil litigation in family law matters because of personal autonomy (Tsistselikis, 2004). Rather than the direct application of Islamic law, the flaw of this system appears to be the denial of state courts’ scrutiny over the decisions of religious courts, which may not be familiar or inclined to apply the same legal standards of civil courts in terms of human rights standards and equality.

In this respect, the Israeli legal system shows that the supervision of a higher judicial body that scrutinizes the decisions of religious courts, specifically the Supreme Court, constitutes a remedy to the infringement of fundamental rights that stems from the application of religious law (Navot, 2007: 142-5). Moreover, in Israel, the co-existence of both 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—and guarantees both the principle of personal autonomy and respect for fundamental rights. Yet, the status of religious courts as state courts, thus of equal rank as civil courts, may lead to the legitimization of those internal restrictions, defined as discriminatory practice of group culture (Kymlicka, 1995: 35-6), that secular legal systems normally reject.

Hence, the UK model may be considered an improvement of contemporary *millet* systems: such an arrangement guarantees the opportunity for Islamic minorities to refer to religious courts and then to perpetuate traditional cultural practices; simultaneously, by guaranteeing state supervision over judicial decisions, this

arrangement is capable of correcting the contradictions of the system in terms of respect of fundamental rights

However, the activity of monitoring religious courts' decisions may lead to active scrutiny rather than mere supervision, resulting in the imposition of civil interpretations on religious issues. Indeed, civil impositions may not take due account of religious aspirations and needs, leading to the infringement of religious rights and freedoms. For instance, preclusion from undertaking a certain role imposed on a woman by a religious court may be considered as discrimination against her, while perfectly consistent with religious principles and values. The gap between values and visions may lead to a certain tension between civil and religious legal communities. As has been observed with regard to Israel, secular legal discourse often bears the main responsibility for the poor reputation of religious judges (Dichovsky, 1986-1988).

The necessity to connect religious sub-systems and the general legal system of the state is confirmed by the development of religious law towards liberal standards. As Pearl and Menski argue, UK 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' (Pearl and Menski, 1998: 58), which seeks legal solutions within the Islamic law framework that are compatible with British social standards (Tibi, 2006).²

Notwithstanding this tendency towards Europeanization, it remains debatable how convenient it is for European states to open the borders of their jurisdictions 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 (Sbai, 2010: 85-7). 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, whereas others may be disregarded as violations of fundamental freedoms. A case-to-case approach based on mutual understanding and 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 do 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 programmes on constitutional and human rights laws is confirmed by some state initiatives, such as in Spain and Germany (Der Spiegel, 2010).

Finally, the recognition of Islamic law in Europe may lead to the paradox of multiculturalism, whereby certain cultural practices, banned in countries where migrants come from, are revitalized in Europe by 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 (Sbai, 2010: 87).

1.2 Selective recognition of foreign legal institutions: the German model

With regard to the selective recognition of foreign legal institutions, the case-by-case approach seems to be the most appropriate to protect vulnerable groups, including women, children, and sexual minorities, who risk being discriminated against even in promotional legal systems that do not recognize certain legal institutions of their original countries.

This is the case of Germany, where *shari'a* is applied by civil courts in the process of recognition of foreign judgments and in private law, including family law contracts or commercial contracts (Rohe, 2004). Specifically, German civil courts do not directly recognize foreign legal institutions, but recognize the factual situations that ensue in favour of individuals whose rights are violated by these institutions, such as a polygamous wife's succession rights, the reunion of polygamous families on humanitarian basis, and a divorce settlement agreed on the basis of Islamic law.³

This option avoids the problem of legitimizing cultural practices contrary to fundamental rights in that international private law permits the "filtering" of legal institutions compatible with the European legal systems through the notion of public order. Simultaneously, the process of recognizing foreign decisions cannot simply disregard foreign legal institutions considered repugnant to European legal culture.

Indeed, 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 vulnerable groups, such as women and children, who have to be guaranteed protection even though the legal system does not recognize the foreign norms that violated their rights, because simple non-recognition would prejudice their already weak position by leaving them without any rights.

Besides Islamic minority claims, a similar condition concerns same-sex marriages in Europe. Since certain states do not recognize the institution of homosexual unions, the selective recognition of legal institutions could solve the problems that ensue from legal situations that, on the one hand are generated within a legal system that recognizes homosexual unions and, on the other hand, have to be solved in another system that rejects that institution—for instance, the rights of children born to a homosexual family married in Sweden and residing in Italy.

However, this option does not define the limits of recognition and its operational practice. 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 the relations between Islamic and European laws is necessary, in dialogue with Islamic legal experts in Europe. This “task-force” of legal dialogue would increase the potential for mutual understanding on values and norms and could be the first step that opens the way for the institutionalization of Islamic law in religious arbitration courts as in the UK. As Rohe emphasizes,

sharī'a in Europe would mean to define *sharī'a* 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 beliefs. 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 who is willing to respect the rule of the land should enjoy this freedom (Rohe, 2004: 348).

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 relevant foreign values and norms and, in particular, they have to understand the implications of such a change. In this respect, dialogue may lead to legal exchange

and to institutional legal differentiation within the European systems. The desirability of this radical change is not a question anymore, since the process has already started. What, on the contrary, has to be considered is the way this process is developing and the goals to be attained (Ekardt, 2005).

2. 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 active efforts to accommodate minorities is an antidote to the political mobilization of groups (McGarry, O'Leary, and Simeon, 2008). The territorial solutions that have traditionally been adopted should be integrated with non-territorial solutions.

The Estonian model of autonomous communities resembles the communal cultural autonomy of *millet* systems,⁴ where ethno-religious groups autonomously run educational and cultural institutions, as well as health and religious organizations aiming to primarily serve the interests of the minority, although also open to general society. As in the *millet* system, Estonian cultural 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 (Eide, Greni, and Lundberg, 1998: 254-7). The introduction of non-territorial instruments for protecting minorities can also guarantee the appropriate protection of cultural communities according to the number of members and financial capabilities of the institutions mandated to enact policies of protection (Krizsa, 2000: 260). For instance, regarding educational policies, separate schools may be possible for 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 *millet* legal systems, where communities enjoy a large degree of autonomy, also raises concerns on the negative potential of such autonomy through segregation and incompatibility with the dominant community. The *millet* system guarantees groups the autonomy to run educational, cultural, and health institutions in the minority language, reflective of the minority culture, and based on the minority's cultural and religious principles. In such systems, groups act as states by providing

their members services according to a certain set of cultural, traditional, and religious principles, which, in terms of group self-government, are equivalent to the constitutional foundations of states. Hence, the risk of creating separate social groups, common to all autonomy arrangements, may lead to confrontational relations between minority groups and majorities.

Autonomy inevitably preserves and develops non-ruling communities, but it cannot turn into a means of self-determination for 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 a multicultural society that is not a melting pot, but rather a society in which different cultures live separately, in parallel to one another (Rabbath, 1982: 117). This lack of connection among communities, Tibi claims, creates instability in that communities do not identify with a supra-communal form of common membership (Tibi, 2002: 178-81).

The need to protect minorities as a duty of liberal democracy has to be balanced with the necessity of preserving a 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 with a genuine will for integration on the side of minorities, who pursue the goal of cultural preservation in self-governing arrangements but are ready to share the values and principles of the dominant community (Marko, 2006: 510). 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.

In practice, 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 (Lapidoth and Ahimeir, 1999: 25). This means that states should guarantee the 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.

In the negotiation process, leaders who advance the interests of their groups represent minorities. 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, educational training for minority leaders and elites is the first step towards effective dialogue and compromise, such as educational programs in universities for Muslim clerics (Heneghan, 2010).⁵ In addition, the hosting state and institutions should be sensible and open to resident minorities and, specifically, to their culture and needs. This is not just a matter of benevolent acceptance, but it also means fully understanding the common values over which to develop the accommodation of minority claims according to the standards of the ruling majority. In terms of legal pluralism, this is evidently even more necessary if one thinks that the hosting state has to deal with foreign legal institutions and customs. Thus, a Western judge will be able to scrutinize a religious court decision only if s/he thoroughly understands the legal aspects and implications of that institution, and thus is capable of finding the appropriate way to limit its application according to Western standards.

3. Political representation: the millet as a means of diversity management

Appropriate representation of minority groups is necessary to attain the effective protection of cultural rights. The recognition of minority groups by the state is not *per se* sufficient if they do not have an actual say in the management of policies in order to achieve their goals. The Iraqi system is an example of this, since the constitution recognizes collective rights, but the legal system practically deprives minorities of rights since they are not guaranteed representation in those institutions in charge of implementing policies relating to minority rights (Anderson and Stansfield, 2005: 373-6).

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 rigid arrangements exacerbate conflict because groups are prone to maximize their goals rather than seek compromise. The latter case comprises a combination of specific representation in areas of interest to minorities, including the educational system and the management of linguistic and religious affairs, with *de*

facto representation of minorities in the legislative, executive, and judiciary bodies. This combination of rigid and elastic models of representation reduces conflict when the relationship between minority and majority is confrontational (Barzilai, 2003: 95). Specifically, representation cannot meet the demands of a minority that not only does not identify with the state because it feels the existence of the state is incompatible with its national aspirations, but also actively pursues national goals that are not in conformity with the constitutional principles of the state of residence (Kremnitzer, 2004: 161-8).

In this respect, the historical model of de-localizing minority councils in pre-independent Lebanon (Nohra, 1988: 41-4) resembles the Hungarian model of a representation system—reflective of Renner’s national cultural autonomy—whereby minorities are guaranteed representation in institutions through inclusive instruments, such as power-sharing at the local level, whereas, at the central level, they are guaranteed selective representation in specific areas of interest (Walsh, 2000). This model is based on the fragmentation of governance (multi-level) within the institutional hierarchy (Bogdandy, 2007).

In this respect, various European legal systems have opted for the institutionalization of dialogue between states and minorities. In some cases institutionalization is informal and minority representatives negotiate with state institutions without legal means that guarantee them actual power, such as the Islamic Councils in Italy and France. The institutionalization of dialogue can lead to mutual knowledge and understanding by empowering minorities to influence the central institutions and ruling groups, as well as preventing them from pursuing goals that do not conform to the fundamental principles of the state.

This model constitutes an option for minorities that have engaged in confrontational relationships with their 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.⁶ In addition, these institutions can hinder groups from autonomously pursuing their own interests by paralyzing political life. With limited powers guaranteed to advance communal interests, minority groups are motivated to negotiate, while in cases of consolidated powers, groups may trigger conflict by exploiting the institutions designed to protect them and

negatively affecting the whole political system, as Lebanon and Belgium show (Mnookin and Verbeke, 2009).

Examples of *millet* solutions include the institutionalization of legal pluralism in the late Ottoman Empire, adopted by the modern Middle Eastern states after the First World War. The Ottoman *millet* developed self-governments for ethno-religious communities in terms of personal status, cultural autonomy and fiscal autonomy. Communities were organized in partially autonomous bodies, which ‘in some ways replaced the direct authority of the Sultan’s government, even though the locus of ultimate authority was never in doubt’ (Davison, 1963: 12). Therefore, Ottoman citizens were subject to the authority of the ethno-religious community to which they belonged for matters of personal status (marriage and divorce), tax levies (for the government of communal activities), and educational services.

Modern Middle Eastern systems have adapted the Ottoman *millet* in order to cope with diversity, defined first as religious communal identity, or ethno-religious identity. The most developed examples of contemporary *millet* are: Lebanon, Israel, and Iraq.

Lebanon provides the example of a political-confessional pact that institutionalized not only personal autonomy, but also political representation. Indeed, Lebanon is based on a paradigm of political confessionalism, whereby power-sharing runs through ethno-religious lines (called *ta’ifiya*); different religious communities are united by a syncretic nationalism that is designed to keep the societal basis united (Rondot, 1968). Israel is an example of liberal democracy where the *millet* is limited to personal status, whereby religious courts administrate matters of family law, guaranteeing the perpetuation of religious practices through limited autonomy. The state recognizes 12 religious communities (including Jews, Muslims, Druze, and several Christian confessions), which enjoy a certain degree of autonomy in governing communal property and communal religious, educational, and cultural services.

As for Iraq, in 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 (including Christians, Yezidis, Sabaens, and Shabaks), in the attempt to manage the complex diversity characterizing Iraqi society, which has been divided by religious and political conflicts. In Iraq the

millet system proves to be particularly effective in protecting minority interests that go beyond conflict among ruling communities, including Kurds and Arabs, as well as Sunni and Shi'a. In this regard, small minorities in Iraq benefit from the *millet* system because they can preserve their identity despite their small numbers by pursuing their interests at the local level.

Still, the focal issue is: why are states willing to negotiate with minorities that are perceived as hostile? Inversely, why should a minority that does not identify with the state of residence be willing to engage in dialogue with state institutions? Beyond the recognition of collective rights at the local level, which would lead to collective satisfaction, another answer is the institutionalization of dialogue. In constitutional terms, the instruments of representation allow for 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, who can pursue their interests 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. In particular, this holds true considering the current pressure that borders are under and the consequent increasing inability to define legal, economic and political spaces that are detaching themselves from spatial territories causing a progressive process of de-territorialization (Papastergiadis, 2000: 115-6).

In this respect, the opening of geo-legal frontiers by recognizing foreign legal traditions 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, the minority question challenges the cultural mission of the states that are the homeland of one culture. In this respect, the idea of Europe constitutes a lifeline for nation-states. As Weiler emphasizes, Europe is not about the creation of a new nation; being European does not imply leveling out different

cultures, but rather creating a new form of aggregation of states and peoples that identify with a common citizenship (Weiler, 1997: 287).⁷ It is ‘the decoupling of nationality and citizenship [that] opens the possibility, instead, of thinking of co-existing multiple *demoi*’, conceived as simultaneously multiple identities ‘at different levels of intensity’ (Weiler, 1997: 287).

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 identification exists in the shape of a European identity. A minority group, having no territory of reference, may be recognized and guaranteed autonomy, yet still not identify with one nation, though 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.

Conclusion

The process of de-territorialization is not simply a sociological phenomenon that affects economic systems through the migration of workers, creating international job markets and influencing transnational economies. 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 uprooted individuals who do not identify with 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.

European states have to find appropriate solutions to the problem of recognizing foreign legal cultures that challenge the duty of the state to maintain certain legal standards as set by human rights law and constitutional law. 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 the non-recognition of foreign institutions or by integration; the latter implies a mutual process of opening geo-legal frontiers by legal systems and 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, then communities barricade themselves in order to perpetuate traditional cultural practices and exploit individual rights that guarantee basic freedoms to the detriment of vulnerable groups. 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 diversity into their social and legal spaces.

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 society. States may maintain their role as “homelands of dominant cultures”, but the non-territorial protection of minorities opens the possibility for diverse communities to create their own social space which, however, does not challenge the identification of one state with one dominant culture, since, ultimately, both dominant and minority cultures identify with one supra-identity.

As previously noted, many European legal systems have adopted models of non-territorial autonomy. Nevertheless, these models are incomplete, or applied to deal with different communal requests and collective needs. In this sense, the *millet* system could serve as a valid model for the comprehensive protection of minority groups and collective rights through non-territorial arrangements. A European *millet* system could correct some of the negative aspects of its contemporary versions that are applied in the Middle East. Due to the increasing importance of non-territorial forms of minority protection, the *millet* system could serve as a model in Europe in adjudicating integrative and non-assimilative claims. Arguably, Europe is developing

its own form of *millet*, but, through a more attentive analysis of the Middle Eastern experience, European states could learn lessons about diversity management.

Notes

1. Specifically, this paper refers to: Lebanon, since it is the most similar system to the Ottoman *millet* with powerful religious courts in matters of personal status and large autonomous ethno-religious groups in matters of cultural rights; Israel, since it is the only liberal democracy that recognizes collective rights in terms of personal and cultural autonomy; and Iraq, where non-territorial autonomy has been constitutionalized alongside territorial federal-like arrangements.
2. 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 as Euro-Islam, which combines Islamic culture with European tradition and principles. European versions of Islam are developing in different countries. 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.
3. See OLG Köln, FamRZ, 1996: 1147 and OLG Düsseldorf, FamRZ, 1998: 1113.
4. The text of the law, in English translation, is available at: http://www.einst.ee/factsheets/cult_auton/.
5. The training courses aim to develop the application of a critical approach to Islamic theological studies. This approach was developed in German faculties of theology during the nineteenth century, as a result of rationalist theories of the Enlightenment. This new method privileged critical and rational approaches to the study of the Bible, in contrast with dogmatic theological theories, which ultimately supported Christian supremacy. Moreover, university training is thought of 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 (Heneghan, 2010). 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 Christian theology departments ran the programmes. As a consequence, these educational programmes were perceived as means for proselytizing, rather than programmes on Islamic theology.
6. 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 Heggy argues, the problems that European states face with their Islamic minorities originate from the forms of dialogue they opt for. European states, according to Heggy, turned to a large variety of Islamic associations and Islamic leaders, including radicals, who are legitimized as representatives of Islam. This all-inclusive approach hinders Islamic communities in the development of 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 relationships with hosting states, Heggy argues that the institutions promoting dialogue should be composed for the majority of moderate leaders, so that radicals would be isolated. See the essays by Tarek Heggy available at <http://www.tarek-heggy.com/index.html>.

7. 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 patriotism. 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 hand, 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 and common cultural history.

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