



Department of Political Science

Chair: Comparative Public Law

**CODIFICATION AND PROTECTION OF HUMAN RIGHTS
IN THE EURO-MEDITERRANEAN REGION:
A COMPARATIVE ANALYSIS**

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Academic year 2017/2018

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INTRODUCTION

Even if the Universal Declaration of Human Rights of 1948 recognized the equality of all human beings, they do not all enjoy the same level of rights. On the one hand human rights perpetrations have been justified on the ground of cultural relativism, while on the other hand even when formally accepted, not all countries are able to guarantee them, because of a lack of commitment, codification or enforcement mechanisms. However, we believe in the importance of human rights enhancement as they are the «foundation of freedom, justice and peace in the world».¹ Moreover, development can be difficultly reached without human rights improvement, because of the extreme interconnection of the two issues.²

The first step to achieve human rights realization is their codification. On the one hand, at international level the United Nations is carrying out a fundamental activity with this regard. In fact, by promoting human rights codification, as well as setting human rights minimum standards to comply with, it provides states with guidelines to follow in order to achieve full human rights realization. On the other hand, regional treaties have been elaborated to render human rights protection more effective and to extend their sphere of action, including both civil and political rights and economic, social and cultural rights.³ Moreover, it might be easier to find a common understanding of human rights at regional level because regionally states are influenced by similar traditions.⁴

However, even if at international level human rights have been codified into several conventions, international institutions to enforce them are still weak.⁵

¹ *Ibidem*, Preamble.

² Alston P. — Robinson M., *The Challenges of Ensuring the Mutuality of Human Rights and Development Endeavours*, in Alston P. — Robinson M. (edited by), *Human Rights and Development: Towards Mutual Reinforcement*, Oxford, Oxford University Press, 2005, 1.

³ Office of the High Commissioner for Human Rights and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, UN, New York and Geneva, 2003, 72, in <https://www.ohchr.org/Documents/Publications/training9Titleen.pdf>.

⁴ Reis Marques M., *A Proteção Internacional dos Direitos Humanos. Dos Sistemas Regionais ao Intento Global da ONU*, in *Boletim de Ciências Económicas*, 2014, 57, 2025-2026.

⁵ Buergenthal T. — Shelton D. — Stewart D.P., *International Human Rights in a Nutshell*, in *GWU Legal Studies Research Paper*, 2013, 34, 27.

Instead, at regional level, in some areas, effective enforcement mechanisms have been reached. For instance, the ECHR provides for a European Court of Human Rights which offers for an effective mechanism of human rights enforcement, while, the ACHR, which instead is below international human rights standards, does not provide for an effective enforcement mechanism. Hence, if the European region has created the most successful system of international human rights' protection in place,⁶ the MENA region should foster its human rights codification as to meet international standards and translated it into effective mechanisms of control.

Therefore, in this thesis we will examine the codification and protection of human rights at regional level. In particular, we will focus the analysis on the European and MENA regions.

When speaking about the European region, we refer to the Council of Europe and the EU. On the one hand, they both aim at human rights enhancement; on the other hand, their relationship should be considered. In fact, by declaring binding the Charter of Fundamental Rights of the European Union, article 6 of the TFEU foresees the accession of the EU to the ECHR and the ECHR's principles as general principles of the Union's law. Moreover, by systemically quoting the ECHR, the ECJ case law contributes to the codification of human rights.

Hence, if we have clarified why the human rights issue is noteworthy, we will now explain why we have decided to compare these two very different regions, with completely diverse legal systems and families. One based mainly on civil law — the UK and Ireland have a common law system — while the other on Islamic law.

We think that a comparison might be valuable in the framework of the Mediterranean as common space of dialogue, stability, human development and integration. In this perspective, we believe that these goals might be difficultly

⁶ Bates E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 2.

achieved if one system efficiently guarantees human rights while the other is weaker. In fact, as we will observe, the European regional system of human rights is «one of the most effective human rights regime»,⁷ while with regard to the MENA region, the Arab Charter on Human Rights was adopted only in 2004 and it does not provide for an efficient supervision mechanism. Hence, a comparison is necessary to understand how large the gap is between the systems and how much they differ one from the other.

Moreover, in this analysis we will also take into consideration the uprisings of the Arab Spring. Asking for human rights enhancement, they triggered constitutional transitions, adoption of reforms and civil wars, which impact human rights. However, countries, like Libya, that are still shuttered by civil wars or that have resisted to the uprising will not be part of the research. We have chosen to investigate the status of human rights legislation and on the rule of law in Egypt, Morocco, Jordan and Tunisia. In fact, in these countries the uprisings, even if to different extents, provoked constitutional changes endowed with relative stability.

Adopting this point of view, we believe that cooperation and exchanges between the two regions might enable the MENA regime of human rights to develop, as European institutions, i.e. the Venice Commission and the European Commission, already provided with success assistance to certain MENA states.

Hence, this thesis aims at answering the following research question: Are there any similarities or differences between the European and the MENA regionals' systems of codification of human rights? Are there any similarities or differences between the European and the MENA regionals' systems of protection of human rights? May the European regime of human rights which is more efficient, influence the MENA one which is at a lower stage of development?

⁷ Human Rights Council, Draft Report on regional arrangements for the promotion and protection of human rights, 2017, in https://www.ohchr.org/Documents/HRBodies/HRCouncil/AdvisoryCom/Session19/A_HRC_A_C_19_CRP_1.docx+&cd=2&hl=it&ct=clnk&gl=it.

By answering these questions, we will briefly outline the international framework of human rights law, then we will analyse the codification process and protection mechanism of human rights in Europe and in the MENA regions, underlining similarities and differences. Finally, we will point out the European activities of promotion of human rights in the MENA region and their cooperation.

In fact, we have divided the research into four chapters. The first Chapter on the codification and protection of human rights at international level is divided into two parts. In the first part we will analyse the codification of human rights at International level. Hence, the Universal Declaration of Human Rights and its background. In the second part, the focus will be the international enforcement of human rights which however is problematic.

In the second chapter on the codification of human rights at regional level, we will put the emphasis on the codification of human rights in the MENA and in Europe. In fact, we have divided the chapter into two parts, plus a final paragraph of conclusion. The first part will be completely dedicated to the codification of human rights at European Level, therefore we will analyse the main documents enshrined with human rights. The second part will be entirely concentrated on the codification of human rights in the MENA region, thus we will take into consideration the main Islamic charter regionally adopted and briefly remark the different traditions that distinguish the Islamic legal system to the civil one. Finally, the last paragraph will point out the differences and similarities of the two systems, thus answering our first research question.

The third chapter on the protection of human rights at regional level will follow the structure of the second. It will be also divided into two parts, plus a conclusive paragraph: the first dedicated to the protection of human rights in Europe, while the second to the protection of them in the MENA. Hence, we will put the emphasis of the mechanism of supervision and enforcement in the two regions. After having shown the main features of the two systems, we will conclude by comparing them, answering, therefore, to the second research question.

In the fourth and last chapter we will offer an overview on the cooperation between the European and MENA regions. By analysing some initiatives carried out in the region by the Euro-Mediterranean Partnership, the European Neighbourhood Policy, the Venice Commission, and EuroMed Rights, we will show whether the cooperation and European action have contributed to human rights' codification and protection enhancement in the MENA. Therefore, the answer to the last research question will lie in this chapter.

Finally, we will conclude this work by remarking its aim and putting together the answers we have attempted to give.

CHAPTER 1 - INTRODUCTION: TOWARDS A PROCESS OF CODIFICATION AND PROTECTION OF HUMAN RIGHTS

The aim of this chapter is to make an excursus on the origin and development of human rights codification, underlining the enforcement problem we are facing today, despite the efforts undertaken by the international community to achieve human rights full enforcement. If on the one hand, human rights have been codified in several international conventions, on the other hand, several violations of human rights still occur. Unless the effort of IOs and NGOs to implement human rights, the “anarchy” condition of the international community, and the principle of non-interference in internal affairs makes it difficult.⁸

In the first part, we will trace the origin of human rights, starting from the Romans until the codification of the recent years. We will discuss about the concepts on which human rights are based and how these concepts developed and affirmed in the course of the centuries, underlining the centrality of the Enlightenment in their affirmation. Then, we will examine the first document codifying human rights and why the Universal Declaration of Human Rights takes a dominant role. We will continue by analysing the following charts of human rights, accentuating why a further codification is necessary to human rights’ implementation.

In the second part, we will put emphasis on human rights protection. At international level, human rights enforcement is still problematic.⁹ Hence, we will discuss about the role played by the UN in their protection. We will be

⁸ International community is considered to be anarchic because of the absence of a world government, nevertheless conventions and norms of conduct agreed by the states aim at reducing anarchy, thus enhancing international order. Hakimi M., *The Work of International Law*, in *Harvard International Law Journal*, 2017, 58, 8-9.

⁹ Boyle K., *New Institutions for Human Rights Protection*, Oxford, Oxford University Press, 2009, 2-3.

focused chiefly on the Council of Human Rights and the High Commissioner for Human Rights as they have primary liability concerning human rights protection. Then, we will shift to the role played by NGOs. Nowadays, NGOs are growing their importance and they are able to influence decision-makers at all levels.¹⁰

In conclusion, we will briefly analyse how international punishment of human rights perpetrators works. As we will see, international community has tried and it is still trying to establish international criminal courts to prosecute individuals against gross violations of human rights, as well as genocides, crimes against humanity, crimes against peace and war crimes. Nevertheless, the enhancement of national and regional courts is fundamental as they have primary responsibility with regard to individual's punishment, provided that the leeway to access those courts is not too narrow.

1.1 ORIGINS AND DEVELOPMENT OF HUMAN RIGHTS' CODIFICATION IN WESTERN SOCIETIES: UNIVERSALISM

Human rights as universal value traces their origins in ancient times. They are grounded on natural law, developed by western scholars in the course of centuries and codified into international conventions. Human rights are considered to be universally valid because they «are intrinsic to the human person and their dynamics of evolution are inherently immutable; therefore, they belong to all human beings and apply to all human societies to an identical extent, irrespective of cultural differences among them».¹¹ Hence, one may claim that human rights «transcend social and cultural idiosyncrasies by grounding moral judgments in universal principles».¹² Furthermore, according

¹⁰ Perugini N. — Gordon N., *The Human Rights to Dominate*, New York, Oxford University Press, 2015, 8.

¹¹ Lenzerini F., *The Culturalization of Human Rights Law*, Oxford, Oxford University Press, 2014, 4, cit.

¹² *Ivi.*

to Huntington,¹³ rights are based on principles of individualism, liberalism, constitutionalism, equality, liberty, the rule of the law, democracy and the separation between the state and the religion. All those principles on which human rights rest have been promoted all over the world. The charts codifying human rights have been recognized by the majority of the countries.¹⁴ Hence, human rights are considered to be universally valid, as they are addressed to all the people without any discrimination and regardless of citizenship.

In addition to the thesis of the universalism of human rights, we can claim that although they have been primarily promoted by western societies, some principles on which human rights are grounded, have been found in different cultures. The conception according to which human beings are born in a condition of equality has been supported by the Confucian practise.¹⁵ The Buddhist tradition stressed the importance of freedom stating that «nobility of conduct has to be achieved in freedom, and even the ideas of liberation (...) have this feature».¹⁶ Moreover, the Islamic tradition recognizes the reciprocity principle, according to which people should treat other people in the same way they would like to be treated (see ¶ 2.2).¹⁷

¹³ Huntington S., *The Clash of Civilization and the Remaking of World Order*, New York, Simon & Schuster, 1996, 40.

¹⁴ The International Convention on the elimination of all forms of discrimination has been ratified by 179 states; The International Covenant on Civil and Political Rights has been ratified by 172 states; The International Covenant on Economic, Social and Political rights has been ratified by 169 states; The Convention on the Elimination of all Forms of Discrimination Against Women has been ratified by 189 states; The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has been ratified by 165 states; The Convention on the Rights of the Child has been ratified by 196 states; The Convention on the Rights of Persons with Disabilities has been ratified by 177 states. Only two conventions -at the day of writing- have been ratified by the minority of the states: The International Convention on the Protection of the Rights of all Migrant Workers and Member of their Families has been ratified by 54 states and the International Convention for the Protection of all Persons from Enforced Disappearance has been ratified by 59 states. United Nations Human Rights Office of the High Commissioner, *Status of Ratification: Interactive Dashboard*, in <http://indicators.ohchr.org>.

¹⁵ Lenzerini F., *The Culturalization of Human Rights Law*, Oxford, Oxford University Press, 2014, 1.

¹⁶ Sen A., *Human Rights and Asian Values*, in *Carnegie Council for Ethics in International Affairs*, 1997, cit., 170-193.

¹⁷ Abdullahi A.A., *Toward an Islamic Reformation. Civil Liberties, Human Rights and International Law*, Syracuse (N.Y.), Syracuse University Press, 1996, 230.

1.1.1 FROM THE ORIGINS OF HUMAN RIGHTS TO THE UDHR

Although, human rights were globally recognized with the Universal Declaration of Human Rights of 1948, this concept traces its origins back in history. The idea of human rights, spreads out since the early centuries with the Canon Law and the Roman Law. Roman philosophers, like Cicero and Seneca, were convinced that freedom is an innate human condition which each human being should enjoy. If Cicero stated that «man is born for justice... and law and equity have not been established by opinion, but by nature»¹⁸, Seneca further developed this idea in *De Beneficis* stating that the freedom of a person's mind is a natural condition that cannot be changed not even when in slavery.

However, in this period we cannot properly talk about human rights but rather about natural rights. Natural rights are rooted in the human being condition.¹⁹ Men are born free and with dignity. Law should be aimed at protecting these conditions, because men are endowed by free will that can hypothetically endanger freedom and dignity of other people. The concept of natural law as human rights ground has been further developed by many philosophers and scholars, as Aquinas, Pico della Mirandola, Grotius, Hobbes, Locke and Rousseau. In the *Summa Theologiae*, Aquinas, re-elaborated the idea of Socrates, Plato and Aristotele, affirming that human beings, following God's will, are naturally inclined to good behaviour and that «this inclination belong to the natural law».²⁰ As human dignity and freedom have been put at the core of the discourse on natural rights, Pico della Mirandola in his *De Hominis Dignitate* focused his attention over the correlation between freedom and dignity. Grotius continued by believing that human rights do not even depend on God's will. They are independent from God's existence because they are deeply intrinsic in human nature. Similarly, the Enlightenment philosophers considered human rights

¹⁸ Cicero M.T., *The Republic and the Laws* (2009), at 88 (English translation by C. D. Yonge of *De re publica* (55-51 BC) and *De legibus* (circa 52 BC)) in Lenzerini F., *The Culturalization of Human Rights Law*, Oxford, Oxford University Press, 2014, 1, cit.

¹⁹ Lenzerini, F., *The Culturalization of Human Rights Law*. Oxford: Oxford University Press, 2014 pg. 47, 1-2.

²⁰ Aquinas T., *Summa Theologiae* (1265-1274), transl. 2007. I-II, 94,2, in Lenzerini F., *The Culturalization of Human Rights Law*, Oxford, Oxford University Press, 2014, 3, cit.

founded on natural law, as a prerogative of human being liberty.

Rousseau in his theory of the social contract tried to give a different explanation on the existence of human rights. Nevertheless, it is not possible to consider the social contract as separated from natural rights, but it rather derives from them. If state and institutions are the product of a contract, natural rights precede the states and serve to limit their power. In fact, it is not possible to think about a society based only on natural rights. If a society would have been regulated only by natural rights, people life would have been characterized by instability.²¹ Legal positivism arose from this critique. Laws are indispensable to make people live in an ordered world.²² Moreover, laws must be enacted by a higher power responsible for their enforcement.²³ Furthermore, positivism held that positive law and moral were separated, because the fact that a law is «just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it».²⁴ In fact, law is what have been decided by the governors and it is not a matter of ideal of justice, rule of the law and democracy satisfaction.²⁵

Even if, some European countries started to adopt codified rules from the XVI century, legal positivism affirmed with the modern state, when positive law began the primary source of law. Codification of law started because of them who thought that it was necessary to live in ordered societies. Hence, it is worth mentioning the German *Zwölf Artikel der Bauern* (Twelve Articles of the Swabian Peasants) of 1525, in which several rights were recognized, as the right to be free from serfdom; the English Bill of Rights of 1689, that was «an Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown»;²⁶ the US Declaration of Independence of 1776 that states that «all

²¹ Bobbio N., *Giusnaturalismo e Positivismo Giuridico*, Rome- Bari, Editori Laterza, 2011, 14.

²² *Ivi.*

²³ *Ivi.*

²⁴ Stanford Encyclopedia of Philosophy, *Legal Positivism*, 2003, in <https://plato.stanford.edu/entries/legal-positivism/>.

²⁵ *Ivi.*

²⁶ Lenzerini F., *The Culturalization of Human Rights Law*, Oxford, Oxford University Press, 2014, 47, cit.

men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness»;²⁷ the US bill of Rights of 1789 in which several negative rights are recognized, as for example the duty of the State not to restrict the freedom of religion; and the French *Déclaration des Droits de l'Homme et du Citoyen*, of 1789 in which are stated the principles of freedom and equality of men.²⁸ Anyway, the first instruments of international law that refers to human rights, even if without using this terminology, are embodied by humanitarian law in the Lieber Code of 1863 and in the Convention II on the Laws and Customs of War of 1899. The first in Article 16 states that «military necessity does not admit of cruelty that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult»;²⁹ while the second in Article 46 states that «[f]amily honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected», as well as that «[p]rivate property cannot be confiscated».³⁰

By the way, human Rights codification, as intended today, occurred in the aftermath of the two world wars of the XX century. In 1919, after World War I, the Covenant of the League of Nations was adopted. The Covenant, as regard to human rights, was mainly aimed at the abolishment of slavery in all of its forms and at securing fair and human labour conditions for men, women and children. The way for the Covenant was paved by some previous agreements as the International Convention for the Suppression of the White Slavery and Traffic of 1910 and it was confirmed by the Slavery Convention of 1926 and ILO forced

²⁷ *Ivi.*

²⁸ *Ibidem*, 47-48.

²⁹ Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, art. 16, in <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>.

³⁰ Lenzerini F., *The Culturalization of Human Rights Law*, Oxford, Oxford University Press, 2014, 49, cit.

Labour Convention of 1930. On 10 December 1948 in Paris, the Universal Declaration of Human Rights was adopted. It was an outcome of World War II aimed at never repeating again the cruelties of the Nazi Regime.

1.1.2 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS OF 1948

The United Nations Charter adopted in 1945 in San Francisco paved the way to the Universal Declaration of Human Rights (UDHR). In San Francisco, the 50 signing states agreed on the creation of an international organization with the objective to secure peace, protect human rights and promote economic and social development. The UDHR was proclaimed by the General Assembly of the United Nations in 1948 with the resolution 217 A. Its purpose was the protection of human rights. The cruelties of World War II and of the Nazi regime shocked the entire population, therefore, the UDHR was conceived as a proper response to it, and furthermore as an instrument to avoid the reiteration of those brutalities by the states.

The Declaration is addressed to all the people and all the countries. In fact, to make it understandable to everybody, it has been translated into over 500 languages. Furthermore, for the very first time, as regards to fundamental human rights to be universally protected, it sets out common standard to be achieved. The declaration is based on the principle of dignity and equality of human beings; «All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood».³¹ It aims at protecting individuals and groups against violence that may interfere with their fundamental freedoms and human dignity. Moreover, according to the UDHR, human rights are universal, indivisible, interdependent, inalienable and interrelated.³² Hence, it is not possible to fully enjoy a certain right, if another one is not realized yet. For example, «the rights to vote and participate in public affairs may be of little importance to someone

³¹ Universal Declaration of Human Rights, 1948, Paris, Art. 1, in http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf.

³² OHCHR, *Human Rights and Indicators: Rationale and Some Concern*, 10, cit., in http://www.ohchr.org/documents/issues/HRIndicators/AGuideMeasurementImplementationChapterI_en.pdf.

who has nothing to eat. Furthermore, their meaningful enjoyment is dependent, (...), on the realization of the right to education».³³

Whether it is true that the Declaration is not binding, it is also true that it has a great moral force and it has influenced the development of further international law on the matter.³⁴ On the one hand, it has persuaded national constitutions of countries with different traditions at recognizing fundamental rights. For example, the Constitution of the Italian Republic at Article 2 states that «the Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed»,³⁵ and at Article 80 it states that «the Chambers authorize, by law, ratification of international of a political nature, or which provide for arbitration or judicial regulation, or imply modifications to the nation's territory or financial burdens, or to laws».³⁶ The Constitution of the Hashemite Kingdom of Jordan in Chapter II on the Rights and Duties of Jordanians at Article 6 states that «Jordanians shall be equal before the Law. There shall be no discrimination between them as regard to their rights and duties, on grounds of race, language or religion»,³⁷ and it adds at Article 7 that «personal freedom shall be guaranteed».³⁸ Moreover, other constitutions³⁹, such as the Constitution of the Islamic Republic of Afghanistan of 2004 and the Constitution of the Kingdom of Spain of 1978,

³³ *Ivi*, cit.

³⁴ Conforti B. — Focarelli C., *The Law and Practice of the United Nations*, Leiden-Boston, Martinus Nijhoff, 2010, 359.

³⁵ Cfr. art. 2, Cost.

³⁶ Cfr. art. 80, Cost;

Hannum H., *The Status of the Universal Declaration of Human Rights in National and International Law*, in *The Georgia Journal of International and Comparative Law*, 1996, 25, 351.

³⁷ Cfr. art.6, comma 1, Cost.

³⁸ Cfr. art. 7, Cost;

Hannum H., *The Status of the Universal Declaration of Human Rights in National and International Law*, in *The Georgia Journal of International and Comparative Law*, 1996, 25, 355- 377.

³⁹ Countries that mention the Universal Declaration of Human Rights of 1948 in their constitutions: Afghanistan, Angola, Bangladesh, Benin, Burkina Faso, Burundi, Cambodia, Chad, Comoros, Congo-Brazzaville, Côte d'Ivoire, Equatorial Guinea, Ethiopia, Gabon, Guinea, Haiti, Mali, Moldova, Nicaragua, Niger, Portugal, Romania, Rwanda, Sao Tomé & Príncipe, Senegal, Somalia, Spain and Togo. Hannum H., *The Status of the Universal Declaration of Human Rights in National and International Law*, in *The Georgia Journal of International and Comparative Law*, 1996, 25, 355- 377.

make a direct referral to the UDHR. In fact, at Article 134, the Afghan Constitution states that «Afghanistan respects and observes the UN Charter and Universal Declaration of Human Rights and other accepted principles of international law»,⁴⁰ while, at Article 10, the Spanish Constitution states that «the standards relative to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain».⁴¹⁴²

On the other hand, it has paved the way to the adoption of further declarations and conventions aiming at protecting human rights and enlarge their sphere of action.

1.1.3 FURTHER STEPS IN THE INTERNATIONAL CODIFICATION OF HUMAN RIGHTS: IS IT DESIRABLE?

The Universal Declaration of Human Rights is followed at UN level by several conventions on the protection of human rights because it transformed the human rights question into a global one. The following covenants are more specific, and their goal is the protection of the rights of the weaker categories.

In 1959 with a resolution of the General Assembly of the UN, the Declaration on the right of the Child was adopted, and in 1963 it is the turn of the Declaration on racial discrimination. Nevertheless, we have to wait until 1966 for the adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Even if they do not provide a strong mechanism of supervision, these two conventions have been one of the main achievements of the United Nations on human rights issues. In fact, they have been ratified by a large number of states from all over the world, including Arab countries and with the Universal Declaration of Human

⁴⁰ Cfr. art. 134, Cost.

⁴¹ Cfr. art 10, comma 2, Cost.

⁴² Hannum H., *The Status of the Universal Declaration of Human Rights in National and International Law*, in *The Georgia Journal of International and Comparative Law*, 1996, 25, 355- 377.

Rights they constitute the International Bill of Human Rights. Furthermore, the rights included in the conventions are very wide and detailed. «Among the economic rights, there are the right to work, to fair wage, to social security and to other form of social assistance, to form trade unions and to strike. With regard to civil and political rights, the usual catalogue of individual freedom is repeated and (...) widened and further specified in a way as to include personal liberty, freedom of thought, conscience and religion, of association and so on»⁴³. Hence, the Covenant on civil and political rights recognizes also collective rights, specifying the right of minorities and the duty of the state of not interfering in the enjoyment of such right.

Furthermore, worth mentioning is the Convention on the Elimination of All Forms of Discrimination Against Women of 1979 and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. The first defines discrimination against women as «any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field»⁴⁴. Hence, signatory States are committed to adopt measures to end all forms of discrimination against women. While the second aims at making a more effective struggle against torture and other degrading treatments and at promoting universal respect and observance of human rights.

The UN is carrying out a fundamental activity in regards to human rights codification and protection. In 1993, the World Conference on Human Rights adopted the Vienna Declaration and the Programme of Action. The Declaration reaffirms all the principles of the previous conventions and it calls for the enhancement of international cooperation in the human rights field.

⁴³ *Ibidem*, cit., p. 361.

⁴⁴ The Convention on the Elimination of All Forms of discrimination against Women (CEDAW) of 1979, in <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

Furthermore, it invites «the General Assembly, the Commission on Human Rights and other organs and agencies of the UN related to human rights to consider ways and means for the full implementation, (...), including the possibility of proclaiming a United Nations decade for human rights».⁴⁵ Moreover, the General Assembly with resolution 55/2 of 8 September 2000 adopted the United Nations Millennium Declaration. The Declaration fixed the Millennium Development Goals (MDGs) to be achieved by 2015. Member States renewed their strong commitment in the achievement of a more peaceful, prosperous and just world. Furthermore, by adopting in September 2015 the 2030 Agenda for Sustainable Development, built on the achievements of the MDGs, Member States reaffirmed again their commitment. The sustainable development Goals (SDGs)⁴⁶, represents an attempt to go beyond the success of the MDGs. The achievement of these seventeen goals will represent a great success in the protection of human rights because they are strongly linked. As reported by the Danish Institute for Human Rights «more than 90% of the Sustainable Development Goals (SDGs) targets are linked to international human rights and labour standards»⁴⁷.

⁴⁵ Vienna Declaration and Programme of Action, 1993, in <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>.

⁴⁶ Goal 1. End poverty in all its form everywhere; Goal 2. End hunger, achieve food security and improve nutrition and promote sustainable agriculture; Goal 3. Ensure healthy lives and promote well-being for all at all ages; Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all; Goal 5. Achieve gender equality and empower all women and girl; Goal 6. Ensure availability and sustainable management of water and sanitation for all; Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all; Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. Goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation; Goal 10. Reduce inequality within and among countries; Goal 11. Make cities and human settlements inclusive, safe, resilient and sustainable; Goal 12. Ensure sustainable consumption and production patterns; Goal 13. Take urgent action to combat climate change and its impacts; Goal 14. Conserve and sustainably use oceans, seas and marine resources for sustainable development; Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystem, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss; Goal 16. Promote Peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels; Goal 17. Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development.

⁴⁷ The Danish Institute for Human Rights, *Human Rights and the SDGs*, in <http://www.humanrights.dk/our-work/sustainable-development/human-rights-sdgs>.

The promotion of human rights carried out by the United Nations is of fundamental importance. By setting human rights minimum standard to comply with, states have guidelines to achieve full human rights realization. In fact, a coordinated activity is essential to achieve common goals.⁴⁸

1.2 THE PROBLEMATIC ENFORCEMENT

Whether nations have agreed on human rights content, the gap between codification and effective protection has not been filled yet. Violations occur because nations are incapable or unwilling of respecting international law norms and they lack institutions that guarantee human rights protection. Hence, on the one hand we have customary international law norms and international treaties that recognize human rights' universality, while on the other hand it is difficult to guarantee their respect because of the sovereignty principle each state enjoys and of noted peculiarities. In fact, the international community activity of monitoring human rights status in each country rouses accusations of interference in domestic affairs. Hence, international community can play an effective role only when the state asks support in the enhancement of institutions and reforms to domestic human rights realization. Moreover, "general situations"⁴⁹ as inequalities, poverty, terrorism and war represent an additional challenge to human rights. Poverty and global inequality undermine human dignity and usually communities that live in extreme poverty do not have equal access to institutions and services of the Government.⁵⁰ Furthermore, the greatest abuses occur in armed conflict when civilians are affected by indiscriminate cruelties, because in most of the cases international actors are not capable to give a concrete answer until the end of the armed conflict.

Since the biggest challenges to human rights are represented by institutional inefficiency and "general situations", International Organizations (IOs) and

⁴⁸ Boyle K, *New Institutions for Human Rights Protection*, Oxford, Oxford University Press, 2009, 1.

⁴⁹ The United Nations High Commissioner for Human Rights, *The OHCHR Plan of Action: Protection and Empowerment*, Geneva, May 2005, 7, in <https://www2.ohchr.org/english/planaction.pdf>.

⁵⁰ *Ivi*.

Non-Governmental Organizations (NGOs) work to monitor, denounce and give assistance to countries in human rights realization. On the one hand, several UN agencies related to human rights do exist. The International Labour Organization (ILO) deals with the improvement of economic, social, civil and political rights in seeking to improve the conditions of the worker. The United Nations Development Programme (UNDP) aims at sustaining an inclusive development. The United Nations Educational, Scientific and Cultural Organization (UNESCO) promotes education on human rights and democracy. The United Nations International Children's Fund (UNICEF) is specifically mandate to promote children's rights. Nevertheless, the Office of the United Nations High Commissioner for Human Rights (OHCHR) with the Human Rights Council are the crucial UN organs as regard to human rights. On the other hand, NGOs as Amnesty International and Human Rights Watch report on human rights status. Furthermore, they are capable of pressing governments and decision-makers in adopting fair policies.

With regard to individual's prosecutions of severe violations of human rights, the international community has established international criminal courts, like the United Nations International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court. However, their actions are limited because they serve to complement national courts which hold the primary responsibility in human rights violations punishment.

In addition, it is worth mentioning the role played by regional organizations to what concern human rights enforcement. Regional treaties have been elaborated to render the protection of human rights at regional level more efficient.⁵¹ In Africa, the Americas and Europe, the regional system of human rights protection is of significant importance. In these areas, specific conventions, such as the African Charter on Human and People's Rights of 1981, the American

⁵¹ Office of the High Commissioner for Human Rights and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, UN, New York and Geneva, 2003, 72, in <https://www.ohchr.org/Documents/Publications/training9Titleen.pdf>.

Convention on Human Rights of 1969, and the European Convention on Human Rights of 1950, with their implementation mechanisms have been adopted. In the countries of the Middle East and Southeast Asia, some treaties and bodies have been adopted only recently, however with restricted functions.⁵² The Arab Charter of Human Rights, despite it was adopted by the League of the Arab States in 1994, entered into force in 2008; while the Association of Southeast Asian Nations (ASEAN) adopted the ASEAN Human Rights Declaration in 2012, that is defined as «roadmap for the regional human rights development»⁵³. However, we will discuss about the role of regional codification and protection of human rights, respectively in Chapter 2 and Chapter 3. In Particular, we will focus the analysis on the European and Middle East countries.

1.2.1 INTERNATIONAL MECHANISMS OF PROTECTION OF HUMAN RIGHTS: THE UN

The Human Rights Council and the OHCHR are vital UN organs in order to protect human rights. Cooperation between them is indispensable, but occasionally problematic. Since they have similar mandates they should mutually respect their competences, without creating interference problems.⁵⁴

The Human Rights Council was established in 2006 with General Assembly resolution 60/251 in replacement of the Commission on Human Rights. The ratio beyond its establishment was the failure and loss of credibility of the Commission. The Commission was highly politicized and the membership of the Commission was sought by human rights violators states as an instrument to protect their accountability.⁵⁵ Moreover, the new Council, which establishment was strongly sustained by Kofi Annan in the Millennium + 5 Summit of 2005, increased optimism with regard to human rights protection. Firstly, it was founded as a subsidiary organ of the General Assembly, while the old

⁵² International Justice Resource Center, *Regional Systems*, in <https://ijrcenter.org/regional/>.

⁵³ International Justice Resource Center, *Asia*, in <https://ijrcenter.org/regional/asia/>.

⁵⁴ Boyle K., *New Institutions for Human Rights Protection*, Oxford, Oxford University Press, 2009, 44.

⁵⁵ *Ibidem*, 27.

Commission was a subsidiary organ of the Economic and Social Commission (ECOSOC). This represents a great step forward since the main tasks of the UN, peace and security, development and human rights have been placed on the same level. A second point is that the Council is required to meet for ten weeks a year for at least three sessions, with the possibility of calling special session, while the Commission met once a year for a six week session.⁵⁶ Thirdly, a new task, the Universal Periodic Review (UPR), that represent «a key mechanism of the Human Rights Council to review the human rights situation of all United Nations Member States in a four and half year cycle»⁵⁷ was introduced. UPR, which its objective is the «improvement of human rights (...) as well as fulfilment of the state's human rights obligation and the state's request enhancement of capacity and technical assistance»,⁵⁸ foresees the review of 48 states each year, selected according to geographic distribution principle; it «should ensure a gender perspective and also take into account the level of development and specificities of countries»,⁵⁹ and it «should be conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner».⁶⁰ Then, the Special Procedure institution and the Complaint Procedure, which were established by the former Commission on Human Rights, are still operating under the Council. Special Procedures mandate holders have the task to report to the Council on human rights situation in specific states or on severe violations of specific human rights worldwide; while the complaint procedure, which is thought for situations of violations, rather than for a complaint of individual violations,⁶¹ was conceived «to address consistent patterns of gross and reliably

⁵⁶ *Ibidem*, 13.

⁵⁷ OHCHR, *Human Rights and Indicators: Rationale and Some Concern*, 15, cit., in http://www.ohchr.org/documents/issues/HRIndicators/AGuideMeasurementImplementationChapterI_en.pdf.

⁵⁸ Boyle K., *New Institutions for Human Rights Protection*, Oxford, Oxford University Press, 2009, 34, cit.

⁵⁹ *Ivi.*

⁶⁰ *Ivi.*

⁶¹ Complaint of individual violations are tackle by courts at national and international level.

tested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances».⁶²

For its part, the OHCHR, that is a division of the UN secretariat, has a support function of the Council. However, it carries on also its independent activity. On the one hand, it is required to draft supporting document as regard to human rights status for the UPR; while on the other hand, it fixes its action plan and it gives support to the treaty bodies.⁶³

Nonetheless, the General Assembly itself covers an important role to what concern human rights protection. If on the one hand the Human Rights Council has been established as a subsidiary organ of the General Assembly, on the other hand also the General Assembly has the task of safeguarding human rights and promoting the rule of the law. Hence, it is entitled to initiate studies and make recommendations in order to reach human rights and fundamental freedoms protection.⁶⁴

1.2.2 INTERNATIONAL MECHANISMS OF PROTECTION OF HUMAN RIGHTS: NGOs

NGOs have a fundamental role with regard to human rights protection. They are composed by experts which investigate on human rights violations worldwide.⁶⁵ Through their accurate analysis they are able to influence governments, companies and decision-makers to adopt fair policies. Moreover, they also use petitions, protests and campaigns to press governments in protecting human

⁶² A/HRC/Res/5/1, paras 85-109, in Boyle K., *New Institutions for Human Rights Protection*, Oxford, Oxford University Press, 2009, 34.

⁶³ The treaty bodies are committees of independent experts with the task of monitoring over the implementation of the core international human rights treaties. There are currently nine human rights committee: the Committee on Economic, Social and Cultural Rights (CESCR); the Committee on the Elimination of Racial Discrimination (CERD); the Committee on the Elimination of Discrimination Against Women (CEDAW); Committee against Torture (CAT); Committee on the Rights of the Child (CRC); Committee on Migrant Workers (CMW); Committee on the Rights of Persons with Disabilities (CRPD); Committee on Enforced Disappearances (CED); the Subcommittee on Prevention of Torture (SPT).

⁶⁴ General Assembly of the United Nations, *Functions and Powers of the General Assembly*, in <https://www.un.org/en/ga/about/background.shtml>.

⁶⁵ Boyle K., *New Institutions for Human Rights Protection*, Oxford, Oxford University Press, 2009, 41.

rights and ceasing violating them. If it is true that their action is not always successful, they have achieved great results. For example, in 2009, Human Rights Watch pressure led the Congolese government to open several rape trials, as sexual violence and non-persecution of criminal is an enormous problem in Congo.⁶⁶ Furthermore, in June 2018, Amnesty International joins fruitfully with other human rights activist to overturn a death penalty sentence against a 19-year-old Sudanese woman.⁶⁷

Nonetheless, NGOs are growing their importance because of participation and involvement in the UN activities. They contribute in the Universal Periodic Review (UPR) process (see ¶ 1.2.1), they play an active role in the dialogue with special procedure, and they have the access to UN documents, as well the opportunity to interact with governments delegates.⁶⁸ Moreover, the participation of NGOs before the Council of Human Rights and the United Nations in general, has been facilitated by the establishment of the Conference of Non-Governmental Organisations in Consultative Status with the United Nations (CoNGO). CoNGO has adopted a voluntary “code of conduct”, as well a document that set “Rules and Procedure for NGO participation at UN Conferences”.⁶⁹

⁶⁶ Since 1998, in Congo, over 200,000 girls have been sexually abused by government troops, militias and foreign armies. Human Rights Watch through their analysis press the Congolese government to persecute those crimes. Human Rights Watch, *Success Story – Stopping Rape as a Weapon of War in Congo*, in <http://www.hrw.org/success-story-stopping-rape-weapon-war-congo>.

⁶⁷ The Sudanese Noura Hussein was sentence to death in May 2018 for «killing the man she was forced to marry, as he tried to rape her the second time». Noura was forced to get married when she was 16. Unless, the death sentence was overturned in June 2018, she will remain imprisoned for the following 5 years and she has to pay a financial compensation to the victim family of \$ 8,400. Amnesty International, *Why Sudanese Teenager Noura Hussein's case matters*, 20 September 2018, cit., in <http://www.amnesty.org/en/latest/campaigns/2018/09/why-sudanese-teenager-noura-husseins-case-matters/>.

⁶⁸ Boyle K., *New Institutions for Human Rights Protection*, Oxford, Oxford University Press, 2009, 41.

⁶⁹ The Conference of NGOs in Consultative Relationship with the UN, *NGO access to the UN*, in <http://www.ngocongo.org/what-we-do/ngo-access-to-the-un>.

1.2.3 PROSECUTING HUMAN RIGHTS VIOLATIONS: BRIEF REMARKS ON INTERNATIONAL CRIMINAL COURTS

Currently, even if sovereign states have the primary responsibility to punish criminals, the international community is trying to establish international criminal courts to punish individuals for international crimes, hence crimes against humanity, crimes against peace, genocide, and war crimes. The procedure is very complex. In fact, the International Criminal Court, that was established in 1998 with the Rome Statute,⁷⁰ which entered into force in 2002, did not pass any judgement. It has conducted merely investigations and preliminary examinations.

However, in the last century several international criminal tribunals for specific situations have been created. Firstly, worth of mentioning is the Nuremberg Tribunal and the Tokyo War Crimes Tribunal. Both were established at the end of World War II, respectively in 1945 and 1946, to punish Nazi criminals and Japanese criminals. Later, the Security Council of the United Nations established the International Criminal Tribunal for the Former Yugoslavia in 1991 and the International Criminal Tribunal for Rwanda in 1994. They serve to judge and punish serious crimes against humanity and violations of human rights committed during the Yugoslav Wars and the Rwandan genocide.⁷¹

Unless the efforts of the international community in prosecuting criminals the improvement of national and regional tribunals is fundamental, as they should have the primary responsibility. Otherwise, violations of international law and human right might remain unpunished.

⁷⁰ 123 state are part to the Rome Statute.

⁷¹ Conforti B., *Diritto Internazionale*, Naples, Editoriale Scientifica, 2013, 468-470.

CHAPTER 2 - CODIFICATION OF HUMAN RIGHTS AT REGIONAL LEVEL: THE EUROPEAN AND THE MENA REGIONS

This second chapter aims at showing how codification of human rights occurs at regional level and with which implications. Regional treaties have been elaborated to render human rights protection more efficient and to extend their sphere of action, including both civil and political rights and economic, social and cultural rights.⁷² Moreover, it might be simpler to carry out codification at regional level than on a global scale because at regional level it is easier for states to find a common understanding of rights because they are influenced by similar traditions.⁷³ In several regions human rights have been codified into far reaching conventions, such as the African Charter on Human and People's Rights of 1981, the American Convention on Human Rights of 1969 and the European Convention on Human Rights of 1950. These conventions not only codified rights in a series of rules that member states must implement into their national legislation, but as we will see in Chapter 3 they provide a mechanism of control guaranteed by the establishment of regional courts. Other regions faced codification of human rights only recently, and, unfortunately, codification in those regions is characterized by a limited sphere of action. In fact, the Arab Charter on Human Rights which entered into force into 2008, does not foresee an efficient supervision mechanism, hence its implementation in domestic legal system as we will see is very limited. The same is valid for the ASEAN

⁷² Office of the High Commissioner for Human Rights and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, UN, New York and Geneva, 2003, 72, in <https://www.ohchr.org/Documents/Publications/training9Titleen.pdf>.

⁷³ With this affirmation we want to say that it would be easier for a European state to achieve a common definition of human rights with another European states than to achieve it with an Asian state or an Arab one, as the Asian and Arab cultures might be based on different values. However, we should underline that different views on human rights can be observed also at regional level. In this perspective, we must mention the United Kingdom and Poland that both negotiated an opt-out from the Charter of Fundamental Rights of the European Union, and they are later joined by the Czech Republic.

Declaration on Human Rights which entered into force in 2012 and it is considered to be below international standards on human rights.⁷⁴

In particular, we have decided to focus the analysis on two specific regions: Europe and Middle East and North Africa, in the spirit of an enhancement of the cooperation between the two regions. As the Euro-Mediterranean region is facing common challenges and is growing fast in terms of political importance and of strategic significance, we believe that cooperation between Europe and the MENA is necessary to guaranteeing their citizens same rights. In the perspective of codification of human rights, we think that a coordination between the two systems, respecting cultural differences, might be helpful in order to achieve the common goals of stability, human development and integration stood by the Union for the Mediterranean (see ¶ 4.1). Hence, the analysis of the two systems is useful to find out which are their current differences and to reflect on how one system can influence the other and vice versa, in a perspective of a mutual enhancement. However, we want to point out that the two systems are at different stages of development. If Europe has consolidated its codification and mechanism of supervision of human rights, the MENA region is moving its first steps on the issue, mostly after the Arab Spring. Hence, it is more likely that Europe will influence the MENA system than the reverse.

In the first part, we will put the emphasis on the codification of human rights at European level. We will begin by analysing the European Convention on Human Rights, taking into consideration its inspiring values and history. Then, we will shift to other relevant conventions adopted by the Council of Europe, such as the European Social Charter and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Finally, we will underline the mechanism of implementation of the ECHR. In fact, national constitutions of member states to the Council foresee different way of implementation of the Convention. By the way, we will also take into account

⁷⁴ International Commission of Jurists, *The ASEAN Human Rights Declaration: Questions and Answers*, Geneva, in <https://www.icj.org/wp-content/uploads/2013/07/ASEAN-leaflet-240713.pdf>.

the measures undertaken by the European Union in order to enhance human rights system, as well as the assistance given by the Venice Commission to countries who required aid in meeting human rights standards. To be clear, we should specify that the European Union is not party to the ECHR, hence it is not bound by it (see ¶ 2.1.2.1). However, the 28 EU states had all ratified the ECHR.

In the second part, we will analyse codification of human rights in the MENA region. Starting from the conception of universalism and relativism of human rights, we will explain why Arab states have adopted declarations and conventions concerning human rights and we will explore their content. First, the Universal Islamic Declaration on Human Rights, then the Cairo Declaration on Human Rights in Islam and lastly the Arab Charter on Human Rights. Then we will move toward the implementation of human rights codification in the Arab League States, underlining the lack of serious measures to achieve it. Hence, we will try to understand how the revolts of the Arab spring have catalysed the implementation of human rights. In conclusion, we will focus the analysis on the codification of them in the countries in which the revolts have brought noteworthy changes: Egypt, Jordan, Morocco and Tunisia.

2.1 CODIFICATION AT EUROPEAN LEVEL

Codification of human rights at European level started soon after the adoption of the Universal Declaration of Human Rights (UDHR) of 1948. In the truth, the first proposal for a European Convention on Human Rights (ECHR) was made six months before the adoption of the UDHR.⁷⁵ The aim was the achievement of human rights' protection on a regional basis that could not be reached on a world scale.⁷⁶ The UDHR was considered to be too weak to guarantee human rights protection, because of the difficulties encountered in drafting binding documents and in establishing a control mechanism.⁷⁷ Therefore, the convention represents

⁷⁵ Bates E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 40.

⁷⁶ *Ivi.*

⁷⁷ European Court of Human Rights, *The Conscience of Europe: 50 Years of the European Court of Human Rights*, 18, in https://www.echr.coe.int/Documents/Anni_Book_Chapter01_ENG.pdf.

one of the first steps towards human rights enforcement. Moreover, it is considered to be a more effective manifestation of the UDHR because it has created the most successful system of international human rights' protection in place.⁷⁸ On the one hand, human rights have been codified in the ECHR, on the other hand, in the aftermath of the entrance into force of Protocol No. 11 in 1998, the ECHR provide individuals, from any nationality taking part in the convention, with the power to apply to an international court – the European Court of Human Rights – when their state fails in ensuring a fundamental right enjoyment (see ¶ 3.1.2).

However, the ECHR was the outcome of a long process because not everybody agreed on the necessity of adopting a chart of human rights on a regional basis. The ECHR's supporters, as the founding fathers Pierre-Henri Teitgen and Sir David Maxwell-Fyfe, and the “pro-Europeans” in general, firmly believed in the creation of a European Convention on Human Rights because of the fear of the spread of communism.⁷⁹ The major leading force for the creation of the ECHR in 1950 was «for free Europe to come up with a human rights document enshrining its ardent belief in human rights and democracy».⁸⁰ Moreover, it was «also viewed as a basic test of membership for the democratic club of European States».⁸¹ Hence, the aim was to create a mechanism able to protect “free Europe” against the ascent of a totalitarian regime. In fact, Pierre-Henri Teitgen, in his speech during the drafting process, in Strasbourg in 1949, affirmed that «democracies do not become Nazi countries in one day. (...) One by one freedoms are suppressed, in one sphere after another. (...) It is necessary to intervene before it is too late».⁸² Nevertheless, several states, especially the United Kingdom were convinced that a human rights Convention would have eroded their sovereignty.⁸³ In fact, as unanimity was needed for the adoption of the 1950

⁷⁸ Bates E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 2.

⁷⁹ *Ibidem*, 4.

⁸⁰ *Ibidem*, 6, cit.

⁸¹ *Ivi*, cit.

⁸² *Ibidem*, 7, cit.

⁸³ *Ibidem*, 6.

Convention, the negotiating parts⁸⁴ agreed on a text that was compromised in a certain extent, in particular as regard to the mechanism of human rights supervision.⁸⁵

With regards to the codification at EU level, many opposed the adoption of the Charter of Fundamental Rights of the European Union.⁸⁶ In fact, in 2000, when the Charter was proclaimed, it was not endowed with binding legal force: It was not incorporated into the Treaties.⁸⁷ The Charter acquired legal binding force after the adoption of the Treaty of Lisbon in 2009. However, the UK and Poland adopted a Protocol to the Treaty on the application of the Charter of Fundamental Rights of the EU. The UK decided for an opt-out in order to «limit the impact of the economic and social rights in the Charter in the UK's legal system».⁸⁸ Subsequently, Poland adopted the same opinion, and later also the Czech Republic decided to join them.⁸⁹

Moreover, by believing that the duty to respect the human rights' charts provisions will preclude governments to act in the interests of their citizens, the UK justice secretary, Chris Grayling, in 2013 attacked the European Courts, by affirming that he does not «really believe that the European jurisdiction of

⁸⁴ In 1950, the negotiating parts were the ten member states of the Council of Europe: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherland, Norway, Sweden, and the UK. Currently, there are 47 states part of the Council of Europe, as well to the European Convention on Human Rights.

⁸⁵ The majority of the states stood against the creation of a Court. However, a Court was enclosed in the Convention as an optional feature, which its jurisdiction states where free to accept or not. Bates E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 8.

⁸⁶ The United Kingdom was completely hostile to the adoption of a European document on human rights with binding force. Dutheil de la Rochère J., *The EU Charter of Fundamental Rights, Not Binding but Influential: The Example of Good Administration*, in Arnall A. — Eeckhout P. — Tridimas T. (edited by), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, Oxford, Oxford University Press, 2009, 157.

⁸⁷ Anderson D. — Murphy C.C., *The Charter of Fundamental Rights*, in Bjondi A. — Eeckhout P. — Ripley S. (edited by), *EU Law after Lisbon*, Oxford, Oxford University Press, 2012, 157.

⁸⁸ *Ibidem*, 166, cit.

⁸⁹ *Ivi*.

Luxembourg or Strasbourg makes [the UK] a better place than it would be otherwise».⁹⁰

Nevertheless, we believe in the importance of human rights codification at regional level in order to succeed in human rights enforcement, because, as it has already been demonstrated,⁹¹ the ECHR «is one of the major developments in European legal history and the crowning achievement of the Council of Europe. The emergence of the authority of the European Court of Human Rights has been described as one of the most remarkable phenomena in the history of international law, perhaps in the history of all law».⁹²

2.1.1 EUROPEAN CONVENTION ON HUMAN RIGHTS AND FURTHER EUROPEAN AGREEMENTS ON HUMAN RIGHTS IN THE FRAMEWORK OF THE COUNCIL OF EUROPE

The creation of the Council of Europe in 1949 with the Treaty of London paved the way for the adoption of the European Convention on Human Rights, officially named Convention for the Protection of Human Rights and Fundamental Freedoms, as well to other European charts on human rights, such as the European Social Charter and the European Convention for the prevention of Torture and Inhuman or Degrading Treatment or Punishment. In fact, the Council was founded with the aim of enhancing and protecting human rights, democracy and the rule of law in Europe.

The Council of Europe in 1950 adopted the European Convention on Human Rights, which entered into force on 3 September 1953, after a long drafting

⁹⁰ The Guardian, *European courts have nothing to offer UK, says justice secretary*, 18 December 2013, in <https://www.theguardian.com/politics/2013/dec/18/european-courts-nothing-offer-uk-justice-secretary>.

⁹¹ Moreover, Amnesty International answering to Chris Grayling attack, by writing a list of reasons, demonstrated why UK is a better place with the Human Rights Act. Amnesty International UK, *Human Rights Act: Eight reasons why the Human Rights Act makes the UK a better place*, 8 October 2018, in <https://www.amnesty.org.uk/eight-reasons-why-human-rights-act-has-made-uk-better-place-british-bill-of-rights>.

⁹² O'Boyle M., *On Reforming the Operation of the European Court of Human Rights*, European Human Rights Law Review 2008 No. 1, in Bates E., *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 1, cit.

process due to the fact that the project did not find a unanimous agreement between the parties (see ¶ 2.1). However, by adopting the Convention, parties reaffirmed «their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend».⁹³ The ECHR is composed of 59 articles, plus several Additional Protocols.⁹⁴ The sphere of action of the Convention has been extended during the years with the adoption of new protocols since, if it was conceived as collective pact against totalitarianism, it has been converted into a sort of European Bill of Rights.⁹⁵ The Additional Protocols aim on the one hand to add additional rights, while on the other hand its purpose, as we will observe in chapter 3, was to amend the system of supervision (see ¶ 3.1.1).⁹⁶

The primary scope of the ECHR was to codify and specify the rights already codified in the UDHR. For instance, Article 3 of the UDHR, that recognizes the right of everyone to «life, liberty and security of the person»⁹⁷, has been codified

⁹³ Council of Europe, Convention for the protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, cit., in https://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁹⁴ The Convention is today presented as amended by the provisions of Protocol No. 14 (ETS no. 194) as from its entry into force on 1 June 2010. The text of the Convention had previously been amended according to the provisions of Protocol No. 3 (ETS no. 55), which entered into force on 20 December 1971, and of Protocol No. 8 (ETS no. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS no. 44) which, in accordance with Article 5 § 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS no. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS no. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS no. 146) lost its purpose. Moreover, Protocol No. 15 will entry into force when the States Parties have signed and ratified it, while Protocol No. 16 came into force on 1 August 2018 in respect of the States which have signed and ratified it. Council of Europe, Convention for the protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, cit., in https://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁹⁵ Bates E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 118.

⁹⁶ It is worth mentioning the entrance into of Protocol No. 11 in 1998 which, by introducing the individual complaint procedure, reformed the supervision mechanism of the Convention.

⁹⁷ «Everyone has the right to life, liberty and security of the person». Article 3, Universal Declaration of Human Rights of 1948, in https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

into articles 2 and 5 of the ECHR.⁹⁸ The first aim at securing the right to life, while the second at securing the right to liberty and security of a person.⁹⁹ Furthermore, the ECHR text foresees the prohibition of torture, inhuman or degrading treatment or punishment (Art.3); the prohibition of slavery, servitude, and forced or compulsory labour (Art. 4); the right to a fair trial (Art. 6); the principle of no punishment without law (Art. 7); the right to freedom of thought, conscience and religion (Art. 9); the right to freedom of expression (Art. 10); the right to freedom of assembly and association (Art. 11); the right to marry and to found a family (Art. 12); the right to an effective remedy (Art. 13); and the

⁹⁸ Bates E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 112.

⁹⁹ Article 2: «Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection»;

Article 5: «Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation». Article 2 does not permit any derogation except in the context of lawful acts of war.

Council of Europe, Convention for the protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, cit., in https://www.echr.coe.int/Documents/Convention_ENG.pdf; ECHR, *Derogations in Time of Emergency*, in https://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf.

prohibition of discrimination (Art. 14).¹⁰⁰ These rights represented the rights on which any democratic regime in Western Europe was based.¹⁰¹ Moreover, a mechanism of permissible limitation and restriction of rights was foreseen. For instance, the restriction of the exercise of many rights such as the right to freedom of assembly and association, could take place in extraordinary cases, such as the interest of public safety, the protection of public order or the protection of freedoms and rights of others.¹⁰² However, always in accordance with the law.¹⁰³ Hence, states are endowed with a wide-range restriction power. That power could have diminished the value of the convention.¹⁰⁴ Nevertheless, as stated by the first President of the European commission for Human Rights, the Convention «offered a constitutional code of human rights capable of detailed application by both international and municipal tribunals»¹⁰⁵.

Furthermore, since the ECHR was limited only to a certain range of civil and political rights whose protection was acceptable for Western European countries, other rights have been added with the adoption of additional protocols.¹⁰⁶ With regards to protocols adding rights, it is worth mentioning the First Protocol, which entered into force in 1954, introduced the right to property, to education and to free election of the legislature. Protocol No. 4, which entered into force in 1968, introduced the prohibition of imprisonment for debts, the

¹⁰⁰ Office of the High Commissioner for Human Rights and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, UN, New York and Geneva, 2003, 96, in <https://www.ohchr.org/Documents/Publications/training9Titleen.pdf>.

¹⁰¹ Bates E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 110.

¹⁰² Office of the High Commissioner for Human Rights and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, UN, New York and Geneva, 2003, 97, in <https://www.ohchr.org/Documents/Publications/training9Titleen.pdf>.

¹⁰³ *Ivi*.

¹⁰⁴ Bates E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 114.

¹⁰⁵ Waldock, C. M. H., *Address by C M H Waldock*, in Council of Europe, *Fifth Anniversary of the Coming into Force of the ECHR: Brussels Exhibition*, 3 September 1958, in Bates E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 114.

¹⁰⁶ *Ibidem*, 110-111.

freedom of movement, the prohibition of expulsion of nationals and the prohibition of collective expulsion of aliens. Protocol No. 6, entered into force in 1985, abolished the death penalty, with the exception of acts committed in time of war or of imminent threat of war. Protocol No. 7, entered into force in 1988, introduced rights related to the safeguard of expulsion of aliens, the right of appeal in criminal matters, the compensation for wrongful conviction, the right not to be tried or punished twice and the equality between spouses. Protocol No. 12, entered into force in 2005, reaffirmed the principle of non-discrimination and equality before the law. Protocol, No.13, entered into force in 2002, entails the abolition of death penalty in all circumstances.¹⁰⁷ Then, we will discuss about Protocols No. 11, 14 and 16, which entails reformation of the European Court of Human Rights in Chapter 3 where we will deal with this topic (see ¶ 3.1.1).

The ECHR also foresees a mechanism of control and implementation of rights. The European Court of Human Rights is the organ currently entitled with this task, but until the entrance into force of Protocol No. 11, the European Commission of Human Rights was the organ entitled to decide whether to bring a case before the Court or not (see ¶ 3.1.1).

Moreover, codification of human rights at European level has gone further with the adoption of the European Social Charter and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The European Social Charter was adopted by the Council of Europe in 1961 and it entered into force in 1965. It was established as a support to the ECHR. In fact, its aim is to secure social and economic rights, such as the right to work (Art. 1); the right of children and young persons to protection (Art. 7), the right of employed women to protection (Art.8) and the right to protection of health (Art. 11). The European Social Charter has been integrated by the adoption of its protocols of 1988, 1991 and 1995. In particular, the 1995 Additional Protocol foresees a mechanism of collective complaints (see ¶ 3.1.1). Then, the Chart has

¹⁰⁷ Council of Europe, Convention for the protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in https://www.echr.coe.int/Documents/Convention_ENG.pdf.

been revised, thus updated and extended, by the adoption of a new European Social Charter in 1996, which entered into force in 1999 and foresees the establishment of the European Committee of Social Rights with the task of supervise on the Charter (see ¶ 3.1.1). Its aim was to introduce a new set of rights, in particular towards the safeguard of the rights of children and young persons, as well to the protection and the right of women and men to equal opportunities and equal treatment, as regard to employment.¹⁰⁸ the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was adopted in 1987 and it entered into force on 1989. With regard to its content, it is similar to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (see ¶ 1.1.3). The most innovative feature of this convention is the establishment of a Committee endowed with «the power to visit any place of detention within the jurisdiction of the Contracting States»¹⁰⁹ – the Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see ¶ 3.1.1).

As we have previously underlined, all the Charts that we have analysed foresee a mechanism of control. We will analyse more in depth how they are enforced when we will discuss the protection of human rights in Chapter 3.

2.1.2 INCORPORATION OF EUROPEAN HUMAN RIGHTS LAW INTO NATIONAL LEGAL ORDERS

The incorporation of the ECHR human rights' law into national legal systems is one of the central point of this Convention. As stated by Article 1 of the ECHR,

¹⁰⁸ Office of the High Commissioner for Human Rights and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, UN, New York and Geneva, 2003, 106, in <https://www.ohchr.org/Documents/Publications/training9Titleen.pdf>.

¹⁰⁹ *Ibidem*, 107, cit.

«the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention».¹¹⁰

The first step for the implementation of the Convention is its ratification. In 1953, States after the long drafting process ratified the Convention without uprising particular objections.¹¹¹ However, after the enlargement of Council of Europe's membership, new members made resistance, especially on the ratification of some Protocols.¹¹² In fact, incorporation of rights into the national legal orders also depends on ratification of the following protocols. It is worth underlining that the acceptance of Protocol No. 11 is a pre-condition for the ratification of the ECHR.¹¹³ Hence, if on the one hand states made no opposition to the adoption of the original text of 1952, their attitude changed towards some Protocols. Since 1952, fourteen protocols have entered into force. It is important to underline that with regard to the ratification of Protocols 2,3,5 and 8 Contracting States made little or no resistance.¹¹⁴ With regard to Protocol No. 4 of 1963, Greece, Turkey, Italy, Spain, Switzerland and the UK were reluctant to its ratification, because the renouncing of expulsion of nationals and aliens was considered to be a political commitment in a sensitive area.¹¹⁵ Italy and Spain ratified it later, respectively in 1982 and 2009.¹¹⁶ Russia alone did not ratify Protocols No. 6 and 13, regarding the prohibition of the death penalty. Furthermore, it was the only one at blocking the entrance into force of Protocol No. 14, which simplifies the procedure of the Court on deciding admissibility

¹¹⁰ Council of Europe, Convention for the protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in https://www.echr.coe.int/Documents/Convention_ENG.pdf.

¹¹¹ They upraised objections on the creation of a supervision mechanism.

¹¹² When the ECHR was adopted, the Council of Europe was composed of 12 member states, while now 47 states are members of the CoE.

¹¹³ Protocol No. 11 reformed the ECHR because it introduces the individual complaint procedure and the compulsory jurisdiction of the Court.

¹¹⁴ Keller H. — Stone Sweet A., *Assessing the Impact of the ECHR on National Legal Systems*, in Keller H. — Stone Sweet A. (edited by), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, Oxford University Press, 2008, 679.

¹¹⁵ *Ivi*, 680.

¹¹⁶ Council of Europe, *Chart of Signature and Ratification of Treaty 046*, in https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/046/signatures?p_auth=dSchwRyE.

cases.¹¹⁷ It ratified the Protocol in 2010, after three years of delaying its entrance into force.¹¹⁸ Indeed, although Protocol No. 12 that contains the non-discrimination principle entered into force in 2005, it has been ratified only by 20 states.¹¹⁹ Protocol No. 15 has not entered into force yet because it misses the ratification of Bosnia and Herzegovina and Italy.¹²⁰ Finally, Protocol No. 16 entered into force in 2018, but it has been ratified by less than one third of member states.¹²¹

Then, with regard to ECHR incorporation into national legal systems, it is important to understand the rank states given domestically to the Convention. In fact, states are free to pursue ECHR implementation into their national systems as to their will, according to their constitutional provisions, hence depending on the relationship foreseen between constitutional law and international treaties.¹²² With regard to the relationship to national law and treaty law, national constitutions can adopt a monist or a dualist posture.¹²³

A more monist approach toward the ECHR will favour its coordination with the national legal order. Spain, a monist state, is characterized by a legal system where its capacity of guaranteeing «the effectiveness of the ECHR is virtually

¹¹⁷ Keller H. — Stone Sweet A., *Assessing the Impact of the ECHR on National Legal Systems*, in Keller H. — Stone Sweet A. (edited by), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, Oxford University Press, 2008, 680.

¹¹⁸ Council of Europe, *Chart of Signature and Ratification of Treaty 194*, in https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/194/signatures?p_auth=dSchwRyE.

¹¹⁹ Protocol No. 12 has been ratified by Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Malta, Montenegro, Netherlands, Portugal, Romania, San Marino, Serbia, Slovenia, Spain, The Former Yugoslav Republic of Macedonia and Ukraine. Council of Europe, *Chart of Signature and Ratification of Treaty 177*, in https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/177/signatures?p_auth=dSchwRyE.

¹²⁰ Council of Europe, *Chart of Signature and Ratification of Treaty 213*, in https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/213/signatures?p_auth=dSchwRyE.

¹²¹ Protocol No. 16 has been ratified by Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia and Ukraine. Council of Europe, *Chart of Signature and Ratification of Treaty 214*, in https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/214/signatures?p_auth=dSchwRyE.

¹²² Keller H. — Stone Sweet A., *The Reception of the ECHR in National Legal Orders*, in Keller H. — Stone Sweet A. (edited by), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, Oxford University Press, 2008, 20.

¹²³ *Ivi*.

perfect». ¹²⁴ The Spanish Constitutional Court has conferred to the ECHR a quasi-constitutional status. ¹²⁵ In fact, article 10 of the Spanish constitution states that «the principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain». ¹²⁶ This result can be achieved also by incorporating the ECHR into the national legal system, when the Convention is provided by direct applicability and it enjoys a supra- legislative status. ¹²⁷ For example, the UK has incorporated in its statutory the majority of the provisions of the ECHR through the Human Rights Act of 1998. ¹²⁸

When a state adopts a more dualist approach, the coordination between national legislation and international treaties results more difficult; however some states that are dualist, as Belgium, or that have rejected the direct applicability of international treaties in their legal system, as Austria, have «conferred on Convention rights constitutional or quasi-constitutional status, with truly transformative effects». ¹²⁹ In fact, Belgian judges have decided to give direct applicability to the Convention, conferring it supra-legislative status, while Austria revised its Constitution in 1964 to give the Convention constitutional status and direct effect. ¹³⁰

¹²⁴ *Ibidem*, 684.

¹²⁵ The Spanish Constitutional Court, «will strike down any statutes that violate the Convention as unconstitutional; it interprets Spanish constitutional rights in light of the ECHR; and it has ordered the ordinary courts to abide by the Strasbourg Court's case law, as a matter of constitutional obligation. [Moreover], if the judiciary ignores the dictates of the Convention, individuals can use the *Amparo* procedure to appeal the issue directly to the Constitutional Tribunal». *Ivi.*, cit.

¹²⁶ Cfr. art. 10, comma 2, Cost.

¹²⁷ *Ibidem*, 20.

¹²⁸ The UK has not included the freedom of movement in the Human Rights Act. The freedom of movement was incorporated in Protocol No. 4 of the ECHR that the UK has not ratified. However, it plays an implicit role in the constitution of the UK. Melton J. — Stuart C. — Helen D., *To Codify or not to Codify? Lessons from Consolidating the United Kingdom's Constitutional Statutes*, London, University College London, the Constitution Unit, 2015, 28-29.

¹²⁹ Keller H. — Stone Sweet A., *The Reception of the ECHR in National Legal Orders*, in Keller H. — Stone Sweet A. (edited by), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, Oxford, University Press, 2008, 20.

¹³⁰ *Ibidem*, 683-684.

Moreover, formally dualist states, as Norway or Sweden, can adopt a monist approach toward the Convention.¹³¹ As formally dualist states can adopt a monist approach toward the ECHR, the opposite is also valid. States that are formally monist, can treat the Convention as foreign law, «living it without much force in the domestic order».¹³² It is the case of Russia, Slovakia, Turkey and Ukraine. Although they are monistic, these countries are characterized by structural problems in the functioning of the judiciary, as well as a lack of commitment to the ECHR.¹³³ However, it is worth specifying that in most countries, the ECHR enjoy a more privileged status than other international treaties. For example, in some states, as Germany and Italy, in which the ECHR has a legislative ranking and not a constitutional one, Constitutional Courts «clarified that the ECHR has a special force that exceeds the normal constitutional discipline of international norms».¹³⁴

Although Member States have made progress to address incompatibilities between national legislation and the ECHR, certain states, as for example Turkey, did not truly examine the compatibility of their legislation with the ECHR.¹³⁵ Hence, it is important to underline the approach –monist or dualist – each state adopts towards the Convention as well as the status acknowledge to the ECHR in the national hierarchy of legal sources to make clear which norms, between the Convention and national law, should prevail in case of incompatibility. In fact, «the ECHR can be said to be effective, domestically, to

¹³¹ *Ibidem*, 684.

¹³² *Ivi*, cit.

¹³³ *Ibidem*, 685;

In addition, Russia demonstrated to be hostile to the ECHR in several occasions, up to the point that in June 2017 it suspended the payment of parts of its contribution to the CoE and at the end of 2017 it threatened to leave the organisation. Heinrich Böll Stiftung, European Union, *A Classic Dilemma: Russia's Threat to Withdraw from the Council of Europe*, February 2018, in <https://eu.boell.org/en/2018/02/21/classic-dilemma-russias-threat-withdraw-council-europe>.

¹³⁴ Martinico G., *Is the European Convention Going to Be "Supreme"? A Comparative Constitutional Overview of ECHR and EU Law before National Courts*, in *European Journal of International Law*, 2012, 23, 404, cit.

¹³⁵ Some states, as Russia, Turkey and Ukraine ratified the convention enthusiastically and perhaps with less commitment to values because in this way they «certify their membership in the circle of good European countries, otherwise dominated by Western Europe». Keller H. — Stone Sweet A., *The Reception of the ECHR in National Legal Orders*, in Keller H. — Stone Sweet A. (edited by), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, Oxford, University Press, 2008, 679, cit.

the extent that national officials recognize, enforce, and give full effect to Convention rights and the interpretive authority of the Court, in their decisions»¹³⁶.

Finally, the Council of Europe gives direct support for the implementation of the European Convention on Human Rights and other European human rights standards into national legislation. In particular, the Human Rights National Implementation Division through cooperation programmes enhance human rights standard in Member States. Through the European Programme for Human Rights Education for Legal Professionals (HELP), it trains national professionals in the application of the Convention. Furthermore, it gives support to national courts to guarantee a coherent interpretation of the European Court of Human Right's case law, therefore harmonizing them with national case law (see ¶ 3.2).¹³⁷

2.1.2.1 IMPLEMENTATION OF EUROPEAN HUMAN RIGHTS LAW

Although all member states of the European Union have ratified the European Convention on Human Rights, the EU is not a party to the ECHR yet. Nevertheless, Article 6 of the Treaty of the European Union (TEU), as revised after the Lisbon Treaty of 2009, foresees the EU accession to the ECHR.¹³⁸ In 2014 the European Court of Justice with the opinion 2/13 found that the Draft

¹³⁶ *Ibidem*, 682, cit.

¹³⁷ Council of Europe, *Human Rights National Implementation Division. Highlights 2016, 2017*, in <https://rm.coe.int/20170717-annual-report-2016/1680732550>.

¹³⁸ Art. 6 «1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law», in <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT>.

Accession Agreement (DAA) was not compatible with the EU law.¹³⁹ However, it is not excluded that in the future negotiations may restart. In this case, some adjustments are needed, as for example, the modification of the DAA and the withdrawal of member states reserves on the ECHR.¹⁴⁰

Even if the EU is not a party to the convention, on the one hand it works to reinforce the authority of the ECHR into EU member states and vis-à-vis EU institutions. In fact, article 6 of the TEU foresees that «fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law».¹⁴¹ Moreover, In the 90's, the ratification of the ECHR became a pre-requisite for EU membership. Some states, as Poland and Slovakia, were asked to make specific reforms in the field of judiciary and anti-corruption to effectively guarantee Convention rights.¹⁴² On the other hand, the EU has codified fundamental rights on its own. In fact, rights have become general principles of the EU law, because of the ECJ case law, also quoting systemically the ECHR and the constitutional traditions of member states as sources of law.¹⁴³ In addition we should mention that, as some scholars have argued, «the case law of the ECJ was a response to the jurisprudence of the Italian and German constitutional courts on “counter-limits,” and that it was, therefore, an attempt

¹³⁹ Opinion 2/13, European Court of Justice, in <http://curia.europa.eu/juris/celex.jsf?celex=62013CV0002&lang1=it&type=TXT&ancre=>.

¹⁴⁰ Cherubini F., *In Merito al Parere 2/13 della Corte di Giustizia dell'UE: qualche Considerazione Critica e uno Sguardo de Jure Condendo*, in *Osservatorio Costituzionale*, 2015, 2, 27-28.

¹⁴¹ Art. 6, comma 3, TEU.

¹⁴² Fabbrini F., *Fundamental Rights in Europe*, Oxford, Oxford University Press, 2014, 9.

¹⁴³ Keller H. — Stone Sweet A., *Assessing the Impact of the ECHR on National Legal Systems*, in Keller H. — Stone Sweet A. (edited by), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, Oxford University Press, 2008, 681;

With regards to ECJ's case law on fundamental rights protection, it is worth mentioning the early decisions of the ECJ on the issue, i.e. *Stauder v City of Ulum* of 1969, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* of 1970 (*Solange I*) and *J Nold v Commission* of 1974. Specifically, the first two cases referred to fundamental rights as formulated in the Constitutions of the States, while the third enacted fundamental rights as an integral part of the general principles of EU law.

to foster the doctrines of supremacy and direct effect of EEC law within the national legal systems».¹⁴⁴

Furthermore, the European institutions in 2000 proclaimed the Charter of Fundamental Rights of the European Union, which acquired full legal effect in 2009 with the entrance into force of the Treaty of Lisbon. Hence from a limited economic community, the EU emerges as a powerful political entity strongly committed to the protection and promotion of human rights.¹⁴⁵ In fact, in 1957 human rights were excluded from the European Economic Community Treaty because human rights were unrelated to the project of economic integration, then «the task of human rights protection was left, instead, to the Council of Europe's ECHR».¹⁴⁶

Before the entrance into force of the EU Charter of Fundamental Rights, article 6 TEU, then Article 7 TEU of the Amsterdam Treaty guarantees member states compliance with the principle of the rule of law.¹⁴⁷ In 2000 it was finally the turn of the EU Charter of Fundamental Rights which became binding in 2009. The innovative feature of the Charter is that it explicitly recognizes the fundamental role that rights play in EU legislation. In fact, six of the seven titles of the Charter are aimed at specifying types of rights.¹⁴⁸ Title I reaffirms the right of human dignity; Title II is devoted to enlist freedoms; Title III upholds the principle of equality and non-discrimination; Title IV is dedicated to solidarity; Title V catalogues the rights of EU's citizens; Title VI is committed to justice.¹⁴⁹

In addition, it is worth underlining that when the Charter obtained legal binding force, it acquired the status of EU primary law, having «the same legal value as

¹⁴⁴ Fabbrini F., *Fundamental Rights in Europe*, Oxford, Oxford University Press, 2014, 9, cit.

¹⁴⁵ De Búrca G., *The Road Not Taken: The European Union as a Global Human Rights Actor*, in *The American Journal of International Law*, 2011, 105, 650.

¹⁴⁶ *Ivi*, cit.

¹⁴⁷ Fabbrini F., *Fundamental Rights in Europe*, Oxford, Oxford University Press, 2014, 10.

¹⁴⁸ Chapter VII provide «general provisions governing the interpretation and application of the Charter». Official Journal of the European Union, Charter of Fundamental Rights of the European Union, in <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN>, cit.

¹⁴⁹ *Ivi*.

the Treaties».¹⁵⁰ Hence, in principle, the Charter «must be capable of being invoked horizontally, where a particular provision fulfils the conditions for direct effect».¹⁵¹ However, when reading the provision of article 51(1) of the Charter, it emerges that it «applies to EU institutions and to the Member States when they are implementing the EU law», while private parties are not mentioned.¹⁵² Therefore, one may argue that if the Courts adjudicates on interindividual disputes, it acts beyond its jurisdiction, expanding the scope of EU law.¹⁵³ However, article 51(1) does not explicitly exclude horizontal effect and, as the ECJ court claimed while ruling on *Åklagaren v Åkerberg Fransson* case, it is inevitable that some horizontal situations come within the scope of EU law.¹⁵⁴ In addition we should mention the *Melloni* case, which is very controversial because by affirming the principle of the primacy of the EU law to preserve its uniformity, the Court of Justice provides for lower level of protection than national constitution.¹⁵⁵

¹⁵⁰ Frantziou E., *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*, in *European Law Journal*, 2015, 21, 659; Art. 6 TEU, in <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT>.

¹⁵¹ *Ivi*, cit.

¹⁵² *Ivi*, cit.

Art. 51(1) TEU: «The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties». In <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN>.

¹⁵³ *Ivi*.

Dubout E., *The Protection of Fundamental Rights and the Allocation of Competences in the EU: A Clash of Constitutional Logics*, in Azoulai L. (edited by), *The Question of Competence in the European Union*, Oxford, Oxford University Press, 2014, 193.

¹⁵⁴ Frantziou E., *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*, in *European Law Journal*, 2015, 21, 659-660.

The *Åkerberg Fransson* case concern a tax fraud. Mr. Fransson was punished twice for tax fraud. However, article 50 of the Charter of Fundamental Rights of the EU recognizes the principle of *ne bis in idem* according to which one cannot be sanctioned twice for the same crime. See full text in http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=134202&occ=first&dir=&cid=2341391.

¹⁵⁵ Marguery T., *European Union Fundamental Rights and Member States Action in EU Criminal Law*, in *Maastricht Journal of European and Comparative Law*, 2013, 20, 287.

In fact, *Melloni*, an Italian citizen who escaped in Spain, was condemned in Italy *in absentia*, thus Italian authorities issued a European arrest warrant. Spain referred to the Charter of Fundamental Rights of the EU by arguing that the principle of not being judged *in absentia* was

However, we will analyse more in depth the role the European Court of Justice when dealing with protection of human rights (see ¶ 3.1.2).

Moreover, when deciding on the incorporation of the Charter into the Lisbon Treaty the UK called for an opt-out, and it was followed by Poland. Hence, the two states negotiated Protocol No. 10 to add to the Charter, and they were later joined by the Czech Republic.¹⁵⁶ By adding the Protocol, the UK, Poland and Czech Republic remain bound by fundamental rights that constitute general principle of the EU, but the Protocol represents a limitation to article 51(1).¹⁵⁷ In fact, «the ECJ, in its case-law, cannot arrive at an extensive interpretation of the concept of ‘implementing Union law,’ and thus allow courts also to check national legal acts other than those that implement European law on their conformity with the Charter».¹⁵⁸ Moreover, the UK-Ireland Protocol in Respect of the Area of Freedom, Security and Justice may also impact on the application of the Charter, because it exempts both countries from measures adopted under Chapter V of the TEU.¹⁵⁹

2.1.2.2 THE COUNCIL OF EUROPE’S ENLARGEMENT AND THE ROLE OF THE VENICE COMMISSION

When the European Convention on Human Right was adopted, just twelve states were parties of the Council of Europe. The Council remained almost entirely a Western European institution until the fall of communism. When communism collapsed and the USSR was dissolved, the Council enlarged membership to Central and Eastern European states. The Council expansion to some extent has transformed and reinforced the role of the European Convention on Human

a supreme principle of the Spanish Constitution that the EU should protect. However, the ECJ ruled in favour of the Italian authorities. See full text of the judgement in <http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=134203&occ=first&dir=&cid=513641>.

¹⁵⁶ Fabbrini S., *Which European Union? Europe After the Euro Crisis*, Cambridge, Cambridge University Press, 2015, 71-72.

¹⁵⁷ Belling V., *Supranational Fundamental Rights or Primacy of Sovereignty? Legal Effects of the So-Called Opt-Out from the EU Charter of Fundamental Rights*, in *European Law Journal*, 2012, 18, 268.

¹⁵⁸ *Ivi*, cit.

¹⁵⁹ Anderson D. — Murphy C.C., *The Charter of Fundamental Rights*, in Bjondi A. — Eeckhout P. — Ripley S. (edited by), *EU Law after Lisbon*, Oxford, Oxford University Press, 2012, 169.

Rights and the European Court of Human Rights.¹⁶⁰ Until the beginning of the 90's, as the Council was a club of twenty-three homogenous countries which largely shared the same political, legal and cultural traditions, the European Court of Human Rights was rarely involved in cases concerning serious perpetration of human rights.¹⁶¹ Moreover, Protocol No. 11, which foresees individual complaint mechanism was not adopted yet. Indeed, the Court operated mainly «at the margins of the human rights *problématique*, establishing basic protections which were admittedly exciting for academic lawyers but in practice did not affect important policy and legal choices adopted within national systems».¹⁶² When the former communist countries acceded to the Council, thus to the Convention, the Court found itself tackling severe violations of rights and general deficiencies of national institutions. From this perspective we can understand the reinforcement of the constitutional role of the Court. In fact, it «ceased being a “fine-tuner” of national legal systems, and was compelled instead to adopt a role of policing national systems which suffered important systemic deficiencies (...), and in which serious rights violation occurred».¹⁶³

Furthermore, the Venice Commission, officially, the European Commission for Democracy through Law, played an important role in helping constitutional transition of former communist states.¹⁶⁴ The Commission was established in 1990 by the Council and it is composed of the 47 members of the Council of Europe plus Algeria, Brazil, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA per a total of 61 member states. Its aim is of providing legal advice to its member states and provide them with assistance in building institutions and a legal

¹⁶⁰ Sadurski W., *Constitutionalism and the Enlargement of Europe*, Oxford, Oxford University Press, 2012, 2-4.

¹⁶¹ *Ivi*.

¹⁶² *Ibidem*, 3, cit.

¹⁶³ *Ibidem*, 4, cit.

¹⁶⁴ «The Commission shall be a consultative body which co-operates with the member States of the Council of Europe and with non-member States, in particular those of Central and Eastern Europe. Its own specific field of action shall be the guarantees offered by law in the service of democracy». Article 1, Appendix to resolution (90) 6, Statue of the European Commission for Democracy through Law, in [https://www.venice.coe.int/webforms/documents/?pdf=CDL-RA\(1990\)001-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-RA(1990)001-e).

system in compliance with European standards and international standards of democracy, the rule of the law and human rights.

In 2017, the Commission gave several opinions on human rights status in different countries.¹⁶⁵ For example, as regards to the measures taken in Turkey with respect to freedom of the media, after the failed coup d'état of 2016, the Venice Commission expressed its concern on the intensification of prosecutions of journalist, consequently to the declaration of the state of emergency.¹⁶⁶ Moreover, its concerns entail also the liquidations of media, which occurred mostly by decree law. The Commission found that this liquidation based on the criteria of connections to terrorist organization, should be based in normal legislation and not on emergency decree law not anchored in a pre-existing legislative provision.¹⁶⁷ Hence in 2017 an inquiry commission was created with the task of re-examining the measures adopted in the aftermath of the state of emergency. However, the independence and efficiency of this commission is questionable.¹⁶⁸

Moreover, in 2017, the Commission was informed that the Republic of Armenia embraced almost all the Commission recommendations with regard to the constitutional law on the Human Rights Defender adopted on December 2016.¹⁶⁹ Proposals entailed «making a distinction between the Defender's ombudsman functions and the Defender's functions as the National Preventive Mechanism under the Optional Protocol to the Convention against Torture; adding the possibility for the Defender to have regional presence to provide effective accessibility to human rights protection across the country; adding clear provisions on the immunity of the means of communication used by the Defender and the staff and that, on the termination of the Defender's mandate,

¹⁶⁵ The report of 2017 on the Venice Commission activities is the last published by the Council of Europe.

¹⁶⁶ Venice Commission, Opinion CDL-AD(2017)021, see full text in [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)021-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)021-e).

¹⁶⁷ Venice Commission, *Annual Report of Activities 2017*, Council of Europe, 2018, 16, in [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2017\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2017)001-e).

¹⁶⁸ *Ivi*.

¹⁶⁹ *Ibidem*, 14.

the recommendation that a report on the activity of the Defender be presented to Parliament and published».¹⁷⁰

These are just some examples of the powerful activity the Venice Commission carries out although its opinions are not binding; however, they are useful to comprehend the impact the Commission has on human rights enhancement.

Additionally, it is worth mentioning the cooperation between the Venice Commission and other countries or organisation. In particular, it has established a relationship of cooperation with Central Asia countries, Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan, with Latin America countries, as Chile, Peru and Mexico, and with the countries of the Mediterranean Basin. For the purposes of this analysis, it is relevant the cooperation between the Venice Commission and the Organisation of Arabic Speaking Electoral Management Bodies (Arab EMBs). In 2015, they signed a Memorandum of Understanding that sets out the terms and conditions for their cooperation in the field of the elections.¹⁷¹ Furthermore, it is worth mentioning, while speaking of Mediterranean countries, the involvement of the Venice Commission in the adoption of the last Tunisian constitution (see ¶ 2.2.5.4).¹⁷² However, we will deepen the issue of cooperation between the European and the MENA regions in Chapter 4.

2.2 CODIFICATION IN THE MENA REGION: UNIVERSALISM OR CULTURAL RELATIVISM?

Human rights to be universally valid should be perceived as so by the whole community of the states. On the one hand, the majority of the states, including several countries with a Muslim majority, have signed the most important charts

¹⁷⁰ *Ibidem*, 14-15, cit.

¹⁷¹ Venice Commission, Co-operation with the Organisation for Arabic Speaking Electoral Management Bodies (Arab EMBs), in https://www.venice.coe.int/WebForms/pages/?p=03_05_Arab_EMBs&lang=EN.

¹⁷² Spada S., *I Diritti Umani quale Possibile Terreno di Dialogo tra Tradizioni Costituzionali: Il Caso della Tunisia*, in Alicino F. (edited by), *I Diritti Umani nel Mondo Globale. Tradizioni Religiose e Tradizioni Costituzionali e Mare Nostrum*, Naples, Editoriale Scientifica, 2016, 221.

and conventions on human rights.¹⁷³ Egypt and Turkey are part of the Universal Declaration of 1948, while Saudi Arabia has ratified the Convention on the Elimination of All Forms of Discrimination Against Women in 2000. On the other hand, they assert that «cross-cultural differences might need to be taken into account in fine-tuning human rights standards and their implementation».¹⁷⁴ Even if most of them have made very positive statements upon the adoption of the Vienna Declaration and Programme of Action of 1993, they have underlined the need of taking into account cultural differences. Considering Islamic law countries, it is worth mentioning the position of the Saudi Arabia delegation regarding the conference. If at the end of the conference on 25 June 1993, the delegation of Saudi Arabia stated that «the important issues covered by this Declaration, (...), should help some peoples to free themselves from foreign occupation and should help others to exercise their right to self-determination or to avoid repression, captivity, torture, displacement, rape and murder in so far as the lofty objective to which we are aspiring is to turn the world into a vast oasis characterized just and comprehensive peace, stability, security, peace of mind and all types of freedom».¹⁷⁵ In addition, Saudi Arabia specified that they would

¹⁷³ Some data on the major international human rights treaties and their ratification status: the International Covenant on Civil and Political Rights has been ratified by all the states with the exception of Antigua and Barbuda, Bhutan, Brunei, Cook Islands, Holy See, Kiribati, Malaysia, Micronesia (Federated States of), Myanmar, Niue, Oman, Saint Kitts and Nevis, Saudi Arabia, Singapore, Solomon Islands, South Sudan, Tonga, Tuvalu and the UAE, then China, Comoros, Cuba, Nauru, Palau and Saint Lucia signed the treaty without ratifying it; The International Covenant on Economic, Social and Cultural Rights has been ratified by all the states with the exception of Andorra, Antigua and Barbuda, Bhutan, Brunei, Cook Islands, Holy See, Kiribati, Malaysia, Micronesia (Federated States of), Mozambique, Nauru, Niue, Oman, Saint Kitts and Nevis, Saint Lucia, Samoa, Saudi Arabia, Singapore, South Sudan, Tonga, Tuvalu, the UAE, and Vanuatu, then Comoros, Cuba, Palau and the USA signed the treaty without ratifying it; the Convention on the Elimination of All Forms of Discrimination against Women has been ratified by all the states with the exception of the Holy See, Iran, Niue, Somali, Sudan and Tonga, then Palau and the USA signed the treaty without ratifying it; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has been ratified by all the states with the exception of Barbados, Bhutan, Cook Islands, Democratic People's Republic of Korea, Dominica, Grenada, Iran, Jamaica, Kiribati, Malaysia, Micronesia (Federated States of), Myanmar, Niue, Oman, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Samoa, Singapore, Solomon Islands, Suriname, Tonga, Trinidad and Tobago, Tuvalu, United Republic of Tanzania and Zimbabwe, then Angola, Brunei, Haiti, India, Palau and Sudan signed the treaty without ratifying it. See more in <http://indicators.ohchr.org>.

¹⁷⁴ Mayer A.E., *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, in *Michigan Journal of International Law*, 1994, 15, 376, cit.

¹⁷⁵ Statement by the delegation of Saudi Arabia, Statements made upon the adoption of the Vienna Declaration and Programme of Action, 1993, Vienna, cit., in <http://www.ohchr.org/EN/AboutUs/Pages/ViennaWCStatements.aspx>.

have observed the verse of the Holy Qur'an.¹⁷⁶ Moreover, during the conference, the Foreign Minister of Saudi Arabia, Prince Saud al-Faysal, defined the Vienna Declaration and Programme of action as «a proper foundation for positive and practical international cooperation, and which would flow into the main stream [sic] of universal support for human rights and freedoms, coming as an expression of the will of over one billion people which gives it a truly universal character by any measure. While the principles and objectives upon which human rights are founded are of a universal nature, their application requires consideration for the diversity of societies, taking into account their various historical, cultural, and religious background and legal system».¹⁷⁷

Thus, many countries do not perceive values of human rights as universally valid, justifying deviations from international law and human rights on the ground of cultural relativism. According to pure cultural relativists, «no moral judgement is universally valid, meaning valid for all cultures. Instead, every moral judgement is culturally relative».¹⁷⁸ Hence, cultural tradition determines the existence and protection of a certain right rather than another. To make the discourse over cultural relativism clearer, it is worth mentioning a scholarly explanation given in *Ethics, Human Rights and Culture. Beyond Relativism and Universalism*, where Williams stated that «[s]ometimes a moral claim may specify that it only governs particular persons of certain identity or capacity ... But even such claims have a general and universalizable outlook. They apply to those with such identities or capacities in any societies or cultures. When the Taliban proclaimed that it was immoral to fly a kite in Afghanistan, they did not mean that it was morally permissible to fly a kite in neighboring Pakistan or in the Mary Popping's [sic.] England. They would like to ban it in these places if only their power could reach. Those Muslims who believe it is decadent for

¹⁷⁶ «Hold fast to the rope of God and do not become separated», and «Act, so that God, His Prophet and the believers will see your actions», Statement by the delegation of Saudi Arabia, Statements made upon the adoption of the Vienna Declaration and Programme of Action, 1993, Vienna, cit., in <http://www.ohchr.org/EN/AboutUs/Pages/ViennaWCStatements.aspx>.

¹⁷⁷ Mayer A.E., *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, in *Michigan Journal of International Law*, 1994, 15, 375.

¹⁷⁸ Lenzerini F., *The Culturalization of Human Rights Law*, Oxford, Oxford University Press, 2014, 4, cit.

women to wear miniskirts believe it is decadent for women everywhere to do so . . . ».¹⁷⁹

However, the debate on the universality of human rights remains open. Neither the Vienna Declaration and Action Programme, nor other international conventions and documents have properly addressed the issue. Every local tradition is trying to give its response to the growing pressure on the protection of human rights. By doing so, countries must take into account the religious and cultural spheres, among the others. By the way, Muslim countries have tried and continue to give their response to human rights in accordance with the Islamic law.

2.2.1 ISLAMIC LAW VS. CIVIL LAW

Before analysing the codification of human rights into the MENA region, it is valuable to briefly remark the characteristics of the Islamic legal family. Firstly, the Islamic law was born as a consequence to the spread of the Islamic religion, founded by Muhammad. Similarly, political, social and cultural systems derived from Islam.¹⁸⁰ We should, however, underline, that according to Islam, it makes no sense to distinguish between moral, politics and law, because they are considered as a *unicum* and they are all based in the holy law: the Sharia.¹⁸¹ By making such a distinction we try to adapt the Islamic system to the western tradition in order to render it more understandable.¹⁸²

Hence, the Islamic legal family is based on the Sharia, which is its source of law. However, this reality is very fragmented as the Sharia include several sources: the Quran, the Sunnah, the *ijma'* and the *qiyas*.¹⁸³ The Quran is the word of Allah revealed to Prophet Muhammad; the Sunnah included the traditions and

¹⁷⁹ Li X., *Ethics, Human Rights and Culture. Beyond Relativism and Universalism* (2006), in Lenzerini F., *The Culturalization of Human Rights Law*, Oxford, Oxford University Press, 2014, 5, cit.

¹⁸⁰ Castro F., *La Shari'a, il Fiqh e le Fonti del Diritto*, in Piccinelli G.M. (edited by), *Il Modello Islamico*, Torino, Giappichelli Editore, 2007, 3.

¹⁸¹ *Ibidem*, 4.

¹⁸² *Ivi*.

¹⁸³ Papa M. — Ascanio L., *Shari'a. La legge Sacra dell'Islam*, Bologna, Il Mulino, 2014, 28.

practices of the Prophet which have been codified in the Hadith; the *ijma*’ is the consensus of the Muslim community or of the jurists, and finally the *qiyas* is the analogy used by judges. Because of its holy origin, the Sharia is immutable: nobody can infringe Allah willingness. However, during the VIII century, the interpretation of the Sharia and the Islamic jurisprudence developed.¹⁸⁴ In fact, the Sharia itself was not anymore able to regulate daily cases.¹⁸⁵ For this reason, the Islamic law, that is an unwritten law, may be called lawyer’s law.¹⁸⁶

Nowadays, several states have included into their constitution the Sharia clause. Hence, all the codified rules and international treaties are subject to the interpretation of the Sharia. This is the case of several MENA states. For example, article 1 of the Basic Law of Saudi Arabia states that «its religion is Islam. Its constitution is Almighty God’s Book, The Holy Qur’an and the Sunna (...) of the Prophet».¹⁸⁷ Moreover, constitutions of Bahrein, Egypt (see ¶ 2.2.5.4), Kuwait, Oman, Sudan, Yemen, the United Arab Emirates contains provisions which directly refer to dominance of the Sharia.¹⁸⁸

By contrast, the civil law legal family, which traces its origins in the *corpus juris civil*, is based on the legal thinking following which codified rules are needed to create order.¹⁸⁹ In fact, legislation, namely codified rules, is the main source of law, and it is followed by the scholarship and the customary law.

Hence, the two system are very different. While the civil law legal family ranks codified rules as the main source of its law and it is not based on religion, but on Roman Law, the Islamic law legal family ranks the Islam as the main source of its legislation. Hence, the lawyer has the task of writing rules, however

¹⁸⁴ *Ibidem*, 47.

¹⁸⁵ *Ivi*.

¹⁸⁶ Moursi Badr G., *Islamic Law: Its Relation to Other Legal Systems*, in *The American Journal of Comparative Law*, 1978, 26, 189.

¹⁸⁷ Cfr. art. 1, Cost., in <https://www.saudiembassy.net/basic-law-governance#Chapter%20One:%20General%20Principles>.

¹⁸⁸ Papa M. — Ascanio L., *Shari’a. La legge Sacra dell’Islam*, Bologna, Il Mulino, 2014, 99-100.

¹⁸⁹ Ferrari G.F., *Civil Law e Common Law: Aspetti Pubblicistici*, in Carrozza P. — Di Giovine A. — Ferrari G.F. (edited by), *Diritto Costituzionale Comparato*, Roma-Bari, Laterza, 2014, 775-804.

respecting the principles of the Sharia.

2.2.2 FROM THE ORIGINS OF HUMAN RIGHTS IN THE MENA REGION TO THE CAIRO DECLARATION OF 1990

Although human rights belong to *jus cogens* of international law, hence they should be applied in all the countries, the Sharia¹⁹⁰, that regulate the law of many countries with an Islamic majority, has been considered by many scholars to be incompatible with human rights universally recognized.¹⁹¹

The Sharia is the law of Allah, the law that has been revealed to the *umma*¹⁹² by the prophet Muhammad, that must be immutable because of its holy origin.¹⁹³ Hence, the Islamic law serves to order all the aspects of a Muslim life, thus, it must regulate also human rights field. However, the Sharia by its nature limits human rights enjoyment, because as observed by Khadduri, human rights in Islam are reserved to those who have full legal capacity, consequently to free Muslim adults. Slaves and non-Muslim that live in Islamic states are not fully protected by the law, and their rights are not entirely recognized.¹⁹⁴ Moreover, it is important to underline that women, despite they have full legal capacity, according to Sharia do not enjoy the same rights as men.¹⁹⁵

If on the one hand the Sharia does not recognize human rights, on the other hand the principle of reciprocity might constitute the basis for human rights universality. According to this principle that is accepted by main cultural traditions, people should treat other human beings the same way they would like

¹⁹⁰ Sharia represents Allah willing, hence Muslim must follow his law. However, Islamic intellectuals have codified a system of sources of law following the word of Allah. Therefore, the Sharia is composed by the *Qur'an*, that is the holy book of Islam, the *Sunna*, namely the traditions of the Prophet Muhammed, the *Ijma'*, that is the consent, and the *Qiyas*, the reasoning by analogy. Papa M. — Ascanio L., *Shari'a. La legge Sacra dell'Islam*, Bologna, Il Mulino, 2014, 28.

¹⁹¹ Abdullahi A.A., *Toward an Islamic Reformation. Civil Liberties, Human Rights and International Law*, Syracuse (N.Y.), Syracuse University Press, 1996, 238-240.

¹⁹² The *umma* is the whole Muslim community.

¹⁹³ Papa M. — Ascanio L., *Shari'a. La legge Sacra dell'Islam*, Bologna, Il Mulino, 2014, 17.

¹⁹⁴ Abdullahi A.A., *Toward an Islamic Reformation. Civil Liberties, Human Rights and International Law*, Syracuse (N.Y.), Syracuse University Press, 1996, 239.

¹⁹⁵ *Ivi*.

to be treated. However, Sharia does not apply the principle of reciprocity to women and non-Muslim as it does to Muslim men. Women and non-Muslim enjoy a lower status than men and they see recognized a lower degree of human dignity.¹⁹⁶ Even if the Sharia today is hardly reconcilable with human rights, we have to bear in mind the historical moment in which the Islamic law developed. In fact, the Sharia was justifiable in its historical context, when universal human rights did not exist and the consuetude wanted that rights of persons derived from their religious belonging.¹⁹⁷ Moreover, during its epoch, the Sharia improved living conditions of discriminated groups, since it contributed to diminish slavery perpetrations and religious and sexual discriminations.¹⁹⁸ Several Islamic scholars, as Khaled Abou El Fadl, believe that the Sharia should take into consideration the contemporary historical circumstance and the modern definition of human rights in order to reform the Islamic law according to them, as it seems not possible to justify human rights violation in the name of the Islamic law. Consequently, «the interpretive component in Islamic theological and legal traditions offered a way for Muslims to transition from adhering to premodern views that privilege God's rights to a modern paradigm that privileges human rights».¹⁹⁹ Hence, two different currents of thoughts have developed. On the one hand, there are States, as Saudi Arabia, that are conservative and radical that think the Sharia must be the unique source of law, while on the other hand some states are adopting revolutionary reforms, required by the population after the uprisings began in 2010 (see ¶ 2.2.5).

However, the relationship between international human rights and Islamic tradition is complex. Starting from the Universal Declaration on Human Rights of 1948, it is worth analysing the reactions of several Muslim countries with regards to its universality. When the Declaration was adopted, only 10 of the 58 member states of the UN were of Muslim's majority. Eight of them,

¹⁹⁶ *Ibidem*, 227-228.

¹⁹⁷ *Ibidem*, 238

¹⁹⁸ *Ivi*.

¹⁹⁹ Dunn S., *Islamic Law and Human Rights*, in Emon A.M. — Ahmed R. (edited by), *The Oxford Handbook of Islamic Law*, Oxford, Oxford University Press, 2015, 10, cit.

Afghanistan, Egypt, Iran, Iraq, Lebanon, Pakistan, Syria and Turkey voted in favour of the text; Saudi Arabia abstained from voting and Yemen was absent. In fact, soon after its adoption, the Islamic world started to spread out the voice of incompatibility of several articles of the Declaration and the Islamic law.²⁰⁰ In particular, Saudi's King criticized the Declaration for not taking into consideration cultural traditions, while an Iranian representative in the UN in 1982 claimed that the UDHR was a «secular understanding of the Judeo-Christian tradition»²⁰¹, resulting in the impossibility of compliance with the Islamic law.²⁰² For example, a discordance with the Sharia was represented by Article 6 of the UDHR – «everyone has the right to recognition everywhere as a person before the law».²⁰³

From this inconsistency between human rights and Islamic law, the necessity of an Islamic codification of human rights was born.²⁰⁴ The Universal Islamic Declaration of Human Rights of 1981 (UIDHR) is the first attempt of Islamic codification in the field of human rights, and it represents the Islamic response to the UDHR. The Declaration was adopted by the Islamic Council of Europe on 19 September 1981 with the aim of reconciling the universal human rights of the UDHR with the Islamic perspective. However, this attempt seems to be vain to the extent in which the declaration is exclusively addressed to the *umma*.²⁰⁵ Moreover, as the entire declaration is based on the Sharia, we can derive that the spirit of the Islamic Declaration is to justify the existence of human rights as

²⁰⁰ Alicino F. — Gradoli M., *L'Islam del XXI Secolo e gli International Human Rights*, in Decaro Bonella C. (edited by), *Tradizioni Religiose e Tradizioni Costituzionali. L'Islam e L'Occidente*, Rome, Carocci Editore, 2003, 150-151.

²⁰¹ London School of Economics, Middle East Centre Blog, *Human Rights: The Universal Declaration Vs. The Cairo Declaration*, 2012, cit., in <http://blogs.lse.ac.uk/mec/2012/12/10/1569/>.

²⁰² *Ivi*.

²⁰³ Universal Declaration of Human Rights, Article 6, 1948 in <http://www.un.org/en/universal-declaration-human-rights/>;

Alicino F. — Gradoli M., *L'Islam del XXI Secolo e gli International Human Rights*, in Decaro Bonella C. (edited by), *Tradizioni Religiose e Tradizioni Costituzionali. L'Islam e L'Occidente*, Rome, Carocci Editore, 2003, 150-151.

²⁰⁴ Azeez Maruf Olayemi A., — Majeed Hamzah Alabi A. — Hidayah Buang A., *Islamic Human Rights Law: A Critical Evaluation of UIDHR & CDHRI in Context of UDHR*, in *Journal of Islam, Law and Judiciary*, 2015, 1, 30.

²⁰⁵ Alicino F. — Gradoli M., *L'Islam del XXI Secolo e gli International Human Rights*, in Decaro Bonella C. (edited by), *Tradizioni Religiose e Tradizioni Costituzionali. L'Islam e L'Occidente*, Rome, Carocci Editore, 2003, 153.

grounded on religious law.²⁰⁶ Hence, human rights principle should be interpreted according to the Sharia. In fact, several references to God and to the holy text are made in the UIDHR, and every article is based on the Islamic law. For example, the Islamic Declaration itself starts with a verse from the Qur'an; «this is a declaration for mankind, a guidance and instruction to those who fear God».²⁰⁷ Then, it is important to underline that the Islamic Declaration is not binding and it does not foresee the ratification mechanism.

Even the Declaration has been criticized, however it has been an attempt to explain human rights in a Muslim perspective. The twenty-three articles of the Declaration enlisted the same rights of the UDHR from the Islamic perspective.²⁰⁸ However, the Islamic Declaration has not been the sole trying to improve the Islamic human rights codification. From this point, new declarations have been adopted aiming at enhancing the previous one.

2.2.3 THE CAIRO DECLARATION ON HUMAN RIGHTS IN ISLAM OF 1990

The Cairo Declaration on Human Rights in Islam (CDHRI) of 1990 is the second attempt of an Islamic codification in the field of human rights. The text has been adopted by the Organisation of the Islamic Conference (OIC).²⁰⁹ The aim of the

²⁰⁶ *Ibidem*, 154.

²⁰⁷ Al Qur'an, Al-Imran 3:138, in <http://www.alhewar.com/ISLAMDECL.html>.

²⁰⁸ Here an example of similarities between an article of the UDHR and the UIDHR. With regard to torture at Article 5 the UDHR states that No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment; while at Article 7 the UIDHR states that no person should be subject to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to an act which is injurious to his interests. In <http://www.un.org/en/universal-declaration-human-rights/> and <http://www.alhewar.com/ISLAMDECL.html>.

²⁰⁹ The OIC has been established in Rabat in 1969 with the aim of promoting Islamic solidarity and developing economic, social and cultural cooperation. The OCI is composed by 57 member states: Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Brunei, Burkina Faso, Cameroon, Chad, Comoros, Côte d'Ivoire, Djibouti, Egypt, Gabon, Gambia, Guinea, Guinea-Bissau, Guyana, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Malaysia, Maldives, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Sierra-Leone, Syria (suspended), Somalia, Sudan, Suriname, Tajikistan, Thailand, Togo, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, Uzbekistan, Yemen. Alicino F. — Gradoli M., *L'Islam del XXI Secolo e gli International Human Rights*, in Decaro Bonella, C. (edited by), *Tradizioni Religiose e Tradizioni Costituzionali. L'Islam e L'Occidente*, Rome, Carocci Editore, 2003, 155.

Declaration was «to serve as a general guidance for Member States on the field of human rights».²¹⁰ Although the Declaration is not binding, it plays an important role in the Islamic world because it has been promoted by the OIC, the most representative Islamic institutions for the number of member states as well as for its economic, political and military weight.²¹¹ In fact, the Declaration has been mentioned by adherent states several times with regards to the adoption of further international conventions. For instance, with regards to the Convention on the Right of the Child (CRC), Saudi Arabia clarified to the Committee that it had “ratified” the CDHRI «to reaffirm its deep-rooted faith in human rights and dignity as prescribed by Islam»²¹². Moreover, with regards to Article 12 of the CRC, concerning religious freedom, Saudi Arabia mentioned article 7(b) of the Cairo Declaration which states that «parents or legal guardian have the right to choose the form of upbringing they want for their children in a manner consistent with their interests and their future in the light of moral values and regulations of Islamic Law».²¹³ However, Abdullah al-Ahsan, who has studied the implementation of the CDHRI in OIC countries, underlines that the attachment of those states to the Declaration is minimal.²¹⁴ For example, al-Ahsan found out that the conduct of Egypt and OIC with regards to human rights recorded during the Mubarak era was ambiguous because Egypt did not raise questions of compliance of its laws with the CDHRI provision, such as whether the Egyptian emergency laws were adopted in accordance with the Sharia or if Sharia consents torture under custody.²¹⁵

²¹⁰ Cismas I., *Religious Actors and International Law*, Oxford, Oxford University Press, 2014, 254, cit.

²¹¹ Alicino F. — Gradoli M., *L'Islam del XXI Secolo e gli International Human Rights*, in Decaro Bonella C. (edited by), *Tradizioni Religiose e Tradizioni Costituzionali. L'Islam e L'Occidente*, Rome, Carocci Editore, 2003, 156.

²¹² First periodic report, Saudi Arabia, Committee on the Rights of the Child, UN Doc. CRC/C/61/Add.2, 1998, para. 15, in Cismas I., *Religious Actors and International Law*, Oxford, Oxford University Press, 2014, 278.

²¹³ First periodic report, Saudi Arabia, Committee on the Rights of the Child, UN Doc. CRC/C/61/Add.2, 1998, para. 121, in Cismas I., *Religious Actors and International Law*, Oxford, Oxford University Press, 2014, 278.

²¹⁴ Cismas I., *Religious Actors and International Law*, Oxford, Oxford University Press, 2014, 278-279.

²¹⁵ *Ivi*.

Although the Declaration does not reject human rights principles, as the Islamic Declaration of 1981, it is based on the Islamic law. It is worth underlining that several limitations have been attached to certain rights in the name of the Sharia and the Declaration foresees a clause stating that it has to be interpreted only according to the Sharia.²¹⁶ In fact, Article 24 and 25 of the Declaration respectively states that «all the rights and freedoms stipulated in this Declaration are subject to the Islamic Sharia»²¹⁷ and the «Islamic Sharia is the only source of reference for the explanation or clarification of any of the articles of the Declaration».²¹⁸ The Declaration reaffirms the principle of equality of all human beings in Article 1,²¹⁹ nevertheless Article 10²²⁰ makes clear the distinction the Declaration makes between Muslim and non-Muslim.²²¹

Moreover, the Declaration stresses the attention on the rejection of colonialism but remains silent on certain rights, such as the rights to freedom of assembly and association.²²² By denouncing colonialism, the Declaration affirms the principle of self-determination, and the duty of «all States people to support the struggle of colonized people for the liquidation of all forms of and

²¹⁶ *Ibidem*, 254.

²¹⁷ Cairo Declaration on Human Rights, Forced Migration Review, Article 24, in <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/Human-Rights/cairo.pdf>.

²¹⁸ *Ibidem*, Article 25.

²¹⁹ Article 1: (a) All human beings form one family whose members are united by their subordination to Allah and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, belief, sex, religion, political affiliation, social status or other considerations. The true religion is the guarantee for enhancing such dignity along the path to human integrity. (b) All human beings are Allah's subjects, and the most loved by Him are those who are most beneficial to His subjects, and no one has superiority over another except on the basis of piety and good deeds. In <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/Human-Rights/cairo.pdf>.

²²⁰ Article 10: Islam is the religion of true unspoiled nature. It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or to atheism. In <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/Human-Rights/cairo.pdf>.

²²¹ Alicino F. — Gradoli M., *L'Islam del XXI Secolo e gli International Human Rights*, in Decaro Bonella, C. (edited by), *Tradizioni Religiose e Tradizioni Costituzionali. L'Islam e L'Occidente*, Rome, Carocci Editore, 2003, 156-1577.

²²² Cismas I., *Religious Actors and International Law*, Oxford, Oxford University Press, 2014, 254.

occupation».²²³ The critic towards colonialism is the most innovative feature of the Declaration.²²⁴ However, the Declaration does not mention several rights that are well established in the human rights practice, such as the freedom of assembly and association and the right of changing one's religion, that in certain states is sanctioned with the death penalty.²²⁵

Finally, even if the Cairo Declaration tried to give guidelines to OIC member states with regards to human rights, this document is strongly tied to the Sharia, colliding with human rights standard. In fact, «instead of building a regionalism that strengthens the human rights protection accorded by member states, the OIC built a form of “regionalism”, which subjects human rights to Sharia».²²⁶ Moreover, the Cairo Declaration does not promote a reform of the Sharia law, but it legitimizes the status quo.²²⁷

2.2.4 THE ARAB CHARTER ON HUMAN RIGHTS OF 2004

The League of the Arab States (LAS) created in 1945, is the organ that will adopt the Arab Charter on Human Rights in 1994.²²⁸ In fact, the LAS was established to «strengthen and coordinate political, cultural and economic relations and to settle disputes between its members»²²⁹, therefore, it does not incorporate provisions concerning human rights. Thus, in 1994, after a long drafting process that started in 1969, the LAS Council, composed of governments representatives adopted the Arab Charter on Human Rights, which was prepared by the

²²³ Cairo Declaration on Human Rights, Forced Migration Review, Article 11, in <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/FMRpdfs/Human-Rights/cairo.pdf>.

²²⁴ Alicino F. — Gradoli M., *L'Islam del XXI Secolo e gli International Human Rights*, in Decaro Bonella, C. (edited by), *Tradizioni Religiose e Tradizioni Costituzionali. L'Islam e L'Occidente*, Rome, Carocci Editore, 2003, 157.

²²⁵ Cismas I., *Religious Actors and International Law*, Oxford, Oxford University Press, 2014, 255-258.

²²⁶ *Ibidem*, 284, cit.

²²⁷ *Ivi*.

²²⁸ Today, the League of the Arab States is composed of 22 member states and 5 observer states. Member states: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen. Observer states: Brazil, Eritrea, India, Venezuela, Armenia.

²²⁹ Allam W., *The Arab Charter on Human Right: Main Features*, in *Arab Law Quarterly*, 2014, 28, 40, cit.

Permanent Arab Commission on Human Rights, namely a body composed of representatives from all the Arab States.²³⁰ Nevertheless, the Charter did not enter into force because states failed to ratify it.²³¹ As the Charter was never ratified, the LAS Council in 2004 with resolution n. 5437 adopted the new Arab Charter on Human Rights, which differs from the previous one, and it opened the ratification process.²³² In fact, since the Charter makes only few explicit referrals to the Islamic law, it is considered to be revolutionary: The Charter put the emphasis on the Arab national identity, instead of on the religion.²³³

The Charter is composed of 53 articles and it includes several rights similar to those included in other universal and regional charter on human rights, such as the UDHR, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the ECHR and the European Social Charter.²³⁴ It is worth mentioning some articles that made the Charter an innovative one with respect to the previous declarations adopted. For example, Article 2, which is very similar to Article 2 of the International Covenant of 1966, introduces the right of Arab people «to self-determination, to control their natural wealth and resources, to freely determine the form of their political structure and to freely pursue their economic, social and cultural development».²³⁵ Article 3 affirms the equality of men and women in the Arab World, in fact «men and women are equal in human dignity, in rights and in duties, within the framework of the positive discrimination established in favour

²³⁰ *Ibidem*, 41.

²³¹ Sudan and Yemen made reservations without explaining their reasons. Oman did not accept the Charter. Bahrain and Kuwait underlined that before accepting the Charter, it should be adopted by the Arab Ministers of Justice. The UAE and the Saudi Arabia argued that the Charter must be consistent with the CDHR. Qatar made reservation on provision he thought inconsistent with the Sharia, the Cairo Declaration and its national legislation.

²³² The original Charter of 1994 was composed of 43 articles, while the reformed text adopted in 2004 is composed of 53 articles. Alicino F. — Gradoli M., *L'Islam del XXI Secolo e gli International Human Rights*, in Decaro Bonella, C. (edited by), *Tradizioni Religiose e Tradizioni Costituzionali. L'Islam e L'Occidente*, Rome, Carocci Editore, 2003, 160; The Charter has been ratified by Algeria, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Palestine, Qatar, Saudi Arabia, Syria, the UAE and Yemen.

²³³ *Ibidem*, 161.

²³⁴ Allam W., *The Arab Charter on Human Right: Main Features*, in *Arab Law Quarterly*, 2014, 28, 46.

²³⁵ Al-Midani M.A. — Cabanettes M., *Arab Charter on Human Rights 2004*, in *Boston University International Law Journal*, 2006, 24, 148.

of women by Islamic Sharia and other divine laws, legislation and international instruments». ²³⁶ Hence, states party to the Charter «shall undertake all necessary measures to guarantee the effective equality between men and women». ²³⁷ Article 30 introduces the freedom of religion, guaranteeing the same rights to Muslims and non-Muslims. However, it makes no explicit referral to the right of change of one's religion, that in some countries is considered a crime of apostasy and punished with the death penalty. ²³⁸ Finally, Article 34 guarantees the right of the child while Article 40 the rights of persons with disabilities. In fact, «State Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development», ²³⁹ and «States Parties are under an obligation to ensure a decent life that guarantees the dignity of persons with mental or physical disabilities». ²⁴⁰

Even if the Charter seems to be innovative and reformist, since several problems encountered by the Cairo Declaration have not been overcome, we need to outline some criticisms. With this regard, Article 6 and Article 7 foresee the infliction of the death penalty. Although the death penalty can be perpetrated only for the most serious crimes, the Charter remains silent on specifying the cases, furthermore it makes not clear in which circumstance the death penalty

²³⁶ According to this article states are required to take actions in order to foster equality between men and women, and to promote inclusion of women in the society. Moreover, this actions are justified on the basis of the Sharia. However, the positive discrimination does not entail the marital regime. In fact, with regards to family law, the art. 38 of the ACHR refers to the Sharia. *Ibidem*, 151;

Alicino F. — Gradoli M., *L'Islam del XXI Secolo e gli International Human Rights*, in Decaro Bonella, C. (edited by), *Tradizioni Religiose e Tradizioni Costituzionali. L'Islam e L'Occidente*, Rome, Carocci Editore, 2003, 162.

²³⁷ Al-Midani M.A. — Cabanettes M., *Arab Charter on Human Rights 2004*, in *Boston University International Law Journal*, 2006, 24, 151.

²³⁸ Alicino F. — Gradoli M., *L'Islam del XXI Secolo e gli International Human Rights*, in Decaro Bonella, C. (edited by), *Tradizioni Religiose e Tradizioni Costituzionali. L'Islam e L'Occidente*, Rome, Carocci Editore, 2003, 163.

²³⁹ Al-Midani, M.A. — Cabanettes M., *Arab Charter on Human Rights 2004*, in *Boston University International Law Journal*, 2006, 24, 58.

²⁴⁰ Allam W., *The Arab Charter on Human Right: Main Features*, in *Arab Law Quarterly*, 2014, 28, 49, cit.

can be inflicted to a child.²⁴¹ Moreover, by considering Zionism a violation of human rights²⁴², the Charter breaches the UN resolution 46/86 of the General Assembly, which clearly prohibit to consider Zionism a form of racism.²⁴³ Then, even if it resolves the distinction between Muslim and non-Muslim, it creates a division between citizens and non-citizens at political, social, economic and cultural level.²⁴⁴ In fact, according to Article 41 the right to education is reserved for citizens and states are required to «ensure free primary and fundamental education to their citizens».²⁴⁵

A further criticism is the absence of an enforcement mechanism.²⁴⁶ However, in September 2014, the Member States of the LAS approved the Statute of the Arab Court of Human Rights with the aim of establishing a regional mechanism of control (see ¶ 3.2.2).²⁴⁷ Additionally, as foreseen by Article 50, 51 and 52 of the Charter, optional protocols and amendments might be adopted in the future in order to solve the ambiguities of the Charter.²⁴⁸

2.2.5 IMPLEMENTATION OF HUMAN RIGHTS INTO NATIONAL CONSTITUTIONS AND THE INFLUENCE OF THE ARAB SPRING

Article 44 of the Arab Charter on Human Rights foresees that «where not already provided for by existing legislative or other measures, the States Parties

²⁴¹ Alicino F. — Gradoli M., *L'Islam del XXI Secolo e gli International Human Rights*, in Decaro Bonella, C. (edited by), *Tradizioni Religiose e Tradizioni Costituzionali. L'Islam e L'Occidente*, Rome, Carocci Editore, 2003, 164.

²⁴² Article 2 comma 3 of the Arab Charter on Human Rights: All forms of racism, zionism, occupation and foreign domination pose a challenge to human dignity and constitute a fundamental obstacle to the realization of the basic rights of people. There is a need to condemn and endeavour to eliminate such practices. In Al-Midani M.A. — Cabanettes M., *Arab Charter on Human Rights 2004*, in *Boston University International Law Journal*, 2006, 24, 151.

²⁴³ Alicino F. — Gradoli M., *L'Islam del XXI Secolo e gli International Human Rights*, in Decaro Bonella, C. (edited by), *Tradizioni Religiose e Tradizioni Costituzionali. L'Islam e L'Occidente*, Rome, Carocci Editore, 2003, 165.

²⁴⁴ *Ibidem*, 166.

²⁴⁵ Al-Midani M.A. — Cabanettes M., *Arab Charter on Human Rights 2004*, in *Boston University International Law Journal*, 2006, 24, 160.

²⁴⁶ The Charter at Article 44 foresees that States Parties shall implement the necessary measures to give effect to the Charter provisions, moreover, at article 45 the Charter foresees the establishment of a Committee.

²⁴⁷ Magliveras K. — Naldi G., *Arab Court of Human Rights: A Study in Impotence*, in *Revue Québécoise de Droit International*, 2016, 29, 157.

²⁴⁸ Al-Midani M.A. — Cabanettes M., *Arab Charter on Human Rights 2004*, in *Boston University International Law Journal*, 2006, 24, 163-164.

undertake to adopt, in accordance with their constitutional process and with the provisions of the (...) Charter, the necessary laws or other measures in order to give effect to the rights recognized by the (...) Charter»²⁴⁹.

Hence, the first step for the implementation of the Charter is its ratification by the states parties to the LAS. In fact, it entered into force in 2008 after seven states ratified it: Algeria, Bahrain, Jordan, Kuwait, Syria, Libya and the United Arab Emirates. Nowadays, the Charter has been ratified by a total of 14 states of the 22 of the League of the Arab States that shall implement it into their domestic legislation; the first seven states already mentioned and Iraq, Lebanon, Palestine, Qatar, Saudi Arabia, Sudan and Yemen.

However, the lack of an enforcement mechanism makes its implementation into domestic legislations difficult.²⁵⁰ Compared to other regional organizations, as for example the Council of Europe (see ¶ 2.1.1 and ¶ 3.1.1), there is not an institution that has jurisdiction on human rights cases, hence implementation of human rights foreseen by the Charter is not granted at supranational level.²⁵¹ As it has been underlined by several studies, reforms are needed to truly implement the Arab Charter into the national legal orders; as for example, changing of national legislations, training State officials and law enforcement officials for the respect of human rights as stated in the Charter, publishing the Charter into the national gazettes and engaging with civil society.²⁵² Moreover, even if states are required to present to the Arab Committee reports on human rights status in their countries every three years, national governments are responsible for sending reports to the Committee. Hence, they are free to represent the national

²⁴⁹ *Ibidem*, 161.

²⁵⁰ Rishmawi M., *Arab Charter on Human Rights (2004)*, in Max Planck Encyclopedia of Public International Law, Oxford, 2008, in <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1913?print=pdf>.

²⁵¹ However, we should bear in mind that the Human Rights Council through the Universal Periodic Review (UPR) monitors the human rights situation of all United Nations member states in a four and half year cycle (see ¶ 1.2.1);

Ivi.

²⁵² *Ivi.*

situation as they choose, perhaps with the possibility of masking human rights perpetrations (see ¶ 3.2.2).²⁵³

Although the Arab Charter on Human Rights seems to not effectively guarantee human rights implementation into the national legal order yet, several Arab States are party to the main international human rights treaties. However, they have subjected ratification of international treaties to broad reservations. For example, taking into consideration the Convention on the Elimination of all Forms of Discrimination against Women that have been ratified by almost all the states worldwide²⁵⁴, we can notice that several Arab states have put reservation on their ratification. Only four members of the LAS ratified the Convention without reservations, Comoros, Djibouti, Palestine and Qatar; while the other states put reservations. For Example, Egypt put a general reservation on Article 2 of the Convention affirming that it will comply with the content of the article once «provided that such compliance does not run counter to the Islamic Sharia».²⁵⁵ Libya put similar reservations on article 2 and 16, affirming that compliance with those articles is subject to the Sharia law.²⁵⁶ Finally, Saudi

²⁵³ Alicino F. — Gradoli M., *L'Islam del XXI Secolo e gli International Human Rights*, in Decaro Bonella, C. (edited by), *Tradizioni Religiose e Tradizioni Costituzionali. L'Islam e L'Occidente*, Rome, Carocci Editore, 2003, 166-167.

²⁵⁴ The Holy See, The Islamic Republic of Iran, Niue, Somalia, Sudan and Tonga are not parties to the convention; while Palau and the United States of America have signed the Convention, but they have not ratified it.

²⁵⁵ Article 2 CEDAW states as it follows: «States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
(g) To repeal all national penal provisions which constitute discrimination against women»;
CEDAW/SP/2006/2, 12.

²⁵⁶ *Ibidem*, 17-18.

Arabia's reservations imply that in case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom of Saudi Arabia is not under obligation to observe the contradictory terms of the Convention.²⁵⁷

As we have observed, Arab states used to subject both the Arab Charter on Human Rights and international conventions to national law. The result is that most of the times they are not in compliance nor with the Arab Charter nor with international standard.²⁵⁸

The lack of human rights protection was one of the causes of the Arab revolts of 2011, that in some countries led to an "improvement" on human rights condition. The revolts, namely the Arab spring, started in Tunisia in 2010 and strongly spread to other countries across the MENA region. Uprisings rose because of the decades of abuses and corruption had surrounded the region.²⁵⁹ People were calling for the end of authoritarian regimes and the establishment of democratic institutions.²⁶⁰ In fact, mass demonstrations led to the overthrow of several regimes.²⁶¹ However, the transition process has demonstrated to be complex. Civil wars, and popularity of terroristic organisation spread across the region. ISIS that was going to fight against the Assad regime in Syria exploited the regional crisis to engage young unemployed who were socially marginalized.²⁶² The Islamic State spread also in Iraq and it is currently rising its influence in the south and rural areas of Libya, boosting its territorial fragmentation. Moreover, Arab revolutions of 2011 opened the way for civil war and fragmentation in Sudan. Terrorism spread across Nigeria with the establishment of Boko Haram, violence increases in Somalia with the influence of Al Qaeda.²⁶³ Jordan,

²⁵⁷ *Ibidem*, 26.

²⁵⁸ Rishmawi M., *Arab Charter on Human Rights (2004)*, in Max Planck Encyclopedia of Public International Law, Oxford, 2008, in <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1913?print=pdf>.

²⁵⁹ Al-Arian A., *Islamist Movements and The Arab Spring*, in Kamrava M. (edited by), *Beyond the Arab Spring: The Evolving Ruling Bargain in the Middle East*, Oxford, Oxford University Press, 2014, 11.

²⁶⁰ *Ivi*.

²⁶¹ Corrao F., *Islam, Religion and Politics*, Rome, Luiss University Press, 2017, 139.

²⁶² *Ibidem*, 144-145.

²⁶³ *Ibidem*, 142-147.

Morocco and Tunisia seems to be the only countries involved in the Arab spring which have not been affected by such a level of violence (see ¶ 2.2.5.4, ¶ 2.2.5.3, ¶ 2.2.5.2).²⁶⁴ For this reason, we have decided to focus the analysis of implementation of human rights in these countries. Moreover, it seems not to be valuable to analyse countries that are still shattered by civil wars or governed by authoritarian regimes. However, we have decided to include Egypt in the analysis because, despite the hard repression of riots, since the beginning of the revolution, two constitutions have been adopted, respectively in 2012 and 2014, signalling significant regime's changes (see ¶ 2.2.5.1).

2.2.5.1 THE TWO STEP PROCESS OF CODIFICATION OF HUMAN RIGHTS IN EGYPT

Protests in Egypt started in January 2011, in Cairo with the demonstration of Tahrir square. We can define the Egyptian uprising as a revolution because of the high intensity of violence between demonstrators and the police, and the rupture with the previous regime.²⁶⁵ People aimed at the overthrowing President Hosni Mubarak, because of the corruption, repression, poverty, unemployment, that characterized his regime. In fact, the 11th of February 2011, Mubarak resigned as President, paving the way to a democratic transition.²⁶⁶ However, Mubarak transferred his power to the Supreme Council of the Armed Forces (SCAF), violating article 81 of the 1971 Constitution, which regulated transition powers, thus, «Mubarak himself opened the door for constitutional rupture by ignoring the constitutional procedure».²⁶⁷ The SCAF in 13th of February adopted a Declaration that foresees his task to amend the constitution of 1971. In March

²⁶⁴ *Ibidem*, 139; Only Gulf Monarchies resisted to the spread of the Arab Spring.

²⁶⁵ Arjomand S.A., *Revolution and Constitution in the Arab World, 2011-12*, in Kamrava M. (edited by), *Beyond the Arab Spring: The Evolving Ruling Bargain in the Middle East*, Oxford, Oxford University Press, 2014, 35;

Morlino L., *What Transition to Democracy*, in *Changes for Democracies: Actors, Structures, Processes*, Oxford, Oxford University Press, 2011.

²⁶⁶ Viceconte M., *Il Rapporto tra Tradizione Religiose, Tradizioni Giuridiche e Diritti Umani nelle Costituzioni Egiziane*, in Alicino F., (edited by), *I Diritti Umani nel Mondo Globale. Tradizioni Religiose, Tradizioni Costituzionali e Mare Nostrum*, Editoriale Scientifica, Naples, 2016, 165.

²⁶⁷ Sultany N., *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring*, Oxford, Oxford University Press, 2018, 246, cit.

a referendum was called in order to approve the new amended constitution, drafted by the *ad hoc* Commission established by the SCAF: The Commission El-Besri. Even if the 77% of the voters were in favour of the new text, the turnout in the referendum was very limited.²⁶⁸ In this scenario, elections of the parliament took place in two stages: In November 2011, the lower house was elected, namely the People's House, while in February 2012, the Shura Council, namely the upper house, was elected.²⁶⁹ Muslim Brothers won the elections and the new parliament established the constituent assembly with the task of drafting the constitution: A constituent assembly which the Supreme Constitutional Court declared unconstitutional.²⁷⁰ However, when Morsi won the presidential elections in June 2012, he interrupted the dialogue with the opposition. Moreover, by ousting the member of the opposition from the constituent assembly, Morsi was able to brought amendment to the new constitution based on the Sharia law.²⁷¹ After a referendum with low turnout, despite the spread of protests against the constitution and Morsi, the new Constitution was approved on 26 December 2012.²⁷² With regards to human rights, the Constitution of 2012 included several articles listing them. The second section of the Constitution, from art. 31 to art. 81, is entirely dedicated to codify human rights.²⁷³ However, the effectiveness of codified human rights is threatened by the frequent reference to the law.²⁷⁴

²⁶⁸ Viceconte M., *Il Rapporto tra Tradizione Religiose, Tradizioni Giuridiche e Diritti Umani nelle Costituzioni Egiziane*, in Alicino F. (edited by), *I Diritti Umani nel Mondo Globale. Tradizioni Religiose, Tradizioni Costituzionali e Mare Nostrum*, Naples, Editoriale Scientifica, 2016, 165.

²⁶⁹ *Ibidem*, 168.

²⁷⁰ The Parliament elected the constituent assembly in March 2012 and it was composed of 100 members: 50 members of the parliament and external experts. The constituent assembly, however, was dissolved by the State Council in April 2012 for its too Islamist preponderance. Another constituent assembly was elected by the Parliament in June 2012. However, the Supreme Constitutional Court was called to adjudicate on the constituent assembly for its composition, which was too Islamist. The Supreme Constitutional Court ruled on the unconstitutionality of the elections, hence of the constituent assembly. As a consequence, the SCAF dissolved the parliament.

²⁷¹ Corrao F., *Islam, Religion and Politics*, Rome, Luiss University Press, 2017, 142-143.

²⁷² *Ivi*.

²⁷³ See the full text of the 2012 Constitution in <https://www.wipo.int/edocs/lexdocs/laws/en/eg/eg047en.pdf>.

²⁷⁴ Viceconte M., *Il Rapporto tra Tradizione Religiose, Tradizioni Giuridiche e Diritti Umani nelle Costituzioni Egiziane*, in Alicino F. (edited by), *I Diritti Umani nel Mondo Globale*.

However, in June 2013, the increasing of violence led to the deposition of Morsi and the return of the Armed Forces.²⁷⁵ General al-Sisi formed the new government and in 2014 the new Constitution was approved. The Constitution of 2014 was drafted by a committee appointed by the armed forces and it did not follow the constitutional text of 2012. That was an entirely new constitution with a strong influence of the military. The constitution of 2014 was approved by a referendum, which, as in 2012, was characterized by a low turnout of 38,6%. Furthermore, the referendum was held in a more oppressive environment with respect to the previous one, thus «it followed the ruthless oppression of the Islamists and the chilling effect of the legal containment of dissent».²⁷⁶

With regard to the relationship between the Constitution of 2014 and human rights, it is worth underlining that according to Freedom House, the new constitution led to a decline of human rights protection: Egypt status declined from Partly Free to Not Free.²⁷⁷ Although on the one hand the Constitution of 2014 recognized several human rights universally valid, on the other hand some provisions represent a limit for their full enjoyment. The Constitution introduced the principle of equality between men and women (art.11), the prohibition of torture (art. 52), personal freedom and protection from untrue imprisonment (art. 54), inviolability of the human body (art. 60), rights of the child (art. 80), the right of asylum (art. 91), the prevision of transitional justice (art. 241).²⁷⁸ However, article 2 of the constitution foresees Islam as religion of the State and the Sharia as a source of law; «Islam is the religion of the State and Arabic is its official language. The principles of Islamic Sharia are the main source of legislation».²⁷⁹ Hence, if art. 2 is read together with article 81, it results that rights and freedoms must be in compliance with the Sharia, leaving space to

Tradizioni Religiose, Tradizioni Costituzionali e Mare Nostrum, Naples, Editoriale Scientifica, 2016, 175.

²⁷⁵ Corrao F., *Islam, Religion and Politics*, Rome, Luiss University Press, 2017, 142-143.

²⁷⁶ Sultany N., *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring*, Oxford, Oxford University Press, 2018, 250, cit.

²⁷⁷ Freedom House, *Freedom in the World 2014*, in <https://freedomhouse.org/report/freedom-world/freedom-world-2014#.VUnSqEJqox8>.

²⁷⁸ Constitution of Arab Republic of Egypt 2014, Unofficial translation, in <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf>.

²⁷⁹ *Ivi*, art. 2.

different interpretation.²⁸⁰ In fact, article 81 states that freedom and rights might be limited if they are not in compliance with constitutional provisions of the first part.²⁸¹ Moreover, if article 92 prohibits to adopt legislation in contrast with recognized fundamental rights, several incompatibilities between Constitution and legislation and international law, including the Arab Charter of 2004, are in place. For example, article 73 of the Constitution recognizes the right to strike, but law 107/2013 bans each strike might endanger production.²⁸²

Finally, the new constitution gives huge powers to the military, up to the point that the military elite have been put at the top positions of the government. In fact, on the one hand, among others, the Constitution gives the military the power to name the Ministry of the Defence, while on the other hand the ex-army General El-Sisi was elected President of the Arab Republic of Egypt.²⁸³ Hence, even if Constitution of 2014 increased human rights codification, their real protection is doubtful.²⁸⁴ To better understand the systems of human rights enforcement, it is worth analysing the role played by the Supreme Constitutional Court, that has the task of interpret laws and to check their constitutionality (see ¶ 3.2.1.1). Hence, in the case of Egypt, the Supreme Constitutional Court decides the extent to which law shall respect the Sharia. Moreover, the judicial system in general seems to be inefficient to guarantee human rights protection (see ¶ 3.2.1.1).²⁸⁵

2.2.5.2 CODIFICATION OF HUMAN RIGHTS IN JORDAN

Protests in Jordan spread at the beginning of 2011. Many young people and the supporters of the Muslim Brothers were against the government and the

²⁸⁰ Viceconte M., *Il Rapporto tra Tradizione Religiose, Tradizioni Giuridiche e Diritti Umani nelle Costituzioni Egiziane*, in Alicino F. (edited by), *I Diritti Umani nel Mondo Globale. Tradizioni Religiose, Tradizioni Costituzionali e Mare Nostrum*, Naples, Editoriale Scientifica, 2016, 185.

²⁸¹ *Ivi.*

²⁸² *Ibidem*, 186.

²⁸³ *Ibidem*, 187.

²⁸⁴ *Ibidem*, 198.

²⁸⁵ *Ibidem*, 182.

monarchy.²⁸⁶ Therefore, they did not explicitly denounce the monarchy because of the huge presence of loyalists in the country. In fact, when they tried to organize a demonstration in a central square of Amman, loyalists fought violently against them, giving the police a reason to intervene and calm down the sit in.²⁸⁷

In addition, the monarchy firstly decided to implement some reforms in order to enlarge its consensus; then it formed a new government with the aim of fighting corruption and dialoguing with adversaries. However, the intention of the monarchy was not truly to improve people situation, but it aimed at taking time, hoping for a spontaneous resolution of the problem.²⁸⁸

However, the top down process triggered by Arab spring led to a reform of the constitution. By ensuring the regime's institutional continuity, reforms «remain mostly superficial and reproduce the autocratic system rather than democratize it».²⁸⁹ In fact, in 2011 at the beginning of demonstrations, the King Abdullah II, appointed a National Dialogue Committee with the task of proposing reforms to amend the Constitution of 1952. The text suggested by the Committee have been later approved by the Parliament without submitting it to a popular referendum.²⁹⁰ Therefore, in September 2011, the King promulgated a decree including the new constitutional provisions.

With regards to human rights, Chapter 2 of the amended Hashemite Kingdom's constitution is devoted to rights and duties of Jordanians. New amendments in this field regards article 6, concerning equality, defence of the homeland, education, family and protection of motherhood, childhood and elderly, article 7 regarding personal freedom, article 8 concerning judicial protection, article 9, prohibition of deportation and freedom of movement, article 15, freedom of opinion, expression, scientific research, and of the press, article 16, freedom of

²⁸⁶ Trombetta L., *Il Maghreb Tra Riformismo e Rivoluzione*, in Corrao F. (edited by), *Le Rivoluzioni Arabe. La Transizione Mediterranea*, Mondadori Università, 2011, 198.

²⁸⁷ *Ivi*.

²⁸⁸ *Ivi*.

²⁸⁹ Sultany N., *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring*, Oxford, Oxford University Press, 2018, 269, cit.

²⁹⁰ *Ibidem*, 270.

assembly and of association, article 18, postal, telegraphic and telephonic communications and article 20, compulsory education.²⁹¹

Furthermore, a constitutional amendment provides for the establishment of a constitutional court, however, as we will observe in Chapter 3, with limited powers (see ¶ 3.2.1.2).

2.2.5.3 CODIFICATION OF HUMAN RIGHTS IN MOROCCO

Moroccan monarchy has been criticized during the rule of the king Hassan II for violations of human rights. These years (1961-1999), the so called “years of lead”, have been characterized by arbitrary detentions, death and disappearance of citizens opposing the monarchy.²⁹² However, his successor, Mohammad VI «was viewed popularly as someone relatively untainted by the human rights abuses associated with his predecessor».²⁹³ In fact, he broke with the past by firing some personalities of the government close to his father.

Nonetheless, Morocco was not immune from protests of 2011. Demonstrations, that started later with respect to other countries (February 2011), were aimed at calling for democratic reforms, instead of overthrowing the monarchy.²⁹⁴ In Fact, King Mohammad VI, triggered a top down process by announcing the new constitution on June 2011.

This constitution has been approved in a referendum by 98,5% of voters.²⁹⁵ The approval of the new Moroccan constitution demonstrated that the 20 February Movement²⁹⁶ has accelerated and consolidated the democratic and reformist path

²⁹¹ The Jordanian Constitution, Unofficial translation by IDEA, in http://www.constitutionnet.org/sites/default/files/2011_constitution_-_jordan_english_final.pdf.

²⁹² DeGeorges T., *Martyrdom in North Africa Following the Arab Spring and the Process of Transitional Justice*, in Siriam C., (edited by), *Transitional Justice in the Middle East and North Africa*, Oxford, Oxford University Press, 2017, 10.

²⁹³ *Ibidem*, 11, cit.

²⁹⁴ Gervasio G., *Il Maghreb Tra Riformismo e Rivoluzione*, in Corrao F. (edited by), *Le Rivoluzioni Arabe. La Transizione Mediterranea*, Mondadori Università, 2011, 200-202.

²⁹⁵ Decaro Bonella C., *La Costituzione del Regno del Marocco del 2011*, in Pfösl E. (edited by), *Marocco. Il Regno del Dialogo*, Rome, Bordeaux, 2014, 15.

²⁹⁶ The 20 February Movement is a movement of protestors who called for reforms. The name of the movement is taken by the date of the first manifestation. In fact, on 20 February 2011 Moroccans carried out first protests in Rabat.

of the country.²⁹⁷ Before the Constitution of 2011, in the country was in force the constitution of 1996.²⁹⁸ The constitution of 2011 is considered to be innovative with respect to the previous one because it introduces a section (Section II) dedicated to fundamental rights and freedoms rooted on the universal standards of human rights. In fact, as stated in the Preamble, the constitution aims at «*protéger et promouvoir les dispositifs des droits de l'Homme et du droit international humanitaire et contribuer à leur développement dans leur indivisibilité et leur universalité*».²⁹⁹

Codified rights are: Guarantee of equality and principle of non-discrimination (art. 19), right to life, security and moral, physical integrity and human dignity (art. 20, 21 and 22), judicial guarantees (art. 23), right to privacy and freedom of movement (art. 24), right to academic freedom, freedom of expression, right to information, and freedom of press (art. 25-28), freedom of assembly, freedom of association and right to strike (art. 29), right to vote (art. 30), right to health care (art. 31), rights of children (art. 32), right to culture (art. 33), rights of the weaker categories (art. 34), right to property (art. 35).³⁰⁰

Moreover, it is worth mentioning article 3 of the Constitution according to which Islam is the religion of the State, but there is not a provision that include the Sharia as a source of law.³⁰¹ Consequently, interpretation of law and human rights enlisted in the constitution should not be subject to the interpretation of the Islamic law.

However, as the powers of the King are still extended, and he still exercises excessively influence in the sphere of the judiciary, an analysis of the judiciary is valuable in order to evaluate the effectiveness of the rights codified (see ¶

²⁹⁷ *Ivi.*

²⁹⁸ Since its independence in 1956, Morocco has adopted a total of six constitutions: 1962, 1970, 1972, 1992, 1996, 2011.

²⁹⁹ La Constitution, Bulletin Officiel, n. 5964, 30-11-2011, in http://www.maroc.ma/en/system/files/documents_page/bo_5964bis_fr_3.pdf.

³⁰⁰ *Ivi.*

³⁰¹ *Ivi.* «*L'Islam est la religion de l'État, qui garantit à tous le libre exercice des cultes*».

3.2.1.3). In fact, «the 2011 Constitution and its subsequent implementation have more flaws than merits».³⁰²

2.2.5.4 CODIFICATION OF HUMAN RIGHTS IN TUNISIA

The Arab spring started in Tunisia in 2010 with a self-immolation of Mohammed Bouazizi in Sidi Bouzid as a sign of protest against the regime.³⁰³ The protests spread across the country and led to the flight of President Zine El-Abidine Ben Ali. Despite the attempt of president to calm down the revolts, he decided to leave the country because his security was under threat and he went to exile to Saudi Arabia.³⁰⁴ The flight from Tunisia of Ben Ali paved the way for a reconstruction of political arenas, triggering the constitutional transition.³⁰⁵

In fact, the Tunisian Constitution was approved in January 2014 after a drafting process lasting since 2011, after the election of the constituent assembly.³⁰⁶ The constituent assembly was elected by the Tunisian people and it is considered to be revolutionary because it breaks with the past.³⁰⁷ In fact, only 2 out of 217 elected members had took part to the Chamber of Deputy of the Ben Ali regime.³⁰⁸ The most represented party was the Islamist movement *Ennahdha*, that gains 89 seats.³⁰⁹ Even if *Ennahdha* tried to convey Islamic principles into the Tunisian constitution, the constituent assembly asked for a Venice Commission's opinion on the drafted constitution, opening the dialogue between different legal traditions.³¹⁰ This dialogue led the Tunisian to introduce a large

³⁰² Biagi F., *The 2011 Constitutional Reform in Morocco: More Flaws than Merits*, Msida, Institute for European Studies, 2015, 5.

³⁰³ Volpi F., *Revolution and Authoritarianism in North Africa*, Oxford, Oxford University Press, 2017, 6.

³⁰⁴ *Ibidem*, 3-10.

³⁰⁵ *Ivi*.

³⁰⁶ Spada S., *I Diritti Umani quale Possibile Terreno di Dialogo tra Tradizioni Costituzionali: Il Caso della Tunisia*, Alicino F. (edited by), *I Diritti Umani nel Mondo Globale. Tradizioni Religiose e Tradizioni Costituzionali e Mare Nostrum*, Naples, Editoriale Scientifica, 2016, 219.

³⁰⁷ Perez D., *Faire la Loi à l'Assemblée Nationale Constituante Tunisienne. Recomposition et Formation d'un Nouveau Personnel Parlementaire Tunisien*, in *L'Année du Maghreb*, 2016, 14, 187-204.

³⁰⁸ *Ivi*.

³⁰⁹ Bouguarche A., *Printemps Arabe, Littérature et Évolution des Droits*, in *Cincinnati Romance Review*, 2013, 36, 80.

³¹⁰ Spada S., *I Diritti Umani quale Possibile Terreno di Dialogo tra Tradizioni Costituzionali: Il Caso della Tunisia*, Alicino F. (edited by), *I Diritti Umani nel Mondo Globale. Tradizioni*

section of their new constitution committed to the codification of human rights.³¹¹ In fact, 29 articles are dedicated to provide a catalogue of human rights. Moreover, they must be interpreted in accordance with the Preamble and Chapter one of the constitution, which refer to general principles. Therefore, an innovative feature is represented by the absence of referral to the Sharia. The constitutional provisions cannot anymore be interpreted according to the Sharia.³¹²

Fundamental rights in the constitution are located in the second chapter and they have been divided into three categories. From article 22 to article 37 we can find the first generation rights, i.e. civil and political rights; from article 38 to article 42 are enlisted the second generations rights, i.e. economic, social and cultural rights; while from article 43 to article 48 are collocated the third generation rights, namely the most progressive rights, i.e. right to a healthy environment.³¹³ Moreover, these rights are recognized to all citizens, both women and men, which are equal before the law without any discrimination. In fact, article 21 states that «*les citoyens sont égaux en droits et en devoirs. Ils sont égaux devant la loi sans discrimination. L'État garantit aux citoyens et aux citoyennes les libertés et les droits individuels et collectifs. Il leur assure les conditions d'une vie digne*».³¹⁴ In particular, codified rights are: the right to life, to dignity and to physical integrity (art. 22 and 23), right to privacy and freedom of movement (art. 24), condition for revoking citizenship and extradition procedure (art. 25), right of asylum (art. 26), judicial guarantees (art. 27-30), freedom of expression, freedom of press, right to information and right to academic freedom (art. 31-33), political freedom (art. 34-37), right to health care (art. 38), right to education (art.39), right to work to equal pay for work and right to safe work environment (art. 40), right to own property (art.41), right to culture (art. 42), right to sport (art. 43), right to water (art. 44), right to a clean environment (art. 45), equal

Religiose e Tradizioni Costituzionali e Mare Nostrum, Naples, Editoriale Scientifica, 2016, 220-221.

³¹¹ *Ivi*.

³¹² *Ibidem*, 228.

³¹³ *Ibidem*, 226.

³¹⁴ *Constitution de la République Tunisienne*, Journal Officiel de la République Tunisienne, 20 April 2015, in <http://www.legislation.tn/sites/default/files/news/constitution-b-a-t.pdf>.

opportunities for women and men and strengthening of women's rights (art. 46), right to children (art. 47), rights of persons with disabilities (art. 48).³¹⁵

However, according to article 49, limitations of these rights can be imposed by law. Moreover, any limitations can only be put in place for reasons of protecting the rights of others, public order, national defence, public health and public morals, respecting the proportionality principle and without compromising their essence.³¹⁶ Hence, if on the one hand, Tunisian constitution seems to be innovative, on the other hand it is important to examine the effective protection of the fundamental rights it claims. We will focus on the effectiveness of fundamental rights in Chapter 3 while analysing the rule of law. (see ¶ 3.2.1.4).

According to article 102 of the Constitution «*la magistrature est un pouvoir indépendant, qui garantit l'instauration de la justice, la suprématie de la Constitution, la souveraineté de la loi et la protection des droits et libertés*».³¹⁷

2.3 CONCLUSION: A COMPARISON BETWEEN THE EUROPEAN AND THE MENA REGIONS' SYSTEMS OF HUMAN RIGHTS CODIFICATION

By analysing the two systems of codification of human rights, respectively the European and MENA ones, we have tried to find out which are their differences and similarities and whether the European model has exercised some influence over the MENA codification. However, it is worth underlining that this comparison presents some limits itself. Limits that are due to different backgrounds of the two regions, diverse willingness of national and international actors and dissimilar aims.

³¹⁵ *Ivi*, and Spada S., *I Diritti Umani quale Possibile Terreno di Dialogo tra Tradizioni Costituzionali: Il Caso della Tunisia*, Alicino F. (edited by), *I Diritti Umani nel Mondo Globale. Tradizioni Religiose e Tradizioni Costituzionali e Mare Nostrum*, Naples, Editoriale Scientifica, 2016, 227-228.

³¹⁶ *Ivi*.

³¹⁷ *Constitution de la République Tunisienne*, Journal Officiel de la République Tunisienne, 20 April 2015, in <http://www.legislation.tn/sites/default/files/news/constitution-b-a-t.pdf>.

First of all, we should remember that they trace their origins in different traditions. The ratio beyond the adoption of the ECHR lies in democracy and in the necessity of avoiding the perpetrations of World War II. Hence, the ECHR followed the path of the Universal Declaration on Human Rights of 1948. The aim is to enforce human rights on a regional basis because of the difficulties encountered in drafting binding documents and in establishing a control mechanism on a global scale.³¹⁸ In fact, the ECHR referred to common constitutional traditions of its member states and to an enforcement mechanism which rendered the Convention «one of the most remarkable phenomena in the history of international law».³¹⁹

By contrast, the ratio beyond the adoption of the Arab Charter on Human Rights of 2004 lies in different ideologies. The ACHR represents the last stage of a process started in 1981 with the adoption of Universal Islamic Declaration of Human Rights, which aim is to answer to the raising requests of human rights protection. The ideology beyond an Islamic codification of human rights is to reconcile the Sharia with the universal human rights recognized by the UDHR. In fact, the Islamic tradition refers to the Sharia as its holy source of legislation. Even if the ACHR is far reaching with respect to the early Islamic conventions on human rights, it is well below international standards of human rights codification, and it does not provide for an efficient enforcement mechanism.

However, the codification process in the MENA region triggered by the UIDHR, is the expression of a willingness of codifying. Moreover, the Arab Spring is a further expression of a rising necessity of human rights codification and protection.³²⁰ In fact, after the Arab Spring, several states of the region adopted or reformed their constitutions. Several constitutions still make reference to the

³¹⁸ European Court of Human Rights, *The Conscience of Europe: 50 Years of the European Court of Human Rights*, 18 in https://www.echr.coe.int/Documents/Anni_Book_Chapter01_ENG.pdf.

³¹⁹ O'Boyle M., *On Reforming the Operation of the European Court of Human Rights*, European Human Rights Law Review 2008 No. 1, in Bates E., *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 1.

³²⁰ Alshehri S., *An Arab Court of Human Rights: The Dream Desired*, in *Arab Law Quarterly*, 2016, 30, 52.

Sharia law, i.e. art. 2 of the Egyptian Constitution of 2014 (see ¶ 2.2.5.1), in a way that the enjoyment of some fundamental rights might be precluded. By the way, the Constitution of Tunisia adopted in 2014 seems to be very innovative. In this perspective, it is worth remembering the role played by the Venice Commission on its drafting process. The speaker of the National Constituent Assembly of Tunisia in 2013 asked for an opinion of the Venice Commission on the drafted Constitution.³²¹ The dialogue between two different legal traditions led to the introduction of a large section dedicated to human rights into the Tunisian Constitution.³²²

Finally, we should underline that codification of human rights has improved in the MENA area. Even if it has not already met international standards, some steps forward have been made, both at regional and national levels. In this perspective, and taking into account that in order to avoid regional crisis as the Arab Spring an enhancement of human rights protection is needed, it is not excluded that in the future, states, as well the League of Arab States will improve their human rights codification.³²³ This scope might be achieved with the involvement of European institution and experts, as in the case of Tunisia where the involvement of the Venice Commission has demonstrated to be beneficial. For this scope we believe that it is important to strengthen the cooperation of the Euro-Mediterranean area, a partnership that started more than twenty years ago (see ¶ 4.1).

However, codification is not the only factor at stake when dealing with human rights. Without an efficient enforcement mechanism, the enjoyment of human rights is not guaranteed. For this reason, we will follow our analysis in Chapter

³²¹ Venice Commission, Opinion CDL-AD(2013)032, see full text in [https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD\(2013\)032-e](https://www.venice.coe.int/WebForms/documents/default.aspx?pdffile=CDL-AD(2013)032-e).

³²² Spada S., *I Diritti Umani quale Possibile Terreno di Dialogo tra Tradizioni Costituzionali: Il Caso della Tunisia*, Alicino F. (edited by), *I Diritti Umani nel Mondo Globale. Tradizioni Religiose e Tradizioni Costituzionali e Mare Nostrum*, Naples, Editoriale Scientifica, 2016, 220-221.

³²³ Alshehri S., *An Arab Court of Human Rights: The Dream Desired*, in *Arab Law Quarterly*, 2016, 30, 52.

3, by focusing on the enforcement of human rights in the Euro-Mediterranean region.

CHAPTER 3 - PROTECTION OF HUMAN RIGHTS AT REGIONAL LEVEL: THE EUROPEAN AND THE MENA REGIONS

Since we have already underlined regional codification of human rights in chapter 2, the third chapter aims at analysing how codified human rights are regionally enforced, as codification is not necessarily translated into effective mechanisms of control. Several regions that have adopted Conventions on human rights, have set up judicial or quasi-judicial organs with the aim of supervising their implementation. For example, the African Charter on Human and Peoples' Rights of 1981 foresees the establishment of the African Commission on Human and Peoples' Rights,³²⁴ the American Convention on Human Rights of 1967 provides for the Inter-American Commission on Human Rights and Inter-American Court of Human Rights,³²⁵ and the European Convention on Human Rights 1950 has instituted the European Court of Human Rights and the European Commission of Human Rights which has been operative until the entrance into force of Protocol No. 11.³²⁶ Other regions such as the MENA and the South-eastern Asia are at an earlier stage of development with regards to human rights protection. In fact, the League of Arab States adopted only in 2014 a Statute of the Arab Court of Human Rights, which is however problematic. For its part, the ASEAN Declaration on Human Rights provides for the ASEAN Intergovernmental Commission on Human Rights, but its activity is carried out with some criticism. The fragile democratic

³²⁴ See Viljoen F., *International Human Rights Law in Africa*, Oxford, Oxford University Press, 2012.

³²⁵ See Buergenthal T., *The Inter-American System for the Protection of Human Rights*, in Meron T. (edited by), *Human Rights in International Law: Legal Policy and Issues*, Oxford, Oxford University Press, 1986.

³²⁶ See Bates E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010.

commitments that characterize ASEAN member states could «hinder AICHR efforts to evolve as a credible human rights mechanism».³²⁷

In particular, we will focus the attention on the European and MENA regions because of strategic importance of the area. Moreover, we aim at finding out how and if a consolidated system of human rights protection as the European may influence the development of the MENA one which is at its first steps of development (see ¶ 2). However, it is worth underlining that the re-enactment of the two systems of protection of human rights, especially with regards to the European region, is without pretensions of exhaustiveness, as it aims at furnishing the parameters of comparison with the MENA region.

In the first part, we will analyse how protection of human rights occurs at European level and its fundamentals. We will put the emphasis on the complex European multilevel architecture.³²⁸ In fact, we will start by examining the European Court of Human Rights (ECtHR) functions and how it changed after the introduction of Protocol No. 11. Then, we will move to the supranational level, taking into consideration the Court of Justice of the European Union and its relationship with the ECtHR, remembering from now that, even if the 28 EU countries are party to the ECHR, the EU is not, hence it is not bound by its decisions. Finally, we will focus the analysis on the national level of protection, where, as we will see, national courts have the primary responsibility with this regard.

In the second part, we will put the emphasis on protection of human rights in the MENA region. We will start by analysing if the Arab Spring has led to an improvement of human rights protection at national level. In particular, we will underline how and if the judicial systems transformed in the aftermath of the 2011 protests. Then, we will move to the regional level. We will consider the Arab Court of Human Rights. Even if it presents several criticisms in meeting

³²⁷ Wahyuningrum Y., *The ASEAN Intergovernmental Commission on Human Rights: Origins and Evolution and the Way Forward*, Strömsborg, International Institute for Democracy and Electoral Assistance, 2014, 26, cit.

³²⁸ See Pernice I., *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, Berlin, Humboldt-Universität zu Berlin, 2009.

international standards of human rights, it is not excluded that in the future, following the recommendations of experts and specialized bodies it might provide the MENA region with a mechanism of control of human rights.³²⁹

3.1 PROTECTION AT EUROPEAN LEVEL

Protection of human rights in Europe occurs at three different levels, according to what has been referred to as the European multilevel architecture.³³⁰ In fact, fundamental rights are protected at national level by states, at supranational level by the European Union and at international level by the ECHR. Each level of this complex structure is characterized by its catalogue of rights and its enforcement mechanism.

The relationship between this three levels has demonstrated to be complex, for instance because of the resistance of certain states to not erode their sovereignty.³³¹ In fact, as several scholars stated, «the development of human rights at the transnational level jeopardizes domestic standards and conceptions of rights, and limits the capacity of the state to decide about the scope of protection to be granted to certain rights or liberties through its legitimate constitutional and democratic processes».³³² Moreover, «the decisions of supranational human rights bodies have been criticized for their tendency to provide final settlement of a case and have been contrasted instead with the capacity of national courts to develop autonomous domestic conceptions of fundamental rights linked to distinct national conditions».³³³

³²⁹ Alshehri S., *An Arab Court of Human Rights: The Dream Desired*, in *Arab Law Quarterly*, 2016, 30, 52.

³³⁰ Fabbrini F., *Fundamental Rights in Europe*, Oxford, Oxford University Press, 2014, 6-7.

³³¹ The Lissabon Urteil decisions is explanatory of the national resistance. In this decision the German Constitutional Court, regarding the constitutionality of the ratification of the treaty of Lisbon, stated that «even after the entry into force of the Treaty of Lisbon, The Federal Republic of Germany will remain a sovereign state and thus a subject of international law. The substance of German state authority, including the constituent power, is protected, the German state territory remains assigned only to the Federal Republic of Germany, and there are no doubts concerning the continued existence of the German state people». BVerfGE 123, 267 (2009) (Lissabon Urteil), para 298 (official English translation) in Fabbrini F., *Fundamental Rights in Europe*, Oxford, Oxford University Press, 2014, 19.

³³² Fabbrini F., *Fundamental Rights in Europe*, Oxford, Oxford University Press, 2014, 19.

³³³ *Ivi*.

If sovereigntist consider the multilevel architecture as challenge to the sovereignty of the state, on the other hand, several scholars have argued that multilevel architecture might enhance human rights protection in Europe.³³⁴ In this perspective, human rights do not belong to the tradition of certain states, but common culture of fundamental rights must be developed. Therefore, this vision «rejects the idea of a systemic, abstract superiority of the state in the protection of fundamental rights, in favour of an open-ended approach which assesses in positive terms the interaction between national and supranational human rights standards».³³⁵ Interaction between national courts and supranational institution is of fundamental importance to give meaning to fundamental rights leading to an improvement of human rights protection in Europe.³³⁶

3.1.1 THE EUROPEAN COURT OF HUMAN RIGHTS

In the original text of the European Convention on Human Rights states opposed the creation of a Court with the task of supervising the convention, because they thought it would have eroded their sovereignty (see ¶ 2.1). Even if Article 19 of the ECHR foresaw the establishment of a court «to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols»,³³⁷ the Court was set up only in 1959 with jurisdiction over a limited number of states.³³⁸

Before its establishment, the European Commission on Human Rights and the Committee of Ministers were the only responsible of the control mechanism. The Commission was the body created to primarily examine cases. In fact, it received applications and it later decided whether they are admissible or not. However, the Commission was a quasi-judicial and quasi-political institution as Commissioner were elected by the Committee of Ministers and they were not

³³⁴ *Ibidem*, 19.

³³⁵ *Ibidem*, 20.

³³⁶ *Ivi*.

³³⁷ Art. 19, Council of Europe, Convention for the protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, cit., in https://www.echr.coe.int/Documents/Convention_ENG.pdf.

³³⁸ Bates E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 11.

required to meet specific qualifications.³³⁹ Moreover, although the Commission had the task of deciding on the admissibility of cases, the Committee of Ministers had the final decision power, without being bound by the Commission's Report.³⁴⁰

In 1959, when the Court was established, the individual petition mechanism was not foreseen. The introduction of the right of individual petition will represent the transformation of the Convention because its acceptance «was important for the Convention to evolve beyond limited conceptualization of it as an interstate, democratic “alarm bell” for Europe».³⁴¹ However, the Court establishment brought the Convention to life and transformed it into a European Bill of Rights. In the first period of its life, by declaring cases admissible, the Commission was responsible to deliver them at the glance of the European Court of Human Rights. Hence, only few cases were judged by the Court. Nevertheless, by the mid 70's things started to change.³⁴² In fact, by judging over an increasing number of cases, the Court boosted its activity. Moreover, at this point, a larger number of states had ratified the Convention.³⁴³

However, the entrance into force of Protocol No. 11 on the 1st November 1998 represented the turning point of the Court, as it instituted the “new Court”.³⁴⁴ In fact, since it aimed at «rationalise the machinery for enforcement of rights and liberties guaranteed by the Convention»,³⁴⁵ it restructured the control machinery. Protocol No. 11 foresees with art.19 that «all alleged violations of the rights and freedoms guaranteed by the Convention and its Protocols are referred directly to the European Court of Human Rights, which shall ensure the observance of the

³³⁹ Bates E., *The Birth of the European Convention on Human Rights—and the European Court of Human Rights*, in Christoffersen J. — Rask Madsen M. (edited by), *The European Court of Human Rights between Law and Politics*, Oxford, Oxford University Press, 2011, 35.

³⁴⁰ *Ivi.*

³⁴¹ *Ibidem*, 36, cit.

³⁴² Bates E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 15.

³⁴³ Even if France signed the Convention in 1950, it ratified it only in 1974.

³⁴⁴ Council of Europe, *The Court in Brief*, in https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf.

³⁴⁵ Council of Europe, *Details of Treaty No. 155*, in <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/155>.

engagements undertaken by the High Contracting Parties»³⁴⁶. Moreover, it established a permanent Court composed of a number of judges equal to that of the High Contracting Parties (art. 19 and 20); it is competent not only to examine inter-State complaints (art.33), but the Court may also «receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto» (art. 34).³⁴⁷ «The right to bring inter-State and individual complaints to the Court does not depend on any specific act of acceptance»,³⁴⁸ however domestic remedies must be exhausted (art. 35).

Moreover, both Protocol No. 14 and 16 entered into force respectively in 2010 and 2018, represent a reformation of the Court. Protocol No. 14 introduced new admissibility criterion, the treatment of repetitive cases and it clarified the inadmissible cases.³⁴⁹ Moreover, the Court started to issue the pilot judgement with the purpose of making the convention effective. In fact, after the adoption of Protocol No. 11 which allows individuals to appeal to the Court, the Court was submerged of cases up to the point it was no longer able to deal with all of them. However, even if Protocol No. 14 has introduced new screening mechanism, they are not enough to improve the Court's ability to deal with the enormous backlog of applicants.³⁵⁰ Protocol No. 16, that has been ratified only

³⁴⁶ Office of the High Commissioner for Human Rights and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, UN, New York and Geneva, 2003, 100; and Council of Europe, *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby*, Strasbourg, 1994, in <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cda9>.

³⁴⁷ Council of Europe, *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby*, Strasbourg, 1994, in <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cda9>.

³⁴⁸ Office of the High Commissioner for Human Rights and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, UN, New York and Geneva, 2003, 101, cit.

³⁴⁹ Council of Europe, *Details of Treaty No. 194*, Strasbourg, 2004, in <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/194>.

³⁵⁰ Scheinin M., *Access to Justice before International Human Rights Bodies: Reflections on the Practice of UN Human Rights Committee and the European Court of Human Rights*, in Francioni F. (edited by), *Access to Justice as a Human Right*, Oxford, Oxford University Press, 2007, 150.

by 10 states (December 2018),³⁵¹ «allows the highest courts and tribunals of a High Contracting Party, (...), to request the European Court of Human Rights to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols».³⁵²

Hence, when a citizen of a state member to the Council of Europe, or a person falling under the jurisdiction of a contracting parties or a refugee, think that their human rights have been violated, they can appeal to the ECtHR.³⁵³ Since the ECHR applies to any person under the jurisdiction of a state party, its dimension is considered to be universal.³⁵⁴ Therefore, «the extent of the rights has no limit *ratione personae*, (...). This means that, under the Convention, there is no distinction among nationals because of adulthood, mental condition or social status, or, for that matter, because of their military status, or between nationals and foreigners, or between the latter given their legal or illegal status».³⁵⁵ However, the application to the ECtHR, to be valid must be in compliance with Rule 47³⁵⁶ of the Rule of the Court. Moreover, even if the application is valid, it does not follow that it will be declared admissible by the Court. In fact, the majority of the cases are rejected at the admissibility stage, because they do not meet the criteria for applying to the Court.³⁵⁷

Finally, we should point out what happen whether the Court finds that a violation of the ECHR has occurred. To this purpose article 41 of the ECHR must be taken

³⁵¹ It has been ratified by Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia and Ukraine.

³⁵² Council of Europe, *Details of Treaty No. 214*, Strasbourg, 2013, in <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214>.

³⁵³ The Court is composed of a number of judges equal to the number of member states of the Council of Europe. Judges are elected by the Parliamentary Assembly of the Council of Europe for a non-renewable term of nine years.

³⁵⁴ Fillol Mazo A. — Gallego Hernández A.C., *Introductory Note. General Obligations of the States Parties Under the Decisions of the European Court of Human Rights in 2014*, in Ziccardi Capaldo G. (edited by), *The Global Community Yearbook of International Law and Jurisprudence 2015*, Oxford, Oxford University Press, 2016, 662.

³⁵⁵ *Ivi*, cit.

³⁵⁶ Rule 47 contains the rule an applicant must follow for a valid application. For the text see https://www.echr.coe.int/Documents/Rule_47_ENG.pdf.

³⁵⁷ For example, in many cases, applicants do not raise the question to national courts before.

into consideration.³⁵⁸ In the above-mentioned situation, article 41 imposes to the state responsible for the violation the legal obligation to end it and repair its consequences.³⁵⁹ Hence, the applicants that has been damaged must be awarded with just satisfaction, namely a sum of money to compensate the injury. The court to fix the sum of money to be repaid distinguishes between pecuniary damage, non-pecuniary damage and cost and expenses.³⁶⁰

With regards to further mechanism of control in the framework of the Council of Europe, it is worth mentioning the implementation mechanism of the European Social Charter of 1996 (see ¶ 2.1.1). In fact, the European Social Charter «provides for a reporting procedure, as well as, on a more limited scale, for a collective complaints procedure allowing international and national organizations of employers and trade unions as well as non-governmental organizations to submit complaints alleging an unsatisfactory application of the Charter».³⁶¹ The organ entitled of the supervision mechanism is the European Committee of Social Rights. While, with regards to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (see ¶ 2.1.1), it also foresees a monitoring mechanism. In fact, it creates a system of visits of any place of detention within the jurisdiction of the contracting states «for the purposes preventing and eradicating the use of torture in Europe».³⁶²

³⁵⁸ Art. 41 ECHR, «If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party», in https://www.echr.coe.int/Documents/Convention_ENG.pdf.

³⁵⁹ Fillol Mazo A. — Gallego Hernández A.C., *Introductory Note. General Obligations of the States Parties Under the Decisions of the European Court of Human Rights in 2014*, in Ziccardi Capaldo G. (edited by), *The Global Community Yearbook of International Law and Jurisprudence 2015*, Oxford, Oxford University Press, 2016, 673.

³⁶⁰ Council of Europe, Article 41 of the European Convention on Human Rights, in <https://www.coe.int/en/web/execution/article-41>.

³⁶¹ Office of the High Commissioner for Human Rights and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, UN, New York and Geneva, 2003, 105, cit.

³⁶² *Ibidem*, 107.

3.1.2 THE COURT OF JUSTICE OF THE EUROPEAN UNION

The Court of Justice of the European Union also plays an important role in the framework of human rights protection in the European region.³⁶³ In fact, the introduction of fundamental rights protection at supranational level through case law has been one of the main achievements of the European Court of Justice (see ¶ 2.1.2.1).³⁶⁴

Since the EU Charter of Fundamental Rights is binding in EU countries, national governments must apply the Charter provisions. In fact, by becoming binding the Charter acquired the status of EU primary law. As such, it enjoys the principle of direct effect, and of primacy. Two principles that have been affirmed by the work of the Court of Justice, with the paramount cases of the *Van Gend en Loos* and the *Costa v Enel*.³⁶⁵ Moreover, it should be specified that national judges must not apply national legislation in contrast with the EU law because they have the duty of protecting individuals' rights from illegal provisions of national law (*Simmenthal* case).³⁶⁶ However, the European Union recognized and protect the national constitutions identities of member states (art. 4(2) TEU).³⁶⁷

³⁶³ The Court of Justice of the European Union is composed of a Court of Justice itself, the General Court. The Court of Justice is the ultimate interpreter of EU law and it is composed of 28 judges (one from each EU country) plus 11 advocates general. The General Court that has jurisdiction on specific issue can be considered as a court of first instance and it is composed of 56 justices.

³⁶⁴ Fabbrini F., *Fundamental Rights in Europe*, Oxford, Oxford University Press, 2014, 9.

³⁶⁵ ECJ judgment of 5/2/1963, case 26/62, full text in <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61962CJ0026&from=IT>; ECJ judgment of 15/7/1964, case 6/64, full text in <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61964CJ0006&from=IT>.

³⁶⁶ ECJ judgment of 9/3/1978, case 106/77, full text in <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61977CJ0106&from=EN>.

³⁶⁷ «The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State». Art. 4, comma 2, TEU, full text in <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012M004&from=EN>.

Nevertheless, even if the Charter has the same legal values as the treaties, several controversies arise while invoking horizontal applicability (see ¶ 2.1.2.1).³⁶⁸

However, individuals can appeal to the Court of Justice of the European Union as a last resort, namely the exhaustion of domestic resources. Thus, an individual that thinks one of their rights protected by the EU law has been infringed must follow the complaints procedure foreseen by the European Union. However, since art. 263 of the TFEU Treaty regarding individual accession to the Court is interpreted too narrowly, only few cases regarding fundamental rights violation are brought before the Court.³⁶⁹ In fact, according to art. 263 individuals can resort to the Court when the violation of a fundamental right is a direct and individual concern.³⁷⁰

However, according to article 267 TFEU, «the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: the interpretation of the Treaties; the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union».³⁷¹ Moreover, the preliminary ruling tool has adapted itself to the changes resulting from the introduction of the Treaty of Lisbon, thus the becoming of the Charter of Fundamental Rights of the EU as a legal binding instrument of EU law. «Article 267 (4) TFEU now requires that if a question “is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay”».³⁷²

³⁶⁸ Frantziou E., *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*, in *European Law Journal*, 2015, 21, 659.

³⁶⁹ Defeis E.F., *Human Rights and the European Court of Justice: an Appraisal*, in *Fordham International Law Journal*, 2007, 31, 1116.

³⁷⁰ «Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former». Art. 230 EEC Treaty, in <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12002E230:EN:HTML>.

³⁷¹ Art. 267, TFEU, full text in <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E267:en:HTML>.

³⁷² Bartolini S., *The Urgent Preliminary Ruling Procedure: Ten Years On*, in *European Public Law*, 2018, 24, 213, cit.

Thereafter, for the cases falling within the Area of Freedom, Security and Justice, the urgent preliminary ruling was introduced.³⁷³

Finally, it is important to underline the relationship between the Court of Justice of the EU and the ECtHR. Even if the EU is not part to the ECHR (see ¶ 2.1.2.1),³⁷⁴ the ECJ has incorporated both the ECHR provisions and the decisions of the ECtHR into its jurisprudence.³⁷⁵ In fact, the ECJ uses to cite the ECHR in several of its judgement or opinion concerning human rights. However, since the Court is not bound by the ECHR, conflicts between them might arise. In fact, the Court «will presumably insist on the jurisdictional right to interpret the Convention itself».³⁷⁶

3.1.3 PROTECTION OF HUMAN RIGHTS AT NATIONAL LEVEL

As states have the primary responsibility with regards to human rights protection, each state should guarantee to their citizens a full enjoyment of their rights. In fact, protection of human rights has been one of the main features of the constitution adopted by European countries after World War II. Europe-wide, states started to adopt «binding catalogue of fundamental rights enshrined in basic laws and safeguarded by the creation of specialized constitutional courts based on the Kelsenian model».³⁷⁷ From Italy and Germany in the late '40s, through Spain, Portugal and Greece in the '70s, to the ex-communist countries of central and eastern Europe in the '90s. Italy has been one of the first countries to adopt a constitution which guaranteed fundamental rights and which foresaw the establishment of a constitutional court with the task of supervising on the compatibility of statutes with the Constitution and fundamental rights. In the second half of the XX century, those countries in which a constitutional transformation did not take place after World War II begun to be focused on

³⁷³ *Ivi*.

³⁷⁴ In 2014 the European Court of Justice with the opinion 2/13 found that the Draft Accession Agreement (DAA) was not compatible with the EU law. See Cherubini F., *In Merito al Parere 2/13 della Corte di Giustizia dell'UE: qualche Considerazione Critica e uno Sguardo de Jure Condendo*, in *Osservatorio Costituzionale*, 2015, 2.

³⁷⁵ Defeis E.F., *Human Rights and the European Court of Justice: an Appraisal*, in *Fordham International Law Journal*, 2007, 31, 1114.

³⁷⁶ *Ibidem*, 1115, cit.

³⁷⁷ Fabbrini F., *Fundamental Rights in Europe*, Oxford, Oxford University Press, 2014, 7, cit.

human rights protection.³⁷⁸ Thus, in 2008 France with the constitutional law of 23 July 2008, introduced a posteriori constitutional review of legislation. Moreover, by incorporating the ECHR into the Human Rights Act, the United Kingdom «empower ordinary courts to adjudicate fundamental rights cases and to declare an Act of parliament incompatible (although without affecting its validity) with the ECHR when it infringes the rights and liberties laid down therein».³⁷⁹ Finally, also in the Scandinavian countries «human-rights-bases judicial review has finally emerged as a prominent feature of contemporary constitutionalism».³⁸⁰

Nevertheless, the national judiciary is facing the challenge of ECtHR and the European Court of Justice.

The European Court of Human Rights must act according to the principle of subsidiarity, namely all the domestic remedies have been exhausted. Hence, national judges have the primary responsibility to make the European Convention on Human Rights effective. The more national officials know the Convention, more the Convention is likely to be applied. In fact, since the entry into force of Protocol No. 11, scholarly researches and teaching of the ECHR have grown significantly in all States.³⁸¹

However, as stated by Article 32 of the ECHR, the Court has final jurisdiction over «all matters concerning the interpretation and application of the convention».³⁸² In fact, once the national official “fails” to apply the Convention, the case might be brought to the Court which must produce a judgement. By providing judgment on the most important violations that are brought one by one

³⁷⁸ *Ibidem*, 8.

³⁷⁹ *Ibidem*, 8-9, cit.

³⁸⁰ *Ibidem*, 9, cit.

³⁸¹ Keller H. — Stone Sweet A., *Assessing the Impact of the ECHR on National Legal Systems*, in Keller H. — Stone Sweet A. (edited by), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, Oxford University Press, 2008, 688-689.

³⁸² Keller H. — Stone Sweet A., *The Reception of the ECHR in National Legal Orders*, in Keller H. — Stone Sweet A. (edited by), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, Oxford, University Press, 2008, 10; and Council of Europe, Convention for the protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, cit., in https://www.echr.coe.int/Documents/Convention_ENG.pdf.

to the Court, the ECtHR is producing case law which will serve as a guide to national officials who intend to apply the Convention.³⁸³ The development of the Court jurisprudence is necessary to influence national legal orders. In fact, as states are not obliged to incorporate the Convention in their national legal orders, national officials are to a certain extent free to interpret the convention as to their discretion.

Furthermore, with regard to the relationship between the Court and the national legal order, it is interesting that the Court can function both as a Constitutional Court or a High Court of Appeal or a Court of Cassation depending the situation which is being dealt with.³⁸⁴ In fact, on the one hand, when the domestic legal order provides lower human rights standards than the Convention, individuals are expected to trigger the action of the Court in order to achieve a higher domestic protection of human rights, making the Court a European Constitutional Court. On the other hand, when the Court has to deal systemic violation of Convention rights, it plays the role of a Court of Cassation or a High Court of Appeal. This situation arose mostly after the Council of Europe's enlargement (see ¶ 2.1.2.2), because certain states, such as Georgia, Russia, Turkey and Ukraine, were incapable of meeting even the most fundamental principles of the rule of law.³⁸⁵

Finally, we should mention that the introduction of Protocol No. 11, concerning the individual complaint procedure, might lead to a conflict between national courts and the ECtHR. In fact, when a case is brought before the Strasbourg Court, and the Court handles an adverse judgement against a member state, it is

³⁸³ Keller H. — Stone Sweet A., *The Reception of the ECHR in National Legal Orders*, in Keller H. — Stone Sweet A. (edited by), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, Oxford University Press, 2008, 15.

³⁸⁴ *Ibidem*, 13.

³⁸⁵ Another problem of meeting convention standards is represented by those states to which is virtually impossible to comply with them. As in the case of Italy regarding the assurance of the timing of judicial proceedings. *Ivi*.

For principles of rule of law see Bingham T., *The Rule of Law*, London, Allen Lane, 2010.

basically saying that the interpretation of the ECHR law a member state has is wrong.³⁸⁶

With regards to the relationship between national judges and the European law, each national judge has the duty of interpreting the EU legislation, in this specific case the Charter of Fundamental Rights of the European Union. However, the autonomy of interpretation national judges is endowed with, is leading to a fragmentation in the EU system. Therefore, «misunderstandings about the interpretation and validity of primary and secondary EU law can seriously hamper the effective application of EU law (“*effet utile*”) at the national level».³⁸⁷ The instrument to guarantee uniform interpretation and application of the EU law is the preliminary ruling proceeding.³⁸⁸ Article 267 TFEU provides the Court of Justice of the European Union with the task of giving preliminary rulings on the interpretation of EU law in order to provide support to national courts. If the preliminary ruling was conceived as «the guarantor of the constitutional integrity of the EU legal system», its role has developed beyond its original scope.³⁸⁹ Nowadays, it also represents «the engine of the EU integration process».³⁹⁰

3.2 PROTECTION IN THE MENA REGION

In 2011 Arab Spring spread out to the MENA region to overthrow authoritarian regimes and to ask an enhancement of human rights protection across the region (see ¶ 2.2.4). Therefore, mechanisms of human rights protection are at an early stage of development because the region is still transforming.

³⁸⁶ Bjorge E., *National Supreme Courts and the Development of ECHR Rights*, in *International Journal of Constitutional Law*, 2011, 9, 5-31.

³⁸⁷ De Werd M., *Dynamics at Play in the EU Preliminary Ruling Procedure*, in *Maastricht Journal of European Comparative Law*, 2015, 22, 150, cit.

³⁸⁸ *Ivi.*

³⁸⁹ Bartolini S., *The Urgent Preliminary Ruling Procedure: Ten Years On*, in *European Public Law*, 2018, 24, 213, cit.

³⁹⁰ *Ivi.*

Protection of human rights in MENA region occurs mostly at national level because there are not any regional organizations endowed with a strong power of protection.

National protection of human rights depends on the degree of development and accountability of the institutions. In particular, the judicial system and security sector are strictly linked to human rights performance.³⁹¹ In fact, «the security sector is an important bulwark of the authoritarian regime. The judiciary has been its accomplice, upholding the powers of the regime and denying appeals from its victims. Together they have helped transform abstract political power into the reality of repression».³⁹² Hence, to truly understand how human rights have improved after the Arab Spring it is worth analysing how and if the judicial system and security sector changed.

With regard to regional protection of human rights we should underline that the Arab Charter on Human Rights of 2004 established an Arab Human Rights Committee, but with a very limited role. In fact, «the Committee's role is not that of a guardian or protector of human rights but supervisory», with the only task of analysing periodic states reports.³⁹³ Moreover, in 2014, Member States of the League of the Arab States approved the Statue of the Arab Court of Human Rights (ACtHR). However, some concerns on this statue have been raised (see ¶ 3.2.2).³⁹⁴

Finally, the Office of the United Nations High Commissioner for Human Rights (OHCHR) is carrying out an important activity in the region, as its work covers 20 countries.³⁹⁵ In fact, it supported specific technical assistance initiatives in several countries and it «called for the protection of human rights across the

³⁹¹ Waltz S., *Linking Transitional Justice and Human Rights*, in Sriram C. (edited by), *Transitional Justice in the Middle East and North Africa*, Oxford, Oxford University Press, 2017, 15.

³⁹² *Ivi*, cit.

³⁹³ Magliveras K — Naldi G., *Arab Court of Human Rights: A Study in Impotence*, in *Revue Québécoise de Droit International*, 2016, 29, 155, cit.

³⁹⁴ *Ibidem*, 158.

³⁹⁵ Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Occupied Palestinian Territory, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, Tunisia, United Arab Emirates, Yemen.

region and an end to the escalation of violence through press releases and briefings to the Human Rights Council, the General Assembly and the Security Council».³⁹⁶

3.2.1 PROTECTION OF HUMAN RIGHTS AT NATIONAL LEVEL

The functioning of the judiciary is a core point when dealing with human rights protection at national level, but its structure is very complex. Judges, as they have the task of interpreting laws, are responsible of individuals' protection. Therefore, when law provides right guarantees and judges fail to apply laws because of corruption or patronage, the judiciary «serves as an accomplice to repressive, authoritarian governments».³⁹⁷ Further concerns are raised when the judicial system is based on special courts that follow their own rules and are not controlled by a Ministry of Justice, as in the case of authoritarian regimes. For example, in Egypt civilians are tried in military courts (see ¶ 3.2.1.4). After, the Arab Spring, some country of the region started a transition process which leads to changes in the justice system. The independence of the judiciary has been strengthening, however some constitutional provision represents a limit to its true independence. For example, in Morocco according to article 107 of the Constitution «*le Roi est le garant de l'indépendance du pouvoir judiciaire*».³⁹⁸ Then, the Arab Spring led, in certain cases, to a reinforcement or establishment of Constitutional Courts.³⁹⁹

Security sector plays an important role too with regards to human rights protection. In several MENA countries security sectors dominate the politics to the point that the Algerian historian Mohamed Arbi has quipped arguing that

³⁹⁶ OHCHR, *UN Human Rights in the field: Middle East and North Africa*, UN Human Rights Report, 2017, cit., in https://www2.ohchr.org/english/OHCHRreport2017/allegati/14_Middle_East_and_North_Africa_2017.pdf.

³⁹⁷ Waltz S., *Linking Transitional Justice and Human Rights*, in Sriram C., (edited by), *Transitional Justice in the Middle East and North Africa*, Oxford, Oxford University Press, 2017, 17, cit.

³⁹⁸ Cfr. art. 107, comma 2, Cost.

³⁹⁹ For example, Jordan Palestine established the Constitution Court after the Arab Spring, respectively in 2012 and 2016.

«while most states have an army, in Algeria, the army has a state».⁴⁰⁰ However, not every country is subjected to the army, and the army is not the sole actor that exercise influence over governments. Since its independence, Tunisian armed forces have been under control of the civilians. National police or Intelligence forces under the control of an Interior Ministry or an autocrat can intervene in national politics. As in the case of Saddam Hussein's Iraq, where the paramilitary unit which operated directly under the control of the President was responsible for the repression of the opposition.⁴⁰¹

Even when transition took place, some abusive practices may continue, as most of the military security officials remain necessary in place.⁴⁰² The first step for effective human rights reform is to bring armed forces under control of the civilians. «But where civilians are not accustomed to such authority, and security forces are not accustomed to ceding it to civilians, the learning curve is very steep».⁴⁰³

To understand which has been the impact of the Arab Spring in MENA countries with regards to human rights protection, we will focus our analysis in specific states: Tunisia, Morocco, Jordan and Egypt. We have decided to focus on those countries because they have been the most affected by significant changes, as for example the reinforcement of the judiciary. Moreover, it seems not to be valuable to analyse countries that are still shattered by civil wars or governed by authoritarian regimes (see ¶ 2.2.4).

3.2.1.1 PROTECTION OF HUMAN RIGHTS IN EGYPT

The Egyptian's two steps process of codification of human rights started with the Arab Spring, led to an enhancement of codification of human rights. However, some concerns arise when focusing on their enforcement. In fact, the judicial system lacks of accountability and the armed forces play an excessive

⁴⁰⁰ Waltz S., *Linking Transitional Justice and Human Rights*, in Sriram C., (edited by), *Transitional Justice in the Middle East and North Africa*, Oxford, Oxford University Press, 2017, 15, cit.

⁴⁰¹ *Ibidem*, 16.

⁴⁰² *Ibidem*, 18.

⁴⁰³ *Ivi*, cit.

influential role which, as we have already underlined, is difficultly compatible with human rights protection (see ¶ 3.2.1).

The judicial system is very complex. The Constitution of 2014 provides that «the State shall be governed by Law. The independence, immunity and impartiality of the judiciary are essential guarantees for the protection of rights and freedoms».⁴⁰⁴ Thus, on the one hand, judges leading the drafting of the 2014 Constitution enhanced the judiciary autonomy, while on the other hand the executive exercises excessive influence over the courts.⁴⁰⁵ In fact, the courts usually «protect the interests of the government and military and have often disregarded due process and other basic safeguards in cases against the government's political opponents».⁴⁰⁶ Moreover, the inefficiency of the judicial system is reflected by arbitrary arrests and detentions, extrajudicial executions and enforced disappearances, torture and other ill-treatment in official places of detention and unfair trials.⁴⁰⁷ For example, according to Amnesty International last report (2017/2018), authorities use prolonged pre-trial detentions up to two years to punish political dissidents,⁴⁰⁸ or unfair mass trials, as the one that occurred in September 2018 when the Cairo Criminal Court sentenced 442 people to prison.⁴⁰⁹ Moreover, several times civilians are judged by military courts.⁴¹⁰

In addition, a crucial point when discussing human rights is the role played by the Supreme Constitutional Court.⁴¹¹ Having the task of interpreting laws and checking their constitutionality, the Supreme Constitutional Court is responsible

⁴⁰⁴ Cfr. art. 94, Cost., Unofficial translation, in <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf>.

⁴⁰⁵ Freedom in the World 2018, Egypt: Overview, Freedom House, in <https://freedomhouse.org/report/freedom-world/2018/egypt>.

⁴⁰⁶ *Ivi*, cit.

⁴⁰⁷ Viceconte M., *Il Rapporto tra Tradizione Religiose, Tradizioni Giuridiche e Diritti Umani nelle Costituzioni Egiziane*, in Alicino F. (edited by), *I Diritti Umani nel Mondo Globale. Tradizioni Religiose, Tradizioni Costituzionali e Mare Nostrum*, Naples, Editoriale Scientifica, 2016, 185.

⁴⁰⁸ For example, in 2018 a judge renewed the pre-trial detention of Hisham Gaafar, a human rights defender, who already spent two years detained, which represents the limit foreseen by Egyptian law.

⁴⁰⁹ Amnesty International, Egypt 2017/2018, in <https://www.amnesty.org/en/countries/middle-east-and-north-africa/egypt/report-egypt/>.

⁴¹⁰ *Ivi*.

⁴¹¹ The Egyptian Supreme Constitutional Court was established in 1979.

for deciding the extent to which law shall respect the Sharia, because as we have already underlined, according to art. 2 Cost. «the principles of Islamic Sharia are the main source of legislation».⁴¹² In this perspective, it is worth underlining that the Supreme Constitutional Court, differently from lower courts, «has frequently shown a highly developed and liberal interpretation of Art. 2 in light of the basic guarantees of human rights and freedoms».⁴¹³

Since its establishment, the Supreme Constitutional Court, played a role of fundamental importance, as it already had the task of defining the relationship between the Sharia and the Constitution.⁴¹⁴ Moreover, its judgement n. 22-8 of January 1992, represents a milestone with regards to human rights protection. In fact, it provided for the recognition of the universality of human rights to the point that from this moment the Supreme Court interprets the human rights guaranteed by the Egyptian constitution according to international documents on human rights.⁴¹⁵ During the Mursi era the Supreme Constitutional Court has been disempowered. Nevertheless, the Constitution of 2014 which regulates on the Supreme Constitutional Court from art. 191 to art. 195, gave it the powers it had before. Moreover, we must underline that as the Constitution of 2014 does not efficiently regulate on the composition of the Constitutional Court, its independence is threatened.⁴¹⁶ In fact, as provided by article 193 Cost. «the Court shall be composed of a President and a sufficient number of deputies to the President. The Commissioners of the Supreme Constitutional Court shall have a President and a sufficient number of Commission presidents, advisors

⁴¹² Cfr. art. 2, Cost., Unofficial translation, in <http://www.sis.gov.eg/Newvtr/Dustor-en001.pdf>.

⁴¹³ Sherif A.O., *The Relationship Between the Constitution and the Shari'ah in Egypt*, in Grote R. — Röder T. (edited by), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, Oxford, Oxford University Press, 2012, 13.

⁴¹⁴ Article 2, as it is codified in the Constitution of 2014, was codified for the first time in the Constitution of 1971 and from this moment it never ceased to be in place.

⁴¹⁵ Viceconte M., *Il Rapporto tra Tradizione Religiose, Tradizioni Giuridiche e Diritti Umani nelle Costituzioni Egiziane*, in Alicino F. (edited by), *I Diritti Umani nel Mondo Globale. Tradizioni Religiose, Tradizioni Costituzionali e Mare Nostrum*, Naples, Editoriale Scientifica, 2016, 163.

⁴¹⁶ *Ibidem*, 165.

and assistant advisors»,⁴¹⁷ but the meaning of “sufficient number” is not clarified.

The outcome of the revolutions of 2011 and of the Constitution of 2014 are not meeting the demands of protestors which were asking for the enhancing of democracy and human rights situation. Several violations of human rights still occur across the country. As reported by Freedom House, which ranked Egypt as a Not Free country, the situation is declining, above all with respect to civil liberties because of the government’s approval of a restrictive law on nongovernmental organizations and repression of labour union’s activity that are not recognized by the government.⁴¹⁸ Moreover, even if certain categories of rights have been strengthening by the Constitution of 2014, the enforcement measures are not sufficient for guaranteeing their effectiveness. For example, the last constitutional text improves women’s right,⁴¹⁹ but according to Amnesty International report «the absence of measures to ensure privacy and protection of women reporting sexual and gender-based violence continued to be a key factor preventing many women and girls from reporting such offences».⁴²⁰

3.2.1.2 PROTECTION OF HUMAN RIGHTS IN JORDAN

With regards to constitutional reforms adopted in Jordan after the Arab spring (see ¶ 2.2.5.2), some of them aimed at improving the judicial system.

⁴¹⁷ Cfr. art. 193, comma 1 and 2, Cost. «The State shall ensure the achievement of equality between women and men in all civil, political, economic, social, and cultural rights in accordance with the provisions of this Constitution.

The State shall take the necessary measures to ensure the appropriate representation of women in the houses of representatives, as specified by Law. The State shall also guarantee women’s right of holding public and senior management offices in the State and their appointment in judicial bodies and authorities without discrimination.

The State shall protect women against all forms of violence and ensure enabling women to strike a balance between family duties and work requirements.

The State shall provide care to and protection of motherhood and childhood, female heads of families, and elderly and neediest women».

⁴¹⁸ Freedom in the World 2018, Egypt: Overview, Freedom House, in <https://freedomhouse.org/report/freedom-world/2018/egypt>.

⁴¹⁹ Cfr. art. 11, Cost.,

⁴²⁰ Amnesty International, Egypt 2017/2018, in <https://www.amnesty.org/en/countries/middle-east-and-north-africa/egypt/report-egypt/>.

In 2011 a provision, foreseeing the establishment of a constitutional court was included in the constitution. However, some concerns arise when dealing with the Jordanian Constitutional Court. Even if the amendment of 2011 empowered it to review the constitutionality of legislation, on the one hand the access mechanism to the Court is very rigid and centralized up to the point that lower courts are discouraged to submit cases to the Constitutional Court.⁴²¹ In fact, the Court of Cassation is the only judicial body who enjoys a direct access to the Court. Therefore, a judge cannot refer a case directly to the Constitutional Court, but it must submit it to the Court of Cassation before. On the second hand, the Constitutional Court is highly influenced by the King, becoming a not independent organ.⁴²² All the nine members of the Court are, in fact, appointed by the King (art. 58).

Moreover, the King is still exercising a vast power over all the judicial system, as all «judgements shall be (...) pronounced in the name of the King».⁴²³ Additionally, article 98 of the Constitution does not make it clear who is responsible to appoint judges, thus it represents a clear threat to the independence of the judiciary.⁴²⁴ In fact on the one hand it provides that «judges of the Civil and Sharia Courts shall be appointed and dismissed by a Royal Decree in accordance with the provisions of the law»⁴²⁵; while on the other hand it foresees that «the Judicial Council shall have the sole right to appoint civil judges as per the provisions of the law».⁴²⁶ However, under the constitutional amendment of 2016, the King appoints the chair of the Judicial Council.⁴²⁷

⁴²¹ Neppi Modona G., *Enhancing the Cooperation between the Constitutional Court and the Judiciary: The Italian Experience*, in *Constitutional Courts and the Judiciary: Protecting Human Rights Together*, Amman, European Commission for Democracy through Law in Cooperation with the Constitutional Court of the Hashemite Kingdom of Jordan, 2014, 5, in [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU\(2014\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2014)007-e).

⁴²² Sultany N., *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring*, Oxford, Oxford University Press, 2017, 270.

⁴²³ Cfr. art. 27, Cost.

⁴²⁴ However, article 97 Cost. provides that «judges are independent, and in the exercise of their judicial functions they are subject to no authority other than that of the law».

⁴²⁵ Cfr. art. 98, comma 1, Cost.

⁴²⁶ Cfr. art. 98, comma 3, Cost.

⁴²⁷ Freedom in the World 2018, Jordan: Overview, Freedom House, in <https://freedomhouse.org/report/freedom-world/2018/jordan>.

The protests of 2011 have not led to the improvement citizens hoped for, as the «the democratic pedigree of the process is questionable, constitutional supremacy is tenuous, and the monarch is not accountable».⁴²⁸ Hence, human rights enforcement is still precarious across the country; especially with regards to restrictions on free expression, free assembly and women's right.⁴²⁹

3.2.1.3 PROTECTION OF HUMAN RIGHTS IN MOROCCO

Even if the Arab Spring led to adopt the new Moroccan Constitution in 2011 (see ¶ 2.2.5.3), the role of the judiciary is important to evaluate the constitution implementation and protection of rights.

The Constitution of 2011 enacts with articles 107 comma 1 the principle of the independence of the judiciary, providing that le «*pouvoir judiciaire est indépendant du pouvoir législatif et du pouvoir exécutif*»⁴³⁰, and it follows with article 108 delivering the principle of irremovability of judges.⁴³¹ However, some concerns arise when reading comma 2 of article 107 Cost., providing that «*le Roi est le garant de l'indépendance du pouvoir judiciaire*».⁴³² The excessive influence of the King may represent a threat to the independence of the judiciary. Then, the new constitution replaces the High Council of the Magistracy with the Higher Council of Judicial Power. Even if the Council is still chaired by the King, it is more independent than the previous one as the executive president is the first president of the Court of Cassation and not as before the Ministry of Justice.⁴³³ The Higher Council of Judicial Power was inaugurated in April 2017. However, a reform of the judiciary is necessary in order to strengthen its independence and the protection of fundamental rights.⁴³⁴ In September 2013,

⁴²⁸ Sultany N., *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring*, Oxford, Oxford University Press, 2017, 272, cit.

⁴²⁹ Human Rights Watch, *Jordan: Events of 2017*, in <https://www.hrw.org/world-report/2018/country-chapters/jordan>.

⁴³⁰ Cfr. art. 107, comma 1, Cost.

⁴³¹ Art. 108 «*Le magistrat du siège son inamovibles*».

⁴³² Cfr. art. 107, comma 2, Cost.

⁴³³ Biagi F., *The 2011 Constitutional Reform in Morocco: More Flaws than Merits*, Msida, Institute for European Studies, 2015, 17.

⁴³⁴ *Ivi*.

the High Authority for National Dialogue⁴³⁵ on the Reform of Justice System presented a proposal for reforming the judicial system, the Charter on the Reform of Judiciary System. This document would represent an important step in meeting democratic standards provided in the Constitution of 2011 and in international human rights treaties, however it has not been adopted yet.⁴³⁶

In addition, the Constitution of 2011 established a Constitutional Court in replacement of the Constitutional Council, with the aim of checking compliance of ordinary law and regulations with the constitution.⁴³⁷ The novelty of the Constitutional Court is represented by the fact that it introduces, in addition to the *ex ante* review of legislation, the concrete constitutional review.⁴³⁸ The reinforcement of the Court position might contribute to the democratisation of the country and an enhancement of human rights protection. The Constitutional Court was established in 2017, but as half of the members are appointed by the King, its independence is ambiguous.⁴³⁹ As sustained by Freedom House in its last report, «the court system is not independent of the monarch, who chairs the Supreme Council of the Judiciary. In practice, the courts are regularly used to punish perceived opponents of the government, including dissenting Islamists, human rights and anticorruption activists, and critics of Moroccan rule in Western Sahara».⁴⁴⁰

Freedom House, in fact, ranked Morocco as a partially free country. Even if reforms have been adopted on the wave of the Arab Spring, in practice many civil liberties are limited because of King Mohammed VI maintenance of «dominance through a combination of substantial formal powers and informal

⁴³⁵ The High Authority for National Dialogue is an organ established by the King Mohammed VI, with the aim of proposing a reform of the judicial system.

⁴³⁶ Biagi F., *The 2011 Constitutional Reform in Morocco: More Flaws than Merits*, Msida, Institute for European Studies, 2015, 17.

⁴³⁷ Cfr. art. 129, 130, Cost., see full text in http://www.maroc.ma/en/system/files/documents_page/bo_5964bis_fr_3.pdf.

⁴³⁸ Biagi F., *The 2011 Constitutional Reform in Morocco: More Flaws than Merits*, Msida, Institute for European Studies, 2015, 17.

⁴³⁹ Cfr. art. 130, Cost.

⁴⁴⁰ Freedom in the World 2018, Morocco: Overview, Freedom House, in <https://freedomhouse.org/report/freedom-world/2018/morocco>.

lines of influence in the state and society».⁴⁴¹ The Constitution failed to meet demands of 2011, as there are no effective guarantees for human rights protection up to the point that several scholars «argue that the constitution is the regime's rather than the people's and that it is merely an “elaborate constitutional smokescreen”».⁴⁴²

3.2.1.4 PROTECTION OF HUMAN RIGHTS IN TUNISIA

The revolution of 2011 (see ¶ 2.2.5.4) led to a reformation of the judicial system. Even if Tunisia was one of the first countries of the MENA region that created in 1991 an institution with the aim of promoting and protecting human rights, the *Comité Supérieur des Droits de l'Homme et des Libertés Fondamentales* (CSDHLF), the Committee has been highly criticized for not being independent.⁴⁴³ To respond to request of protestors, the Constitution of 2014 established, at article 128, the *Instance des droits de l'homme*, an independent organ which replaced the CSDHLF in protecting and promoting human rights. The *Instance* has the power of inquiry on human rights violations in the country, furthermore it should be consulted on human rights drafted legislation.⁴⁴⁴ The organic law which regulates the *Instance* composition, organization and mechanism of control has been adopted on 16 October 2018.

Moreover, also judicial power as stated by the Constitution of article 102, is responsible for human rights protection.⁴⁴⁵ To accomplish this task the judiciary must be independent. However, Freedom House has ranked the independence of the judiciary in Tunisia with a share of 2 points out of 4.⁴⁴⁶ Even if article 107

⁴⁴¹ *Ivi.*

⁴⁴² Sultany N., *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring*, Oxford, Oxford University Press, 2017, 269.

⁴⁴³ Spada S., *I Diritti Umani quale Possibile Terreno di Dialogo tra Tradizioni Costituzionali: Il Caso della Tunisia*, Alicino F. (edited by), *I Diritti Umani nel Mondo Globale. Tradizioni Religiose e Tradizioni Costituzionali e Mare Nostrum*, Naples, Editoriale Scientifica, 2016, 224.

⁴⁴⁴ *Ibidem*, 225.

⁴⁴⁵ Cfr. art. 102, Cost., «*La magistrature est un pouvoir indépendant, qui garantit l'instauration de la justice, la suprématie de la Constitution, la souveraineté de la loi et la protection des droits et libertés.*

Le magistrat est indépendant. Il n'est soumis, dans l'exercice de ses fonctions, qu'à l'autorité de la loi.».

⁴⁴⁶ Freedom in the World 2018, Tunisia: Overview, Freedom House, in <https://freedomhouse.org/report/freedom-world/2018/tunisia>.

of the Constitution provides that judges are irremovable except in the cases and, within the guarantee provided for by the law, this statement seems to not fully comply with international standards.⁴⁴⁷ In fact, according to international standards of irremovability of judges, they «may only be removed for reasons of incapacity or behaviour that renders them unfit to discharge their duties».⁴⁴⁸ Moreover, as it was established by the Constitution⁴⁴⁹, in 2016 a legislation to establish Supreme Judicial Council was adopted. Council members were elected in October 2016. This represents an important step for Tunisia, because it has the task of ensuring the independence of the judiciary and of electing the member of the Constitutional Court, which, however has not been established yet.⁴⁵⁰

The establishment of a Constitutional Court is a central point for human rights recognition in Tunisia, because it will evaluate the constitutionality of decrees and law with the Constitution, hence if laws are in compliance with human rights constitutionally recognized.⁴⁵¹ The need for the establishment of a Constitutional Court was soon expressed also by Tunisian President Beji Caid Essebsi who in his New Year's address of 2019 urged Parliament «to speed up procedures for

⁴⁴⁷ Cfr. art. 107, Cost., «Le magistrat ne peut être muté sans son consentement. Il ne peut être révoqué, ni faire l'objet de suspension ou de cessation de fonctions, ni d'une sanction disciplinaire, sauf dans les cas et conformément aux garanties fixés par la loi et en vertu d'une décision motivée du Conseil supérieur de la magistrature»; International Commission of Jurist, *Enhancing the Rule of Law and Guaranteeing Human Rights in the Constitution: A Report on the Constitutional Reform Process in Tunisia*, Geneva, 2013, 37, in <https://www.icj.org/wp-content/uploads/2013/02/TUNISIA-CONSTITUTION-REPORT-FINAL.pdf>.

⁴⁴⁸ *Ivi*, cit.

⁴⁴⁹ The *sous-section première* regulates the functioning of the Supreme Judicial Council, see full text in <http://www.legislation.tn/sites/default/files/news/constitution-b-a-t.pdf>.

⁴⁵⁰ Freedom in the World 2018, Tunisia: Overview, Freedom House, in <https://freedomhouse.org/report/freedom-world/2018/tunisia>.

⁴⁵¹ The Constitutional Court is foreseen by article 118 Cost., which provides that «La Cour constitutionnelle est une instance juridictionnelle indépendante, composée de douze membres, choisis parmi les personnes compétentes, dont les trois-quarts sont des spécialistes en droit et ayant une expérience d'au moins vingt ans.

Le Président de la République, l'Assemblée des représentants du peuple et le Conseil supérieur de la magistrature désignent chacun quatre membres, dont les trois-quarts sont des spécialistes en droit. Les membres de la Cour constitutionnelle sont désignés pour un seul mandat de neuf ans.

Un tiers des membres de la Cour constitutionnelle est renouvelé tous les trois ans. Il est pourvu aux vacances survenues dans la composition de la Cour, selon les modalités suivies lors de la désignation, compte tenu de l'autorité de nomination intéressée et de la spécialité.

Les membres de la Cour élisent un président et un vice-président parmi les membres spécialistes en droit».

the election of the Constitutional Court's members».⁴⁵² While waiting for the establishment of the Constitutional Court, Tunisia creates a Temporary body, namely the Provisional Instance to Review the Constitutionality of Draft Laws.

The Provisional Instance has been created by the organic law n. 2014-14 pursuant to article 148 of the Constitution.⁴⁵³ Currently, the Provisional Instance is responsible for ruling on draft laws, but it cannot adjudicate over other disputes, such as over the president and prime minister's powers.⁴⁵⁴ The lack of the Constitutional Court is dangerous for Tunisia's democracy. In fact, the Tunisian government was able to pass some ambiguous laws, i.e. restrictive counterterrorism law and a blanket amnesty for corrupt officials from the Ben Ali regime.⁴⁵⁵ If the Constitutional Court had been in place, it might have been able to challenge the constitutionality of these laws.

Despite some criticisms, Tunisia transition has been considered successful. As support, we should mention that Freedom House ranks Tunisia as a free state. In fact, in its last overview of the Country, it states that although the influence of the old regime officials, corruption and economic challenges represent an obstacle to democratic transition, Tunisians enjoy unprecedented political rights and liberties.⁴⁵⁶ Moreover, the Tunisian transition has been considered by Ahmed Driss, President of the Centre for Mediterranean and International Studies (CEMI), a unique democratic transition; furthermore «it seems to have

⁴⁵² ANSAMed, Tunisia: elections and Arab League summit in 2019 — Essebs. Citizens urged to vote by president, 2 January 2019, in http://www.ansamed.info/ansamed/en/news/sections/politics/2019/01/02/tunisia-elections-and-arab-league-summit-in-2019-essebs_c94371f6-f535-4f94-8f37-ce88907ffbce.html.

⁴⁵³ Spada S., *I Diritti Umani quale Possibile Terreno di Dialogo tra Tradizioni Costituzionali: Il Caso della Tunisia*, Alicino F. (edited by), *I Diritti Umani nel Mondo Globale. Tradizioni Religiose e Tradizioni Costituzionali e Mare Nostrum*, Naples, Editoriale Scientifica, 2016, 233-234;

See full text of the Constitution in <http://www.legislation.tn/sites/default/files/news/constitution-b-a-t.pdf>.

⁴⁵⁴ Grewal S., *Tunisia Needs a Constitutional Court*, Washington, The Brookings Institution, 20 November 2018, in <https://www.brookings.edu/blog/order-from-chaos/2018/11/20/tunisia-needs-a-constitutional-court/>.

⁴⁵⁵ *Ivi*.

⁴⁵⁶ Freedom in the World 2018, Tunisia: Overview, Freedom House, in <https://freedomhouse.org/report/freedom-world/2018/tunisia>.

passed a turning point, and it is safe to say that the transition to democracy is set to succeed».⁴⁵⁷

3.2.2 TOWARDS AN ARAB COURTS OF HUMAN RIGHTS?

As we have underlined protection of human rights at national level in the MENA region is limited, with the only exception of Tunisia (see ¶ 3.2.1.1). However, the situation does not improve when we shift to the regional level. Even if the League of the Arab State (LAS) adopted in 2004 the Arab Charter on Human Rights (ACHR) which has been considered to be to some extent revolutionary (see ¶ 2.2.3), the ACHR does not follow the European model, creating a judicial or quasi-judicial body to supervise on violations of treaty obligations by contracting parties, such as the European Court of Human Rights foreseen by the European Convention on Human Rights.

The ACHR provides for the establishment of an Arab Human Rights Committee, however with a very limited role.⁴⁵⁸ The Charter only specifies the appointment procedures of the members of the Committee but remains silent on its mandate, as article 45 of the Charter provides that the Committee has the task of establishing its own Rules of Procedure.⁴⁵⁹ Basically, its task is to review periodic reports that states present every 3 years relating to the domestic implementation of the ACHR. However, as national officials are responsible for writing reports, they might manipulate the real situation for political interests, masking human rights violations.⁴⁶⁰

Nonetheless, the LAS made a step forward, as in September 2014, it adopted the Statute of the Arab Court of Human Rights (ACtHR). However, the Statute is

⁴⁵⁷ Driss A., *The Tunisian Exception*, in MED – Mediterranean Dialogues, in Talbot V. — Torelli S.M. (edited by), *Building Trust: the Challenge of Peace and Stability in the Mediterranean: Report*, Rome, 4th Edition, Italian Institute for International Political Studies, 2018, 16.

⁴⁵⁸ The Committee was established in 2009 and it is composed of seven members elected for a four-year renewable term, which must be independent and impartial but they are not required to have prior legal experience.

⁴⁵⁹ Magliveras K. — Naldi G., *Arab Court of Human Rights: A Study in Impotence*, in *Revue Québécoise de Droit International*, 2016, 29, 155.

⁴⁶⁰ Alicino F. — Gradoli M., *L'Islam del XXI Secolo e gli International Human Rights*, in Decaro Bonella C. (edited by), *Tradizioni Religiose e Tradizioni Costituzionali. L'Islam e L'Occidente*, Rome, Carocci Editore, 2003, 166-167.

not attached to the Arab Charter on Human Rights, but it is conceived as an autonomous treaty body affiliated to the LAS «seeking to consolidate the contracting parties' will to implement their obligations pertaining to human rights and fundamental freedoms».⁴⁶¹

The Statute has been adopted after a process which lasted two years. In 2012, Bahrain proposed the creation of an Arab Court of Human Rights, and a year later at the Doha Summit, the LAS approved its creation and established a committee of legal experts to write the Statute. However, the drafting process has been characterized by a lack of transparency, as the appointment of committees and the composition of the Committee were not clarified.⁴⁶² Moreover, the drafting process took place without involving academics, professionals or civil society experts.⁴⁶³

The ACtHR is not operative, because since the opening of ratification of the treaty in 2014, only Saudi Arabia ratified it in 2016, while at least seven ratifications are needed.⁴⁶⁴ By the way, we should underline that seventeen «leading national and international human rights organizations sent a letter on 31 August 2014 to the LAS Ministers of Foreign Affairs, urging them to defer action on the adoption of the Statute»⁴⁶⁵, because worries arose with regards to the drafting process and the content.⁴⁶⁶

⁴⁶¹ Magliveras K. — Naldi G., *Arab Court of Human Rights: A Study in Impotence*, in *Revue Québécoise de Droit International*, 2016, 29, 158, cit;

Article 2 of the ACtHR «Within the framework of the League of Arab States, an Arab Court of Human Rights shall be established as an independent Arab judicial body that aims at consolidating the State Parties' will in implementing their obligations regarding human rights and his freedoms; its composition, jurisdiction and method of work shall be governed by the Statute and the Rules of Court».

⁴⁶² Rishmawi M. — Kayyali S. — Saleh E., *The League of Arab States: Human Rights Standards and Mechanism*, Amman, Open Society Foundations and Cairo Institute for Human Rights Studies, 2015, 54.

⁴⁶³ *Ivi.*

⁴⁶⁴ Magliveras K. — Naldi G., *Arab Court of Human Rights: A Study in Impotence*, in *Revue Québécoise de Droit International*, 2016, 29, 171.

⁴⁶⁵ International Commission of Jurists, *The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court*, Geneva, 2015, 10, cit., in http://graduateinstitute.ch/files/live/sites/iheid/files/sites/international_law/shared/international_law/Prof_Clapham_website/docs/MENA-Arab-Court-of-Human-Rights-Publications-Report-2015-ENG.pdf.

⁴⁶⁶ *Ivi.*

The key concerns of the Statute's content are represented by article 19, regarding access to the Court, article 16 regarding the subject-matter jurisdiction of the Court, articles 5, 6, 7, 8 and 15 regarding judges and the independence of the Court and article 18 regarding the exhaustion of domestic remedies.⁴⁶⁷ More in depth, according to art. 19 individuals are restricted to access the court directly. Art. 16 provides that the Courts shall adjudicate over cases on the interpretation of the Arab Charter on Human Rights and any other Arab Treaties in the field of human rights, but it is not clear which other Arab Treaties the Statute refers to. Although articles 5, 6, 7, 8 and 15 require judges to be selected according to principles of integrity credibility and expertise, the appointment procedures are not clear. Finally, art. 18 is too restrictive because it «unjustifiably inhibit[s] victims of human rights abuses from accessing the Court».⁴⁶⁸

Several obstacles should be overcome to achieve an accountable regional enforcement mechanism; thus hypothetical amendments might modify the system by enabling it to truly protect human rights. The International Commission of Jurists presented suggestions to amend the Statute.⁴⁶⁹ For example, it argued that the Statute should «incorporate the UN Basic Principles on the Independence of the Judiciary in all matters relating to the independence of the Arab Court and the career of its judges»⁴⁷⁰; moreover it should «provide that the Arab Court is to take full account of international human rights law,

⁴⁶⁷ Rishmawi M. — Kayyali S. — Saleh E., *The League of Arab States: Human Rights Standards and Mechanism*, Amman, Open Society Foundations and Cairo Institute for Human Rights Studies, 2015, 57;

See full text of the Statute (unofficial English translation by International Commission of Jurists) in http://graduateinstitute.ch/files/live/sites/iheid/files/sites/international_law/shared/international_law/Prof_Clapham_website/docs/MENA-Arab-Court-of-Human-Rights-Publications-Report-2015-ENG.pdf.

⁴⁶⁸ *Ivi.*

⁴⁶⁹ See all the suggestions in International Commission of Jurists, *The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court*, Geneva, 2015, 7-8, in http://graduateinstitute.ch/files/live/sites/iheid/files/sites/international_law/shared/international_law/Prof_Clapham_website/docs/MENA-Arab-Court-of-Human-Rights-Publications-Report-2015-ENG.pdf.

⁴⁷⁰ International Commission of Jurists, *The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court*, Geneva, 2015, 7-8, cit., in http://graduateinstitute.ch/files/live/sites/iheid/files/sites/international_law/shared/international_law/Prof_Clapham_website/docs/MENA-Arab-Court-of-Human-Rights-Publications-Report-2015-ENG.pdf.

including the obligations of any State that is party to the case before it, in its interpretation of the provisions of the Arab Charter or other Arab human rights treaties so as to prevent inconsistency or conflict in the application of those provisions with any other international legal obligations of States parties»⁴⁷¹, and it should «ensure that all individuals within the territory of a State party, or subject to its jurisdiction, can have access to the Arab Court when they claim to be a victim of a violation».⁴⁷²

Finally, we think that national governments have no choice but to enforce human rights principles by improving the mechanism of the ACtHR, in order to avoid further regional crisis resulting from gross violations of human rights, as the Arab Spring.⁴⁷³ Hence, we should watch the future development of the LAS and the ACtHR.

3.3 CONCLUSION: A COMPARISON BETWEEN THE EUROPEAN AND THE MENA REGIONS' SYSTEMS OF HUMAN RIGHTS PROTECTION

By analysing the European and MENA system of protection of human rights, we have tried to understand how much they differ one from the other and if they may have characteristics in common. However, as already specified in Chapter 2, this comparison because of the diverse backgrounds of the two regions presents some limits itself (see ¶ 2.3).

Firstly, we should point out that, while the European system offers an advanced regional mechanism of protection of human rights, the MENA region deals with an emerging regional system of protection of human rights, which requires a strong support.⁴⁷⁴ In fact, on the one hand, the European Court of Human Rights was settled up in 1959 with jurisdiction over a limited number of cases, then its

⁴⁷¹ *Ivi.*

⁴⁷² *Ivi.*

⁴⁷³ Alshehri S., *An Arab Court of Human Rights: The Dream Desired*, in *Arab Law Quarterly*, 2016, 30, 52.

⁴⁷⁴ Piatkowska K., *To What Extent do Regional Human Rights Systems Contribute to the Promotion and Protection of Human Rights Globally?*, Wroclawski, University of Wroclawski, 2013, 18.

role evolved in the years, but the entrance into force of Protocol No. 11 in 1998, which introduced the right of individual petition right, represented the turning point of the ECtHR. Hence, the transformation of the Court was a process that lasted almost 40 years, and it always aimed at its enhancement as the last protocol to be reformed was adopted in 2018. On the other hand, the Statute of the Arab Court of Human Rights has been opened to ratification only in 2014 and it has not entered into force yet because of the lack of ratification. However, as we have underlined, it provides the ACtHR with very limited powers. Moreover, the lack of transparency in the drafting process, the limited access to the court and the “independence” of judges represent a threat to its functioning. In addition, we should remember that while the ECtHR is foreseen by the ECHR, the Statute of ACtHR has been adopted by the League of Arab States. In fact, the Arab Convention on Human Rights provides for an Arab Human Rights Committee, nevertheless with very limited powers. However, it is not excluded that in the future, Statute of the ACtHR will be amended in a way to meet international standards. In fact, suggestions on how to amend it have already been presented.⁴⁷⁵

A similarity with the European regional system of protection of human rights may be constituted by the effort undertaken by the League of the Arab State in order to endow the MENA region with a system of protection of rights. The idea of establishing an Arab Human Rights Court has been welcomed by some international institutions as the International Commission of Jurists, because «an effective, independent and impartial regional human rights court could make an enormous contribution to the effective enjoyment of human rights of persons in the LAS region and to holding the LAS States accountable for human rights violations». ⁴⁷⁶ Moreover, it is worth underlining that nor the civil society, nor

⁴⁷⁵ International Commission of Jurists, *The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court*, Geneva, 2015, 7-8, cit., in http://graduateinstitute.ch/files/live/sites/iheid/files/sites/international_law/shared/international_law/Prof_Clapham_website/docs/MENA-Arab-Court-of-Human-Rights-Publications-Report-2015-ENG.pdf.

⁴⁷⁶ *Ibidem*, 5, cit.

other stakeholders have been involved in the drafting process, which has been conducted behind closed doors.⁴⁷⁷

Then, we should remember that national courts have the primary responsibility with regards to human rights protection. One may appeal to the regional organization when they have exhausted internal remedies. However, domestic situations of the state members to the Council of Europe and to the League of the Arab State is very different. With only few exceptions, i.e. Russia or Turkey, the rule of law in the states of the Council of Europe is strong; while Tunisia is the only exception of the LAS area, a region where the rule of law is very weak. Finally, if a citizen of a Council of Europe's states see one of their rights infringed by appealing to the ECtHR may have a chance to restore their rights. What about a citizen of a LAS' states whose rights have been infringed?

Finally, we think that the MENA region in the future will be obliged to develop a proper mechanism of human rights enforcement, otherwise it will face new regional crisis as the Arab Spring.⁴⁷⁸ Moreover, with regards to the common challenges the Euro-Mediterranean region is facing, we believe that a cooperation between the two region is of fundamental importance. In particular, with regards to human rights, the MENA regional system of protection might take inspiration from the European system which has demonstrated to be a consolidated mechanism of human rights protection. For this purpose, it seems of fundamental importance the involvement of experts and specialized bodies.

⁴⁷⁷ *Ivi.*

⁴⁷⁸ Alshehri S., *An Arab Court of Human Rights: The Dream Desired*, in *Arab Law Quarterly*, 2016, 30, 52.

CHAPTER 4 - COOPERATION BETWEEN EUROPE AND THE MENA REGION IN THE FIELD OF HUMAN RIGHTS' CODIFICATION: A BRIEF OVERVIEW

In this Chapter we will deal with the cooperation between the European and MENA regions, underling whether this relationship might lead to an enhancement of human rights' codification. By referring to the European region we mean the actions carried out by both the EU and the Council of Europe. However, we will put the emphasis on the EU external action because of its strong democracy promotion commitment.⁴⁷⁹

Before moving to the cooperation between Europe and the MENA region in the field of human rights, we should point out that this relationship has not been exempted from critics. Critics moved above all with regard to the EU's human rights conditionality clauses.⁴⁸⁰

The incorporation of human rights commitment has characterized European law and policies vis-à-vis the EU member states: human rights' consideration, such as on direct and indirect discriminations, are taken into account while implementing EU policies.⁴⁸¹ Such a characteristic reflects also in the EU foreign policies. In fact, the EU has included human rights clauses in numerous agreements covering almost 150 countries worldwide.⁴⁸² To our research's purposes, it is worth underlining that the EU's Mediterranean policy became a

⁴⁷⁹ Youngs R., *The European Union and the Promotion of Democracy: Europe's Mediterranean and Asian Policies*, Oxford, Oxford University Press, 2002, 4.

⁴⁸⁰ Ippolito F., *Mainstreaming Human Rights in EuroMed Bilateral Relations*. "The Road to Hell is Paved with Good Intentions", in Ziccardi Capaldo G. (edited by), *The Global Community Yearbook of International Law and Jurisprudence 2016*, Oxford, Oxford University Press, 2017, 84.

⁴⁸¹ *Ivi*.

⁴⁸² Bartels L., *Human Rights Conditionality in the EU's International Agreements*, Oxford, Oxford University Press, 2005, 32.

I.e. human rights clauses are included in cooperation and association agreement with several South American countries (Mexico, Chile, and Mercosur), in the Euro-Mediterranean agreements, and in cooperation agreements with Asian countries (Bangladesh, Cambodia, India, Korea, Laos, Macao, Nepal, Pakistan, Sri-Lanka and Vietnam).

EU priority during the 90s because of its proximity and strategic importance.⁴⁸³ The attention towards the Southern Mediterranean shore led to EU's democracy promotion and human rights commitment.⁴⁸⁴ In fact, human rights clause have been included in the Euro-Mediterranean association agreements in the framework of the Barcelona Process and in the European Neighbourhood Policy.⁴⁸⁵

However, the human rights conditionality clauses have been considered to some extent hypocrite to the point that the hypocrisy distinguishing the human rights mainstreaming conception in Euro-Mediterranean relations has been compared to «Pot Luck, Emile Zola's most acerbic satire, examines the contradictions that pervade bourgeois life to reveal a multitude of betrayals and depict a veritable 'melting pot' of moral and sexual degeneracy».⁴⁸⁶ In fact, it has been pointed out that even if the EU is continually remarking the importance of democracy promotion and human rights' protection, the liberal economic reasoning, the principle of non-interference and national sovereignty in practice usually prevail over the human rights discourse, rendering EU policies toward third countries inconsistent.⁴⁸⁷

However, the cooperation on human rights in the Euro-Mediterranean region, thought with its limits, has demonstrated to be fruitful on certain occasions. For example, at the EU level, in the framework of the Euro-Mediterranean Partnership, the pressure exercised by the EU in relation to individual human

⁴⁸³ Youngs R., *The European Union and the Promotion of Democracy: Europe's Mediterranean and Asian Policies*, Oxford, Oxford University Press, 2002, 2.

⁴⁸⁴ *Ivi.*

⁴⁸⁵ Bartels L., *Human Rights Conditionality in the EU's International Agreements*, Oxford, Oxford University Press, 2005, 33;

Ippolito F., *Mainstreaming Human Rights in EuroMed Bilateral Relations*. "The Road to Hell is Paved with Good Intentions", in Ziccardi Capaldo G. (edited by), *The Global Community Yearbook of International Law and Jurisprudence 2016*, Oxford, Oxford University Press, 2017, 83.

⁴⁸⁶ Ippolito F., *Mainstreaming Human Rights in EuroMed Bilateral Relations*. "The Road to Hell is Paved with Good Intentions", in Ziccardi Capaldo G. (edited by), *The Global Community Yearbook of International Law and Jurisprudence 2016*, Oxford, Oxford University Press, 2017, 89, cit.

⁴⁸⁷ Malmvig H., *Caught Between Cooperation and Democratization: The Barcelona Process and the EU's Double-Discursive Approach*, in *Journal of International Relations and Development*, 2006, 9, 347.

rights abuse has led to an enhancement of human rights situation on the Southern shore of the Mediterranean See.⁴⁸⁸ In addition, it is worth underlining the impact the interinstitutional dialogue between cultures may have on the human rights situation. Dialogue may foster a common understanding of human rights, leading to their enhancement.⁴⁸⁹ For example, at the Council of Europe level, the dialogue between the VC and national authorities of certain MENA countries brought some benefits with regards to human rights (see ¶ 4.2).

For this reason, in this chapter, we have decided to briefly examine some forms of cooperation between European and the MENA regions. With regard to the initiatives carried out by the EU, we have decided to focus the analysis on the Euro-Mediterranean Partnership and the European Neighbourhood Policy, while with regard to the Council of Europe involvement on the area we have decided to consider the role played by Venice Commission because of its achievement in strengthening codification and human rights institutions. Then, we will briefly analyse the activities of NGOs in the region, in particular we will take into consideration EuroMed Rights, a network of NGOs, because they strongly contribute to the advancing of dialogue.

Hence, in the first part, we will deal with the Euro- Mediterranean Partnership (EMP) and its evolution into the Union for the Mediterranean. We will also put the emphasis on the European Neighbourhood Policy (ENP), that represents a Euro-Mediterranean policy which developed alongside the EMP but separated from it.

In the second part, we will analyse the role played by the Venice Commission (VC) in the Mediterranean basin. In fact, VC has been successfully involved in constitution-making, in giving opinions on constitutional justice and in organizing workshops, conferences and seminars linking experts of the two regions with the aim of strengthening cooperation.

⁴⁸⁸ Youngs R., *The European Union and the Promotion of Democracy: Europe's Mediterranean and Asian Policies*, Oxford, Oxford University Press, 2002, 35.

⁴⁸⁹ Sadun G., *Diritti Umani e Dialogo Euro-Mediterraneo: Un Approccio "Minimalista"*, in *Persona y Derecho*, 2008, 58, 120.

Finally, we will move on to the EuroMed Rights, a network of human rights' civil society organizations of the area. In fact, as we will see, the empowerment of civil society is a necessary condition for democracy and human rights realization.⁴⁹⁰

4.1 INITIATIVES AT EU LEVEL

Over the last two decades the interest of the EU towards the MENA region has increased, due to the transformation taking place in the region and its proximity.⁴⁹¹ «The potential instability that might derive from the growing economic imbalances and asymmetry between the EU and the southern shore of the Mediterranean was seen to render increasingly urgent a fundamental revamp of relations between the two regions».⁴⁹² Therefore, the EU took several initiatives to strengthen the relationship with the MENA, i.e. the Euro-Mediterranean Partnership, the European Neighbourhood Policy.⁴⁹³

4.1.1 THE EURO-MEDITERRANEAN PARTNERSHIP

The Barcelona Process, namely the Euro-Mediterranean Partnership started in November 1995 with the adoption of the Final Declaration of the Barcelona Euro-Mediterranean Ministerial Conference and its work programme and it represented «the first European attempt to conduct a coordinated foreign policy action towards the region».⁴⁹⁴ The aim of the Partnership was «to turn the Mediterranean into a common area of peace, stability and prosperity through the reinforcement of political dialogue, security, and economic, financial, social and cultural cooperation».⁴⁹⁵ It is worth underlining that one of the first objectives to be achieved through dialogue in order to foster stability and peace in the

⁴⁹⁰ Feliu L., *Global Civil Society Across the Mediterranean: The Case of Human Rights*, in *Mediterranean Politics*, 2005, 10, 368.

⁴⁹¹ Cavatorta F. — Rivetti P., *EU-MENA Relations from the Barcelona Process to the Arab Uprisings: A New Research Agenda*, in *Journal of European Integration*, 2014, 36, 619.

⁴⁹² Youngs R., *The European Union and the Promotion of Democracy: Europe's Mediterranean and Asian Policies*, Oxford, Oxford University Press, 2002, 11, cit.

⁴⁹³ *Ibidem*, 20.

⁴⁹⁴ *Ivi*, cit.

⁴⁹⁵ Barcelona Declaration and Euro-Mediterranean Partnership, in <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:r15001&from=IT>.

Mediterranean is the respect of human rights and rule of law and democracy.⁴⁹⁶ In fact, the essential aspect on which the partnership was based was the «strengthening of democracy and respect for human rights, sustainable and balanced economic and social development, measures to combat poverty and promotion of greater understanding between cultures».⁴⁹⁷ Moreover, it should be specified that «the new Barcelona Process was significant in enshrining, for the first time, co-operation over the promotion of democracy and human rights as an integral part of EU–Mediterranean relations».⁴⁹⁸

Therefore, to this purpose, state partners undertake to apply the «principles of the United Nations Charter and Universal Declaration of Human Rights, and international law, and to exchange information in these areas»,⁴⁹⁹ and the «twelve Mediterranean partners signed up to principles of political pluralism within the Barcelona Declaration».⁵⁰⁰ The introduction of the discourse of democracy and political pluralism into the EU-Mediterranean relations was one of the main achievement of the Barcelona Process. In fact, «the securing of this commitment was seen as an important achievement by EU states in so far as they could henceforth refer Mediterranean states back to their own pledge to enhance democratic principles and the protection of human rights. The EU's declared aim was to seek to inculcate a broader adherence to basic democratic values over the longer term, and by embedding the discourse of democracy the Barcelona Process would contribute to this goal».⁵⁰¹

However, it should be underlined that the Euro-Mediterranean Partnership tackled with several problematic while carrying out its activity, i.e. a scarce political commitment, to the point of compromising the achievement of its goals.

⁴⁹⁶ *Ivi.*

⁴⁹⁷ *Ivi.*

Sadun G., *Diritti Umani e Dialogo Euro-Mediterraneo: Un Approccio "Minimalista"*, in *Persona y Derecho*, 2008, 58, 109-110.

⁴⁹⁸ Youngs R., *The European Union and the Promotion of Democracy: Europe's Mediterranean and Asian Policies*, Oxford, Oxford University Press, 2002, 13, cit.

⁴⁹⁹ Barcelona Declaration and Euro-Mediterranean Partnership, in <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:r15001&from=IT>.

⁵⁰⁰ Youngs R., *The European Union and the Promotion of Democracy: Europe's Mediterranean and Asian Policies*, Oxford, Oxford University Press, 2002, 13, cit.

⁵⁰¹ *Ivi.*

Despite the crisis faced by the region and the difficulty of reaching its objectives, the Partnership survived, because of the common agreement of the necessity of a regional institutional arrangement to tackle with the challenges of the region.⁵⁰²

Moreover, in 2007, in the framework of the Barcelona Process, under the aegis of Nicolás Sarkozy, the idea of the establishment of an organization with the name of Mediterranean Union spread out. This idea has represented a step forward to the Barcelona Process for the achievement of democracy and human rights protection through dialogue between the two regions.⁵⁰³ Nevertheless, originally, the idea of Sarkozy was to establish a Mediterranean Union under the leadership of France, separated from the European Union and the Barcelona Process.⁵⁰⁴

Instead, on 13 July of 2008 with the adoption of the Joint Declaration of the Paris Summit for the Mediterranean, the Union for the Mediterranean (UfM) was established, and it was based on the Euro-Mediterranean partnership launched in Barcelona in 1995. Hence, at the meeting Head of States and Governments reaffirmed their commitment in addressing common challenges faced by the region together.⁵⁰⁵

The Union for the Mediterranean is composed of the 28 EU states plus 15 countries of the southern and western Mediterranean, namely Albania, Algeria, Bosnia and Herzegovina, Egypt, Israel, Jordan, Lebanon, Mauritania, Monaco, Montenegro, Morocco, Palestine, Syria, Tunisia and Turkey.⁵⁰⁶ The UfM is structured in a way to foster co-decision and shared responsibility between the two sides of the Mediterranean. In fact, the UfM is chaired by a co-presidency

⁵⁰² Bayón D., *La Unión por el Mediterráneo: Al Final, una Etapa Más en el Proceso de Barcelona*, in *Unisci Discussion Papers*, 2008, 17, 205.

⁵⁰³ Blázquez Rodríguez I., *La Dimensión Mediterránea del Espacio de Libertad, Seguridad y Justicia. Del Proceso de Barcelona a la Unión Europea por El Mediterráneo*, in *Revista Electrónica de Estudios Internacionales*, 2010, 19, 1.

⁵⁰⁴ Reiterer M., *From the (French) Mediterranean Union to the (European) Barcelona Process: The “Union for the Mediterranean” as Part of the European Neighbourhood Policy*, in *European Foreign Affairs Review*, 2009, 14, 319.

⁵⁰⁵ Joint Declaration of the Paris Summit for the Mediterranean, see full text in https://ufmsecretariat.org/wp-content/uploads/2012/09/ufm_paris_declaration1.pdf.

⁵⁰⁶ Syria suspended its membership in 2011. Libya has an observer status. European institutions and League of Arab states representatives participate in UfM meetings.

of the Northern and Southern Mediterranean Countries. Moreover, «the members of the Union for the Mediterranean meet on a regular basis at the level of Senior Officials from the Ministries of Foreign Affairs of the 43 UfM countries, EU institutions and the League of Arab States».⁵⁰⁷ Then, the Secretariat which is based in Barcelona is the operative body.

In 2017 the UfM adopted its road map for action. By reaffirming common goals of peace stability and security in the region, the UfM specified the necessity of intensifying political dialogue between the countries of the region. In fact, «the deeper and more comprehensive this dialogue will be, the more effective will the operational activities of the Secretariat to address the current challenges be».⁵⁰⁸ By adopting this roadmap, the UfM launched several programmes of action in different fields, as sustainable development, research and innovation and women's empowerment. However, it should be underlined that even if one of the first objective of the Euro-Mediterranean Partnership was the strengthening of human rights and the rule of law,⁵⁰⁹ «human rights have descended in the list of priorities» because of the politicization of Euro-Mediterranean relations.⁵¹⁰

4.1.2 THE EUROPEAN NEIGHBOURHOOD POLICY

In 2004, when the EMP was facing a crisis (see ¶ 4.1.1), the European Neighbourhood Policy (ENP) was launched.⁵¹¹ The aim of the ENP was to integrate neighbour countries into the European market upon the condition of their implementation of economic and political reforms in order to «create a 'ring

⁵⁰⁷ Union for the Mediterranean, *Structure*, in <https://ufmsecretariat.org/who-we-are/structure/>.

⁵⁰⁸ Union for the Mediterranean, Roadmap for Action, 10, in <https://ufmsecretariat.org/wp-content/uploads/2017/10/UfM-Roadmap-for-action-2017.pdf>.

⁵⁰⁹ See Barcelona Declaration and Euro-Mediterranean Partnership, in <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:r15001&from=IT>.

⁵¹⁰ Bicchieri F., *The Union for the Mediterranean, or the Changing Context of Euro-Mediterranean Relations*, in *Mediterranean Politics*, 2011, 16, 11.

⁵¹¹ Commission of the European Communities, European Neighbourhood Policy, 2004, in https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2004_communication_from_the_commission_-_european_neighbourhood_policy_-_strategy_paper.pdf.

of friends' around all the eastern and southern periphery of the enlarged Union by incorporating the non-members into a European (that is, EU)-led economic region». ⁵¹² In fact, in the framework of the ENP, the EU offers to South Mediterranean countries ⁵¹³ significant measures of economic and political integration. In exchange, it asks South Mediterranean countries commitment to «common values, principally within the fields of democracy, rule of law, respect for human rights, including minority rights, promotion of good neighbourly relations, and the principles of market economy and sustainable development». ⁵¹⁴

Finally, it should be clarified that even if the ENP is addressed to the South Mediterranean, like the EMP, it was thought to complement the EMP instead of replace it. ⁵¹⁵ In fact, according to the European Commission, «the instruments available in ENP are 'additional bilateral incentives and opportunities, responding to individual countries' reform efforts'». ⁵¹⁶

4.2 INITIATIVES IN THE FRAMEWORK OF THE COUNCIL OF EUROPE: THE VENICE COMMISSION

The European Commission for Democracy through Law, namely the Venice Commission, is the advisory body of the Council of Europe on constitutional matters. As we have already observed, the Commission is composed of 61 states and its aims are of providing legal assistance in building institutions and legal

⁵¹² Barbé Izuel E. — Mestres i Camps L. — Soler i Lecha E., *La Política Mediterránea de España: Entre el Proceso de Barcelona y la Política Europea de Vecindad*, in *Revista CIDOB d'Afers Internacionals*, 2007, 79-80, 38.

Cardwell P.J., *EuroMed, European Neighbourhood Policy and The Union for the Mediterranean: Overlapping Policy Frames in the EU's Governance of the Mediterranean*, in *Journal of Common Markets Studies*, 2011, 49, 227.

⁵¹³ Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria and Tunisia.

⁵¹⁴ Baracani E., *From the EMP to the ENP: New European Pressure for Democratisation*, in *Journal of Contemporary European Research*, 2007, 1, 56, cit.

⁵¹⁵ Cardwell P.J., *EuroMed, European Neighbourhood Policy and The Union for the Mediterranean: Overlapping Policy Frames in the EU's Governance of the Mediterranean*, in *Journal of Common Markets Studies*, 2011, 49, 227.

⁵¹⁶ *Ivi.*

systems in compliance with European standards and international standards of democracy, the rule of law and human rights (see ¶ 2.1.2.2).

For the purposes of this analysis we will put the emphasis on the fruitful cooperation the Venice Commission is carrying out with the countries of Southern Mediterranean. However, we will mention only few of the many projects the Commission is carrying out in the area. In fact, due to the numerous activities in which the Venice Commission is involved and it was involved during the year, it is not possible to mention all of them in this section.

The interconnection between the Venice Commission and the Mediterranean basin led to the implementation of several projects in Jordan, Morocco and Tunisia.⁵¹⁷ This achievement confirmed the necessity to reform State institutions as to meet international standards.⁵¹⁸

The most important results have been recorded in Tunisia, which is member to the Commission. Firstly, the dialogue started concerned the Tunisian Constitution adopted in 2014 and led to the inclusion of a large section of human rights' provision into the Constitution (see ¶ 2.2.5.4).⁵¹⁹ Taking into account the Venice Commission reports of its activities of the last years,⁵²⁰ we can notice that during the years it has collaborated with Tunisia in different fields, such as constitutional justice and organization of joint conferences with the aim of exchanging views and strengthening cooperation.⁵²¹ In particular, in 2015, the

⁵¹⁷ It is important to find out that also Algeria, Egypt and Palestine showed interest towards cooperation with the Venice Commission. Venice Commission, Annual Report of Activities 2017, 8, in [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2017\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2017)001-e).

⁵¹⁸ Venice Commission, Annual Report of Activities 2017, 8, in [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2017\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2017)001-e).

⁵¹⁹ Spada S., *I Diritti Umani quale Possibile Terreno di Dialogo tra Tradizioni Costituzionali: Il Caso della Tunisia*, Alicino F. (edited by), *I Diritti Umani nel Mondo Globale. Tradizioni Religiose e Tradizioni Costituzionali e Mare Nostrum*, Naples, Editoriale Scientifica, 2016, 220-221.

⁵²⁰ The report of 2017 is the last published.

⁵²¹ Venice Commission, Annual Report of Activities 2012, in [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2012\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2012)001-e). Venice Commission, Annual Report of Activities 2013, in [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2013\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2013)001-e). Venice Commission, Annual Report of Activities 2014, in [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2014\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2014)001-e).

Venice Commission provided support in drafting the organic law on the constitutional court,⁵²² and in 2016 and 2017, it participated in the organization of important workshops and conferences such as “The foundations of the independence of independent bodies” and “Parliamentarians and Mediators, actors of good governance”.⁵²³

The Venice Commission has developed a significant dialogue also with the Moroccan authorities.⁵²⁴ The cooperation has been focused mostly in «fields such as legislation in the human rights field, the reform of the judiciary, notably the introduction of the referral of cases on violations of fundamental rights by ordinary courts and support to the new institutions and the consolidation of the rule of law». ⁵²⁵ For example, in 2017, the Commission provided an informal opinion on the drafted organic law on the organisation of the judiciary, and also in Morocco organized seminars, workshop and conference in collaboration with others institutions in order to reinforce the cooperation.⁵²⁶

With regard to the relationship between the Venice Commission and the Jordanian authorities, we should point out that they carried out a fruitful cooperation in the field of the constitutional justice.⁵²⁷ In 2017, a delegation from Jordan visited Strasbourg where it was able to meet officials from the Council

Venice Commission, Annual Report of Activities 2015, 65 in [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2015\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2015)001-e).
 Venice Commission, Annual Report of Activities 2016, in [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2016\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2016)001-e).
 Venice Commission, Annual Report of Activities 2017, 48, in [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2017\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2017)001-e)

⁵²² The dialogue with on the new Constitutional Court is continuing.

⁵²³ Venice Commission, Annual Report of Activities 2015, 65 in [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2015\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2015)001-e).
 Venice Commission, Annual Report of Activities 2016, in [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2016\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2016)001-e).
 Venice Commission, Annual Report of Activities 2017, 48, in [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2017\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2017)001-e)

⁵²⁴ Morocco is member to the Venice Commission.

⁵²⁵ Venice Commission, Annual Report of Activities 2017, 8, cit. in [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2017\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2017)001-e).

⁵²⁶ *Ibidem*, 48.

⁵²⁷ Venice Commission, Annual Report of Activities 2017, 8, cit. in [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA\(2017\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-RA(2017)001-e).

of Europe's Departments and attend a Parliamentary Assembly in plenary session.⁵²⁸

Moreover, the Venice Commission is also involved in regional activities with the aim of implementing important projects in the MENA region. In partnership with other organizations it prepared seminars and workshops to foster the circulation of information and strengthen the cooperation between Europe and this region. For example, in the framework of the Euro-Mediterranean cooperation, the Venice Commission has organized the Intercultural workshop on democracy, which in 2017 reached its 5th edition. In this framework, an important workshop took place, namely Interaction between Constitutional Courts and similar jurisdictions and ordinary courts, which brought together «presidents of Constitutional courts, members of ordinary courts, judges and academics from Algeria, Egypt, Jordan, Lebanon, Morocco, Tunisia and Palestine and their European counterparts and Council of Europe experts for an exchange of experience and good practices».⁵²⁹

Even if the Venice Commission has not got direct influence on the application of norms it suggested, the «premise of the VC's work is the presumption that several factors can result in gradual changes».⁵³⁰ Among the factors that can lead to changes, we should mention the communication with representatives of the state and its political and social organizations, the publication of opinions and their following submission for discussion by the public, and the participation in seminars and conferences.⁵³¹ «Such changes may also include the basic conditions for the application of the law».⁵³² Hence, it might be possible that by strengthening the cooperation between the Venice Commission and the Mediterranean region, the MENA countries will assist to an improvement of their legal systems, i.e. democracy, rule of law and human rights.

⁵²⁸ *Ibidem*, 47.

⁵²⁹ *Ibidem*, 49, cit.

⁵³⁰ Hoffmann-Riem W., *The Venice Commission of the European Council – Standards and Impact*, in *European Journal of International Law*, 2014, 25, 590, cit.

⁵³¹ *Ivi.*

⁵³² *Ivi.*

However, even if the independence of the Venice Commission and its highly qualified personnel renders it a reputational authority in the field, states might be reluctant to allow the Venice Commission involvement because they might view it «as the arm of an outside authority like the EU».⁵³³

4.3 NGOs INITIATIVES: EUROMED RIGHTS

EuroMed Rights is a network of human rights NGOs fundraised by donors which links NGOs operating in the Mediterranean region. Currently, it is composed of almost 80 members from the countries of the region.⁵³⁴ It was established after the launch of the Barcelona Process on the idea that civil society of the Euro-Mediterranean region «believe in a common destiny and have a mutual interest

⁵³³ *Ibidem*, 597, cit.

Duranti F., *La Commissione di Venezia e il Diritto Comparato*, in *Diritto Pubblico Comparato ed Europeo*, 2017, 19, 255.

⁵³⁴ It follows the regular Members. Algeria: National Autonomous Union of Public Administration Staff, Coalition of Families of the Disappeared in Algeria, and Algerian League for the Defence of Human Rights; Bulgaria: Center for Legal Aid- Voice in Bulgaria; Cyprus: Action for Equality, Support, Antiracism, and Mediterranean Institute for Gender Studies; Czech Republic: People in Need; Denmark: The Danish Centre for Research and Information on Gender, Equality and Diversity, Dignity, and Danish Institute for Human Rights; Egypt: Andalus Institute for Tolerance and Anti-Violence Studies; Finland: Tampere Peace Research Institute; France: National Federation Solidarity with Women, Education League, Human Rights League, and Tunisian Federation for a Two Banks Citizenship; Greece: Greek Council for Refugees, and Greek Committee for International Democratic Society; Ireland: 80:20 Educating and Acting for a Better World; Israel/Palestine: Women's Centre for Legal Aid and Counselling, Al Mezan for Human Rights, The Public Committee Against Torture in Israel, B'tselem, Arab Association for Human Rights, The Legal Center for Arab Minority Rights in Israel, and Palestinian Center for Human Rights; Italy: Italian Refugee Council, and Associazione Ricreativa Culturale Italiana; Jordan: ARDD – Legal Aid Organization, Mizan Law Group for Human Rights, and Sisterhood is Global Institute; Lebanon: ALEF act for Human Rights, Lebanese Center for Human Rights, and Palestinian Human Rights Organisation in Lebanon; Morocco/ Western Sahara: ADALA, Moroccan Organisation of Human Rights, Espace Associatif, Moroccan Association of Human Rights, and Democratic Association of Women From Morocco; Portugal: Portuguese Human Rights League – Civitas; Spain: Spanish Commission for Refugees, Human Rights Institute of Catalonia, Federation of Associations for the Defence and the Promotion of Human Rights, and Internacionalisme Solidaritat Feminismes; Sweden: Kvinna Till Kvinna; Syria: Syrian Center for Media and Freedom of Expression, and Damascus Center for Human Rights Studies; Tunisia: Committee for the Respect of Freedom and Human Rights in Tunisia, Tunisian League of Human Rights, Tunisian Forum for Economic and Social Rights, and Tunisian Association of Democratic Women; Turkey: Helsinki Citizens' Assembly, and Human Rights Association-Turkey; the UK: Solicitors International Human Rights Group and Bar Human Rights Committee of England and Wales. Regional Members: European Association for the Defence of Human Rights, Arabic Network for Human Rights Information, Arab Institute for Human Rights Cairo Institute for Human Rights Studies and, Amara International. Associate Members: Women's International League for Peace and Freedom, World Organization Against Torture, Norwegian Helsinki Committee, Human Rights Watch, International Federation for Human Rights, Association for the Prevention of Torture and, Amnesty International (EU office).

in working closer with one another in protecting and promoting human rights».⁵³⁵ Hence, by consolidating partnership and cooperation of civil society organizations in the region, it aims at disseminating human rights values and increasing the awareness and capacity of civil society actors.

It is worth underlining that the involvement and strengthening of the civil society is a key aspect of improving human rights situation. In fact, «within various political spheres, it has been suggested that the path towards democratization by authoritarian regimes is inevitably linked to the existence of a strong civil society»⁵³⁶.

In this regard, EuroMed Rights has already reached great achievements. Indeed, it organized several regional coordination meetings between Civil Society Organizations, as the seminar organized in Brussels in 2016 which gathered several Civil Society Organizations, with the aim of exchanging best practices. Moreover, in 2017, it organized a workshop in Maghreb to improve Civil Society mobilisation and advocacy skills.⁵³⁷ The workshop was joined by over 15 Civil Society Organizations from Algeria, Morocco and Tunisia.⁵³⁸

Furthermore, in June 2018, EuroMed Rights adopted its 2018-2021 work programme. It renewed its commitment on human rights, specifying that it will focus its activity on enabling space for civil society work, migrant and refugees' protection, economic and social rights and women's rights and gender equality issues, through the promotion of networks and capacity building, advocacy work, exchange of information and the strengthening of partnerships and cooperation.⁵³⁹

⁵³⁵ EuroMed Rights, Work Programme 2018-2021, 15, cit., in https://euromedrights.org/wp-content/uploads/2018/09/Work-programme-and-Strategy-2018-2021_EN.pdf.

⁵³⁶ Feliu L., *Global Civil Society Across the Mediterranean: The Case of Human Rights*, in *Mediterranean Politics*, 2005, 10, 368, cit.

⁵³⁷ EuroMed Rights, 2015-2017 Activity Reports, 13, in <https://euromedrights.org/publication/2015-2017-activity-report/>.

⁵³⁸ We should mention that the activity carried out by the EuroMed Rights is not only aimed at monitoring MENA countries, but also European States, as for example Spain for its security law, France for its counter terrorism measures and Hungary for a restrictive NGOs law.

⁵³⁹ EuroMed Rights, Work Programme 2018-2021, 17-30, in https://euromedrights.org/wp-content/uploads/2018/09/Work-programme-and-Strategy-2018-2021_EN.pdf.

CONCLUSION

In conclusion, this research has described the main features of two regional systems of codification and protection of rights and how they interact — the European and the MENA ones — outlining their effectiveness, thus the differences/similarities they display. In addition, this work has attempted to investigate whether the cooperation between the Northern and the Southern shores of the Mediterranean basin is beneficial to the cause of human rights.

This research has been structured in the following way: The first chapter gives an overview of the international codified standards of human rights and of the extent to which they are implemented. The second chapter examines the codification of human rights, first in Europe and after in the MENA region. It analyses how the principles enshrined in regional and international conventions of human rights have been domestically receipted. Finally, it compares the two systems, indicating their points convergence and divergence. The third chapter studies the human rights enforcement mechanisms both in Europe and in the MENA. For the two regions, it analyses the regional and national systems of protection of rights, i.e. regional courts or commissions and domestic judicial systems. In addition, it provides a comparison of the abovementioned systems. The fourth chapter offers an overview of the Euro-Mediterranean cooperation. It chiefly outlines benefit of the exchange between the regions, underlining cases in which this activity has been beneficial for human rights realization. However, as mentioned in the chapter, the cooperation is not exempted from critics.

The answer to the research question — are there any similarities or differences between the European and the MENA regionals' systems of codification of human rights? Are there any similarities or differences between the European and the MENA regionals' systems of protection of human rights? May the European regime of human rights which is more efficient, influence the MENA one which is at a lower stage of development? — can be found alongside chapters 2, 3, and 4.

By comparing the European and the MENA regions' systems of human rights codification, one may argue that the MENA system are slowly making steps forwards in the direction of the enhancement of human rights codification, hence of the ECHR and UDHR. In fact, if they differ because of their origins — the ECHR is grounded on the World War II heritage likewise the UDHR, while the ACHR is based on the necessity of reconciling Sharia with the UDHR—; if they are diverse in their contents — the ECHR and the Charter of Fundamental Rights of the EU completely embraced the principles enshrined in the UDHR, while the ACHR is considered to be below them — the willingness of codifying they showed might be a common feature. What we have positively noticed is that the process of codification in the MENA, started with the implementation of the UIDHR by the states of the region, is improving. If the UIDHR is a vain attempt of human rights codification to the extent it is addressed exclusively to the Muslim community, if the CDHRI continues to be based on the Islamic law, the ACHR compared to them is a far reaching document on human rights. In addition, the Arab Spring might be seen as demonstration of this willingness. In fact, due to the 2011 uprising, several MENA states adopted new constitutions, or reformed their existing ones. Even not each of them has achieved a satisfactory level of human rights codification and protection, i.e. article 2 of the Egyptian Constitution on the status of Islamic law, however, steps forward have been made. Moreover, it is worth underlining the positive impact the Euro-Mediterranean dialogue may have with regard to the codification and the enforcement of human rights. This is the case of Tunisia. In fact, also thanks to the intense activity conducted by the Venice Commission on the ground, Tunisia adopted a Constitution with a large section dedicated to human rights.

By comparing the European and the MENA regions' systems of human rights protection, we have found out that while the European system of human rights protection is efficient and far reaching, the MENA region is practically unprepared on the issue. Firstly, it should be pointed out that national courts have primary responsibility with regards to human rights protection. In this regards, we would like to put emphasis on the different strength of the rule of law in the countries of the two regions. The rule of law in the Council of Europe's member

states is strong on average,⁵⁴⁰ while the rule of law in the MENA states is very weak.⁵⁴¹ Hence, at national level citizens enjoys different level of protection of rights. What if a citizen perceive national courts have failed to protect their rights? The answer varies from region to region. Starting from the European region, we have observed that individuals, once exhausted internal remedies, may directly refer the case to the ECtHR, which has the duty to enforce the ECHR.⁵⁴² Moreover, for the 28 EU states, the ECJ is responsible for the ultimate judicial enforcement of the Charter of Fundamental Rights of the European Union in matters covered by EU law. With regards to the MENA region, when states fail to protect citizens' right, a court to enforce the ACHR is not foreseen. The ACHR provides for an Arab Committee on Human Rights which liability is questionable. However, recently, the LAS agreed on the Statute of the ACtHR. The effort undertaken to its adoption may represent a first step toward the establishment of an effective system of protection of rights as the ECHR. However, the statute of ACtHR is not enough to guarantee human rights protection, as it is encompassed by several harmful features, nor supported by a system of independent domestic courts in most cases and by structural principles that could let the ACHR prevail over national law. Nevertheless, if modified, it might be more efficient. We believe in a further evolution of a supranational

⁵⁴⁰ It is worth remembering that there are some exceptions. For example, we cannot include Turkey and Russia in those states with a strong rule of law. By using the term rule of law we mean the authority and influence of law. To make it clear it is worth mentioning the eight principles identified by Bingham to define it in his work *The Rule of Law*:

1. The law must be accessible, clear & predictable.
2. Questions of legal rights should be resolved by the law and not the exercise of discretion.
3. The law should apply equally to all, except where objective differences justify differentiation.
4. Ministers must act within their powers and not exceed their limits.
5. The law must afford adequate protection of fundamental human rights.
6. The law should provide access to justice, especially where people cannot resolve inter-personal disputes themselves.
7. Courts and tribunal processes should be fair.
8. The state should comply with international law.

Bingham Centre for the Rule of Law, *The Rule of Law*, in <https://binghamcentre.biicl.org/schools/ruleoflaw>.

See also Bingham T., *The Rule of Law*, London, Allen Lane, 2010.

⁵⁴¹ Tunisia seems to be the only states with a stronger rule of law than other states of the region.

⁵⁴² Individual that can directly appeal to the ECtHR are the citizens of a state member to the Council of Europe, a person falling under the jurisdiction of a contracting parties or a refugee. However, the right of individual petition has been introduced after the entrance into force of Protocol No. 11 in 1998.

MENA system of codification and implementation of rights because national governments have no choice but to enforce human rights principles by improving the mechanism of the ACtHR, in order to avoid further regional crisis resulting from gross violations of human rights.⁵⁴³

Finally, by analysing the cooperation initiatives in the Mediterranean, we have found out that such an interaction between the two sides of the Mediterranean may be beneficial to the human rights' cause. As dialogue, communication with representatives of the state and the participation in seminars and conference have been mentioned as factors that led to changes,⁵⁴⁴ and several IOs and NGOs, i.e. the Union for the Mediterranean, EuroMed Rights and the Venice Commission, are carrying out the abovementioned activities in the area, one may claim that those activities may contribute to the enhancement of human rights in the Euro-Mediterranean region. To support this position, it is valuable to remember the role played by the Venice Commission. The VC's involvement in the Tunisian Constitution of 2014, contributed to the adoption of a human rights constitution whose human rights' codification makes it one of the most advanced of the region.

Therefore, this thesis has attempted to prove that although the European and MENA regions are very different because of their distinctive backgrounds and legal systems, the MENA system of codification and protection of human rights is slowly developing towards meeting international standards of human rights, hence, towards the European system. Considering the valuable impact on human rights that the EU institutions and those of the Council of Europe have had, one may argue that the intensification of the cooperation between the two regions will be beneficial.

⁵⁴³ Alshehri S., *An Arab Court of Human Rights: The Dream Desired*, in *Arab Law Quarterly*, 2016, 30, 52.

⁵⁴⁴ Hoffmann-Riem W., *The Venice Commission of the European Council – Standards and Impact*, in *European Journal of International Law*, 2014, 25, 590.

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SUMMARY

Introduction

This thesis is focused on the codification and protection of human rights in the European and MENA regions. On the one hand human rights are the «foundation of freedom, justice and peace in the world»;⁵⁴⁵ on the other hand a comparison might be valuable in the framework of the Mediterranean as common space of dialogue, stability, human development and integration.

Hence, this thesis attempts to answer the following research question: Are there any similarities or differences between the European and the MENA regionals' systems of codification of human rights? Are there any similarities or differences between the European and the MENA regionals' systems of protection of human rights? May the European regime of human rights which is by far more effective, influence the MENA one which is at a lower stage of development?

Chapter 1- Introduction: Towards a process of codification and protection of human rights

The aim of this chapter is to make an excursus on the origin and development of human rights codification, as well the international mechanisms of protection. Despite the efforts undertaken by the international community to achieve human rights full implementation, their enforcement is problematic. On the one hand, human rights have been codified in several international conventions; on the other hand, several violations of human rights repeatedly occur.

Human rights have been globally recognized with the adoption, in 1948, of the Universal Declaration of Human Rights signed by 48 of 58 states.⁵⁴⁶

⁵⁴⁵ Universal Declaration of Human Rights, Preamble, in https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

⁵⁴⁶ Eight countries abstained: Czechoslovakia, Poland, Saudi Arabia, Soviet Union, Byelorussian SSR, Ukrainian SSR, South Africa and Yugoslavia. Two countries did not take part to the vote: Honduras and Yemen.

Nevertheless, they trace their origins in ancient times. They are grounded in natural law, developed by western scholars in the course of the centuries and codified into international conventions.

Before moving on, it is worth underlining that human rights are considered to be universally valid because they «are intrinsic to the human person and their dynamics of evolution are inherently immutable; therefore, they belong to all human beings and apply to all human societies to an identical extent, irrespective of cultural differences among them».⁵⁴⁷ In fact, even if they have been primarily promoted by western societies, some principles on which human rights are grounded, have been found in different cultures, i.e. the Confucian practice,⁵⁴⁸ the Buddhist belief,⁵⁴⁹ and the Islamic tradition.⁵⁵⁰

The idea of human rights, spreads out since the early centuries with the Canon Law and the Roman Law. Roman philosophers, such as Cicero and Seneca, were convinced that freedom is an innate human condition which each human being should enjoy. However, in this period we cannot properly talk about human rights but rather about natural rights. Natural rights are rooted in the human being condition.⁵⁵¹ Men are born free and with dignity. Therefore, law should be aimed at protecting these conditions. In fact, as men are endowed by free will, they might endanger freedom and dignity of other people. In addition, the concept of natural law as human rights ground has been further developed during the centuries by many philosophers and scholars, as Aquinas, Pico della Mirandola, Grotius, Hobbes, Locke and Rousseau.

However, it should be pointed out that if a society would have been regulated only by natural rights, people life would have been characterized by

⁵⁴⁷ Lenzerini F., *The Culturalization of Human Rights Law*, Oxford, Oxford University Press, 2014, 4, cit.

⁵⁴⁸ Lenzerini F., *The Culturalization of Human Rights Law*, Oxford, Oxford University Press, 2014, 1.

⁵⁴⁹ Sen A., *Human Rights and Asian Values*, in *Carnegie Council for Ethics in International Affairs*, 1997, 170-193.

⁵⁵⁰ Abdullahi A.A., *Toward an Islamic Reformation. Civil Liberties, Human Rights and International Law*, Syracuse (N.Y.), Syracuse University Press, 1996, 230.

⁵⁵¹ Lenzerini, F., *The Culturalization of Human Rights Law*. Oxford: Oxford University Press, 2014 pg. 47, 1-2.

instability.⁵⁵² Thus, codified rules are indispensable to make people live in an ordered world.⁵⁵³ It follows the affirmation of legal positivism: Positive law began the primary source of law at least in continental Europe and in the great part of the Western world.

Human Rights codification, as intended today, occurred in the aftermath of the two world wars of the XX century. The paramount document enshrined with the principle of human rights is the UDHR adopted in 1948 with the aim of never repeating again the cruelties of the Nazi Regime. For the very first time, a universal document sets out common standard to be achieved concerning human rights. In fact, the UDHR aims at protecting individuals and groups against violence that may interfere with their human rights that are universal, indivisible, interdependent, inalienable and interrelated.⁵⁵⁴

The Declaration is not binding; however the great moral force it is endowed with has influenced the development of further international law on the matter, paving the way for the adoption of further conventions.⁵⁵⁵ For example, in 1959, the Declaration on the right of the Child was adopted, and in 1963 it is the turn of the Declaration on racial discrimination. In 1966 the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were agreed. By setting human rights minimum standard to comply with, states have guidelines to achieve full human rights realization.⁵⁵⁶

Whether nations have agreed on human rights content, the gap between codification and effective protection has not be filled yet. Violations occur because nations are incapable or unwilling of respecting international law norms and they lack institutions that guarantee human rights protection. Since the biggest challenges to human rights are represented by institutional inefficiency

⁵⁵² Bobbio N., *Giusnaturalismo e Positivismo Giuridico*, Rome- Bari, Editori Laterza, 2011, 14.

⁵⁵³ *Ivi*.

⁵⁵⁴ OHCHR, *Human Rights and Indicators: Rationale and Some Concern*, 10, cit., in http://www.ohchr.org/documents/issues/HRIndicators/AGuideMeasurementImplementationChapterI_en.pdf.

⁵⁵⁵ Conforti B. — Focarelli C., *The Law and Practice of the United Nations*, Leiden-Boston, Martinus Nijhoff, 2010, 359.

⁵⁵⁶ Boyle K, *New Institutions for Human Rights Protection*, Oxford, Oxford University Press, 2009, 1.

and “general situations”, IOs and NGOs work to monitor, denounce and give assistance to countries in human rights realization.

The Human Rights Council and the OHCHR, together with the General Assembly are the fundamental UN endowed with the task of protecting human rights. For instance, the Universal Periodic Review (UPR) represents «a key mechanism of the Human Rights Council to review the human rights situation of all United Nations Member States in a four and half year cycle».⁵⁵⁷ Moreover, the Special Procedure and the Complaint procedure, also regulated by the Human Rights Council, are noteworthy with regards to human rights monitoring and enforcement. In addition, NGOs, through their accurate analysis, are able to influence governments, companies and decision-makers to adopt fair policies. To this scope, they may use petitions, protests and campaigns aimed at pressing governments in protecting human rights and ceasing violating them.

Finally, we should briefly remark that even if sovereign states have the primary responsibility to punish criminals, the international community is trying to establish international criminal courts to punish individuals for international crimes, hence crimes against humanity, crimes against peace, genocide, and war crimes, i.e. the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

Chapter 2- Codification of human rights at regional level: The European and the MENA regions

The second chapter is focused on the codification of human rights at regional level and its implications. Regional treaties have been elaborated to render human rights protection more efficient and to extend their sphere of action, including both civil and political rights and economic, social and cultural rights.⁵⁵⁸ In particular, this chapter aims at showing how codification of human

⁵⁵⁷ OHCHR, *Human Rights and Indicators: Rationale and Some Concern*, p.15, cit., in http://www.ohchr.org/documents/issues/HRIndicators/AGuideMeasurementImplementationChapterI_en.pdf.

⁵⁵⁸ Office of the High Commissioner for Human Rights and the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges*,

rights occurs in the European and the MENA regions, in the spirit of an enhancement of the cooperation between the two areas. As the Euro-Mediterranean region is facing common challenges and is growing fast in terms of political importance and of strategic significance, we believe that cooperation between Europe and the MENA is necessary to guaranteeing their citizens same level of rights' enjoyment. Hence, the comparison of the two systems is useful to find out which are their current differences and to reflect on how one system can influence the other and vice versa, in a perspective of a mutual enhancement. However, it should be pointed out that the two systems are at different stages of development. Europe has consolidated its codification and mechanism of supervision of human rights, while the MENA region is moving its first steps on the issue, mostly after the uprisings of 2011. Hence, it is more likely that Europe will influence the MENA system than the reverse.

Codification in the European region

Codification of human rights at European level started soon after the adoption of the UDHR of 1948, which was considered to be too weak to guarantee human rights protection, because of the difficulties encountered in drafting binding documents and in establishing a control mechanism.⁵⁵⁹

The ECHR was the outcome of a long drafting process because not everybody agreed on the necessity of adopting a chart of human rights on a regional basis. On the one hand, several critics aroused with respect to the control mechanism foreseen by the Convention, on the other hand "pro-Europeans" supported its adoption because of the fear of the spread of communism and «for free Europe to come up with a human rights document enshrining its ardent belief in human rights and democracy».⁵⁶⁰ Hence, the Council of Europe in 1950 adopted the

Prosecutors and Lawyers, UN, New York and Geneva, 2003, 72, in <https://www.ohchr.org/Documents/Publications/training9Titleen.pdf>.

⁵⁵⁹ European Court of Human Rights, *The Conscience of Europe: 50 Years of the European Court of Human Rights*, 18, in https://www.echr.coe.int/Documents/Anni_Book_Chapter01_ENG.pdf.

⁵⁶⁰ Bates E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 4-6.

European Convention on Human Rights, which entered into force on 3 September 1953, The ECHR is composed of 59 articles, plus several Additional Protocols. The sphere of action of the Convention has been extended during the years with the adoption of new protocols since, if it was conceived as collective pact against totalitarianism, it has been converted into a sort of European Bill of Rights.⁵⁶¹ Moreover, codification of human rights at European level has gone further with the adoption of the European Social Charter in 1961 and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1987.

It should be underlined that, according to Article 1 of the ECHR, its incorporation into national legal systems is one of the central point of this Convention. To this regard, we must consider the ratification process and the rank states gave domestically to the convention. Firstly, in 1953, States after the long drafting process ratified the Convention without uprising particular objections.⁵⁶² However, after the enlargement of Council of Europe's membership, new members made resistance, especially on the ratification of some Protocols.⁵⁶³ Secondly, ECHR implementation depends on the relationship foreseen between constitutional law and international treaties.⁵⁶⁴ A more monist approach toward the ECHR will favour its coordination with the national legal order, while a more dualist approach will threat the coordination between national legislation and international treaties. However, it is worth specifying that in most countries, the ECHR enjoy a more privileged status than other international treaties. For example, in some states, as Germany and Italy, in which the ECHR has a legislative ranking and not a constitutional one,

⁵⁶¹ Bates E., *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford, Oxford University Press, 2010, 118.

⁵⁶² They upraised objections on the creation of a supervision mechanism.

⁵⁶³ When the ECHR was adopted, the Council of Europe was composed of 12 member states, while now 47 states are members of the CoE.

⁵⁶⁴ Keller H. — Stone Sweet A., *The Reception of the ECHR in National Legal Orders*, in Keller H. — Stone Sweet A. (edited by), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, Oxford, Oxford, University Press, 2008, 20.

Constitutional Courts «clarified that the ECHR has a special force that exceeds the normal constitutional discipline of international norms».⁵⁶⁵

Although all member states of the European Union have ratified the European Convention on Human Rights, the EU is not a party to the ECHR yet. Nevertheless, Article 6 of the Treaty of the European Union (TEU), as revised after the Lisbon Treaty of 2009, foresees the EU accession to the ECHR and it adopts the Convention — also as regards to the Charter's interpretation — as a standard for the EU action. In 2014 the European Court of Justice with the opinion 2/13 found that the Draft Accession Agreement (DAA) was not compatible with the EU law.⁵⁶⁶ However, it is not excluded that in the future negotiations may restart. In this case, some adjustments are needed, as for example, the modification of the DAA and the withdrawal of member states reserves on the ECHR.⁵⁶⁷ Even if the EU is not a party to the convention, it works to reinforce the authority of the ECHR into EU member states and vis-à-vis EU institutions. On the one hand, the ratification of the ECHR became a pre-requisite for EU membership, while on the other hand the EU has codified fundamental rights on its own to the point that the European institutions in 2000 proclaimed the Charter of Fundamental Rights of the European Union, which acquired full legal effect in 2009 with the entrance into force of the Treaty of Lisbon.

With regard to the European region, we should finally underline that the CoE remained almost entirely a Western European institution until the fall of communism, when it enlarged its membership to Central and Eastern European states. The CoE expansion to some extent has transformed and reinforced the role of the European Convention on Human Rights and the European Court of

⁵⁶⁵ Martinico G., *Is the European Convention Going to Be "Supreme"? A Comparative Constitutional Overview of ECHR and EU Law before National Courts*, in *European Journal of International Law*, 2012, 23, 404, cit.

⁵⁶⁶ Opinion 2/13, European Court of Justice, in <http://curia.europa.eu/juris/celex.jsf?celex=62013CV0002&lang1=it&type=TEXT&ancre=>.

⁵⁶⁷ Cherubini F., *In Merito al Parere 2/13 della Corte di Giustizia dell'UE: qualche Considerazione Critica e uno Sguardo de Jure Condendo*, in *Osservatorio Costituzionale*, 2015, 2, 27-28.

Human Rights.⁵⁶⁸ Until the beginning of the 90s the European Court of Human Rights was rarely involved in cases concerning serious perpetration of human rights.⁵⁶⁹ When the former communist countries acceded to the CoE and to the Convention, the Court found itself tackling severe violations of rights and general deficiencies of national institutions. Hence, the Court «ceased being a “fine-tuner” of national legal systems, and was compelled instead to adopt a role of policing national systems which suffered important systemic deficiencies (...), and in which serious rights violation occurred».⁵⁷⁰ Furthermore, an important role in helping constitutional transition of ex-communist states was played by the Venice Commission, which its aim is of providing legal advice to its member states and provide them with assistance in building institutions and a legal system in compliance with European standards and international standards of democracy, the rule of the law and human rights.

Codification in the MENA region

Human rights to be universally valid should be perceived as so by the whole community of the states. On the one hand, the majority of the states, including several countries with a Muslim majority, have signed the most important charts and conventions on human rights. On the other hand, they assert that «cross-cultural differences might need to be taken into account in fine-tuning human rights standards and their implementation».⁵⁷¹ Several Muslim states, in the framework of the Vienna Declaration and Programme of Action of 1993 have underlined the need of taking into account cultural differences when tackling with human rights. In this perspective, they have tried and continue to give their response to human rights in accordance with the Islamic law, thus with the Sharia, the holy law revealed to the *umma* by the prophet Muhammad. If on the one hand the Sharia has been considered by many scholars to be incompatible with human rights universally recognized, on the other hand the principle of

⁵⁶⁸ Sadurski W., *Constitutionalism and the Enlargement of Europe*, Oxford, Oxford University Press, 2012, 2-4.

⁵⁶⁹ *Ivi.*

⁵⁷⁰ *Ibidem*, 4, cit.

⁵⁷¹ Mayer A.E., *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, in *Michigan Journal of International Law*, 1994, 15, 376, cit.

reciprocity might constitute the basis for human rights universality.⁵⁷²

In this perspective, it is understandable why the relationship between international human rights and Islamic tradition is complex. In fact, the necessity of an Islamic codification of human rights was born from the inconsistency between human rights and Islamic law.⁵⁷³ The Universal Islamic Declaration of Human Rights of 1981 (UIDHR) is the first attempt of Islamic codification in the field of human rights, and it represents the Islamic response to the UDHR. Hence, its aim is of reconciling the universal human rights of the UDHR with the Islamic perspective. However, this attempt seems to be vain to the extent in which the declaration is exclusively addressed to the *umma*.⁵⁷⁴ Moreover, as the entire declaration is based on the Sharia, we can derive that the spirit of the Islamic Declaration is to justify the existence of human rights as grounded on religious law.⁵⁷⁵

The second Islamic attempt of codifying human rights is represented by the Cairo Declaration on Human Rights in Islam (CDHRI) of 1990. However, although the Declaration does not reject human rights principles, as the Islamic Declaration of 1981, it is based on the Islamic law. In fact, several limitations have been attached to certain rights in the name of the Sharia and the Declaration foresees a clause stating that it has to be interpreted only according to the Sharia.⁵⁷⁶

In this framework in 2004 the League of Arab State adopted Arab Charter on Human Rights. Since the Charter makes only few explicit referrals to the Islamic law, it is considered to be revolutionary: The Charter put the emphasis on the

⁵⁷² Abdullahi A.A., *Toward an Islamic Reformation. Civil Liberties, Human Rights and International Law*, Syracuse (N.Y.), Syracuse University Press, 1996, 238-240.

⁵⁷³ Azeef Maruf Olayemi A., — Majeed Hamzah Alabi A. — Hidayah Buang A., *Islamic Human Rights Law: A Critical Evaluation of UIDHR & CDHRI in Context of UDHR*, in *Journal of Islam, Law and Judiciary*, 2015, 1, 30.

⁵⁷⁴ Alicino F. — Gradoli M., *L'Islam del XXI Secolo e gli International Human Rights*, in Decaro Bonella C. (edited by), *Tradizioni Religiose e Tradizioni Costituzionali. L'Islam e L'Occidente*, Rome, Carocci Editore, 2003, 153.

⁵⁷⁵ *Ibidem*, 154.

⁵⁷⁶ *Ibidem*, 254.

Arab national identity, instead of on the religion.⁵⁷⁷ However, several problems already encountered by the Cairo Declaration have not been overcome, i.e. the absence of an enforcement mechanism, the ambiguity on the death penalty.

Finally, it should be considered the incorporation of human rights law into the national legal orders and the impact of the Arab Spring on this process. Even if 14 out of the 22 states of the LAS have ratified the Charter, the lack of an enforcement mechanism makes its implementation into domestic legislations difficult.⁵⁷⁸ States are required to present to the Arab Committee reports on human rights status in their countries every three years. However, national governments are responsible for sending reports to the Committee, thus they are free to represent the national situation as they choose, perhaps with the possibility of masking human rights perpetrations. With regards to international human rights treaties, even if several Arab States are party to them, they have subjected ratification of international treaties to broad reservations.

The lack of human rights protection was one of the causes of the Arab revolts of 2011, that in some countries led to an “improvement” on human rights condition. People were calling for the end of authoritarian regimes and the establishment of democratic institutions.⁵⁷⁹ In fact, mass demonstrations led to the overthrow of several regimes.⁵⁸⁰ However, the transition process has demonstrated to be complex. Civil wars, and popularity of terroristic organisation spread across the region. Jordan, Morocco and Tunisia seems to be the only countries involved in the Arab spring which have not been affected by such a level of violence, while in Egypt, despite the hard repression of riots, significant regime’s changes have been recorded.

⁵⁷⁷ *Ibidem*, 161.

⁵⁷⁸ Rishmawi M., *Arab Charter on Human Rights (2004)*, in Max Planck Encyclopedia of Public International Law, Oxford, 2008, in <http://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1913?print=pdf>.

⁵⁷⁹ *Ivi*.

⁵⁸⁰ Corrao F., *Islam, Religion and Politics*, Rome, Luiss University Press, 2017, 139.

Protests in Jordan triggered a top down process which led to a reform of constitution, ensuring the regime's institutional continuity. Demonstrations in Morocco led to the adoption of a new constitution, announced by King Mohammad VI in June 2011. Uprisings in Tunisia led to the fall of President Ben Ali, which paved the way for a reconstruction of political arenas, triggering the constitutional transition.⁵⁸¹ In fact, the new Tunisian Constitution was approved in 2014. Revolts in Egypt led to the overthrowing of President Mubarak and the adoption of two new constitutions respectively in 2012 and 2014.

A comparison

The comparison itself presents some limits due to different backgrounds of the two regions, diverse commitments of national and international actors and dissimilar aims.

First of all, we should remember that the European and MENA systems of human rights codification trace their origins in different traditions. The ECHR is grounded on the World War II heritage likewise the UDHR, while the ACHR is based on the necessity of reconciling Sharia with the UDHR. Furthermore, they differ in their contents. If the ECHR and the Charter of Fundamental Rights of the EU completely embraced the principles enshrined in the UDHR, the ACHR is considered to be below them.

However, the willingness of codifying they showed might be a common feature. What we have positively noticed is that the process of codification in the MENA, started with the implementation of the UDHR by the states of the region, is improving. If the UDHR is a vain attempt of human rights codification to the extent it is addressed exclusively to the Muslim community, the ACHR compared to them is a far reaching document on human rights. In addition, the Arab Spring might be seen as demonstration of this willingness. In fact, due to the 2011 uprising, several MENA states adopted new constitutions, or reformed

⁵⁸¹ Volpi F., *Revolution and Authoritarianism in North Africa*, Oxford, Oxford University Press, 2017, 6.

their existing ones. Even not each of them has achieved a satisfactory level of human rights codification and protection, however, steps forward have been made.

Chapter 3- Protection of human rights at regional level: The European and the MENA regions

The third chapter aims at analysing how codified human rights law is enforced regionally, as codification is not necessarily translated into effective mechanisms of control. Several regions that have adopted Conventions on human rights, have set up judicial or quasi-judicial organs with the aim of supervising their implementation. Other regions such as the MENA and the South-eastern Asia are at an earlier stage of development with regards to human rights protection. In particular, the attention is focused on the European and MENA regions because of strategic importance of the area. However, it is worth underlining that the re-enactment of the two systems of protection of human rights, especially with regards to the European region, is without pretensions of exhaustiveness, as it aims at furnishing the parameters of comparison with the MENA region.

Protection in the European region

Protection of human rights in Europe occurs at three different levels, according to what has been referred to as the European multilevel architecture.⁵⁸² In fact, fundamental rights are protected at national level by states, at supranational level by the European Union and at international level by the ECHR. Each level of this complex structure is characterized by its catalogue of rights and its enforcement mechanism.

The ECHR at article 19 foresees the establishment of a Court that was set up only in 1959. Before its establishment, the European Commission on Human Rights and the Committee of Ministers were the only responsible of the control mechanism. In 1959, when the Court was established, the individual petition

⁵⁸² Fabbrini F., *Fundamental Rights in Europe*, Oxford, Oxford University Press, 2014, 6-7.

mechanism was not foreseen. The introduction of the right of individual petition in 1998 with the entrance into force of Protocol No. 11 will represent the transformation of the Convention and its turning point. In fact, since it aimed at «rationalise the machinery for enforcement of rights and liberties guaranteed by the Convention»,⁵⁸³ it restructured the control machinery. Moreover, both Protocol No. 14 and 16 entered into force respectively in 2010 and 2018, represent a reformation of the Court. Protocol No. 14 introduced new admissibility criterion, the treatment of repetitive cases and it clarified the inadmissible cases.⁵⁸⁴ Protocol No. 16, «allows the highest courts and tribunals of a High Contracting Party, (...), to request the European Court of Human Rights to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols».⁵⁸⁵ Hence, when a citizen of a state member to the Council of Europe, or a person falling under the jurisdiction of a contracting parties or a refugee, think that their human rights have been violated, they can appeal to the ECtHR.⁵⁸⁶ If the ECtHR finds that a violation has occurred, the state responsible for the violation has the legal obligation to end it and repair its consequences (art. 41).⁵⁸⁷ With regards to further mechanism of control in the framework of the Council of Europe, it is worth mentioning the implementation mechanism of the European Social Charter of 1996 and the monitoring mechanism foreseen by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

⁵⁸³ Council of Europe, *Details of Treaty No. 155*, in <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/155>.

⁵⁸⁴ Council of Europe, *Details of Treaty No. 194*, Strasbourg, 2004, in <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/194>.

⁵⁸⁵ Council of Europe, *Details of Treaty No. 214*, Strasbourg, 2013, in <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214>.

⁵⁸⁶ The Court is composed of a number of judges equal to the number of member states of the Council of Europe. Judges are elected by the Parliamentary Assembly of the Council of Europe for a non-renewable term of nine years.

⁵⁸⁷ Fillol Mazo A. — Gallego Hernández A.C., *Introductory Note. General Obligations of the States Parties Under the Decisions of the European Court of Human Rights in 2014*, in Ziccardi Capaldo G. (edited by), *The Global Community Yearbook of International Law and Jurisprudence 2015*, Oxford, Oxford University Press, 2016, 673.

The Court of Justice of the European Union also plays an important role in the framework of human rights protection in the European region.⁵⁸⁸ In fact, the introduction of fundamental rights protection at supranational level through case law has been one of the main achievements of the European Court of Justice.⁵⁸⁹ Since the EU Charter of Fundamental Rights is binding in EU countries, national governments must apply the Charter provisions. In fact, by becoming binding the Charter acquired the status of EU primary law. As such, it enjoys the principle of direct effect, and of primacy. Nevertheless, even if the Charter has the same legal values as the treaties, several controversies arise while invoking horizontal applicability. With regards to the relationship between the Court of Justice of the EU and the ECtHR, we should underline that even if the EU is not part to the ECHR the ECJ has incorporated both the ECHR provisions and the decisions of the ECtHR into its jurisprudence.⁵⁹⁰

As states have the primary responsibility with regards to human rights protection, each state should guarantee to their citizens a full enjoyment of their rights. In fact, protection of human rights has been one of the main features of the constitution adopted by European countries after World War II. Europe-wide, states started to adopt «binding catalogue of fundamental rights enshrined in basic laws and safeguarded by the creation of specialized constitutional courts based on the Kelsenian model».⁵⁹¹ Nevertheless, the national judiciary is facing the challenge of ECtHR and the European Court of Justice. The European Court of Human Rights must act according to the principle of subsidiarity, namely all the domestic remedies have been exhausted. However, as stated by Article 32 of the ECHR, the Court has final jurisdiction over «all matters concerning the interpretation and application of the convention».⁵⁹² Furthermore, with regard to

⁵⁸⁸ The Court of Justice of the European Union is composed of a Court of Justice itself, the General Court. The Court of Justice is the ultimate interpreter of EU law and it is composed of 28 judges (one from each EU country) plus 11 advocates general. The General Court that has jurisdiction on specific issue can be considered as a court of first instance and it is composed of 56 justices.

⁵⁸⁹ Fabbrini F., *Fundamental Rights in Europe*, Oxford, Oxford University Press, 2014, 9.

⁵⁹⁰ Defeis E.F., *Human Rights and the European Court of Justice: an Appraisal*, in *Fordham International Law Journal*, 2007, 31, 1114.

⁵⁹¹ Fabbrini F., *Fundamental Rights in Europe*, Oxford, Oxford University Press, 2014, 7, cit.

⁵⁹² Keller H. — Stone Sweet A., *The Reception of the ECHR in National Legal Orders*, in Keller H. — Stone Sweet A. (edited by), *A Europe of Rights: The Impact of the ECHR on National*

the relationship between the Court and the national legal order, it is interesting that the Court can function both as a Constitutional Court or a High Court of Appeal or a Court of Cassation depending the situation which is being dealt with.⁵⁹³ Finally, we should mention that the introduction of Protocol No. 11, concerning the individual complaint procedure, might lead to a conflict between national courts and the ECtHR. With regards to the relationship between national judges and the European law, each national judge has the duty of interpreting the EU legislation, in this specific case the Charter of Fundamental Rights of the European Union. However, the autonomy of interpretation national judges is endowed with, is leading to a fragmentation in the EU system. Therefore, «misunderstandings about the interpretation and validity of primary and secondary EU law can seriously hamper the effective application of EU law (“*effet utile*”) at the national level».⁵⁹⁴ The instrument to guarantee uniform interpretation and application of the EU law is the preliminary ruling proceeding foreseen by article 267 TFEU with the aim of providing support to national courts.⁵⁹⁵

Protection in the MENA region

In 2011 Arab Spring spread out to the MENA region to overthrow authoritarian regimes and to ask an enhancement of human rights protection across the region. Therefore, mechanisms of human rights protection are at an early stage of development because the region is still transforming. Protection of human rights in MENA region occurs mostly at national level because there are not any regional organizations endowed with a strong power of protection.

National protection of human rights depends on the degree of development and accountability of the institutions. In particular, the judicial system and security

Legal Systems, Oxford, Oxford, University Press, 2008, 10; and Council of Europe, Convention for the protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, cit., in https://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁵⁹³ *Ibidem*, 13.

⁵⁹⁴ De Werd M., *Dynamics at Play in the EU Preliminary Ruling Procedure*, in *Maastricht Journal of European Comparative Law*, 2015, 22, 150, cit.

⁵⁹⁵ *Ivi*.

sector are strictly linked to human rights performance.⁵⁹⁶ In fact, «the security sector is an important bulwark of the authoritarian regime. The judiciary has been its accomplice, upholding the powers of the regime and denying appeals from its victims. Together they have helped transform abstract political power into the reality of repression».⁵⁹⁷ Hence, to truly understand how human rights have improved after the Arab Spring it is worth analysing how and if the judicial system and security sectors changed.

In Egypt, even if the Egyptian's two steps process of codification of human rights led to an enhancement of their codification the judicial system lacks of accountability and the armed forces play an excessive influential role which, as we have already underlined, is difficultly compatible with human rights protection. Constitutional reforms adopted by Jordanian authorities after the Arab Spring aimed at improving the judicial system. However, the King is still exercising a vast power over all the judicial system to the point that the judiciary cannot be considered independent. Morocco faces a similar situation. In fact, Even if reforms have been adopted on the wave of the Arab Spring, in practice many civil liberties are limited because of King Mohammed VI maintenance of «dominance through a combination of substantial formal powers and informal lines of influence in the state and society».⁵⁹⁸ A different situation is recorded in Tunisia. The revolution of 2011 led to a reformation of the judicial system, that even if it is to some extent below international standards, the future establishment of a Constitutional Court foreseen by the Constitution of 2014 may ensure the independence of the judiciary. Moreover, the establishment of a Constitutional Court is a central point for human rights recognition in Tunisia, because it will evaluate the constitutionality of decrees and law with the Constitution, hence if laws are in compliance with human rights constitutionally recognized.

⁵⁹⁶ Waltz S., *Linking Transitional Justice and Human Rights*, in Sriram C. (edited by), *Transitional Justice in the Middle East and North Africa*, Oxford, Oxford University Press, 2017, 15.

⁵⁹⁷ *Ivi*, cit.

⁵⁹⁸ *Ivi*.

With regard to regional protection of human rights we should underline that the Arab Charter on Human Rights of 2004 established an Arab Human Rights Committee, but with a very limited role. In fact, «the Committee's role is not that of a guardian or protector of human rights but supervisory», with the only task of analysing periodic states reports.⁵⁹⁹ Moreover, in 2014, Member States of the League of the Arab States approved the Statute of the Arab Court of Human Rights (ACtHR). However, the Statute is not attached to the Arab Charter on Human Rights, but it is conceived as an autonomous treaty body affiliated to the LAS «seeking to consolidate the contracting parties' will to implement their obligations pertaining to human rights and fundamental freedoms».⁶⁰⁰ Moreover, the lack of transparency of the drafting process, the provisions regarding the independence of judges, the access to the Court and the subject-matter jurisdiction of the Court endangers the effectiveness of the Court. In fact, although the ACtHR is not operative because of a lack of ratification, seventeen «leading national and international human rights organizations sent a letter on 31 August 2014 to the LAS Ministers of Foreign Affairs, urging them to defer action on the adoption of the Statute». Moreover, the International Commission of Jurists presented suggestions to amend the Statute as to meet international standards.

A comparison

The comparison itself presents some limits due to different backgrounds of the two regions, diverse willingness of national and international actors and dissimilar aims.

However, by comparing the European and the MENA regions' systems of human rights protection, we have found out that while the European system of

⁵⁹⁹ Magliveras K — Naldi G., *Arab Court of Human Rights: A Study in Impotence*, in *Revue Québécoise de Droit International*, 2016, 29, 155, cit.

⁶⁰⁰ Magliveras K. — Naldi G., *Arab Court of Human Rights: A Study in Impotence*, in *Revue Québécoise de Droit International*, 2016, 29, 158, cit;

Article 2 of the ACtHR «Within the framework of the League of Arab States, an Arab Court of Human Rights shall be established as an independent Arab judicial body that aims at consolidating the State Parties' will in implementing their obligations regarding human rights and his freedoms; its composition, jurisdiction and method of work shall be governed by the Statute and the Rules of Court».

human rights protection is efficient and far reaching, the MENA region is practically unprepared on the issue. As national courts have the primary responsibility with regard to human rights protection, we should put emphasis on the different strength of the rule of law in the countries of the two regions. The rule of law in the Council of Europe's member states is strong on average,⁶⁰¹ while the rule of law in the MENA states is very weak.⁶⁰² Hence, at national level citizens enjoys different level of protection of rights. Moreover, at regional level the ECHR provides for the ECtHR, which has the duty to enforce the Convention, and, for the 28 EU states, the ECJ is responsible for the ultimate judicial enforcement of the Charter of Fundamental Rights of the European Union in matters covered by EU law. By contrast the ACHR provides for an Arab Committee on Human Rights which liability is questionable. However, recently, the LAS agreed on the Statute of the ACtHR. However, the statute of ACtHR is not enough to guarantee human rights protection, as it is encompassed by several harmful features, nor supported by a system of independent domestic courts in most cases and by structural principles that could let the ACHR prevail over national law.

⁶⁰¹ It is worth remembering that there are some exceptions. For example, we cannot include Turkey and Russia in those states with a strong rule of law.

By using the term rule of law we mean the authority and influence of law. To make it clear it is worth mentioning the eight principles identified by Bingham to define it in his work *The Rule of Law*:

1. The law must be accessible, clear & predictable.
2. Questions of legal rights should be resolved by the law and not the exercise of discretion.
3. The law should apply equally to all, except where objective differences justify differentiation.
4. Ministers must act within their powers and not exceed their limits.
5. The law must afford adequate protection of fundamental human rights.
6. The law should provide access to justice, especially where people cannot resolve inter-personal disputes themselves.
7. Courts and tribunal processes should be fair.
8. The state should comply with international law.

Bingham Centre for the Rule of Law, *The Rule of Law*, in <https://binghamcentre.biicl.org/schools/ruleoflaw>.

See also Bingham T., *The Rule of Law*, London, Allen Lane, 2010.

⁶⁰² Tunisia seems to be the only states with a stronger rule of law than other states of the region.

Chapter 4- Cooperation between the European and the MENA regions in the field of human rights: A brief overview

This last conclusive chapter aims at showing initiatives of cooperation in the Euro-Mediterranean region. Cooperation has demonstrated to be fruitful in certain occasions, but it has not been exempted from critics. In fact, on the one hand human rights conditionality clause has been considered to some extent hypocrite to the point that the hypocrisy distinguishing the human rights mainstreaming conception in Euro-Mediterranean relations has been compared to «Pot Luck, Emile Zola's most acerbic satire, examines the contradictions that pervade bourgeois life to reveal a multitude of betrayals and depict a veritable 'melting pot' of moral and sexual degeneracy».⁶⁰³ On the other hand, dialogue may have a great impact on human rights fostering a common understanding and leading to their enhancement.⁶⁰⁴

In the framework of the EU external action, one of the first objectives to be achieved in order to foster stability and peace in the Mediterranean is the respect of human rights, rule of law and democracy.⁶⁰⁵ In this perspective dialogue is fostered through the Euro-Mediterranean Partnership (EMP) and the European Neighbourhood Policy (ENP). In the framework of the Council of Europe, the Venice Commission (VC) action in the area is noteworthy. Its relationship with the countries of the Mediterranean Basin led to the implementation of several projects in Jordan, Morocco and Tunisia. For example, the dialogue started between the VC and the Tunisian authorities concerning the Tunisian Constitution adopted in 2014, led to the inclusion of a large section of human rights' provision into the Constitution.⁶⁰⁶ Finally, in the framework of NGOs,

⁶⁰³ Ippolito F., *Mainstreaming Human Rights in EuroMed Bilateral Relations*. "The Road to Hell is Paved with Good Intentions", in Ziccardi Capaldo G. (edited by), *The Global Community Yearbook of International Law and Jurisprudence 2016*, Oxford, Oxford University Press, 2017, 89, cit.

⁶⁰⁴ Sadun G., *Diritti Umani e Dialogo Euro-Mediterraneo: Un Approccio "Minimalista"*, in *Persona y Derecho*, 2008, 58, 120.

⁶⁰⁵ Barcelona Declaration and Euro-Mediterranean Partnership, in <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:r15001&from=IT>.

⁶⁰⁶ Spada S., *I Diritti Umani quale Possibile Terreno di Dialogo tra Tradizioni Costituzionali: Il Caso della Tunisia*, Alicino F. (edited by), *I Diritti Umani nel Mondo Globale. Tradizioni*

EuroMed Rights works to foster dialogue between the two side of the Mediterranean, basing its work on the idea that civil society of the Euro-Mediterranean region «believe in a common destiny and have a mutual interest in working closer with one another in protecting and promoting human rights».⁶⁰⁷

Conclusion

By comparing the European and the MENA regions' systems of human rights codification, one may argue that, despite several differences between the two systems, the MENA one is slowly making steps forwards in the direction of the enhancement of human rights codification and enforcement, hence of the ECHR, the EU Charter of Fundamental Rights and UDHR. By comparing the European and the MENA regions' systems of human rights protection, we have found out that while the European system of human rights protection is effective overall and far reaching, also thanks to the role played by domestic courts, the MENA region is practically unprepared on the issue. Finally, by analysing the cooperation initiatives in the Mediterranean, we have found out that such an interaction between the two sides of the Mediterranean may be beneficial to the human rights' cause.

Therefore, this thesis has attempted to prove that although the European and MENA regions are very different and at first sights non-comparable, the MENA system of codification and protection of human rights is slowly developing towards the meeting of international standards of human rights, hence, towards the European system perhaps also thanks to the geographic proximity and institutional collaboration. Considering the valuable impact on human rights that European institutions have had, one may argue that the intensification of the cooperation between the two regions will be beneficial in the years to come.

Religiose e Tradizioni Costituzionali e Mare Nostrum, Naples, Editoriale Scientifica, 2016, 220-221.

⁶⁰⁷ EuroMed Rights, Work Programme 2018-2021, 15, cit., in https://euromedrights.org/wp-content/uploads/2018/09/Work-programme-and-Strategy-2018-2021_EN.pdf.

