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Four countries, one people: legal issues on Kurdish question

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Introduction

The issue I try to discuss involves countries settled in a peculiar geo-strategic area where it was, is and will be fundamental to maintain border-lines in order to avoid tough conflicts. In this context there is a people, the Kurds, who live in border areas of Turkey, Iraq, Iran and Syria and that has no recognition to the self-determination nor as a minority since the Treaty of Lausanne¹ was signed.

A brief historical overview could explain the origins of the Kurdish question. During the Ottoman empire, Kurds lived peacefully with the other ethnical, religious and linguistic groups of the empire, thanks to the system of *millet*². After the end of the First World War the situation changed because, under the influence of the European colonization, the empire was divided in various States with their own domestic jurisdiction. From that moment the half-moon of Kurdistan was separated and became East Anatolia in Turkey, North in Iraq, Jazira in Syria and Korasan in Iran.

The first part of this essay deals with legal aspects concerning Kurdish protection as a minority in those States listed above. Particularly, the first paragraph concerns the Kurdish question in Turkey, underlining how the “turkization” of Kurdish people was considered by the political élites as a means to protect national unity; I also talk about recent developments under the AKP Government to pacify the eastern region finding means of recognition for Kurdish minority that won’t break national unit.

Second paragraph concerns Kurds living in northern Iraq, focusing on the developments occurred since the first Gulf War who lead the region becoming a sort of *de facto* State, with its own competencies. The position of the region in the new Iraqi federalism is also discussed.

As a third step, I analyze Kurdish question in Iran, with regard to the religion differences between Kurds and the majority of the country, trying to demonstrate that the mix of different religious and ethnical belonging is the main reason of the discrimination.

In the following paragraph, I deal with the situation of Kurds in Syria, particularly considering the choice of the policy makers to ignore Kurds, preventing them to have identity documents and authorizations to work, transforming Kurds in a sort of untouchables similar to the lower Indian caste.

¹ As we will see in the following paragraph, the treaty of Lausanne was signed after the rejection by Turkey of the Treaty of Sèvres that defined the new asset of the Ottoman empire. This treaty was negotiated by the Ankara-based Government that took the place of the Istanbul-based one and that established the Republic of Turkey. The Conference of Lausanne, that lead to the Treaty, was fundamental for the international recognition of the Republic of Turkey as successor State of the Ottoman empire, but also because it redrawn Turkish borders solving the questions about the Straits and establishing the exchange of population between Turkey and Greece. The importance of this Treaty for Kurdish question will be discussed soon after. (C. L. Rozakis, P. N. Stagos, *The Turkish Straits*, Martinus Nijhoff Publishers, 1987, 37-39).

² *Millet* system is the most ancient “pillar system” for the management of multinational States. It assured autonomy to the various minorities living into the Ottoman empire. Particularly, they were free to manage family laws and were governed by their own leaders that were also the contact with the sultan. See B. Bernardini d’Arnesano, *Costituzionalizzazione, ottomanesimo e identità nazionale*, Pensa, 2004 and F. Palermo, J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze*, CEDAM, 2008, 52.

In the second part, finally, I try to suggest some solutions that come from comparative public law in order to protect Kurds assuring them individual and minority rights.

Part I

1. To understand the reasons which pushed Turkey to misrecognize Kurds during the last century, first of all it's important to understand the origins of this country. Leader-State of the Ottoman Empire³, at the end of First World War Turkey had its borders established, and strongly reduced, by the Treaty of Sèvres, signed on 10th August 1920, who left Turkey without the provinces of Edirne, Antep, Urfa, Kars and, moreover, Izmir. Of our specific interest are articles 62-64 of the Treaty, which recognized the right of Kurds to have an independent State, following the provision of the 14 points drafted by US President Wilson⁴. The Treaty of Sèvres was also at the origins of the so called Sèvres Syndrome⁵ which still today may be considered an important element in Turkish policy making⁶. However, the dispositions of the Treaty were never implemented because of the rising of the Young Turks⁷ and of the general Mustafa Kemal, soon after become President of the Republic and called Atatürk⁸. He negotiated a new treaty, able to respect his idea of Turkish borders, but also to avoid a new conflict, particularly with the British army, which continues to be settled in closer Iraqi province of Mosul.

The Treaty of Lausanne dealt on the issue of borders definition, totally forgiving the self-determination promised to Kurdish people. The Treaty contains just few articles about the minorities that would be included in the new designed borders, but they were referred moreover to Greek and orthodox people. In effect, articles 37-45, s. III, of the Treaty affirmed the right to protect

³ About the organization of sovereignty in the Ottoman empire, it could be interesting to underline that the empire had a *suzerain* State, Turkey, which coordinated the management of the empire with vassals States. Because of the difference between the Ottoman *suzerainty* and the western concept of sovereignty, at the moment of the division of the empire between the colonizer States, particularly during the negotiation of 1856 Treaty of Paris, Turkey was considered just as a user of benefits deriving from the agreements between European powers. (E. Augusti, *La Sublime Porta e il Trattato di Parigi del 1856. Le ragioni di una partecipazione*, in *Le Carte e la Storia, Rivista di storia delle istituzioni*, 1, 152-157, il Mulino, 2008).

⁴ Those points were summarized by President Wilson during his speech at the U.S. Congress on 8 January 1918. Aiming to establish a lasting peace, he presented the points also at the 1919 Conference of Paris. They provided for the end of secret diplomacy, the limitation of arms and the resolution of colonial conflicts considering both the interests of colonizer powers and occupied populations.

⁵ On this point see: F. Salomoni, *Paradossi e dilemmi dell'identità nazionale turca*, in M. Rampazzi, A.L. Tota, *La memoria pubblica*, UTET, 2007, 127-147 and M. Guida, *The Sévres Syndrome and the "Klompö" theories in the Islamist and Secular Press*, in *Turkish Studies*, IX, 1, 2008, 37-52.

⁶ F. L. Grassi, *Atatürk*, Salerno Editrice, 2009, 198.

⁷ They were the *young* part of the Ottoman society at the beginning of the 20th century in the sense that they were progressive and modern. Moreover they wanted the abolition of the sultanate and the approval of a Constitution. For further information, see E. E. Ramsaur, *The Young Turks: prelude to the revolution of 1908*, Russel & Russel, 1970.

⁸ Mustafa Kemal (1881-1938) is defined in the Preamble of the Turkish Constitution «the immortal leader and the hero without rival». Overactive member of Young Turks and general during the First World War, he was the first President of the Republic of Turkey, from 1923 to 1938. For Turkey, this period was an era of great reforms aiming to transform it in a modern, democratic and secular State. (See: F. L. Grassi, *Atatürk*, *op. cit.*, 2009 and P. Kinross, *Atatürk: the Rebirth of a Nation*, Phenix Press, 2003, 343).

minorities and to use their own languages in public offices, but, as article 44 says, those provisions are referred just to «non Muslim people of Turkey», excluding in this way Kurds, who are, for the most part, Sunni Muslims⁹.

In order to assimilate Kurds, Ankara used a double strategy aiming, on one hand, to dislocate all over Turkish territory the Kurdish people, breaking in this way its tribal traditional unity; on the other hand, the policies made by the Government aimed to limit Kurdish cultural rights reducing the ethno-cultural cohesion with those Kurdish communities settled over the borders.

For these reasons, article 2 of 1924 Constitution prevented from using languages different from Turkish; consequently, Kurdish was definitely banned with 3 March 1924 decree n. 430 on the unification of the educational system, which recognized the right to education only in Turkish. 1924 Law n. 1505 also limited property rights establishing the expropriation of lands in favor of Turkish speakers which decided to live in Kurdistan¹⁰.

The following year 10 June 1925 law n. 1097 launched the Southern Eastern Anatolian Project (*Güney Anadolu Projesi – GAP*), which established the deportation of Kurds from the Kurdistan's Turkish provinces and their distribution on Turkish territory in way able to limit their presence under the 5% of the population of the villages where they were settled.

In 1987, finally, law-decree n. 425 created the Super-Governor for East Anatolia, with huge powers over the life of people living in that region. He had the power to control working activities but also political one and, by extension, those activities concerning holidays and social ceremonies; moreover decree n. 425 established that Super-Governor's acts could not be appealed to any court.

The GAP also limited Kurdish cultural rights and freedom of expression; for instance article 14 of the law n. 1097 prevented to speak Kurdish publicly. The change of the Arab alphabet with the Latin one, with 1928 decree n. 1353, was another instrument to break the cultural unity and isolated Kurds from the communities who lived on the other side of the borders; it also caused the destructions of thousand of manuscripts about Kurdish history and tradition. To reaffirm the existence of a unique ethnical group in Turkey, laws n. 2596 of 28 November 1934 and n. 2597 of 3 December 1934, respectively prevented to use Kurdish surname and traditional clothes. In the same period the propaganda started to call Kurdish people as “Turks of the Mountain”, meaning that differences between Turks and Kurds only depended on the isolation caused by the morphology of the region.

⁹ Kurds became Muslims in 7th century a. D., laying Islam upon the previous belief derived by the Zoroastrian doctrine. At the present time they are prevalently Sunni Muslim, but there are also some Alevites minorities and the Yezidis community. The latter follows a creed totally different from Islam and has its own holy book written in Kurdish.

¹⁰ The Turkish part of Kurdistan contains 18 of the 67 Turkish *villayet* (provinces) located in the South East of Anatolia.

Also after the liberal 1961 Constitution¹¹, Kurdish situation did not change. Decree n. 6/7635 of 25 January 1967 prevented the «introduction and the diffusion in Turkey of publications, and other means of communication published in Kurdish».

After the revolt started since 1984 by the *Partîya Karkéren Kurdîstan* (Worker Party of Kurdistan - PKK)¹², the Government created the system of the *koy koruculari*¹³, and the Parliament extended the power of army and police to jail suspected people and confiscate everything was considered a danger for country's unity. After three year, 1987 decree n. 424 allowed the Minister of Internal Affairs to confiscate any publication able to upset public order and to close its publisher.

However, it's important to underline that the assimilationist approach analyzed till now has always had in Turkish policy makers the opposition of those who supported a political solution following the example of the Spanish one for Basques. Particularly the former President Turgut Ozal proposed a solution based on decentralization and on the concession of a limited degree of autonomy to Kurds¹⁴.

Finally, some important aspects concerning legal protection of Kurds as a minority in Turkey come from the present Constitution, entered in force in 1981. I would like to remind article 3, which states that Turkey is an indivisible entity and its language is Turk. Just few words able to sign a strong difference with 1961 Constitution which stated that the official language was Turk, without excluding the possibility of local languages. The reference to the indivisibility at article 3 could also be considered as a mean to ignore the existence of other sub-identities, as the Kurdish one. The Report on Minorities, issued by the Consultative Council for Human Rights¹⁵, also assumes that the attempt to ignore the existence of minorities transforms the related claims in incitation to separatism and secession.

However something is slowly changing in Turkey, as demonstrated by the approval of the controversial 27 June 2004 law n. 5233, which assures some compensations for the damages derived from the clashes between Turkish troops and PKK since 1984. Moreover, a latent recognition of Kurdish language can be seen in the partial abrogation of 1983 law n. 2932, which

¹¹ See I. O. Kaboglu, *De la réforme constitutionnel en Turquie*, in *Chroniques de l'OMIJ*, PULIM, 2004, 9-30.

¹² PKK originally was a Maoist political movement founded after the 1971 coup d'état. Slowly it abandoned the political arena and since 1984 transformed itself in an armed group fighting for Kurdistan independence. Its prominent leader is Abdullah Öcalan, at the moment jailed in Turkey. (A. Markus, *Blood and belief: the PKK and the Kurdish fight for independence*, NYUP, 2007).

¹³ This expression could be translated as "village watchmen". *Koy koruculari* are about 60 thousands policemen of Kurdish origins that supported government and controlled the eventually dangerous activities that happen in villages, particularly defending them from armed forces of Kurdish guerrilla. Some authors sustained that this loyalty to government was obtained through the threat of harm families, houses and personal goods (H. J. Barkey, G. E. Fuller, *Turkey's Kurdish Question*, Carnegie Commission on Preventing Deadly Conflict Series, Rowman & Littlefield Publishers, 1998, 147-148).

¹⁴ For a better examination of Ozal's policy toward Kurds, see H. J. Barkey, G. E. Fuller, *Turkey's Kurdish Question, passim*, e S.C. Roach, *Cultural Autonomy, Minority Rights and Globalization*, Aldershot, 2005, 108.

¹⁵ About the functions and structure of this Council and also about the complex trial that involved his President see I. O. Kaboglu, *Libertà di espressione e diritti umani in Turchia: il Consiglio consultivo dei diritti dell'uomo dinanzi al giudice penale*, in *Politica del Diritto*, 1, 2008, 165-188.

prevented the use of Kurdish language, and in the approval of 2003 law n. 130, concerning the chance to allow private broadcasting, education and the use of name in Kurdish.

Those are just few examples of a more general trend that involves Turkey in last decades. The aim to become part of the European Union and to be definitively recognized by the international community as a modern and democratic State, as the internal claims for a more pluralistic society motivated policy makers to reform several times 1981 Constitution. They also started a debate over some fundamental principles of the Republic, as ethnical homogeneity or secularism¹⁶.

2. Iraqi Kurdish region is located in the north of the country and is composed by 18 provinces; those territories, however, do not include some other provinces where Kurds are settled, as Kirkuk, Ninive, Dyala and Waset.

From an historical point of view I may underline that the relationship between Kurds and Arabs of this country was not always peaceful. After the 1919 foundation of Iraq, Kurds participated to the political life of the country and, although the international community did not provide the promised independent State for them, article 3 of 1958 Constitution, that entered in force after the Free Officers riot, declared that Iraq was the homeland of Arabs and Kurds. Also the flag reminded this brotherhood, drawing the dagger and the sword, respectively symbols of Kurdish and Iraqi identities, close together.

After 1963 Ba'th coup d'état, Saddam Hussein signed with Mullah Mustafa Barzani¹⁷ the 1970 March Manifesto, an agreement which provided for the recognition of Kurdish as official language in the region inhabited by Kurds, their participation in Government and civil service, the appointment of a Kurdish vice President of the Republic, the creation of a Kurdish self-governed unit including the major areas where Iraqi-Kurds lived. However the Manifesto was never implemented and in 1974 Saddam Hussein imposed an autonomy agreement that provided a limited autonomy under the control of the President of the Republic; this area of autonomy also ignored Kirkuk, a province of the Iraqi territory always contended with the Arab population of the country that is in the center of a huge debate also in the new democratic regime. From that moment the Arab

¹⁶ It is possible to quote the recent event that also menaced the governmental party AKP. This controversial party tried to redraw Turkish secularism starting from education. Particularly, on 9 February 2008 Parliament approved a Constitutional amendment of articles 10 and 42 that provided for the participation to the university lessons to girls dressed with the *turban*, the traditional scarf that cover just hairs. On 9 June 2008 Constitutional Court declared the unconstitutionality of the amendment. At the same time the President of the Cassation Court asked Constitutional Court to dissolve AKP alleging that its policies were unconstitutional, violating the first three article of the Constitution that states, among others, the principle of secularism.

¹⁷ Mullah Mustafa Barzani (1903-1079) was the first leader of the KDP – Iraq, one of the most important and influent Kurdish parties not only in Iraq but in the whole Kurdish community. In 1946 he was Minister of the Defense in the Republic of Mahabad (see § 3); in 1950, come back in Iraq thanks to the wind of détente among Arabs and Kurds, he organized a Kurdish bloc aiming to obtain the autonomy by the Iraqi Government. After his death, his son Massoud succeeded to the guide of the party and became the main actor of the long lasting conflict with Jalal Talabani, leader of the other prominent Kurdish party PUK. See, among the others, M. Barzani, A. Ferhadi (ed.), *Mustafa Barzani and the Kurdish liberation movement (1931-1961)*, Palgrave McMillan, 2003.

dictator started to exalt the role of its ethnic group in the country and slowly reduced the political influence of Kurds.

The war against Iran was the occasion for Saddam to minimize also the physical presence of Kurds in Iraq. Identifying them as enemies of the State and conspirators with Iranians, he started the *Anfal*¹⁸, with the deportation and killing of thousands of Kurds. With the First Gulf War the situation changed again and the resolution n. 688 of UN Security Council, with the operation Provide Comfort, established a no flight zone which allowed the concrete autonomy of the Kurdish Region¹⁹. The second Gulf War, the death of Hussein and the approval of 15 October 2005 Constitution finally included the Kurdish Region into the Federal State of Iraq.

This historical overview is fundamental to understand the last developments of the Kurdish issue and the relationship with the other ethnic and religious components of the country. In fact, since the redaction of 2005 Constitution, Sunni and Shi'a Arabs had to cooperate between them and with Kurds in order to draft a basic law of compromise able to drive Iraq to peace.

The Text underlines since article 3 that Iraq is composed by a plurality of nations and religious groups, equal before the law without any possible discrimination based on sex, race, origin, religion, creed, opinion and socio-economical status, as article 14 states. It also states that the official languages of the country are both Arab and Kurd.

Another important element is the governance asset drawn by the Constitution, which provide for an asymmetric bicameral Parliament and, for four years, an executive power composed by the Council of Ministers and the Presidency Council, a panel of three member representatives of Kurds, Shi'a and Sunni.

Focusing on the Kurdish region it is possible to underline that this area has a permanent population living a defined territory, that is it miss just the full sovereignty over the land, with an own army, in order to have all the characteristics that defined a State²⁰. However it could be also highlighted that

¹⁸ The *Anfal* Operation, that took his name from the Koranic *sura Al-Anfal* that was the code name of the operation and means "spoil of war", consisted of a series of attack against Kurds living both at Iranian and Turkish borders conducted by the Saddam Hussein's regime between 1986 and 1989. On 21 August 2006 the *Anfal* trial began in Baghdad. For more detail about the trial, see M.A. Newton, *The Anfal Genocide: Personal Reflections and Legal Residue*, in *Vanderbilt Journal of Transnational Law*, 2007, 40, 1523- 1541.

¹⁹ During this period the main problem for Kurdish community came from inside. The Kurdish parties PUK and KDP failed to cooperate and created a double administration system. The conflict between them was also supported by neighboring countries: particularly, Turkey supported the KDP administration in the north of the region and Iran supported the PUK one in the south. In September 1998, under the U.S. mediation, the leaders Barzani and Talabani signed the Washington Agreement, also called Final Statement of the Leaders Meeting. 2003 invasion of Iraq and the following 2006 free election finally ended the conflict. Both leaders organized a Kurdish Alliance, as an electoral coalition that included also some small parties, and signed an agreement for the distribution of the political power. They decide that the Prime Minister of the Kurdish Region and the Speaker of the Kurdistan National Assembly will be appointed alternatively by KDP and PUK.

²⁰ It is for these reasons that McColl calls Iraqi Kurdistan "an emergent State", focusing on the fact that it can become independent in a very close moment. (R. McColl, *The Insurgent State: Territorial Bases of Revolution*, in *Annals of the Association of American Geographers*, 1969, 39, 613-31; G.R.V. Stansfield, *Iraqi Kurdistan: Political development and emergent democracy*, Routledge Curzon, 2003, *passim*).

the Kurdish militia of *peshmerga* is still in force and have the policy power over the region, based on article 118 of the Constitution; the same article established the possibility to have abroad regional diplomatic mission able to manage social and cultural policies. About the full sovereignty, instead, at the moment Kurdish National Assembly is the only one of the Federal Republic of Iraq who has drafted a project of Constitution, in November 2002. This project remembers the dispositions entered in force just in the Kurdish region in 1992, that are laws n. 1 and 2 of the same year, which *de facto* define an independent asset of the Region, with a parliamentary system based on the dialogue, and even the political conflict, between two major parties, PUK and KDP.

Differently from the Provide comfort period, during which the economical introits derived moreover from the Oil for food program, the new Federal State provides funds for Kurdish region using the oil. Articles 110 states that the incomes of existent oil well are due to the Federal State, while those belonging to the possible new wells will be due to Regions²¹.

3. The rising of the Kurdish issue in Iran could be connected to the end of the Second World War, when the presence of Soviet troops in the north of the country, and the succession at the Iranian throne of Mohammed Reza Pahlavi, encouraged Kurds to declare their independence from the reign of the Shah and to proclaim, in January 1946, the Republic of Mahabad²². This experience, which lasted till December 1946, was a very brief one but was enough to strongly revitalize the cultural idea of a community of Iranian Kurds. In fact, during this period Kurd became the official language, Kurdish traditions and customs were used to define the flag and anthem and a flourishing press animated political life.

However, the increasing of the cold war and, particularly, the pull out of soviet troops which protected the Republic, caused the end of this period of tolerance and freedom. Kurds came back under the power of the Shah, who used the land reform to expropriate Kurds properties and re-establish his sovereignty over the seceded province.

The Islamic Revolution and the Supreme Guide Ayatollah Khomeini tried in a first time to achieve Kurdish loyalty giving them, in 1979, a sort of self-management because of their religious belonging to Sunni Islam that makes them a minority in relation to the Shi'a majority of the country. The recognition of a religious difference, however, differs from Kurdish ambitions, which claim for an autonomy that depends on their different ethnical identity, traditionally considered more important than the religious belonging. This kind of recognition was hardly in contrast with Khomeini's idea of the State and with the religious principles on which the Islamic Republic of Iran is based. In fact the Koran considers just the idea of *umma* that is the community of the believers

²¹ For further elements on the general situation of Kurds in Iraq see KHRP, *A fact-finding mission in Kurdistan, Iraq: gaps in the human rights infrastructure*, 2008, www.khrp.org.

²² The Republic of Mahabad was funded by Qazi Muhammad, and by the Society for the Revival of Kurdistan headed by him, in the northern western Iran. The manifesto of this Republic, that refused to be part of the Azerbaijan SSR but used the support of Soviet Union to affirm its autonomy from Iran, clearly explain the project for the future of the political élite who drove it. Particularly they wanted to affirm the use of Kurdish for education and administration and the election of a Council for Kurdistan (D. McDowall, *The Kurds: a nation denied*, Minority Rights Publication, 1992, 67).

without borders, and ignores the concept of nation; for this reason it is very hard to introduce in the Iranian context the idea of the independence, or even the autonomy, of a portion of the land based on a different ethnical belonging. Facing the increasing claim for autonomy by Iranian Kurds and taking advantage from the situation of war against Iraq, the Supreme Guide declared the *jihad* against them and, as Saddam Hussein was coevally doing, started an operation of systematic exterminations.

It was just with the end of the war against Iraq that some controversial concessions were given to Kurds in order to pacify the country. In fact at present they have some rights protected by the Constitution. Article 15, for instance, guarantees the opportunity to use Kurdish language for communications, even if the same article strictly forbids the use of local languages for education. Another controversial point concerns the political participation. Although there is no provision about ethnical discriminations in this field, Kurdish parties, as many other, have been considered counter-revolutionary, as prescribed by the provisions of 1982 law on the activities of political parties, societies, political or union associations, Islamic or religious minorities association. Particularly, article 8 of the law binds to a permission issued by the Minister of Internal Affairs the possibility to form parties, whose activities are continuously under the control of a specific commission composed by two members of the judiciary, two of the legislative power and one of the Minister of Internal Affairs itself.

Finally, the Iranian Constitution seems to follow the reasoning of the Treaty of Lausanne, containing some provisions about the treatment of non-Muslim minorities. As said before, this point of view about the protection of minorities, which reminds the Koranic distinction between Muslim and *dhimmi*, totally excludes the opportunity to find means for Kurdish recognition, whose belonging to the Sunni Islam has been already reminded.

4. The Kurdish question in Syria is probably the less known and studied, even if the presence of Kurds in this region dates back to the Crusades²³.

From a geographical point of view, there are three Kurdish enclaves (Kurd Dagh, Jarablus and Cobani, Cezire) and some quarters where Kurds are settled in Damascus and Aleppo.

As underlined for the other contexts analyzed before, also in Syrian provinces of the Ottoman empire Kurds lived peacefully with Arabs thanks to the system of *millet*. It was the Kurdish loyalty to the empire and the support they gave it against the raising Arab nationalism since the last decades of the 19th century that dissolved the harmony.

As a consequence of this ideological conflict, both 1928 Syrian Constituent Assembly and 1958 Constitution refused to recognize the presence of a Kurdish minority in the new and independent State. Some years later, 1962 decree n. 93 and 1963 law on citizenship provided for concrete means to misrecognize this presence. In particular the decree authorized the population census asking each

²³ In fact they were historically settled in Syria when Salah al-din, that had Kurdish origins, transferred there his huge family and those of his troops during the third crusade (D. McDowall, *A modern history of the Kurds*, I.B. Tauris Publisher, 2004, 22-23).

inhabitant to demonstrate that he lived in Syria since before 1945; the law, instead, refused citizenship to everybody was not able to prove what asked by the decree.

The misrecognition of Kurdish presence in Syria has produced effects for long time. Three different categories of Kurds are now findable in Syria: *ajanib*, *maktumin* and half-caste. The first one comprehends non-citizen foreigners that is the status given to Kurds after the census that provides for specific identity documents and that did not allow to vote, own property or obtain a governmental job, even if they are not exempted by the obligatory military service. The category of *maktumin* refers to unregistered, who adds to the previous limitations also the impossibility to receive treatments in State hospitals or to obtain marriage certificates. Half-caste are moreover children born from mixed marriage, often expelled from schools just because they are “not fully Syrian”.

As some observers underline²⁴, Kurds can escape from this situation of marginalization becoming members, or even informants, of the Ba’th party. The reward is the so called *wasta*, that, thanks to Ba’th regional leader, lets them not only participate to the Syrian society, but also have education and job.

From an ideological point of view the hate against Kurds was spread all over the country by a pamphlet edited in 1965 by the Commander for the internal security of the Al-Hasaka Governorate, which, assuming a complot between Kurds, Jewish and Western countries, suggested twenty instruments to destroy the unity of Kurdish communities. He proposed their deportation, if possible in Turkey, the refusal to give them education, the settlement of Arabs in the areas lived by Kurds through the concession of land for collective farms, the institution of a sort of sanitary cordon at the border with Turkey to avoid illegal immigrants, the refusal to guarantee them political rights and citizenship. The idea became reality in 1970, when the government deported Kurds from 332 villages and, issuing another decree, imposed in the Kurd Dagh the Arab toponimy on the Kurdish one, stopped the supplying of water, electricity and phone lines, denied the visa to build houses or restore streets.

The approval of the Constitution, entered in force on 31 January 1973, did not change the situation, moreover because the set of laws about citizenship continued to be in force. Another important point is that the long and very detailed catalogue of rights does not contain any provision about minorities and since the preamble it is possible to understand that founding value of the Syrian Constitution is the ethnical homogeneity. Although on this point it is possible to remind that also Constitutions of some democratic countries do not consider the question of minorities and do not contain provisions on the matter, it is also possible to underline that those democracies base national identity on citizenship, not on ethnicity as the Syrian one does.

Moreover, the situation of Kurds was worsened by 1986 decree n. 1012, which forbids the use of Kurdish during the working time; more strictly, the circular n. 7014 issued in 1996 by the Minister for Local Administration of the Governorate of Al-Hasaka forbids to use Kurdish during working time also in private conversations. The control over the Kurdish culture was completed by 1988

²⁴ About the constant influence of corruption in Syria and its consequences on Kurdish society see reports about the Kurdish situation in Syria published by Kurdish Human Rights Project, on www.khrp.org.

decree n. 1865, which forbids songs in Kurd as a means to ban the main Kurdish festival, the *Nawruz*, for the celebration of the New Year.

Finally, some reflections about the present situation. A few months after his election in 2002 President Al-Asad promised an amnesty for Kurds who committed political crimes and recognized Kurds as a part of the Syrian history. In 2006 he also promised to solve the question of citizenship, only to then declaring in 2005 that the issues of citizenship and census were “sensible” ones and it would take some more (*and undefined*) time to solve it. In addition, international observatories, particularly the Kurdish Human Rights Project, in 2008 still highlighted that identity-based discriminations continue and Kurdish people are obliged to live in Syria as foreigners without any chance to leave the country because any adequate documentation to travel abroad is issued for them²⁵. Considering this situation, it is obvious that Kurds have also inexistent political rights. Some of them operate covertly, but as a consequence they could be charged with challenging the Arabic character of the Syrian people, incite sectarian strife and threaten the unity of the State. Looking at the Syrian Penal Code, some other provisions often affect Kurds: participation to international organizations without the permission of the government, conspiracy, attack to provoke civil war or sectarian fighting through arming Syrians or encouraging them to arm themselves against each other or inciting killings and looting, inciting sectarian strife. Those are, for instance, charges used by the Syrian Air Force Security in August 2008 to jail Meshal al-Tammo, member of the Kurdish political party “Kurdish Future Current” and of the unauthorized network “Committee for the Revival of the Civil Society”.

²⁵ See: R. Bernu, *Human rights and Kurds in Syria: discrimination and repression*, 2008, www.khrp.org.

Part II

The analysis of the Kurdish people situation in the main countries where it is settled²⁶ could suggest some reflections about the possible solutions able to save the integrity of those States but also to guarantee the respect of Kurdish minority rights.

In order to understand these options, it is fundamental to clarify some terminological points. First of all I would like to focus on the concept of *Nation* as a natural society of men with common life and social conscience, common land, origin, tradition and language²⁷. This idea is not contrary to participation of different nations into a unitary State²⁸.

Another element that needs to be clarified is the couple minority/people. Although they are sometimes used without distinction, I think that Kurds will obtain more protection of their rights if they accept to consider themselves as a minority²⁹ in each country they live, instead of trying to be considered a people asking for self-determination and independence. About the option of the recognition by the international community of an *ius secedendi*, it must be underlined how the most part of academics recognize the right to secession only in peculiar circumstances³⁰. At least, it is possible to claim for internal self-determination that is the right to be protected by the State in which they live³¹. This position is also supported by international law, as demonstrated by article 27 of 1966 International Covenant on Civil and Political Rights as by 1981 Report of the U.N. Sub-

²⁶ It must be reminded that some Kurdish communities live also in the so called diasporas. Some of them are settled in Lebanon, where an autochthon tiny group was integrated by further members between 1925 and 1950. A more noteworthy group lives in the ex-SSRs as Azerbaijan, Georgia and Kazakhstan. (See L. I. Meho, K. L. Maglaughlin, *Kurdish culture and society: an annotated bibliography*, Greenwood Publishing Group, 2001, 24; C. R. Ember, M. Ember, I. A. Skoggard, *Encyclopedia of diasporas: immigrant and refugee cultures around the world*, Springer, 2004, 456).

²⁷ S. Mancini quoted by A. Del Vecchio, *Giurisdizione internazionale e globalizzazione*, Giuffrè, 2003, 111.

²⁸ On the mechanisms for current constitutional systems to recognize and promote the social participation of different national groups see G. Rolla, *L'organizzazione costituzionale dello Stato*, Giuffrè, 2007, 36-38.

²⁹ About the concept of minority academics highlighted some difficulties to find a definition (see F. Palermo, J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze*, CEDAM, 2008, 13-16).

Here I accept the definition of Capotorti, who used the word *minority* to identify a group numerically lower as regards the rest of the population of a State, in a non dominant position, whose members, having the nationality of that State, have also ethnical, linguistic and religious features that differ from the rest of the population and shown, at least vague, a sense of belonging aiming to preserve their own culture, religion, customs and language. (F. Capotorti, *The Protection of Minorities under Multilateral Agreements on Human Rights*, in *The Italian Yearbook of International Law*, Editoriale Scientifica, 1976, 14. See also H. Hannum, *The Concept and Definition of Minorities*, in M. Weller (ed.) *Universal Minority Rights*, Oxford University Press, 2007, 50-63; P. Thornberry, *Minorities and Human Rights*, in *Minority Rights Group Report*, 3, 1990, 6-7.

³⁰ See A. Cassese, *Self-Determination of People – A Legal Appraisal*, Cambridge University Press, 1995, 23; L. Hannikainen, *Self-Determination and Autonomy in International Law*, in M. Suksi (ed.), *Autonomy: Application and Implication*, Kluwer Law International, 1998, 80.

³¹ About the evolution of the legal concept of self-determination and its pertinence in questions concerning National minority rights, see A. Xanthaki, *The Right to Self-Determination: Meaning and Scope*, in N. Ghanea, A. Xanthaki (ed.), *Martinus Nijhof Publisher*, 2005, 32. The author underlines that currently this concept is no longer referable only to secession and independence, but it includes also the right to democratic governance, to the participation to the social and political life of the State, to the autonomy.

Commission on the Prevention of Discriminations and Protection of Minorities³². Also the U.N. General Assembly, with 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities³³ clarified that the fail to respect the provisions of the Declaration did not provide a right to independence³⁴. Some other confirmations come from the praxis of OSCE and Council of Europe³⁵, which retain that minorities has to be protected against discriminations but that it is not a group right but an individual one.

The idea is that the unity of the State is respected both in centralized one and in those which decentralize some powers and competencies in order to balance interests of a pluralistic society³⁶. Comparative law proposes a huge spectrum of Constitutions which chosen autonomy to accommodate diversity³⁷.

The first example comes from article 2 of 1978 Spanish Constitution which recognizes the autonomy of nationalities and regions that are part of the State. The same wish to protect the peculiarities of minorities is in 1990 Hungarian Constitution, whose article 68 recognizes to minorities the role of constituent element of the State.

This approach, however, is based on some points that already appeared during the previous analysis: recognition of citizenship, creation of decentralized authority able to integrate minorities, electoral system promoting political participation of minorities³⁸. Looking at the those cases, as the Turkish or the Iranian ones, where a specific portion of land lived by Kurds could be individuated, it is possible to suggest the introduction of a model of regionalism similar to the Spanish one, based

³² UN Doc. E/CN4/ Sub.2/404/ Rev.1, 1981, §173.

³³ Resolution 47/135 adopted by the U.N. General Assembly of 18 December 1992.

³⁴ This Declaration represents a step forward on the path for the protection of minorities because it contains a very detailed catalogue of rights, as the right to identity and the connected ban of ethnocide or cultural destruction of a group by States. Reaffirming the absence of overlaps between rights of minorities and right to independence, it also deprives of an international legal support those micro-nationalisms that could be able to seriously damage the general equilibrium between States (U. Villani, *La protezione internazionale dei diritti umani*, LUISS University Press, 2005, 67-74).

³⁵ About the role of the Council of Europe for the recognition of Kurdish minority rights, see Resolution n. 1519, adopted on 4 October 2006 by the Assembly of the Council. The Resolution recognizes the improvements of Turkey for the implementation of Kurdish cultural rights and hope for an inter-ethnic cooperation in order to succeed. The Council of Europe provided also two conventional instruments to protect minorities: 1992 European Charter for Regional or Minority Languages and 1995 Framework Convention for the protection of national minorities.

³⁶ A good example in this sense can come from Canada. It could be also useful to consider the well-known reference issued in 1998 by the Supreme Court about the possible secession of Québec. The Court underlined that the right to self-determination was due only to people subjected during colonialism. See G. Rolla (ed.), *Eguali ma diversi. Identità ed autonomia secondo la giurisprudenza della Corte Suprema del Canada*, Giuffrè, 2006, and T. Groppi, *Canada*, il Mulino, 2006. About the general attitude of Canada towards the autonomy of minorities and their protection see G. A. Beaudoin, *La situation au Canada*, in *Local Self-Government, Territorial Integrity and Protection of Minorities*, European Commission for Democracy through Law, International Colloquium, Lausanne, 25-27 April 1996, Zurich, Schulthess Polygraphischer Verlag AG, 1996, 39-51.

³⁷ On the academic debate about autonomy and International law see: Z. A. Skubaty, *Introduction*, in Z. A. Skubaty (ed.), *Beyond a One-Dimensional State: an Emerging Right to Autonomy?*, Martinus Nijhoff Publishers, 2005, xxxiv.

³⁸ See Y. Ghai, *Public Participation, Autonomy and Minorities*, in Z. A. Skubaty (ed.), *op. cit.*, 14.

on the so called *hechos diferenciales*, but also to the model that attributes peculiar autonomy just to some parts of its territory, as Portugal does for Azores and Madeira³⁹. *Mutatis mutandis*, it could be applicable also the provision that article 111 of 1994 Moldova Constitution provides for Turkish population of Gaguzia, which has a huge degree of autonomy inside the State⁴⁰.

About the recognition of individual rights, a suggestion could come by the affirmative action⁴¹ which provides for the protection of cultural, linguistic and religious characteristics. Without considering Western Constitutions, it is possible to remind article 40 of 1995 Constitution of Azerbaijan and article 50 of 1994 Belarus Constitution, which states the right of everyone to protect its national belonging and uses its own language.

Considering the question of political participation of Kurds, an example could be found in the principle of proportionality provided in the Constitution of Denmark, Croatia, Hungary and Slovenia, which reserve some parliamentary seats to minorities in the case that no party can guarantee an adequate representation being able to overcome the threshold barriers fixed by electoral laws. After all, also article 64 of the Iranian Constitution reserve a predefined number of seats to non-Muslim minorities; in this case it will be enough to extend the provision to all the other minorities of the country.

At the end, some suggestions about each case. With reference to the Turkish case, it is possible to remember what the CCHR suggests in the Report on Minorities: the creation of a super-identity. The authors of the Report hoped for the abrogation of the status of “Turkish citizen” in favor of the status of “citizen of Turkey”. This simple periphrasis could be, in the opinion of the authors, suitable also for those citizens of non-Turkish nationality, as, for instance, Kurds.

About Syria, the recognition of Kurdish minority could be obtained through the effective respect of that international Convention that Syria has already ratified⁴², maybe also using the economical influence of European Union, moreover through the new Euromed, and of other international actors. In fact, in this case could be used the Baltic clause of the principle of conditionality and also the clause of social incentive in order to pretend the respect of human right in the country in exchange of economical benefits.

The influence of international actors could be used also in Iraq. In this case, where the recognition of Kurdish people is perfected, the particular influence of United States and of those country who participated to the coalition of willing could be fundamental to help the discussion and the creation

³⁹ G. Rolla, *La costruzione delle autonomie. Considerazioni sintetiche alla luce dell'esperienza italiana e spagnola*, in *Istituzioni del Federalismo*, 5, 2005, 795.

⁴⁰ A. Barbaneagra, *The Situation in Moldova*, in *Local Self-Government, Territorial Integrity and Protection of Minorities*, *op. cit.*, 11-22.

⁴¹ The term, synonymous of positive action, refers to those provisions contained in Constitutions, for instance of U.S.A. or India, that allow particular discrimination between citizens in order to promote the disqualified classes, i.d. to guarantee the substantial equity among citizens and not only the formal one stated in constitutional texts. (For a general overview about the effect of affirmative action see A. E. Sadler *Affirmative action*, Greenhave Press, 1996).

⁴² For instance, it will be enough to obtain the respect of 1966 U.N. Covenants or of the 1954 Convention on elimination of statelessness.

of compromise between different ethnical and religious fragments of the population in order to avoid that this peculiar federalism could dismember the State and destabilize Middle East.

The actual fear for the creation of an independent Iraqi Kurdistan could be shown looking at the reactions of the other leaders and government soon after the 2003 invasion of Iraq. Turkish troops started to bomb the region in order to contrast Kurdish forces⁴³ and, at the same time, Syria and Iran started to increase the control over the activities of Kurds living into their borders. The anxiety for an independent Kurdistan in Iraq also pushed Turkish, Syrian and Iranian leaders to meet and discuss an understanding on security matters⁴⁴.

Conclusions

As a conclusion it is possible to highlight that both international and constitutional law provide for many options in order to guarantee Kurdish minority protection. But, as demonstrated by the present situation, maybe legal provisions are not enough to really solve Kurdish question.

For this reason I think it could be fundamental to consider the role of civil society. In effect, only the debate on this issue among local societies of the States concerned by the question and the comprehension that the recognition of Kurdish rights will not invalidate majority rights but, on the contrary, will pacify the society and improve it evolution.

An important role in favoring the creation of this debate could be attributed to international actors and NGOs. About the first one, it is possible to remind that not only big international power as U.S. or European institution have an important role in sustaining (but never imposing) democracy implementation all over the world, but also some less notorious networks as the Inter-parliamentary Union, that can help policy makers to discuss local solution to common problems. On the contrary, NGOs, operating closer to the population, could improve direct dialogue among people, the only means to let people understand that there is the human race and its right is the same without any kind of discriminations.

⁴³ See ABC news, *Turkey bombs PKK targets in North Iraq*, appeared on 29 October 2008 (www.abc.net.au).

⁴⁴ See: R. Bernu, *Human rights and Kurds in Syria: discrimination and repression*, 2008, www.khrp.org.

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