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Constitutional adjudication and constitutional interpretation in Israel, Morocco and Jordan: a comparative analysis

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INTRODUCTION

In the last thirty years, the Middle East and North Africa (MENA) region represents one of the area in which constitutional justice has increased without any doubts its power. After the Arab Springs, many countries in North Africa have introduced or strengthen their Constitutional Courts. Israel, in the early 1990s, experienced the so-called "constitutional revolution", which inaugurates a new phase of activism of the Israeli Supreme Court.

Given these developments, this comparative analytical work presents the main features of the constitutional adjudication and constitutional interpretation in Israel, Morocco and Jordan. It focuses on the constitutional history of the three countries and on the establishment of the Supreme or Constitutional Courts in order to identify how they are entrusted with the task of declaring and protecting fundamental rights and what it is the role they fulfil in this regard. In particular, the right to freedom of religion will be examined, given the important role the religion had and has in shaping the constitutional order of Israel, Morocco and Jordan - albeit in different ways. It is important to notice that this work want to give an overview on the topic mentioned above, and does not have the presumption to be exhaustive.

The choice of this topic comes from the will of understanding deeply the unique constitutional history of Israel and the peculiar constitutional developments of Morocco and Jordan after the Arab Springs. Indeed, Israel decided to draft a constitution 'by stage', meaning that it will be written by Chapters, each of which would exist as independent Basic Law.[1]Indeed, it can be said that Israel was born without a constitution. This assumption would change only in 1995 thanks to the active role of the Israeli Supreme Court, or HCJ, one of the most active Courts in the world. Indeed, its 'constitutional revolution', started with the *Bank Hamizrahi* decision (1995)[2], changed the Israeli constitutional nature, recognizing the supremacy of the basic laws, their

[1] Suzie Navot, *The Constitution of Israel. A contextual Analysis,* Hart Publishing, Oxford and Portland, Oregon (2014)

[2] HCJ 6891/93 *United Mizrahi Bank v. Midgal Cooperative Village.* For an English translation of the judgment, see *Israel Law Report* 1995 (2) – Special Volume

constitutional status and introduced the mechanism of constitutional adjudication.

For its part, Morocco was the first country that adopted a new constitution after the Arab upheavals in 2011, comprising a new Constitutional Court and a reduction of the monarchy's power. Jordan also implemented an important constitutional amendment after 2011, which also comprised the establishment of a Constitutional Court. The introduction of these Courts represents without any doubts a step forward for the establishment of a state based on the rule of law. However, as the work will outline, the independence and the tasks given to the Courts in Morocco and in Jordan is limited.

To conduct this comparative analysis, an independent variable was selected, namely the presence or not of a constitution. This choice was made since the fact that Morocco and Jordan has a written constitution, meanwhile Israel remained without a written constitution or a bill of rights contained in one document.[3] Therefore, it was examined the constitutional order of the countries. In a second moment, each country was ideally placed in one of the two models of judicial review, which are the centralized and decentralized one.[4] As it would be pointed out in the course of the work, if Morocco and Jordan entitled only the Constitutional Court to implement judicial review, in Israel, besides the Supreme Court, also ordinary courts are entitled to review the constitutionality of legislation. As a consequence, placing Israel in one of the ideal models of judicial review has resulted more controversial. As intervening variable, the role and case law of the Supreme or Constitutional Courts was discussed, in order to identify the activism of each of them in their country.

This work is divided in three Parts, each one composed of two Chapters, for a total of six Chapters.

Part One of this work outlines the constitutional history of Israel, Morocco and Jordan and presents their Supreme or Constitutional Courts. In the first Chapter, firstly the constitutional debate in Israel will be discussed, starting

[3] Ran Hirschl, "Towards Juristocracy. The Origins and consequences of the new constitutionalism", Harvard University Press (2004)

[4] Mauro Cappelletti, "Judicial Review in Comparative Perspective", California Law Review, Volume 58/Issue 5 (1970)

from the importance of the Declaration of Independence (1948) up to arrive at the famous Harari Resolution (1950). This resolution represents one-of-a-kind compromise in comparative constitutional law, which would frame the Israeli constitutional process, establishing the draft of the constitution by "stages" or Basic Laws. This compromise left at least three questions; 1) the real intention of the Knesset in proceeding with the establishment of a constitution; 2) the topics to be included in the basic laws; 3) the status of these basic laws vis-à-vis regular laws, both approved with the same majority in the Knesset.[5]

This conundrum will be a feature of the famous *Bank Hamizrahi* decision of the Supreme Court, which will establish the supremacy of the Basic Laws – in particular Basic Law: Human Dignity and Liberty and Basic Law: Freedom of occupation - and the constitutional adjudication of laws. The second section of Chapter two, the constitutional history of Morocco will be presented, underlining the pivotal figure of the King in every constitutional-making and revision processes. Indeed, Morocco experienced six attempts of constitution, every one granted by the King. Every constitution until the one of 2011 is analyzed, stressing the most relevant provisions, as for example the one which grants to the King the role of Head of the state and Commander of the Faithful.[6] To the constitution of 2011 will be given more space, since important steps towards a liberal democratic state were done. This constitution is the outcome of the requests of the Arab Springs and his major change is embodied in the establishment of the Constitutional Court. However, it will be also pointed out that traditional provisions, such as the "sacredness" of the King. In a third stage, it will be described the Jordanian constitutional history, which results to be similar to the Moroccan one. Nevertheless, Jordan experienced only two constitutions, one in 1928 and one in 1952, the latter one still in place, though revised. The King, being the head of the state, retains important powers, such as the power to dissolve the Parliament. As it will be pointed out, the Arab Springs have marked an important step toward the establishment of a state based on the

[5] Aharon Barak, *Proportionality. Constitutional rights and their limitaitons,*Cambridge University Press, Cambridge (2012

[6] Rainer Grote,Tilmann Roder, "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press (2016)

rule of law and on respect of international the international standards. In this regard, a Constitutional Court was put in place, the first one in the Jordanian history. This establishment should be seen as a positive trend, although Jordan, the same as Morocco, reserve the important powers to the monarchy. Chapter Two will be dedicated to the description of the Israeli Supreme Court and the Constitutional Courts of Morocco and Jordan.

Part Two shall discuss the constitutional adjudication and interpretation in Israel, Morocco and Jordan. In a first moment, the main questions on judicial review are outlined, taking into consideration important writings from the literature, as Mauro Cappelletti.[7] Then, the two models of judicial review are presented in order to see which one of the two fit in countries taken into consideration. In a second moment, the Israeli constitutional review is introduced, starting from the landmark decision of the Supreme Court, which is the *Bank Hamizrahi* (1995). In this regard, the influences gained by the US Supreme Court decision *Marbury v. Madison* are analyzed. Then, the work will pass introducing the constitutional review in Morocco and Jordan, which will be analysed together given the proximity of their constitutional order. Indeed, both can be included in the centralized model of constitutional review. However, being their constitutional justice recent, not many considerations would be done on their work.

Moving forward, Chapter 4 of Part Two will deal with the constitutional interpretation process in these three countries. At a first time, the principal elements of constitutional interpretation are presented.[8] Then the Israeli Supreme Court's method of constitutional interpretation will be analysed, showing the prevalence of the purposive method as a way of interpreting. An important part is given to comment the influence of Aharon Barak on the Supreme Court activism, as judge and President of the Court. At the end, the very recent established constitutional interpretation in Morocco and Jordan will

[7] Mauro Cappelletti, "Judicial Review in Comparative Perspective", California Law Review, Volume 58/Issue 5 (1970)

[8] Soririos A. Barber, James E. Fleming, "Constitutional Interpretation", Oxford University Press (2007)

be introduced, underling the ambiguities present in the constitutional texts' that make difficult a clear constitutional interpretation to the Constitutional Court.

Part Three addresses the role of religion in the Israeli, Moroccan and Jordanian constitutional systems and presents how each order implement the respect of freedom of religion. Indeed, the event of the Arab Springs highlighted the pivotal importance of the constitutional treatment of Islam.[9] Israel, Morocco and Jordan share the common feature of placing the religion as a pivotal driving factor in framing their constitutional history. The Jews historical revenge and the Jewishness character of the laws and customs of Israel is studied[10], as well as the role of the Sharia law is stressed as important factor for the Moroccan and Jordanian constitutional life. Being in a moment of the history in which it has been increasing international or regional conflicts due to religious reason, the analysis conducted will be focused in the constitutional treatment of the right of freedom of religion in these countries. After having presented the international covenants and standards on the respect of freedom of religion, Chapter 6 is dedicated to the Israeli, Moroccan and Jordan constitutional protection of the right to freedom of religion. Thanks to the Israeli Supreme Court's work of interpretation of the Basic Law: Human Dignity and Liberty, the right to freedom of religion is extensively protected.[11] Regarding Morocco and Jordan, a reflection on the independence of the Constitutional Courts in protecting fundamental rights is presented with scope of underlines that the freedom of religion in Morocco and Jordan is constitutionally protected but, in practice, the effectiveness of it is monopolized by the monarchy.[12] This final chapter will be clue to identify how the Israeli Supreme Court and the Moroccan and Jordanian Constitutional Courts, through their work of constitutional adjudication and interpretation, act in protecting fundamental human rights, such as freedom of religion.

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[9] Dawood I. Ahmed, "Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions", University of Chicago Law School (2014)

[10] Ruth Lapidoth, "Freedom of Religion and Coscience in Israel", Catholic Universitary Law Review, Volume 47, Issue 2 Winter (1998)

[11] Aharon Barak, "Human Dignity in Comparative Law", Cambridge University Law (2015)

[12] [12] Driss Maghraoui, "The Strengths and Limits of Religious Reforms in Morocco", Mediterranean Politics, Vol. 14, No. 2, 195-211, Routledge (2009)

PART I – Constitutional system of Israel, Morocco and Jordan

Chapter 1 – Constitutional history of Israel, Morocco and Jordan

Introduction

This part will deal with the constitutional history of Israel, Morocco and Jordan. At the beginning, we will analyse the constitutional debate in Israel and the Harari compromise, which gave birth to the Israeli constitutional framework. Moreover,we will figure out how the constitutional revolution was implemented by the Israeli Supreme Court, which also will be studied. Secondly, the Moroccan constitutional stages are presented, underlining the pivotal figure of the King in all the constitutional-making and changing processes and we will get until the adoption of the new constitution in 2011. Also, the Moroccan Constitutional Court is presented in order to see how it was born and its independence from the other branches. At the end, we will investigate the Jordanian constitutional system, pointing out the similarities with the Moroccan one. Indeed, also for Jordan the 2011 represented an important year in terms of constitutional renovation. However, as opposed to Morocco, Jordan was affected by several constitutional amendments, which embodied a step forward the achievement of a parliamentary monarchy.

1.1 Setting up and evolution of the Israeli legal system: from the Declaration of Independence (1948) to the *Bank Hamzirahi* judgment (1995)

The State of Israel was born in 1948 with the Declaration of Independence, a document as the French Declaration of the Rights of Man and of the Citizen and the US declaration. This document was signed by the members of the Provisional Council of State, operating as a legislative authority, and is based on the opinions given by the UN Partition Decision, a plan adopted by the General

Assembly with Resolution 181 (II), as the basic international reference for the Jewish people's right to establish its state.[13]The Declaration established the mechanism for electing the principal organs of the state and included several sections and procedures for the drafting process of a constitution for Israel, as following:

"*We declare that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath, the 6th Iyar, 5708 (15th May, 1948), until the establishment of the elected, regular authorities of the State in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948, the People's Council shall act as a Provisional Council of State, and its executive organ, the People's Administration, shall be the Provisional Government of the Jewish State, to be called ''Israel''* "[14]

However, the Constitution in Israel would never be written and the absence of it marked an exception in the regular constitutional-making process experienced by the majority of democratic countries. Indeed, in Israel there is no written source as a normative act regulating the nature of the state. Even if, with the 1990s, several Basic Laws were promulgated, regulating important fundamental human rights. Those Basic Laws obtained a constitutional status in Israel, thanks to the actions of the Israeli Supreme, which will be analysed below.

The Israeli constitutional-making process differentiates itself from the John Elser scholar's understanding on constitutional making process. Elster, in explaining why constitutions occurs in waves, theorized that almost every new Constitution is written in the wake of a crisis or exceptional events of any sorts.[15]Among such crisis are revolution, decolonization, regime change, economic plunge and war. These events explain the birth of the US Constitution, the Indian Postcolonial Constitution, the post- apartheid South African Constitution and the post-Soviet Union European Constitutions. At its

[13]Suzie Navot, *The Constitution of Israel. A contextual Analysis,* Hart Publishing, Oxford and Portland, Oregon (2014)

[14]Declaration of the Establishment of the State of Israel, Official Gazette, Number 1, (1948)

[15]John Elster, *Forces and Mechanisms in the Constitution-Making Process,* 45 Duke L.J 365 (1995)

foundation, Israel too appeared at first to have gone through decolonization and war before adopting a Constitution: the war against the Arab countries was – temporarily - won and the British mandate in Palestine was concluded in favour of the establishment of a proper State of Israel. However, as Gideon Sapir noted, in fact the circumstances that led to Israel's becoming a constitutional democracy do not fit precisely the model set by Elster. Indeed, when the independence process ended in 1948, it closed without producing a Constitution.[16] Even if, the Declaration of the Establishment of the State of Israel provided a specific process of executing the constitution in three stages.

At the beginning, while the Provisional Council of State was to act as a temporary legislative branch, the elections were to be held for a Constitutional Assembly in charge of writing the Constitution. Completed this process, the Assembly should have been dissolved. As a final stage, other elections would have been held for electing the Knesset's members according to the electoral system determined by the new-born Constitution. After the Knesset's election, also the Provisional Council of State would finish its job and dissolve.

However, this process happened only partially. In charge of writing a draft Constitution to be submitted to the Constitutional Assembly, was the Constitutional Committee, which was appointed by the Provisional Council of State and performed his role collecting and coordinating the proposals and materials relating to the Constitution. The Committee received several draft constitutions from the political parties, which were focused primarily on institutional matters relating to the government's structure, the legal system and the electoral method. However, in late 1948, when the Constituent Assembly was not elected yet, the Constitutional Committee expressed its opposition to the drafting of a constitution for Israel, both for ideological and practical reasons.[17]

[16]Gideon Sapir, *Constitutional revolutions: Israel as a case-study,* Cambridge University Press, United Kingdom (2009), p. 356

[17] Suzie Navot, *The Constitution of Israel. A contextual Analysis,* Hart Publishing, Oxford and Portland, Oregon (2014) p.7

According to some scholars, mainly Gideon Sapir[18], the Declaration of independence was only a mean to gain the official recognition from the international community and soon disregarded a guideline for the constitutional-making process. Indeed, once the Constituent Assembly was elected in early 1949, it remained in charge and changed its name in First Knesset (Transition Law, 1949). However, the Assembly not only represented a legislative body but maintained its constituent power, meaning that it could be able to both draft a Constitution and pass the laws at the same time. In this regard, it is important to notice that the term of constituent power is used to refer to the power of the Assembly in drafting laws with constitutional value, which are called in Basic laws. [19]

The Transition Law seemed to have political reasons, as emerging mainly from David Ben Gurion's opinion. Initially, Prime Minister Ben Gurion was willing to adopt the American model of a written constitution, but finally he chose to adhere to the model of the British constitutionalism, which contained has no written and rigid constitution[20]. In his speeches in the Knesset, Ben Gurion, speaking about the State of Israel, argued that:

"Our state is being recreated every day. Every day, additional Jews liberate themselves by immigrating to our country: every day, additional parts of our country are liberated from their status as wasteland. This dynamism cannot tolerate a rigid framework and artificial constraints. The laws of Israel must adapt themselves to this dynamic development."

During the debate held on the 1st of February 1950 in the Knesset, Ben Gurion's position was reiterated through the Mapai's speaker Y. Bar-Rav-Hai,

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[18] Gideon Sapir, *Constitutional revolutions: Israel as a case-study,* Cambridge University Press, United Kingdom (2009)

[19] For more informations about the constitutuent power see, Emmanuel-Joseph Sieyés, "What is the Third State?" (1789); Zoran Oklopcic, "The Paradox of Constitutionalism: Constituent Power and Constitutional Form", International Journal of Constitutional Law, Volume 6, Issue 2 (2008) p. 358-370

[20] Amnon Rubinstein,*Israel Studies An Anthology: Israel's Partial Constitution – The Basic Laws,* www.jewishvirtuallibrary.*org*(2009)

who stressed the necessity to achieve a more stable situation that will enable the formation of a homogenous framework expressing the development level of a people. According to the Mapai party, Israel was at the beginning of a revolution and not at the end. Thus, since the Constitutions are meant to fix and preserve certain principles, the State of Israel should wait for the development of a more solid political and societal framerokk before establishing a Costitution for Israel. In the same debate, also religious parties restated the same beliefs, adding an important argument to its defence, that is related to the importance for a Constitution to have an educational and cultural value. According to them, drafting a Constitution in that moment of the Israeli history would not add anything to the Israeli dignity. Rather it would resemble to the Constitution of the South and Central American countries, considered a number of superficial principles without educational value. According to the religious party, it was not possible to distinguish between the Constitutions of Haiti, Honduras, Costa Rica or Nicaragua.It is also worth noting that the religious Members of the Knesset (MKs) were against the drafting of a Constitution because they believed that the *Torah* (Old Testament) was their only source of legitimacy. On the contrary, the left-wing Mapam party was in favour of drafting a constitution straight in the 1950 because it believed important for a constitutional state to establish some limits on the power of the legislative, executive and judicial branches.[21]

Overall, according to D. Barak-Erez, the domestic political debates regarding the content of the future Constitution made it impossible to agree upon a text which would gain a broad consensus in the heterogeneous Israeli society, consisting of immigrants from diverse cultural backgrounds with strongly-held opposing ideologies (nationalist, socialist and religious)[22]. Indeed, the opponents of the constitution argued that framing a Constitution at this time would be the

[21]Israel First Knesset - The Debate on a Constitution, Itamar Rabinovich, Jehuda Reinharz " *Israel in the Middle East, documents and readings on society, politics, and foreing relations, pre-1948 to the present*", Brandeis University Press, US (2008)

[22]Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective,* 26 Colum. Hum, Rts, L. Rev. 309 (1995)

responsibility of a cultural war among the various parts of the nation and that the State of Israel was still in a "dynamic flux of crystallisation"[23].

From the debate in the Knesset, mixed feelings emerged with regard to the adoption of a written Constitution. In June 1950, the disagreements persisted and led to the adoption of the compromise formula proposed by MK Yizhar Harari, well known as the Harari decision:

"*The First Knesset instructs the Constitution, Law and Justice Committee to prepare a draft State Constitution. The constitution will be built chapter by chapter, in such a way that each will constitute a separate Basic Law. The chapters shall be presented to the Knesset when the committee completes its work, and all the chapters together shall comprise the Constitution of the State*."[24]

The Harari resolution, then, declared that the constitution-drafting process would evolve in steps, in the shape of Basic Laws that would be unified only at the end of the process. Yet, the Knesset adopted a compromise that, in terms of comparative constitutional law, was unique: the adoption of a Constitution in stages[25]. Thus, the Constituent Assembly, acting as the First Knesset, dissolved without having drafted a Constitution or adopting a single basic law. At the moment of its dissolution, the First Knesset passed the Transition (Second Knesset) Law 1951, which provided that all the powers that the Second Knesset had would have been transferred to the Third and to every subsequent one. This leads us to conclude that, the Constituent assembly disappeared with its constituent power. Thus, a future attempt to draft a constitution would require either new elections for a new constituent assembly or a national referendum.

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[23]Susie Navot, *The Constitution of Israel. A contextual Analysis,* Hart Publishing, Oxford and Portland, Oregon (2014)

[24]Knesset protocols 1743 (1950) (second hand)

[25]Susie Navot, *The Constitution of Israel. A contextual Analysis,* Hart Publishing, Oxford and Portland, Oregon (2014)

An interesting question deals with the implications of the Harari decision. Did the First Knesset truly means to gradually go ahead with the establishment of the constitution, or did their decision to progress by stage was just meant to remove the question from the debate?

The actual development of the facts demonstrates a slowness in the process. In fact, eight years would run between the Harari decision and the enactment of the first basic law, titled "Basic Law: The Knesset". This apathy was due to the several unresolved questions that the Harari compromise left behind it. The first deals with the time framework through which the process of basic laws' enactment.[26]Indeed, the legislation process proceeded extremely slowly, also after the enactment of the first basic law.

Another question that the Harari compromise left open concerns the topics to be included in the future Basic laws. Usually, constitutions deal with two types of issues: the institutional structure and the system of basic principles. In this regard, it is worth to underline that, from the Harari decision to 1992, several basic laws were enacted, but these laws concentrated only on the institutional framework of the state and hardly mentioned fundamentals rights or values. In many regards, this absence is due to the opposition of the religious party and its allies who hardly went to compromise in matters dealing with freedom of religion, freedom of expression and equality.[27]

The third issues left behind by the Harari resolution dealt with the status of the basic laws vis-à-vis regular laws that the Knesset meanwhile approved as the legislative authority. Indeed, it was not clairfied whether those basic laws should acquire a constitutional status or not. Essentially, the question dealt with the constitutional rigidity and supremacy of these basic laws. Is it possible to amend them? If so, did it required a special majority in the Knesset? The fact that those rights had not a constitutional value, made confusing the fundamental distinction between the scope of the right and the extent of its limitation, as the former Chief

[26]Ivi

[27]Gideon Sapir, *Constitutional revolutions: Israel as a case-study,* Cambridge University Press, United Kingdom (2009)

Justice of the Israeli Supreme Court and major promotor of the Israeli constitutional revolution (1992) Aharon Barak argues[28].

This bring us to the final and pivotal question of *pouvoir constituant* (constituent power). We are used to see constitution-making process led by a constituent power, mainly an assembly, to which is granted the only function of drafting a constitution in a fixed period of time. In Israel, we have seen an ordinary Parliament pursuing a constitution-making process in a relative long period of time, about forty years. This conundrum attracted the title of "the problem of constituent continuity" [29], strongly argued by the Israeli Supreme Court during its pivotal judgment *Bank Hamizrahi (1995)*[30].

However, answers to many of these questions, mainly on the status of the basic laws, were given by the Supreme Court through several judgements until *Bank Hamizrahi* judgement in 1995, which marked a change in the status of human rights in Israeli law.[31] Indeed, this decision provided Israel with a constitutional bill of rights, establishing also a judicial review on the basic laws, the *Basic Law: Freedom of Occupation* and *Basic Law: Human Dignity*.

It has to be mentioned that until 1992, the Declaration of Independence was used by the Supreme Court as a powerful tool for legislative interpretation, even though it does not have constitutional value. This is because the Declaration particularly refers to the democratic nature of the state. [32]Moreover, according to Prof. Rivlin, prior to 1992, fundamentals human rights, protected by regular laws, were interpreted by the Israeli Supreme Court using the American liberal approach[33].

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[28]Aharon Barak, *Proportionality. Constitutional rights and their limitaitons,*Cambridge University Press, Cambridge (2012)

[29]Melville B Nimmer, "The Uses of Judicial Review in Israel's Quest for a Constitution", 70 Columbia Law Review (1970)

[30] HCJ 6891/93 *United Mizrahi Bank v. Midgal Cooperative Village.* For an English translation of the judgment, see *Israel Law Report* 1995 (2) – Special Volume

[31]Previous cases: *Ziv* case(1948), *Rogozinsky* case (1970), *Yardor* case (1965)

[32]Susie Navot, *The Constitution of Israel. A contextual Analysis,* Hart Publishing, Oxford and Portland, Oregon (2014)

[33]Meaning: interpretation agreeing to what the reader believes the author reasonably intended, Eliezer Rivlin, *Israel as a Mixed Jurisdiction*, McGill Law Journal, Volume 57, Number 4 (2012)

In conclusion, the constitution was never adopted and the State of Israel protected fundamental rights trough regular laws (passed with simple majority by the Knesset and easy to overcome with another regular law) until 1992. Despite the lack of a Bill of Rights, the Supreme Court acted since the beginning as a protector of individual rights[34]. However, we have to wait until 1992 - when the Supreme Court took an even more active role in shaping the constitutional history of Israel - to speak about a special kind of written constitution on which the Supreme Court is able to do a proper constitutional review.

1.2 Setting up and evolution of the Moroccan constitutional system: from the independence to the constitution of 2011

Morocco did not face the same problem of Israel in drafting a constitution. On the contrary, it actually passed through the adoption of six differents constitutions (1962, 1970, 1972, 1992, 1996, 2011), without counting the experiment in Fes in 1906. Indeed, even if Morocco gained the independence from the French and Spanish protectorates in 1956, the first Moroccan constitution was drafted in only in 1962.

On the validity of the above mentioned constitutions, there are many discussions. For example, the scholar Mohammed Hashah, defined each of them as an example of "failed constitutionalism", because they all were granted by the king.[35]Indeed, the significance of these constitutions had more to do with a need to legitimize government and the King rather than with the establishment of a democratic legislative power[36]. Thus, the main goal was more to empower the Sovran than to grant rights to citizens. Moreover, this behaviour is justified by the fact that, in Morocco, the king, being considered a direct descendant of the

[34]Gideon Sapir, *Constitutional revolutions: Israel as a case-stud,* Cambridge University Press, United Kingdom (2009)

[35]Mohammed Hashah, "Moroccan Exceptionalism Examined: Constitutional Insights pre- and post- 2011, IAI Working Papers 13/34, (2013) p.3

[36]Rainer Grote, Tilmann Roder, "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press(2016)

Prophet of Islam,is legitimized to consistently made himself the promoter of any constitutional change.[37]

After the independence (1956), the King Mohammed V and his son who succeeded to him in 1961, already tried to provide a constitutional order to Morocco.[38]However, according to M. Hashah, Mohammed V only provided some constitutional tools for calming down the major post-colonial domestic powers, which were the liberation movement together with the army and the Independence party.

Accordingly, since the beginning of the Moroccan constitutional history, the several constitutional-building processes were characterized by an attempt to balance the concession of rights to the citizens with the maintenance of the king's supremacy.

For a matter of space and relevance, in this section we will only briefly mention the constitutional reforms adopted before 2011, and then strictly pass to the adoption of the 2011 constitution, given its importance for the establishment of a constitutional court and for constitutional review of legislation.

After the death of Mohamed V, his son Hassan II managed to establish a constitution in 1962, approved by more than 80 per cent of the voting population. However, referring to Morocco we speak about a "given constitution" model that has shaped the political scene from the 1960s until now.[39] Indeed, according to the unanimous opinion of the scholars, this Constitution has been considered as "given" by the King, despite the popular vote. This is due to the fact that the King always managed to identify the essential elements on which the reforms were to be based.[40] In the 1962 constitution, a particular relevance was given to Article 19, which stated:[41]

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[37]The point about the separation between politics and religion in Morocco will be analysed in the final chapter, which is focus on the freedom of religion.

[38]Justin Frosini, Francesco Biagi, "Political and Constitutional Transitions in North Africa. Actors and Factors" Routledge, New York (2015)

[39]Mohammed Hashah, "Moroccan Exceptionalism Examined: Constitutional Insights pre- and post- 2011, IAI Working Papers 13/34, (2013), p.3

[40] Justin Frosini., Francesco Biagi, "Political and Constitutional Transitions in North Africa. Actors and Factors" Routledge, New York (2015), p. 58

[41]Bouchkars A., "Politics in Morocco: Executive Monarchy and Enlightened Authoritarianism", Routledge, London (2011), second hand

"*The king, Amir al-Muminin (commander of the faithful), shall be the supreme representative of the nation and the symbol of the unity thereof. He shall be the guarantor of the perpetuation and the continuity of the state. As Defender of the Faith, he shall ensure respect for the constitution. He shall be the protector of the rights and liberties of citizens, social groups and organizations*"

To the king was granted the role of "*Amir Al Moumine*" (Commander of the Faithful), representing the unity of the nation, the guarantor of respect for Islam and protector of human rights.[42] Given the importance of the king's status of the Commander of the Faithful and his absolute control over political system, the literature spoke about the fact that within the Art. 19 was present a "Constitution within a Constitution" or a "Supra-Constitution". [43]The king was at the centre of the political system mechanism and since the beginning no mention was given to the principle of balance of power. Indeed, the Prime Minister, who is appointed by the king regardless of the electoral results, has no executive power, being considered as a mere high civil servant who co-ordinates the work of the ministries (Art.24).[44]Also to the legislative branch is reserved a minor role in that the legislative agenda stems from the will of the king and not from the two chambers. Therefore, the Parliament was born wearing a symbolic role.
Many talked about this period as the "Hassanian democracy"[45]. Indeed, like the 1962 constitution, also those that followed it in 1970, 1972 and 1992 were designed by the king and ratified by a popular vote. In this regard, Francesco Biagi interestingly observes regarding constitutionalism in Morocco: that, it is used as an instrument to maintain and strengthen authoritarian/semi-

[42]Justin Frosini, Francesco Biagi., "Political and Constitutional Transitions in North Africa. Actors and Factors" Routledge, New York (2015), p. 51
[43] Abdellah Tourabi, "Constitutional Reform in Morocco: Reform in times of revolution", Constitutional Refrom in Arab Reform Initiative (2011) p.6
[44]Mohammed Hashah, "Moroccan Exceptionalism Examined: Constitutional Insights pre- and post- 2011, IAI Working Papers 13/34, (2013)
[45]Patricia Campbell, "Morocco in Transition: Overcoming the Democratic and Human Rights" Legacy of King Hssan II, African Studies Quarterly

authoritarian rules[46]. Indeed, each of the constitutions confirm the pre-eminence of the monarchy and the subordination to it of all other political institutions.

However, at the beginning of the 1990s, Morocco received from the international community pressure to implement democratic reforms[47]. Hassan II was forced to enact some reforms to provide protection of individual rights. This process will end with the entry into force of the new Moroccan Family Code on March 8 2004 (*Moudawana*) under Mohammed VI reign. The provisions present in this new code were extremely progressive in matters of family and property law and encountered the resistance of the patriarchal society. Together with this and despite the democratic reforms, the Moroccan institutional picture remained unchanged. The king still was involved in every decision made both by the parliament and the executive and several violations of human rights were carried out. For example, the freedom of expression was not protected and the king's dissidents faced strong repressions and often were imprisoned.

All considered, it may be argued that the period that goes from the independence to the beginning of the 2000s, was characterized by two opposing tendencies: democratic reforms in a sense and violation of human rights in another. Thus, according T. Carothers' theory, we can place Morocco into the category of a "hybrid" regime. In particular, the author above cited, classified the hybrid regimes into the categories of countries which have a basic institutional form of democracy, yet one political group – in Moroccan case is the king- dominates the system in such a way that there appears to be little prospect of alternation of power in the foreseeable future.[48]

Nevertheless, the Arab spring, a movement of uprisings exploded in North Africa during the 2011, marked an important turning point in the constitutional history of Morocco. Indeed, after the outbreak of the20 February Movement, we faced an improvement in both the institutional arrangements,

[46]Francesco Biagi, "Will Surviving Constitutionalism in Morocco and Jordan Work in the Long Run: A Comparison with Three Past Authoritarian Regimes", Cambridge Journal of International and Comparative Law (3)4: 1240-1259 (2014)

[47]The Wall of Berlin was just fallen and a wave of new constitution was about to start

[48]Thomas Carother "The End of the Trasition Paradigm", Journal of Democracy, vol 13, no. 1 (2002)

establishing a sort of principle of separation of power, and in the protection of human rights. On 20 February 2011, approximately 150,000-200,000 young Moroccans across the country marched in a call for greater democracy and change[49]. The 20 February Movement, denouncing the systematic and endemic corruption of the state, also hoped for a radical constitutional and political reforms being able to build a state based on the rule of law and separation of power. The movement was joined later also by a range of political groups, containing different ideologies but all requiring a renewal of the state form of government towards a parliamentary democracy, based on the principle of popular sovereignty, an independent judiciary and the separation of powers. These actors founded the National Council of Support for the 20 February Movement. This protest movement was deemed so important that the king Mohammed VI had to respond to his demands with a promise of constitutional reforms.[50] In addition, the king was concerned by the harshest revolts and revolutions broken out in neighboring countries. Thus, the monarchy's first reaction was the establishment of the Economic and Social Council, a body already provided by the constitution of 1992 but remained on paper until then. Its functions were those of advisor, submitting studies to the government and parliament, with the final aim of creating a new social charter to boost the economy and investments.[51]Another important innovation regarded the creation of the National Council on Human Rights. Chaired by the renown human tights activist Driss el-Yazami, this body had the purpose of addressing all questions relating to the protection of human rights and the preservation of the individual and collective dignity.[52] Along with this function, the Council was called to

[49]Mohamed Madani, Driss Maghraoui, Saloua Zerhouni, "The 2011 Moroccan Constitution: A Critical Analysis", IDEA- International Institute for democracy and electoral assistance (2012) p. 6

[50]Omar Bendourou, "La nouvelle constitution marocaine du 29 juillet 2011", Presses Universitaires de France, 2012/3 n°91

[51]Mohamed Madani, Driss Maghraoui, Saloua Zerhouni, "The 2011 Moroccan Constitution: A Critical Analysis", IDEA- International Institute for democracy and electoral assistance (2012)

[52]Frosini J., Biagi F., "Political and Constitutional Transitions in North Africa. Actors and Factors" Routledge, New York (2015)

check also the compliance of the national legislation with the international conventions on human rights that Morocco had ratified.[53]

Finally, the most famous reaction of the monarchy to the 20 February Movement was the king's speech on the 9th of March of 2011, where he announced the soon to be adopted constitutional reform. The king set up a plan, agenda and rules of drafting a new constitution. [54] Given also to these features, Francesco Biagi talked about the 2011 Moroccan constitution as an "*octroyées"* one. Indeed, even if the constitution was ratified by a popular referendum, the latter was the result of weeks of propaganda perpetrated by the monarchy to promote the reform. The referendum seemed more like an authoritarian plebiscite. This is also demonstrated by the fact that several reports of fraud came out from the Moroccan election day. [55]

According to the king, the major features on which the constitutional reform should be based: 1) the guarantee of a pluralist nature of the Morocco identity; 2) strengthening of the rule of law and expansion of the fundamental human rights; 3) the independence of the judiciary and the establishment of a Constitutional Court; 4) the establishment of the principle of separation of power through the transfers of new powers in the hands of the Parliament and the government; and 5) consolidation of the role of the political parties in a pluralistic perspective.[56]

In addition, the day after the speech, the king appointed and *ad hoc* body, the Consultative Commission on Constitutional Reform, being composed of jurists, economists, and sociologists and having the task of preparing the new

[53]International Covenant on Civil and Political Rights (ICCPR),International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Rights of the Child (CRC), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), International Convention for the Protection of All Persons from Enforced Disappearance, Convention on the Rights of Persons with Disabilities (ICRPD)

[54]Mohamed Madani, Driss Maghraoui, Saloua Zerhouni, "The 2011 Moroccan Constitution: A Critical Analysis", IDEA- International Institute for democracy and electoral assistance (2012)

[55] Justin Frosini, Francesco Biagi., "Political and Constitutional Transitions in North Africa. Actors and Factors" Routledge, New York (2015) p. 59

[56]Ibidem p. 56

Constitution. It is worth to mention that the commission, chaired by Abdellatif Menouni – a renowned constitutional lawyer and former member of the Constitutional Council - lacked religious members or *oulema,* thereby stressing the path towards secularization that the new constitution was intended to pursue[57].

Although these positive premises, the royal speech did not reassure the protesters of the February 20 Movement, the left-wing opposition parties and the several human rights organizations. In addition, the composition of the Consultative Commission for Constitutional Reform was also criticized for its proximity between the Kind and its members. However, the critics were not accompanied by serious alternative proposals in front of the Commission, so that some scholars, as Madani, Maghraoui and Zerhouni speak about a *makhzenization* (domestication) of the political parties. [58] Therefore, the practical outcome of that behaviour was that the commission merely wrote the text of a constitution with the content "dictated" by Mohammed VI. [59] Given the drafting process' speediness, the Commission met with the political parties in early June 2011 and, despite some criticism regarding the sending proposal's process, the king invited the population to participate to a constitutional referendum to be held on July 1. In sum, the constitution was democratic only on paper because the procedures implemented to adopt it were the same as the one followed in the precedent constitutions. With a result of a constitution written under the king's dictation and then approved by a plebiscite. At the end, this plebiscite seemed to be an electoral exercise without content, given the fact that probably the only participants were the monarchy's supporters.

The new constitution was adopted with the 98.5% of the vote with a turnout of 73.5% and was enacted by a *dahir* (royal decree)the 29 of July, 2011. The referendum appeared as a renewal of the traditional act of fidelity (*bay'a)*

[57]Ibidem p. 57

[58]Mohamed Madani, Driss Maghraoui, Saloua Zerhouni, "The 2011 Moroccan Constitution: A Critical Analysis", IDEA- International Institute for democracy and electoral assistance (2012); *makhzenization:* when speaking about makhzen and makhzenization is implied an authoritarian practisce of government without any form of accountability

[59]Justin Frosini., Francesco Biagi, "Political and Constitutional Transitions in North Africa. Actors and Factors" Routledge, New York (2015)

between the sultan and his subjects than any more else.[60]Another point in favour of this thesis is that the *dahir* is a royal decree that does not require countersignature by the executive and that is therefore classified as a symbol of the quasi-absolute power of the king. In sum, we can argue that the character of "*octroyées"* constitutions has always be and still is an important feature in Moroccan constitutional history.

Nevertheless, the constitutional text appeared long, with 180 articles and a preamble and brought significant novelties compared to the 1996 constitution, mostly in relations to fundamental human rights and the separation of powers' principle.

Regarding the guarantee of several fundamental human rights, the preamble stipulates that the international conventions ratified by Morocco shall take priority on the domestic law and that the latter should be modified in line with the former. A particular reference was made also in relation to the principle of quality regardless of the gender, creed or belief and language. In order to guarantee that these rights were respected, the constitution provided itself also an instrument to control the constitutionality of court's decision in trials, which lacked before. Indeed the Art. 133 of the constitution states that:

"*The Constitutional Court shall have competence to look into an exception of unconstitutionality raised in the course of a trial, when one of the parties argues that the law on which depends the outcome of a trial undermines the rights and freedoms guaranteed by the Constitution*." [61]

As respect to the separation of power's principle, there is no doubts that the most important innovation was represented by the split of the famous Art. 19 into two provisions: Art 41. And Art 42. This article embodied the cornerstone of the Moroccan constitutional system and the most important source of the near-

[60]Mohamed Madani, Driss Maghraoui, Saloua Zerhouni, "The 2011 Moroccan Constitution: A Critical Analysis", IDEA- International Institute for democracy and electoral assistance (2012); *makhzenization:* when speaking about makhzen and makhzenization is implied an authoritarian practisce of government without any form of accountability

[61]Constitution of Morocco 2011; also, the process of constitutional review will be analyze in deeper way in the Chapter 3 of this work

absolute power of the king. [62] Mainly, the split was intended to make a separation between the spiritual power (Art. 41) and the temporal power (Art. 42) of the king. Article 41 stipulates that the king being the "Commander of the Faithful" should ensure the respect of Islam. And, he should chair on the Higher Ulema Council, which is the only body entitled to issue promulgate *fatwas* (religious opinions). Article 42 defines the other king's function of "head of state". He needs to ensure the respect of the constitution, the good functioning of the institution and the respect of Morocco's international commitment. He also "shall be the guarantor of the independence of the country and of the territorial integrity [..]". Also, he guarantees the rights and the freedoms of the citizens. Finally, the article specifies that the king exercises his functions through royal decrees (*dahirs*), some of them, depending on the subject-matters, do not need the countersignature of the competent minister. And, it is worth to underline that those decrees without need of countersignature are related to important matters: such as, the appointments of the Head of the Government (Art. 47), the dissolution of the Parliament (Art.51) and the appointment of half of the members of the Constitutional Court (Art.30) as well as the presentation of proposed constitutional amendments for referendum (Art. 174). [63]Summing up, the king still has prerogatives to exercise in the other branch. For this reason, the principle of separation of power is just partially accomplished.

In one way, the reform of Art 19 represents without doubts a revolution in Moroccan constitutionalism. Indeed the "sacredness" character of its constitution disappeared.[64]In another way, the interpretation of the king's function in the new articles (41 and 42) is problematic. It is true that, after the split of Art. 19, the exclusivity in the legislative power to the king no longer exists. [65] However, this separation does not lead to the impossibility for the king

[62]Rainer Grote., Tilmann Roder, "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press(2016)

[63]Francesco Biagi, "The Separation of Powers and Forms of Government in the MENA Region following the "Arab Spring": a Break with the Past?", Il Mulino –RivisteWeb, (2018)

[64]The article was also used to be called a "constitution within a constitiuion" for the huge powers that gave to the king

[65]David Melloni, "La constitution marocaine de 2011: une mutation des ordres politiques et juridique marocains", Le Seuil- Pouvoirs n°145 (2013)

to legislate. Rather, he retains the legislative power shared with the Parliament, to which the constitution has granted the exclusive legislation on matters,such as for example on family status. Hence, it could be argued that despite the big efforts to establish a principle of separation of power, there are many other measures that demonstrate the constitutional supremacy of the king.

In conclusion, we can consider that the merits of the 2011 constitutional reform consists in the enhancement of the protection of fundamental human rights and in the introduction of a slight version of the principle of separation of power. However, despite this significant revolution, Morocco remains affected by the hegemony and the central role of the monarchy. This point will be even further underlined when we will analyse in depth the model of constitutional review of legislation in this country in Chapter 3.

1.3 Setting up and evolution of the Jordanian constitutional system: from the independence to the constitutional amendment of 2011

Jordanian constitutional history did not differ much from the Moroccan one. Indeed, as in Morocco, also in this case we can talk about a granted constitution. The first Jordanian constitution in 1928 contained a mixture of characteristics taken by the Ottoman and the British traditions. Also, it is worth to mention that the idea of a constitution and of a legal reform including codification of law as well as concepts of citizens' rights, regardless of ethnicity or religion, had been at the core of the political debate in the second half of the nineteenth century and the beginning of the twentieth. [66]An important feature of the 1928 constitution is the reference to a general proposition of inviolability of individual right but nonetheless it allowed for the downgrading of protection through decree, that could fall below certain standards of human rights. This characteristic paved the way to a modern trend in most of the countries in the Arab worlds[67]. An example of that in the 1928 Jordanian constitution is Art. 6, which stipulates:

[66]Rainer Grote., Tilmann Roder, "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press (2016) p.124
[67]Ibidem p.125

"*The personal liberty of all those resident in Jordan is inviolable from aggression or interference. No one shall be incarcerated, or arrested or punished or forced to change his place of residence or put in shackles, or forced to serve in the army, except in accordance with the law. All dwellings are protected against trespass and no one is permitted to enter them except in accordance with the law*."

Indeed, usually the problem was in the interpretation of certain laws by the king, which was able to nullify the right theoretically protected.

Also, another feature of the 1928 constitution is the absence of reference to a parliamentary monarchy. Indeed, no governmental accountability whatsoever toward the Parliament was required. Rather, it has been noted a fusion between the legislative and the executive branches.

After the independence on 1946, when the British mandate was abolished and Jordan was recognized as "The Hashemite Kingdom of Jordan", a new constitution was established, which remained valid until 1952. The 1947 constitution basically fixed some amendments included in the 1928 Basic Law.[68]

The 1952 constitution is the long-lived of Jordan and still currently in place, though revised. We can affirm that this constitutional transition towards a more parliamentary system was the result of several circumstances, such as the death of King Abdullah and the subsequent ascendants of King Talal and the unification of both East and West banks.[69] Credits should be given also to the prime ministers of that period, Tawfiq Pasha Abu l-Huda and Ibrahim Pasha Hashim, who chaired the committee in charge of drafting the constitution. Then, the 1952 constitution was subjected to restrictive changes during the reign of king al-Husayn (1952-1999). Until arriving to the constitutional amendements of 2011, where the 1952 constitution was consistenly modified.

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[68] Mohammed Torki Salameh, Azzam Ananzah, "Constitutional Reforms in Jordan: A Critical Analysis", Digest of Middle East Studies, Volume 24, Number 2 pp. 139-160 (2015) p. 141

[69] The Jericho Conference was held in December 1948 to decide the future of the portion of Palestine that was held by Jordan at the end of the 1948 Arab–Israeli War, led by Sheikh Muhammad Ali Ja'abari. Pro-Jordanian personalities called for the annexation of the West Bank, including East Jerusalem, to Jordan.This unification was later known as the "Unification of the Two Banks" (the eastern and western banks of the Jordan River).

Examining the 1952 constitutional text, it is clear that some efforts were made to move forward a parliamentary monarchy, such as the Art. 40, which affirms:

"*The King shall exercise his powers by a Royal Decree, and the Royal Decree shall be signed by the Prime Minister, and the minister or ministers concerned. The King shall express his concurrence by placing his signature above the said signatures*."

This article affirms the fact that the king shall exercise his function by a royal decree, which needs to be signed by the Prime Minister and/or ministers concerned. Also, the requirements for a parliamentary monarchy where, in many terms, confirmed, as Art 51 states:

"*The Prime Minister and the minsters are collectively responsible before the House of Representatives, for the general policy of the state and every minister is individually responsible before the House of Representatives for the work of his ministry*."

Thus, it is present an instrument of accountability of the government towards the Parliament.

Summing up, in the 1952 Jordanian constitution, the king is the head of the state and immune from responsibility (Art.30); the government is appointed by the king but needs to pass the vote of confidence of the Parliament, to whom it is collective responsible; and the executive power is on the hand of the king, but only prior ministers' advices. Nevertheless, under Arts. 34 and 35, the king maintained important powers, as of dissolving the House of Representatives and dismissing the prime minister.[70] All considered, we can assert that the most important achievement of this Constitution is the vote of confidence needed to appoint the government because it links the latter to the Parliament. However, the power to dismiss the government stayed in the hands of the king, which could act without the need of a vote of confidence. According to the Francesco Biagi, Jordan as Morocco, followed a path of "surviving constitutionalism", i.e a constitutionalism whose main purpose is not to democratize the country, but to

[70]Rainer Grote, Tilmann Roder, "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press (2016) p.123

guarantee the regimes' own survival. Indeed, we are in a situation in which the promulgation of a constitution is used by the king as a mean to maintain and strengthen the authoritarian/semi-authoritarian regime. [71]

With this regard, during the end of the fifties, Jordan experienced a retrogression in the path toward a parliamentary monarchy. The new constitution of 1952 led to the flourishment of the political life in Jordan, as fair elections and active political parties. Also, the press experienced a full freedom, as much as this period is called the "golden age" of the Jordanian democratic experience. However, the fiftiesrepresented as well a difficult period for the Jordanian regime, which suffered of internal and external challenges. After 1956, Jordan suffered military and foreign countries interference. [72] Also, the political opposition was against the King's and the regime's policies. From the international arena, Jordan suffered the consequence of the Arabian cold war, among its neighborough countries, Egypt, Iraq and Israel. These circumstances led the King Hussein to deliver a series of reforms identified as a "coup" against the Parliament in 1957.[73] These reforms are important because they will shape the Jordanian political life until the beginning of the nineties. Indeed, the king dissolved the Parliament, abolished all political parties, banning their activities and proclaimed the martial law. The amendments that were introduced had the scope of increasing the role of the executive authority vis à vis the legislative power. As a consequence, the principle of separation of power that was, on the paper, proclaimed by the 1952 constitution, was disrupt. The most anti-democratic amendment gave the power to the executive authority to dissolve the House of Representatives and to postpone parliamentary election indefinitely. [74] Another feature of this retrogression, was the fact that the king gave the power

[71]Francesco Biagi, "Will Surviving Constitutionalism in Morocco and Jordan Work in the Long Run: A Comparison with Three Past Authoritarian Regimes Cambridge Journal of International and Comparative Law (2014)

[72]The Suez crisis was about to end and a new shape in the power in the Middle East was about to be designed.

[73]Mohammed Salameh, Azzam Ananzah, "Constitutional Reforms in Jordan: A Critical Analysis", Digest of Middle East Studies, Volume 24, Number 2 pp. 139-160 (2015)

[74]Ivi p. 143

to the executive authority to approve provisional laws, thus giving a legislative power to the government[75].

The Jordanian political situation returned at its democratic stage only after the 1989, when a new international system was about to be created. Given the waves of democratization that were taking place all around the world, following the disintegration of the Soviet Union, the king had come to realize that he should have granted more liberties to the Jordanian society. Furthermore, there was the American pressure on Jordan for adopting democratic reforms.[76] As a consequence, the king was forced to announce the first elections in 1989 after twenty-two years. Thus, all the parties, previously banned, restarted their activities. At this regard, it is worth to mention that during the period of political parties' banning, the only movement remained active is the Muslim Brothers because it was registered as as an association rather than a political party.[77] It is important to underline this point because the Muslim Brother in Jordan put themselves at the stake of the electoral progress by promoting fair elections.[78] The Left and the radicals had a lot of troubles in organizing themselves in a solid party, while the ruling oligarchy seen the election in a distort perspective. Indeed, they carried out the electoral campaing through traditional tribal method.

At the end, the Muslim Brothers won the majority of the House of Representative, becoming the ruling party. However, it should be noted that, despite the democratization process and the election were a success, this was thanks to the king's authority. Thus, the central position of the king always reiterated in the political and constitutional history of Jordan too.[79]In this regard, the scholar Finer talked about a "façade democracy" in Jordan, referring to a 'system where liberal-democratic institutions are established by law but are in

[75]In Israel, this is a current trend. In Chapter 3 we will analyse the introduction by the Knesset of the so-called "temporary provisions". This laws were adopted when the topic in question had been argued to violate human rights.

[76]Rainer Grote, Tilmann Roder, "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press (2016)

[77] Mohammed Salameh, Azzam Ananzah., "Constitutional Reforms in Jordan: A Critical Analysis", Digest of Middle East Studies, Volume 24, Number 2 p. 143

[78]Milton-Edwards Beverly, "Facade Democracy and Jordan", British Journal of Middle Eastern Studies, Vol. 20, No. 2 (1993)

[79]As in Morocco

practice so manipulated or violated by a historic oligarchy as to stay in office'.[80] A similar concept was is expressed by the Francesco Biagi, of whom we mentioned above the important concept of 'surviving constitutionalism'. All considered, we can conclude that the king in Jordan, as in Morocco, always put himself in a position of promotor of constitutional and political change because he wanted to make sure a pivotal role for him in the constitutional system of his country.

This trend is further demonstrated during the constitutional amendment that Jordan experienced in 2011. Indeed, after the end of the cold war, a new conflict, the Gulf crisis, started to destabilize the regional fragile equilibrium of the Middle East. This was not the optimal environment for a constitutional reform's endorsement. Also, the country experienced the death of the King Hussein in 1999, who was the responsible of years of democratic retrogression. A new era was about to start with the accession of King Abdullah II to power in 1999. He started a program of economic modernization and renovation of the Jordanian state. This process was accompanied by hope for political transformations and constitutional amendments leading to a gradual transition to pluralism. However, this latter reform retarded to be initiated. This was because of the international arena's interference. Indeed, in 2003 the American occupation of Iraq, provoked several problems in Jordan, that was historically affiliated with Iraq. This event started a series of terroristic attacks in the Jordan's capital, Amman, that lead to a further postponement of the constitutional reform. The following elections in 2003, 2007, and 2010 were marked by less citizens' confidence on the role of the House of Representatives in the state's ruling process. [81]

As in many other neighbouring countries, the Arab Spring was a driving factor of changes in Jordan. Even if, in comparison to Morocco, in Jordan the 2011 constitutional amendment was lighter, several steps forward were made towards the establishment of a parliamentary monarchy. The choice of constitutional and legislative reforms as a method of dealing with a rising

[80] Finer S. E., "Comparative Government", Pelican, London (1970) p.441, second hand

[81] Mohammed Salameh, Azzam Ananzah., "Constitutional Reforms in Jordan: A Critical Analysis", Digest of Middle East Studies, Volume 24, Number 2 pp. 139-160 (2015)

popular uprising was not new in Jordan, as we noticed in 1989 with the "return to democracy".[82]The Jordanian streets were full of protesters calling for fundamentals reforms in the structure of the political system. The protesters demanded a change within the actual regime and not the establishment of a new one. [83]And this boosted the monarchy and its *entourage* to face the popular frustration with several tools.

One of it was the establishment of a Royal Committee in charge of reviewing the constitution and to come with a proposal to implement the necessary amendments. However, the work of this committee was done in total secrecy and the personalities inside of it were all faithful to the king.[84] Indeed the King Abdullah took a crucial role in the shaping of the constitutional reform. In only one month, the constitutional amendments proposed by the Royal Committee were discussed and approved by the House of Representatives. Thirty-six articles that contained seventy-eight amendments to the constitution represented the Jordanian constitutional reform of 2011. The amended constitution was published in the Official Gazette on October 1, 2011.[85] One year later, in June 2012, the Parliament passed the new electoral law, which modified the 'single non-transferable vote' system.[86]

With respect to the constitutional reforms, it can be said that they were much more limited compared to Morocco's. Nevertheless, in both countries, further steps were made toward the consolidation of the rule of law. A constitutional court, of which we will speak about on the next chapter, was established to monitor the constitutionality of laws and regulations. Furthermore, an independent body (Art. 64) has been designed to supervise the election process,

[82]Rainer Grote., Tilmann Roder, "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press (2016)
[83]Francesco Biagi, "Will Surviving Constitutionalism in Morocco and Jordan Work in the Long Run: A Comparison with Three Past Authoritarian Regimes Cambridge Journal of International and Comparative Law (2014)
[84]Mohammed Salameh, Azzam Ananzah, "Constitutional Reforms in Jordan: A Critical Analysis", Digest of Middle East Studies, Volume 24, Number 2 pp. 139-160 (2015)
[85]Rainer Grote, Tilmann Roder., "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press (2016)
[86]As we have seen, the electoral legislation is a sensitive issue in Jordan for historical reason: such as the period (1957-1992) where the political parties were banned

which helped to restore the credibility of the Jordan's elections.[87]Also, the protection of human rights was reinforced through the amendments of Arts. 16-9,15-18, and 20, which specified the non-constitutionality of physical or moral torture and abuse. However, most of the articles are poorly written firstly in Arabic and also in its English translation, as for example Art.6, paragraph (2) and (4), regarding the equality of the Jordanians, their issues and duties. [88]

Moreover, the Chapter 4, section I of the constitution remained entirely intact. This means that the king retained his executive power, was able to appoint the government and could dissolve the House of Representatives. Moreover, he still can ratify the laws and has a veto power which can only be exceeded by a two-third majority. [89]

With regard to the establishment of a constitutional adjudication, a first step was done by creating a Constitutional Court, which had never existed before. Despite some concerns about its independence, this should be seen as a success. The role and functioning of this body will be explained in the next chapters.

In conclusion, we have seen that Jordan followed, in minor way, the same path of Morocco in matter of constitutionalism. Indeed, they shared the characteristic of the constant and pivotal figure of the king in the promotion of a constitutional reform. The fact that the king always managed to retain the most important powers affected the path towards the establishment of a real parliamentary democracy, based on the rule of law and the separation of powers' principle.

[87]Imen Gallala-Arndt, "Constitutional reforms in Tunisia, Egypt, Morocco and Jordan: A comparative assessment", Panorama,n°141(2012)

[88]Rainer Grote., Tilmann Roder., "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press (2016)

[89]Francesco Biagi, "Will Surviving Constitutionalism in Morocco and Jordan Work in the Long Run: A Comparison with Three Past Authoritarian Regimes Cambridge Journal of International and Comparative Law (2014)

Chapter 2 – The Constitutional and Supreme Courts in Israel, Morocco and Jordan: procedures of appointment and composition

2.1 The Israeli Supreme Court

This paragraph wants to explain the functioning of the Supreme Court in Israel. The focus will be on its development since the establishment of the Israeli state and the mechanism of its judges' appointment. Moreover, it will analyse in deepth its increasing judicial activism and its changing position regarding the doctrines of justiciability and standing.

As the former Chief Justice Aron Barak argues, a pivotal precondition for understanding the judicial role is the independence of the judiciary.[90] And, as Suzie Navot affirms, Israel's judiciary is autonomous, independent and trusted by the public. Indeed, the Court system is set out, according to Basic Law: The Judiciary and the Courts Law, as involving three levels: magistrates' courts, six district courts and the Supreme Court.[91] For a matter of space and time, in this paragraph we will only deal with the role of the Supreme Court, which is the highest court in the State of Israel.

The Israeli Supreme Court has two main roles. First, it works as the court of final resort for appeals against decisions passed on by district courts and as a consequence rules on civil, administrative and criminal matters. Secondly, it sits as the High Court of Justice (HCJ), and hears petitions against state authorities and other tribunals.[92] At this regard, it is important to underline that the Supreme Court and the HCJ are the same body. Thus, in this work both the names are used indicating the same institution.

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[90] Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy" , Harvard law Review, Vol 116:16 (2002)

[91] Suzie Navot, *The Constitution of Israel. A contextual Analysis,* Hart Publishing, Oxford and Portland, Oregon (2014)

[92] Ivi p. 194; plus, in 2000, the Knesset creatd the Administrative Affairs Courts Law, which authorised district courts to sit as administrative courts and address such issues. The aim of the prosivion was to overcome the HCJ workload. However, the case of humans rights' infrigement remained of HCJ's judicial matter.

In Israel, the judicial review has been one of the most contested issues, given the absence of vast national unity on fundamental matters, such as status of human rights and occupied territories. However, in 1992 with the *Bank Hamizrahi* case, the Supreme Court gave itself the power to judicially review the laws of the Knesset. This decision will be further analyse in Chapter 3, where it will be analysed the similitaries with the US decision *Marbury vs. Madison,* where the US Supreme Court acknowledge its own power to enforce the supremacy of the US Constitution over all others laws.[93]

The Supreme Court is composed of fifteen judges who are appointed by the President of Israel from names suggested by the Judicial Selection Committee, which is composed of nine members: three Supreme Courts Judges (comprising the President), two cabinet ministers (one of the being the Minister of Justice), two Knesset members, and two representatives of the Israel Bar Association. In order to appoint the judges, a majority of 7 of the 9 committee members is required, or two less that the number present at the meeting. Once appointed, judges are meant to serve "for life" and in practice until the age of 70, unless prior resignation. An Ombudsman's office is also provided in order to deal with the public complaints against judges (from the magistrate's courts to the Supreme Court).

HCJ work's is different from the other courts: it does not hear oral testimonies and its hearings are meant to give an immediate remedy, which may extend 'relief for the sake of justice' in every matter that is outside the jurisdiction of all other courts.[94]

Above we have seen that the Supreme Court, acting as HCJ, has the role to deal with administrative disputes. However, the Israeli Supreme Court has not always acted as an administrative court. In this regard, it has to be noticed that the Israeli judicial structure was mostly influenced by the British mandate period, from which its role in administrative disputes derived. The UK did not trust the local courts to deal with public matters, thus they created the HCJ as a unique institution controlled by British judges to deal with petitions against the

[93] Ibidem p. 198

[94] Section 15 (c) of Basic Law: The Judiciary

public authority.[95]Indeed, especially since the 1970s, the Court has advanced characters of a constitutional court similar to the Western centralized model, as the Austrian one, where the Constitutional Court is the only one in charge of judicially review the legislative acts. Moreover, another similitary can be made between the Israeli Supreme Court and the European Consitutional Courts as "quasi-political" ruler. Indeed, according to Mauro Cappelletti "in the European centralized constitutional it often happens that the constitutional court ruled on political questions.[96] In Israel, this characteristic is extremely present, also thanks to the work of Aharon Barak, as President of the Supreme Court during the so-called "constitutional revolution" in 1992. Indeed, in the 1980s, prior to the constitutional revolution, Justice Barak refused to place political issues outside the scope of judicial review, and his rulings soon become recognized for its motto: 'everything is justiciable'.[97] In addition, this trend marked a difference with the US Supreme Court, which often rejected to consider issues considered as essentially political. [98] In the literature, this interpretation of the judicial review is known as the 'normative justiciability" of Aharon Barak. Indeed, in his justiciability's theory, he distinguished two types of justiciability: the normative and the institutional.

The normative justiciability answers to the question whether there are legal criteria for determining a given dispute. According to Justice Barak, every legal problem has criteria for its resolution. There is no legal vacuum. Laws fill the whole world. [99]

With respect to the institutional jusiticiability, in the famous 1988 *Ressler* decision, Barak A. established a singular point, arguing that "the important question is not respect for one branch or another. The important question is

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[95]Rivka Weill, "The Strategic Commonlaw Court of Aharon Barak and its Aftermath: On Judicially-led Constitutional Revolutions and Democratic Backsliding", Journal Law & Ethics of Human Rights (2019)

[96] Mauro Cappelletti, "Judicial Review in Comparative Perspective", California Law Review, Volume 58, Issue 5 (1970) pp. 1040-1041

[97]Suzie Navot, *The Constitution of Israel. A contextual Analysis,* Hart Publishing, Oxford and Portland, Oregon (2014); HCJ 910/86 *Ressler v The Defense Minister,* ver 43 (2), 441 (1988)

[98] Mauro Cappelletti, "Judicial Review in Comparative Perspective", California Law Review, Volume 58, Issue 5 (1970) pp. 1040-1041

[99]Aharon Barak, "The Judge in a Democracy", Princeton University Press (2006) p. 178- 183

respect for the law. He continues by saying that he "cannot see how insisting that a branch of the state respects the law can harm that branch or undermine the relationship between it and the other branches".[100]

Moreover, to those who argue that institutional non-justiciability is implicit in the principle of separation of powers, Judge Barak responded that "the separation of powers is not a permit for a branch of the state to violate the constitution or a statute".[101]

Thus, Justice Barak paved the way to the Israeli constitutional revolution, by arguing that every matter is central in the work of the Supreme Court, serving as a guardian of a wider scope of protection of democracy's principles- mainly the rule of law. It is thanks to this active role of the Supreme Court that Israel faced a vital phase of constitutionalism. Indeed, its increasing intervention in parliamentary affairs and its judicial review of executive regulations gave birth to the Israeli constitutional core, which is mainly represented by the so-called Basic Law: Freedom of Occupation, and Basic Law: Human Dignity and Freedom, both enacted in 1992.[102] To these two, it need to be added the others Basic Laws regulating the three branches of the state.

Another revolution that contributed to the increasing judicial activism of the Supreme Court is the one related to the standing before the court. Indeed, section 15(c) of Basic Law: The Judiciary allows the HCJ to grant 'relief for the sake of justice' and deliver orders that bind public position holders. However, before 1980s, the HCJ acted on the basis of a threshold requirement of 'standing' as a precondition for hearing a petition. Thus, only the petitioners personally affected by a government action could appeal to the Court.[103]

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[100]HCJ 910/86 *Ressler v. Minister of Defense,* 42 (2) P.D. 441 (1988)

[101]Aharon Barak, "The Judge in a Democracy", Princeton University Press (2006) p.183-186

[102]In **6821/93,** *United Mizrahi Bank Ltd. v. Migdal Cooperative Village,* 49(4) the Israeli Supreme Court unanimously held that the two "Basic Laws" passed in 1992, *Basic Law: Human Dignity* and *Basic Law: Freedom of Occupation,* together with existing Basic Laws on the structure of government, are the supreme law of the land and constitute Israel's constitution. *Mizrahi Bank* sentence subjects any new statute to judicial review under these Basic Laws. I called this development a "constitutional revolution

[103]Suzie Navot, *The Constitution of Israel. A contextual Analysis,* Hart Publishing, Oxford and Portland, Oregon (2014);

This behaviour changed since the *Rissler* decision. From late 1980s, the HCJ legalized the appealing also to appellants who have showed no personal harm. These "user-friendly" access rules to the Court enabled the Court over the time to develop a solid common law protecting individual rights.[104] Besides the fact that, the Court became also a pivotal political player, which may be seen as creating a balance of power between the other branches.[105]

For all these judicial achievements, the Israeli Supreme Court is internationally known for its intense activism, given also the absence of a written unified constitution. Indeed, in the first years of the State of Israel, the Supreme Court, had only an interpretative role, not having a written constitution which prevented a judicial review of laws. However, following a political and cultural revolution started in 1970s, also the Supreme Court started to acquire a key role in shaping the Israeli constitution. Its works increased so much that took some scholars, as Menahem Mautner, to talk about a transition from 'formalism to activism'.[106]

Summing up, we can argue that all these judicial revolutions paved the way for the establishment of a proper judicial review mechanism in Israel, to which Chapter 3 is dedicated.

2.2 The Moroccan Constitutional Court

The Moroccan Constitutional Court, compared to the Israeli Supreme Court, is much less active also because of its recent establishment, with the 2011 constitution. Even if, it has to be said that Morocco established a Consitutitonal Council in 1996, having the duty of consitutitonally review the laws passed by the Parliament and the latter internal functioning.[107] However, none of the body (the King, the Prime Minister, the Presidents of both Chambers) in charge of

[104]Barzilai G., "Courts ad hegemonic institutions: The Israeli Supreme Cour in comparative perspetive", Israel Affairs (2007) https://doi.org/10.1080/13537129908719509

[105]Suzie Navot, *The Constitution of Israel. A contextual Analysis,* Hart Publishing, Oxford and Portland, Oregon (2014);

[106]When we talk about formalism, we refer to the British influence, which seen the Israeli adjudication as merely formalistic. For more information about this transition: Mautner M., "Law and Culture of Israel", Oxford University Press (2011)

[107] Chapter VI of the 1996 Moroccan Constitution

appealing expection of unconstitutionality has resort to the Constitutional Council. This is explained by the fact that, the Council was seen as the protector of the royal prerogatives.[108] For this reason, after the Arab Springs, this organ will be substituted with the Constitutional Court, which acquired more powers, especially in the taking cognizance of an expection of unconstitutionality raised in the course of a process (Art. 133).[109] However, this section will less full of details regarding the Moroccan Constitutional Court, given the fact the its process of functioning is currently under debate.

In Morocco, the constitutional justice's theme will occupy a privileged place within the 2011 constitutional revision process, revealing the degree of intimacy existing with the paradigm of the rule of law. Indeed, it is generally established that constitutional justice is a determining element of the rule of law especially since the end of the 1980s. In Morocco, since the adoption of the new Constitution, the key word has been implementing the Constitution. The word used in Arabic on a large scale, both by political actors and in the press and, consequently, by citizens in their comments on this process, is the term *tanzil*. That, literally means moving from top to bottom and totally suits the supremacy of the Constitution.

It is worth notice that the word has a religious essence because it refers to the descent of the Koran on the prophet andwhat should follow as an application of its precepts to the city and its inhabitants.[110]

It is important to underline that this theme has not given rise to any particular controversy, dissension, or antagonism within the Commission. As the scholar Bernoussi argued, it was self-evident that constitutional justice needed to be reworked to make it effective and to make it an effective instrument for the protection of fundamental rights.[111]

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[108] Francesco Biagi, "La giustizia costituzionale in Nord Africa e Medio Oriente in seguito alle primavere arabe", Quaderni costituzionali (ISSN 0392-6664), Il Mulino (2019) p. 648

[109] Chapter VIII 2011 Moroccan Constitution

[110] Lamghari A., "Développements constitutionnels rècents au Maroc (juillet-décembre 2011)", Venice Commission (2012)

[111] Nadia Bernoussi, "La constitution de 2011 et le juge constitutionelle", in "La constitution marocaine de 2011. Analyses et commentaires" (2012)

As said above, the new Constitutional Court replaced the Constitutional Council provided by the 1996 Constitution, which was composed of six members only. The 2011 Constitution reserves one chapter to the Judiciary (Title VII), which is presented by Art.107 as "independent of the legislative power and the executive power", and one chapter (Title VIII) to the newly established Constitutional Court.

According to Art. 130, the Constitutional Court is composed of twelve members appointed for a nine year non-renewable term. Six members are chosen by the King, of which one member is designed by the Secretary General of the Superior Council of the Ulema, and six elected, half by the Chamber of Representatives and half by the Chamber of Councilors. The vote is done by secret ballot and with the majority two-thirds of the members composing each Chamber. The President of the Constitutional Court is appointed by the King, from among the members appointed, which are chosen from among the notable persons disposing of a high knowledge in the juridical domain and of a judicial competence and have exercised their profession for more than fifteen years.[112]

The Court, besides deciding on the validity of the election of the members of Parliament and the organization of referendums, has to make sure that organic laws, ordinary laws and regulations of both House of Parliament are not in conflict with the constitution (Art.132). [113] As it can be noticed, the Moroccan constitutition followed the French model of constitutional review.

On August 2014, law No. 066.13 organising the Court came into force. Under this law and the Constitution, the Constitutional Court is also competent to rule on: the constitutionality of all organic laws prior to their promulgation; the internal regulations of the houses of Parliament prior to their implementation; and the constitutionality of laws referred prior to their promulgation by the King, Prime Minister, the President of the House of Representatives, the President of the House of Counsellors, one-fifth of the members of the Chamber of Councillors.[114]

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[112]Moroccan Constitution of 2011, Title VIII (Arts.129-133)

[113]Francesco Biagi, "The 2011 Constitutional reform in Morocco: more flaws than merits", Jean Monnet Occasional Paper 07/2014

[114]Moroccan Constitution of 2011, Title VIII (Arts.129-133)

A novelty was introduced in the 2011 constitution regarding the Constitutional Court jurisdiction and is expressed in Art 55., which states that "when the Constittuional Court [..] declares that an international commitment involves a provision which is inconsistent with the Constitution, the said text may not be ratified until the Constitution has been revised". Moreover, a constitutional review *ex ante* was added to the already established *ex post.* However, on the Moroccan constitutional adjudication and interpretation process we will return in the following chapters.

Returning to the importance given to the establishment of the Moroccan Constitutional Court, despite the progress made by the constitution toward the fulfilment of the rule of law, the judiciary in general is not the guardian of the constitution, which remained exclusively matter of the King. Nor it is the guarantor of the individual and collective liberties. Also in this new constitution, the power of the judiciary is fundamentally related to the power of the king as the head of state (Art. 42) and *Imamat,* or 'commander of faithful' (Art. 41). This relation appears in a number of judicial level. Regarding the Constitutional Court one, the King's has the power to refer matters to it. [115]

In conclusion, we can argue that the Moroccan Constitutional Court maintained part of the tasks assigned to it in 1996 and increased its power of constitutional review of legislation with both the introduction of an ex ante control and possibility of a concrete constitutional review, meaning that the Court can judge an exception of unconstitutionality during the course of a trial (Art.133). The establishment of the *ex post* constitutional review thus seems to be an important step towards the reinforcement of the Constitutional Court's role, not only as counter-majoritarian body but also as the promotor of the democratization process.[116] Even more, considered the fact that the previous Constitutional Council was not able to fulfil its role,given the fact that the Parliament appealed only few times to it. However, since the recent

[115]Mohamed Madani, Driss Maghraoui, Saloua Zerhouni, "The 2011 Moroccan Constitution: A Critical Analysis", IDEA- International Institute for democracy and electoral assistance (2012)

[116] Francesco Biagi, "The 2011 Constitutional reform in Morocco: more flaws than merits", Jean Monnet Occasional Paper 07/2014

establishment, it is difficult to comment in a definitive way the Constitutional Court's actions. In the following chapters, we will discuss its constitutional review process of legislation. Moreover, in Part II of this work, we will also analyse its interpretation of legislation, which is strongly influenced by the Islamic religion.

2.3 The Jordanian Constitutional Court

Prior to the constitutional amendment of 2011, Jordan did not have a Constitutional Court. The only provision relating to the enforcement of the constitution was in Art.122 of the Jordanian Constitution of 1952, which charged the High Tribunal with the right to interpret the constitution. Its official function was to solve controversies that arise during trails of ministers for offenses they committed during their duties (Art. 57). [117]However, there were doubts regarding the legality of its work, since it was a body partially composed by politicians and the exercise of its power was related to the Council of Ministers' will. Also, before 2011 constitutional reform, only the *ex-ante* constitutional adjudication was provided in Jordan.

Thus, the constitutional reform of 2011 introduced important novelties on the constitution's protection area. As part of the constitutional revision, a new chapter (Chapter 8) was added to the constitution which created the Jordanian Constitutional Court, meant to work as an independent and separate judicial body. The law No. 15/2012 defined the work and procedures within the new Court, in which we can observeelements of the French model of constitutional justice and of other regional systems, as the Egyptians one.[118]

According to Art. 58, the new Constitutional Court is to be composed of nine members at least, president included, to be appointed by the king through a Royal Decree for a non-renewable term of six years. This non-renewable term represents an important safeguard to ensure the independence of the justices,

[117]Rainer Grote, Tilmann Roder, "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press (2016)

[118]Laith Nasrawin, "Protecting Human Rights Through Constitutional Adjudication – Jordan as a Case Study", Digest of Middle East Studies, Volume 25, Number 2, Wiley Periodicals (2016)

which are in charge with constitutional duty of protecting individuals' human rights.

With respect to the Court composition, the Royal Constitutional Reform Committee stressed the need for the Constitutional judges to be professionally competent. Article 60 of the Jordanian Constitution specifies the criteria and qualification that a judge must meet to be eligible to the Court: 1) being of Jordan nationality; 2) having reached 50 years of age; 3) having either served as a judge in the court of cassation or the high court of justice; 4) being a professor at the university law; or 5) having worked as a lawyer in private practice for at least 15 years. However, unlike Moroccan Constitution, the Jordanian one still leaves the door open to the membership of former politicians. Indeed, under Art. 61, the "specialists" who fulfil the conditions for membership in the Senate may also join the new Court. [119] All considered, we can argue that this characteristicin the Jordan Constitution, together with the pivotal constitutional role of the king, certainly infringe the principle of separation of power and the independence of the Court, since members of the legislative can join it.

As already mentioned above, Jordan had always exercised the constitutional judicial review prior to the constitutional amendment of 2011, despite this was an exercize higly politicized and any legislative provisions gave this explicit power. Indeed, the scope of this *ex ante* constitutional review was unclear and its effects were partial. The High Tribunal, which was the body embodied of constitutional review and interpretation before 2011, had no ability to invalidate laws and regulations.

After the Arab Spring, the society's prerogatives were changed and the Kingdom of Jordan needed to evolve too. For this reason, the primary purpose behind the establishment of the Jordanian constitutional court was to provide access to justice to the individuals and to define the relationship between individuals and the state authorities. From 2011, the Jordanian Constitutional Court can strike down laws and regulations if it retains that the latter are incompatible with the

[119] Rainer Grote , Tilmann Roder, "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press (2016)

constitution.[120]Besides this, the Court is also empowered to deliver constitutional interpretations of the constitution upon request of the executive or from a majority of either House of Representatives or the Senate. Thus, at least on the paper, the Constitutional Court acquired an active role in shaping the Jordanian system of fundamental human rights protection.

In conclusion, with the Arab Spring, the king of Jordan was forced to give up some his supreme powers to the Constitutional Court, which being an independent body can now represent an important counter-majoritarian body of the Jordanian state. Nevertheless, as we have seen and we will see in the next chapter, its power will be always restricted to a limited area. Indeed, in Jordan, the supremacy of the king is even more evident.

Conclusion

This part had the aim of introducing to the reader the constitutional system of Israel, Morocco and Jordan. We have seen how the Israeli constitution, working without a written constitution, had implemented its own form of government. Also, we gave special attention in the analysis of the Israeli Supreme Court, which was the promotor of the 1992 Israeli "constitutional revolution". Indeed, thanks to its interpretation and adjudication work, the Supreme Court succeeded in protecting several fundamental human rights. Moreover, we have dealt with the Moroccan constitutional history, pointing out the importance of the figure of the king as promotor of any constitutional change. This king's attitude had the clear intent of preserving the main powers among the other branches of the state. Also, we analysed the Moroccan Constitutional Court, though does not play the same role of the Israeli one in shaping the constitutional order of its state. Finally, we went in analysing to the Jordanian constitutional system, which presented more elements of discrepancy with a proper parliamentary system, where the rule of law and the separation of powers'

[120]Laith Nasrawin, "Protecting Human Rights Through Constitutional Adjudication – Jordan as a Case Study", Digest of Middle East Studies, Volume 25, Number 2, Wiley Periodicals (2016)

principles are respected. As in Morocco, also the Jordanian king tried to retain as much powers as possible vis à vis the legislative the executive and judiciary.

PART II – Constitutional review of legislation and interpretation in Israel, Morocco and Jordan

Chapter 3 – Constitutional Review in Israel, Morocco and Jordan

Introduction

Part Two of this thesis will try to give an overview of the mechanism of constitutional review of legislation and interpretation in Israel, Morocco and Jordan. First, the main questions on judicial review will be presented, taking into consideration important writings from the literature, as Mauro Cappelletti.[121] As follow, the two main models of constitutional review will be described, underlining the fact that Israel might not be included a whole in one of the two models. In a second moment, the Israeli constitutional review will be introduced, starting from the landmark decision of the Israeli Supreme Court which is the *Bank Hamizrahi* (1995).[122] The similarities and influences received by the US Supreme Court decision *Marbury v Madison* will be also analysed. Then, the work will pass introducing the constitutional review in Morocco and Jordan, which will be analysed together given the proximity of their constitutional order. Indeed, both of the countries implement a centralized constitutional review model. Moving forward, Chapter 4 of this part will deal with the constitutional interpretation process in these three countries. At a first time, the principal elements of constitutional interpretation will be underlined, pointing out also the various theories of interpretation that a court can use, starting from the originalism and arriving to the purposive one. Then the Israeli Supreme Court's

[121] Mauro Cappelletti, "Judicial Review in Comparative Perspective", California Law Review, Volume 58/Issue 5 (1970) p. 1018

[122] HCJ 6891/93 *United Mizrahi Bank v. Midgal Cooperative Village.* For an English translation of the judgment, see *Israel Law Report* 1995 (2) – Special Volume

method of constitutional interpretation will be analysed, showing the prevalence of the purposive method as a way of interpreting. The influence of Aharon Barak, as judge and President of the Court will be also pointed out. At the end, the very recent established constitutional interpretation in Morocco and Jordan will be introduced, underling the ambiguities present in the constitutional texts' that make difficult a clear constitutional interpretation to the Constitutional Court.

3.1 The principal questions about constitutional review

This Chapter deals with the general notion of constitutional review, analyzing the different models and the actors involved. We need to begin by saying that the power that was given to the Supreme or Constitutional Court to review the actions of the other branches of government always represented a controversial issue. Many scholars, such as Alexander Bickel., wondered about who should be empowered to decide that an act is repugnant to the Constitution.[123] And, according to Aharon Barak, giving this power to the Constitutional judges is respectful of the principle of separation of power and rule of law. [124]

Saying that an act must obey or be in compliance with the constitution, it means to attribute the constitution a superior level in the legal hierarchy of law. According to Mauro Cappelletti, this tendency represents one aspect of "man's never-ending attempt to find something immutable in the continuous change that is his destiny". Laws changes, but the Law must remain, and with it, society's fundamental values; a law that contravenes the higher Law is no a law at all.[125]

With the time, society understood that also the Law and the fundamental values could change. The traditional model of legislative supremacy, mainly exemplified by the British Commonwealth, but also by the French doctrine, felt.

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[123] Alexander Bickel, "The Least Dangerous Branch. The Supreme Court at the Bar of Politics", Yale University Press (1962)

[124] Aharon Barak "The Judge in a Democracy", Princeton University Press (2016)

[125] Mauro Cappelletti, "Judicial Review in Comparative Perspective", California Law Review, Volume 58/Issue 5 (1970) p. 1018

Thus, even if the legislative was always seen as the only source of law, after the Nazi-Fascist era, people, especially in Europe, began to rethink the judiciary as a counter power of the legislative.

A new model was established, which inverted the twin principles of the sovereignty of Parliament so that legislative power is legally limited and courts are empowered to enforce these limits.[126] Thanks to the influence of the positivism, society began to put in a written document its values, conferring to it a rigidity character, and created instruments for protecting them. Thus, the community established new body for guaranteeing that the government obey to the constitution, independent from the legislative and the executive. [127] This new instrument is represented by the judges of some courts or, in the majority of the systems, of a special Constitutional or Supreme court, which by applying a control of constitutionality of the laws and regulations preserves the higher Law through the time.

Rephrasing, the Law was meant to be composed of a specific set of fundamental rights and liberties which have the status of supreme law. This document, called constitution or Bill of rights, is built against amendment or repeal by Parliament majorities, and is enforced by an independent institution – usually a court but not only – which has the power to strike down legislation that it finds in conflict with these rights.[128] However, it must to be said that the content of the fundamental rights preserved and the form of constitutional review adopted by the countries differ.

During the history, two mains system of constitutional review were established: the centralized, which is the Western Europe one, and, the decentralized models, adopted by the US and usually by common law countries. The centralized model, which is the European one, was elaborated by Kelsen, who was a supporter of the formal hierarchy of legal norms. According to this

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[126] Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism. Theory and Practice", Cambridge Studies in Constitutional Law, Cambridge University Press (2013)

[127] Mauro Cappelletti, "Judicial Review in Comparative Perspective", California Law Review, Volume 58/Issue 5 (1970)

[128] Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism. Theory and Practice", Cambridge Studies in Constitutional Law, Cambridge University Press (2013)

model, only the Constitutional Courts have the power to review the compliance of the legislation with the constitution. Here, the Court is seen as a negative legislator. Indeed, it has a veto power on the legislation passed by the parliament. Thus, a Constitutional Court has the only power to check the compliance of legislation with the constitution. The type of review that it performs is abstract and *ex ante.* Abstract because there is not a concrete proceeding in which a doubt of constitutionality arises. *Ex ante* means that the control of constitutionality occurs before the entering into force of law. In this model, the effect of the judgement is *erga omnes* and causes the removal of the law from the legal system. We will see that this model, besides being the European one, is also adopted – partially- by Morocco and Jordan.

With regard to the second model, the decentralized one, it mainly applies to the US and the other common law systems. One of the characteristics of this model is that the constitutional control happens in a proceeding before a court, every judge, at any level of government, can check the compliance of a law with the Constitution. Indeed, not only the Supreme Court is entitled to exercise constitutional review of legislation. This is why it has been called decentralized system. Another feature is that the type of judgement in which a legislation can be declared unconstitutional appears to be *concrete* and *a posteriori* (or ex-post). *Concrete* because there is a specific case that the court needs to solve. While, *a posteriori* because the law that you need to apply is already in force. In this model, the effects of the judgement is *inter partes,* which means that only the parts of the proceedings are regarded by the disapplication. Indeed, in a future proceeding, before a different judge, the decision could be different. Also, this type of judgement is retroactive, which means that the judgement is applicable to the past. Another important feature of this model is the principle of *stare decisis*, which means that when a court declares the law unconstitutional it creates a precedent, so also the lower courts have to declare it unconstitutional.[129] It is used to associate this model to common law countries, mainly because the US paved the way to it with the famous *Marbury vs Madison* sentence. Also,

[129] Michel Rosenfeld, Andras Sajò(ed.by), "Oxford Handbook of Comparative Constitutional Law", Oxford University Press, Oxford 2012

Israel adopted this model, being influenced by the US path. In the next paragraph, we will analyse how the US Supreme Court influenced the Israeli one in the establishment of a judicial review of legislation. Also, it will appear that it is difficult to place Israel in one of the two models of constitutional review, since it has features of both of them.

In conclusion, we can argue that, depending on the body that detains the power of constitutional review we can figure out which institution is primarily entrusted with the tasks of declaring and protecting citizen's rights and liberties.[130]

3.2 Procedures in Israel: the "constitutional revolution" in 1995

Judicial review of laws and governmental regulations has long been one of the most challenging issues in Israeli society and has often provoked harsh public debates. Indeed, many Israelis believe that decisions on important life's matter should be made by the Knesset, based on a majority view, and not by the Court.[131] The disputes reflect from the fact Israel lacks vast national consensus on fundamental issues such as the place of religion, the nature of the state, the status of occupied territories, the scope and status of human rights etc.[132] Even if the constitutional revolution, implemented in 1992, by the Israeli Supreme Court fixed a set of fundamental human rights to be protected, the Israeli society is still very fragmented. Also, the following revolutionary decision of *Bank Hamizrahi* taken by the Supreme Court in Israel in 1995, on questions similar to those decided in *Marbury v. Madison*, is not yet broadly accepted.[133] Indeed, after the *Bank Hamizrahi's* decision, Israel was not seen any more as a state having only a material constitution, represented by *Basic Law: Freedom of*

[130] Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism. Theory and Practice", Cambridge Studies in Constitutional Law, Cambridge University Press (2013)
[131] Amnon Rubinstein, Barak Medina, "The Constitutional Law of the State of Israel Law", 6th edn 173, Stoken, Israel (2005), second hand (Hebrew)
[132] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart publishing (2014)
[133] Yoram Rabin, Arnon Gutfel, "*Marbury v. Madison* And Its On Israeli Consttutional Law", University of Miami International and Comparative Law Review (2007)

Occupation and *Basic Law: Human Dignity and Liberty*. The transition from a substantive to a formal constitution was based on a limitation clause in both human rights basic laws. This decision established the limitation clause that was intended to limit the Knesset's legislative power.[134]

Regarding the limitation clause argument, it is necessary to underline its importance within the constitutional adjudication and interpretation process. As Barak A. argued, there are several ways to limit a constitutional right. On the one hand, we might find a constitution prescribing several human rights without providing any mechanism for their limitation, as the US Constitution in relation to the First Amendment. On the other hand, we might encounter a constitution which defines the rights in absolute terms alongside a general limitation clause which applies to those rights. This is the approach used by Canada, South Africa and Israel.[135] Indeed, Israel, as South Africa, was influenced by the general limitation clause in the Canadian Charter, in which the rights appear to be of an absolute nature.

In this context, the 1948 Universal Declaration of Human rights specified a list of human rights and did not contain a specific limitation clause. Indeed, it provided a general one, which states that:

"*In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society*."[136]

Following the same path, the Canadian Charter generated its very own limitation clause, that instead of specifying particular circumstances, such as health or morals, under which each particular right can be limited, include a single and general limitation clause. Indeed, the Canadian Constitution

[134] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart publishing (2014)
[135] Aharon Barak, "Proportionality. Constitutional Rights and their Limitations", Cambdrige University Press, Cambridge (2012) p. 133
[136] Art. 29(2), Universal Declaration of Human Rights (1948);

guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law *as can be demonstrably justified in a free and democratic society'* (Art.1 of the Canadian Charter of Rights and Freedoms). [137] Accordingly, in Israel the limitation clause included in Basic Law: Human Dignity and Liberty provides:

"*There shall be no infringement of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required*" [138]

The same provision appears in the Israeli *Basic Law: Freedom of Occupation.* The approach of the Israeli Supreme Court seems to be taking in respect to this question is that these basic laws should be viewed as if they do contain a limitation clause. Moreover, the Court created a "judicial limitation clauses" that allow for the review of laws that impair institutional basic laws.[139]According to some scholar, the exportation of the limitation clause to institutional basic laws constitutes a second revolution. [140]

It has to be said that all these constitutional texts, contains rights characterized by an absolute nature. Their relative side results from reading of them in conjunction with the general limitation clause.[141] All considered, we need to note that those general limitation clauses have a flexible character and allow room for interpretation. Indeed, its non-specific character also signify that they could over or under-limit rights depending on the orientation of the Court. [142]However, this problem will be analysed in a deep way in Chapter 4.

This digression on limitation clause was needed is order to continue analysing the importance of the *Bank Hamizrahi's* judgement in Israel. Indeed,

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[137] Institute for Democracy and Electoral Assistance (IDEA), Limitation Clauses (2014)
[138] *Basic Law: Human Dignity and Liberty* (1992)
[139] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart publishing (2014)
[140] Ariel Bendor, "Four Constitutional Revolutions", 6 Mishpat Uminshal 305 (Hebrew) second hand
[141] Aharon Barak, "Proportionality. Constitutional Rights and their Limitations", Cambdrige University Press, Cambridge (2012) p.142-143
[142] Institute for Democracy and Electoral Assistance (IDEA), Limitation Clauses (2014)

this decision initiated the constitutional review's process in Israel, by ruling that if a law infringed any of the fundamental rights contained in a basic law and failed to meet the conditions of its limitations clause, that law could be invalidated by the Court regardless of Knesset majority that enacted it. [143] In so ruling, the Supreme Court gave herself the power and the right to judicially review Knesset legislation. Moreover, for this self-recognition made by the Israeli Supreme Court, the *Bank Hamizrahi's* decision is usually assimilated to the US Supreme Court *Marbury v. Madison*'s judgement. In this decision, the US Supreme Court interpreted the US Constitution as empowered it to enforce the supremacy of the Constitution over all other laws. [144] Thus, the Israeli Supreme Court, while considering the question of judicial review, ruled that even though Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation do not involve a primary provision establishing that any norm that does not meet the requirement of the above mentioned basic laws is void, the Court has the power to declared it void. To sustain its statement, the Court explained that the judicial review is an implementation of the rule of law, democracy and the separation of powers. [145] Moreover, Justice Barak referred to the US *Marbury v. Madison* by saying that it was the central contribution of American constitutional concepts to the universal constitutional concept". [146] He also cited Justice Marshall as follow:

"*The powers of the legislature are defined and limited and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed,*

[143] Suzie Navot , "The Constitution of Israel. A contextual Analysis", Hart publishing (2014) p.31-32; also for the Israeli constitutional history see Chapter 1
[144] *Ibidem* p. 198
[145] Yoram Rabin, Arnon Gutfel , "*Marbury v. Madison* And Its On Israeli Consttutional Law", University of Miami International and Comparative Law Review (2007
[146] CA 6821/93 *United Hamizrahi Bank v Midgal Cooperative Village* 49 (4) (1995)

and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it."

Following the US approach, the HCJ expanded its ruling so that the courts could also exercise the power of judicial review over cases in which it was declared that the unconstitutional law violates human rights that are not protected by the two Basic Laws. [147] An important feature to point out is regarding the period in which judicial review was introduced in Israel, which differs from the US. The US Supreme Court was established as a constitutional court in a moment in which there were not controversies damaging the society. On the contrary, according to Daphne Barak Erez, the Israeli Supreme Court was about to begin constitutional review "in a less innocent phase of national development". For this reason, also, the Israeli constitutional review faced and is facing difficulties and barriers from the society. [148]

The Israeli Supreme Court's approach has been extremely criticised by the Knesset and the Israeli society. This was due also to the absence of an explicit constitutional norm giving the power to Supreme Court to judicially review Knesset's legislation. Nevertheless, the Knesset did not react immediately to *Bank Hamizrahi* judgement with new laws. However, it failed to introduce, maybe on purpose, *Basic Law: Legislation*, which was supposed to establish the basic laws' normative constitutional status and the Supreme court's judicial review powers.[149] Perhaps, it is for this reason that the judicial review of the HCJ

[147] Yoram Rabin, Arnon Gutfel A., "*Marbury v. Madison* And Its On Israeli Consttutional Law", University of Miami International and Comparative Law Review (2007)
[148] Daphne Barak Erez, "From an Unwritten to a Written Constitution: The Israeli Challenge in American perspective", 26 Colum, Human Rights Review (1995)
[149] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart publishing (2014)

appears to have been and to have remained quite restricted, nullifying about ten laws over the past twenty years.

Besides this fact, the procedure established for the judicial review of the constitutionality of laws happens in two ways: 1) direct judicial review, which means that any person declaring a violation of his protected rights may present a petition to the HCJ, challenging the constitutionality of that violation; and 2) indirect judicial review, which means that any judge, as part of the legal proceeding over which that judge presides, has the power to examine the constitutionality of laws. However, the latter case has only happened once because in the general mixed feelings about judicial review, it is commonly only accepted that the HCJ acted the judicial review. [150]

In addition, it has to be said that the Israeli judges are forced to follow the stare decisis principle, yet in an exceptional way. According to Basic Law: The Judiciary, decisions of the Courts bind all lower courts, but not the Supreme Court itself, which has the possibility to deviate from them.[151] Although, in practice, this deviation happened rarely, it is important to notice the presence of this principle, being an important feature of the decentralized model.

Thus, it can be affirmed that, stating the similarities with both the decentralized and the centralized model, Israel has a constitutional review model more similar to the Western countries. Due to the fact that, it has been mainly the HCJ to have the right to exercise a constitutionality control on legislation until today. Even if, as we it will be explain below, the Court has limited space for actions because of the Knesset's power.

This duality in the powers of both the Supreme Court and the Parliament is explained by the fact that Israel is placed in a new model of constitutionalism. From the literature, mainly according to Stephen Gardbaum, Israel is considered to be part of the "new Commonwealth model of constitutionalism", which departs from the traditional model of parliamentary sovereignty.[152] In this approach, the legislatures and the courts are treated as joint rather than

[150] *Ibidem* p.204

[151] *Ibidem* p. 63

[152] Stephen Gardbaum., "The New Commonwealth Model of Constitutionalism. Theory and Practice", Cambridge Studies in Constitutional Law, Cambridge University Press (2013) p.1

"alternative exclusive protectors and promotors of rights, as under the two traditional models – civil and common law- , and decouples the power of judicial review of legislation from judicial supremacy.[153] An example of this duality in the protection of rights in Israel is the re-enactment in 1994 of Basic Law: Freedom of Occupation. Indeed, this Basic Law, one of the eleven, was re-enacted with a provision (Section 8) giving the power to the Knesset to immunize a statute from the Basic Law by a vote of majority of its members if expressly so stated when enacted.[154]

Moreover, the Knesset, during the past twenty years, reacted to the Supreme Court's monumental verdict of *Bank Hamizrahi* in several ways. First, by increasing the number of Supreme Court judges from 14 to 15, in order to make more difficult the decision-making process. Moreover, it managed to naming certain law as "temporary laws", meaning that the law in question had been argued to violate human rights. This represents an ad hoc method of the Knesset for signalling that it is aware of the harm that this legislation may cause to human rights, but since the law is provisional, that harm should be viewed as proportional. [155] As a consequence, most of the petitions against such temporary laws have been rejected, being recognised by the Court the proportionality involved in their temporarily.

In conclusion, it has been seen as the Supreme Court acting as the HCJ actively participate not only in framing a constitutional order in Israel, but also managed to actively participate to make this order to be respect and protect, according to the rule of law and the separation of powers. By establishing the judicial review on the constitutionality of Knesset's law with the *Bank Hamizrahi's* judgement, the Court completed the constitutional revolution

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[153] *Ibidem* p.2

[154] *Ibidem* p.11; Section 8, Basic Law: Freedom of Occupation: "*A provision of a law that violates freedom of occupation shall be of effect, even though not in accordance with section 4, if it has been included in a law passed by a majority of the members of the Knesset, which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law; such law shall expire four years from its commencement unless a shorter duration has been stated therein*"

[155] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart publishing (2014) p.201

started in 1992. Also, it has to be underline the huge influence of the *Marbury* decision on the Supreme Court action. Indeed, between many similarities, both US and Israeli Court used the judicial tools available to respond to an unstable and complex political and social reality. [156] However, it has been underline also the actions implemented by the Knesset with the scope of maintaining its position of guarantor of the rule of law. As a consequence, despite the judicial revolution, the Supreme Court's judicial review appears to remain restricted. Nevertheless, on the other hand, the role of the Israeli Supreme Court gained important powers in the field of constitutional interpretation, which will be analysed in the next Chapter.

3.3 Procedures in Morocco and Jordan – a comparative perspective

The constitutional orders of Morocco and Jordan are very similar, being both constitutional monarchies that reserve a pivotal position to the figure of the king. Indeed, as we have seen in Part One of this thesis, they are both considered as a model of "surviving constitutionalism" by Francesco Biagi. If we cannot deny that the Arab springs have produced some significant political and constitutional changes in these two countries, still both the monarchies managed to retains the most important powers. However, among the constitutional changes brought by the Arab upheavals are the introduction of a Constitutional Court in Jordan and the strengthening of the competences and functions of the Moroccan Constitutional Court. [157]

In both countries, the Arab upheavals generated strong protests form the society that required constitutional reforms in order to increase the protection of human rights and the separation of powers. It is interesting to note that these requests did not include the limitation of power of the monarchy because, in both countries, the king is considered to be the effective guarantors of the social and political stability, given his "unifying role" provided by the Constitution. For this reason, the kings themselves promoted and "granted" the constitutional

[156] Yoram Rabin, Arnon Gutfel, "*Marbury v. Madison* And Its On Israeli Consttutional Law", University of Miami International and Comparative Law Review (2007)

[157] Francesco Biagi, "La giustizia costituzionale in Nord Africa e Medio Oriente in seguito alle primavere arabe", Quaderni costituzionali (ISSN 0392-6664), Il Mulino (2019)

reforms in Morocco and Jordan, which comprised the introduction and the strengthening of their Constitutional Courts. As we have seen in Part One, among the several novelties introduced during the reforms, there is the establishment of a Constitutional Court, entitled of judicially review the constitutionality of the law passed by the Parliament.

In Morocco, a sort of judicial review already existed previous the 2011 constitutional reform. Indeed, the constitutional justice became integrated into the Moroccan institutional land gradually. [158] In 1992, the control over ordinary law was the only thing that was missing to Moroccan constitutional order to be considered among the states that enjoyed a true constitutional justice.[159] This further step was introduced with the constitution of 1996, which established and delegated to a Constitutional Council, an independent judicial body, the power of control over the constitutionality of ordinary laws. However, until 2010, the Constitutional Council's judicial review was very restricted.

For this reason, the new constitution of 2011 replaced the Constitutional Council and established a Constitutional Court. This new court, according to Art. 132, has the power to control that organic laws, ordinary laws, and regulations of the Parliament are in conformity with the constitution.[160] Moreover, it has to be noted that the new constitution introduced a *concrete* and *ex-post* constitutional review. Indeed, Article 133 states:

"*The Constitutional Court shall have competence to look into an exception of unconstitutionality raised in the course of a trial, when one of the parties argues that the law on which depends the outcome of a trial undermines the rights and freedoms guaranteed by the Constitution"*

[158] The 1908 draft Moroccan Constitution already provided for political control of laws exercised by the Council of notable, while the 1962 Constitution, out of concern for "institutional economy", instituted a constitutional chamber within the Supreme Court.

[159] Rainer Grote, Tilmann Roder, "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press (2016)

[160] Justin Frosini, Francesco Biagi, "Transitions from authoritarian rule following the Arab uprisings: A matter of variables" in "Political and Constitutional Transitions in North Africa. Actors and Factors, Routledge, New York (2015)

The introduction of such *ex post* review - which from 2011 existed alongside the *ex-ante* review, already established in the 1996 constitution – appears to be extremely important to strengthen the position of the Constitutional Court *vis à vis* the other branches. After this new introduction, Moroccan Constitutional Court reinforced its position as a counter-majoritarian body and enhance the democratization process of Morocco.[161] Indeed, the Constitutional Court acquired a new role as judge no longer of a purely abstract conflict of a law with the constitution, of judging not a law but the application of that law. [162] However, we can argue that, despite the progress made at this level, the Constitutional Court and the judiciary as a whole, continues not to be the guardian of the constitution, a power reserved to the king according to Article 41 and Article 42 of the Constitution.

According to the scholar Bernoussi, two tendencies are expected from this novelty, said to create a "living law", given the individuals' right to appeal. Firstly, the concrete constitutional review will establish the "democratization" of the constitutional law, which will no longer address only the rights of the state but also ordinary matters. Secondly, it will settle a dialogue or, in the worst-case scenario, a conflict, between judges, if the Court of Appeal decides not to refer a matter to the Constitutional Court. [163] In this regard, the Venice Commission advised Morocco to adopt a system where all the judges, also the ones of the lower courts, are able to refer an exception of unconstitutionality to the Court. However, the organic law n.86-15 on the exception of unconstitutionality has not been yet ratified because the Constitutional Court never approved it. (judj. n. 70-18 of 2018). [164]

Therefore, the effectiveness of this provision will depend on its implementation and in particular on the question whether it is in power to refer

[161] Francesco Biagi, "The pilot of limited change" in Frosini J., Biagi F., "Political and Constitutional Transitions in North Africa. Actors and Factors, Routledge, New York (2015)
[162] Nadia Bernoussi, "Morocco's Constitutional Court after the 2011 Reforms", in Grote T., Roder T., "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press (2016)
[163] Ivi p. 704
[164] Francesco Biagi, "La giustizia costituzionale in Nord Africa e Medio Oriente in seguito alle primavere arabe", Quaderni costituzionali (ISSN 0392-6664), Il Mulino (2019)

question of constitutionality to the Constitutional Court. And also, if it is given specific rights to the parties involved in the proceeding in order to initiate the procedure to Court, as it happens in Egypt.[165]

All considered, we can argue that despite Morocco continues to be an *executive* monarchy, the changes introduced with the 2011 constitution paved the way for establishment of a democratic state, built on the respect of separation of powers and the rule of law.

If Morocco represents a case of strengthen of constitutional courts, Jordan represents a case of emergence of a constitutional court after the Arab springs. Indeed, before the 2011 constitutional reform, the Kingdom of Jordan had a High Tribunal Council, which was composed of the Speaker of the Senate as President, and other eight members, and had the power of constitutional judicial review. However, the constitutional review was ambiguous, given the absence of regulation in matter. Indeed, after that a law was declared unconstitutional, it remained effective for the absence of a Court that repealed it. Thus, despite the numerous claims for the establishment of a Constitutional Court [166], Jordan needed to wait until 2011 for having some pivotal changes in the its constitutional justice.

Indeed, after the Arab uprising, a new Chapter - Chapter 8 - was introduced in the 1952 Constitution, regulating the establishment of an ordinary law that defined the work and procedures of the new Constitutional Court. This was the Law of the Constitutional Court of Jordan, which was issued in 2012, and set the powers of the new court. If we should take this novelty as an important factor enhancing the democratization of Jordan, we need also to mention that the new Court was limited to overseeing the constitutionality of applicable laws and regulations, and interpreting the provisions of the constitutions.[167] In particular, according to Article 59, the Constitutional Court

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[165] See Art. 29 of the Law No. 48/1979 on the Supreme Constitutional Court of Egypt

[166] Muddather Karaki., Raed Faqir, Majed Ahmad Marashdah, "Democracy and Judicial Controlling in Jordan. A constitutional Study", Journal of Politics and Law, Vol. 4, No. 2 (2011)

[167] Laith Nasrawin, "Protecting Human Rights Through Constitutional Adjudication – Jordan as a case study", Digest of Middle East Studies, Volume 25, Number 2 (2016) p.272

has the power to check the constitutionality of laws and regulations, as well as the right to interpret the provisions of the constitution if so requested either by virtue of a decision of the Council of Ministers or by a resolution taken by the Senate or the Chamber of Deputies passed by an absolute majority. Another important novelty introduced by the 2011 constitutional amendment is the introduction of a *concrete* and *ex-post* constitutional review. Indeed, according to Article 60, "in pending cases any party to the lawsuit may argue that a law is not in conformity with the Constitution. In case the relevant court finds that the plea has merit, it must refer to the court specified by the law for the purpose of examining the referral of such to the Constitutional Court." [168]

Moreover, judgements of the constitutional Court are final, binding and enforceable immediately. The decision need to be published within 15 days in the Official Gazzete. If the Court states that a provision is not in line with the Constitution, that provision should be erased at the date of the judgement is issued. However, regarding the possibility of amending the provision considered unconstitutional, it is not specified a mechanism for transferring such laws to the Parliament. [169] However, the constitutional reform of 2011 introduced a limitation clause in order to protect the hard core of fundamental rights present in the constitution. Indeed, with the judgment n.4/2013, the Jordanian Constitutional Court has started to nullify several norms that were particularly restrictive in terms of human liberties.[170]

Up to now, despite the disposal of a Constitutional Court and a judicial review process, very few cases were brought to the Court by the government or the Parliament. Indeed, out of the twelve judgements, until 2016, which the Constitutional Court has issued so far, 8 cases were dismissed without any logical or persuasive reasoning. Moreover, regarding the plea of unconstitutionality before any ordinary court, the Constitutional Court has

[168] Muddather Karaki, Raed Faqir, Majed Ahmad Marashdah, "Democracy and Judicial Controlling in Jordan. A constitutional Study", Journal of Politics and Law, Vol. 4, No. 2 (2011)

[169] Laith Nasrawin, "Protecting Human Rights Through Constitutional Adjudication – Jordan as a case study", Digest of Middle East Studies (2016)

[170] Francesco Biagi, "La giustizia costituzionale in Nord Africa e Medio Oriente in seguito alle primavere arabe", Quaderni costituzionali (ISSN 0392-6664), Il Mulino (2019) p. 658

shown a tendency of desisting from ruling on the non-constitutionality of laws related to the rights and freedoms of the parties to the underlying case. [171]
In sum, in Jordan also was introduced an important novelty to enhance the democratization of the state. However, much more than in Morocco, the king retained in his hand much of the power.

In conclusion, we need also to underline that given the very recent constitutional justice of both Morocco and Jordan, few judgements were done. However, as Francesco Biagi stated, "delaying the establishment of bodies entitled of constitutional justice risks to weakened their innovative appointment". [172]

Chapter 4 – Constitutional Interpretation in Israel, Morocco and Jordan

4.1. The principal questions of constitutional interpretation

Constitutional interpretation is about the question on how to decide constitutional meaning, or which approach to the meaning of the Constitution is the best. Several philosophers, political scientists, legal scholars and jurists still debate on whether a constitution can mean anything in and of itself. However, the current trend is to accept the fact that a Constitution means something in its self. [173] US Chief Justice Marshall believed that the Constitution should be read as a document "intended to endure for ages, to come and consequently to be adapted to the various crises for human affairs". [174] Thus, one of the question

[171] Hammouri, "Constitutional Reform and the Rise of Constitutional Adjudication in Jordan. Background, Issues and controversies" in Grote T., Roder T., "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press (2016)
[172] Francesco Biagi, "La giustizia costituzionale in Nord Africa e Medio Oriente in seguito alle primavere arabe", Quaderni costituzionali (ISSN 0392-6664), Il Mulino (2019) p. 661

[173] Sotiros Barber, James Fleming, "Constitutional Interpretation. The basic questions", Oxford University Press, New York (2007)
[174] Terrance Sandalow, "Constitutional Interpretation", University of Michigan Law School" (1981)

about constitutional interpretation is how is a constitution's scope determined, or better, how are the scope of the rights, included in the constitution, determined.[175] There are several theories that tried to give some tools of constitutional interpretation. One of these is textualism, which is a mode of interpretation that focuses on the transparent meaning of the text of the legal document. Those who follow this theory usually believes there is an objective meaning of the text.[176] This represents a positivistic approach, referring strictly to the text and not to the current societal perception of the issue.

Another theory is originalism, which is based on the original intent of constitutional framers – i.e the interpretation given by the founding fathers of the constitution. Accommodation to change through interpretation is not wholly foreclosed on this view, but defenders of this view believe that judgement is securely bounded by the intentions of the "framers".[177] The negative aspect of these two methods is that if the norm is very old, it remains frozen and does not adapt to the society, especially if the constitution is very rigid and hardly amendable. [178]

Nevertheless, there are other theories that are less related to the text of the constitution. At the risk of initial oversimplification, in these approaches, the boundaries of permissible constitutional interpretation are subject to continuous adjustment. In the following methods, the meaning of the Constitution is never fixed; rather, it changes over time to accommodate altered circumstances and evolving values.[179] In this framework, we have the systematic interpretation, which predicts reading the provision in conjunction with other principles, in order to see the real spirit of a norm. Moreover, we have the "living tree" method and the purposive interpretation, on which there are ongoing debates.

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[175] Aharon Barak., "Proportionality. Constitutional Rights and their Limitations", Cambdrige University Press, Cambridge (2012)

[176] Brandon Murrill, "Modes of Constitutional Interpretation", Congressional Research Service (2018)

[177] Terrance Sandalow, "Constitutional Interpretation", University of Michigan Law School" (1981)

[178] Michel Rosenfeld, Andras Sajò (ed.by), "Oxford Handbook of Comparative Constitutional Law", Oxford University Press, Oxford 2012

[179] Terrance Sandalow, "Constitutional Interpretation", University of Michigan Law School" (1981)

According to the "living tree" theory, interpretation should be done in accordance to the evolving needs of the society. This model empowers judges a lot. For this reason, we could say that it is not very legally precise. This approach can be quite dangerous to use, especially true in civil law countries. Indeed, in this system the judges are considered the *bouche de la loi,* which means that judges are required to stick and be faithful to the law. On the contrary, in common law countries, this approach fits better. Indeed, the living tree theory restrains judges more effectively and it is more justifiable in abstract terms than textualism and originalism. Historically, the common law does not recognize the law's adherence to an authoritative source, either the founding father or "we the people". [180]

For what concerns the purposive constitutional interpretation, of which Barak's is a strong promotor, is based on the belief that any legal text or constitution should be interpreted in accordance with its purpose. This purpose is the *ratio juris*, which means the ultimate purpose the text was designed to achieve. As a consequence, this approach contains both the subjective purpose, which is regarding the intentions of the creators of the constitutional text, and the objective purpose, which is the understanding of the text based on its role and function. [181] This approach takes into consideration the special nature of the constitution, derived by its legal status of supreme law of the land and as its unifying role in structuring the nation through the time.[182] Thus, by putting together both the subjective purpose, which is the founding fathers' intention, and the objective one, which the system's intention as whole, the judges can give a much more extended interpretation of the constitution. According to Barak, in this merge we can see demonstrated the special nature of the constitutional text. As a consequence, this would be the main approach used by the Israeli Supreme Court, which thanks to that, was able to increase its power vis à vis the Knesset.

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[180] David Strauss, "Common Law Constitutional Interpretation", University of Chicago Law School (1996)
[181] Aharon Barak., "Proportionality. Constitutional Rights and their Limitations", Cambdrige University Press, Cambridge (2012)
[182] *Ivi* p. 46

One of the challenge in which constitutional interpretation is required is when there are two rights at stake. Indeed, when this is verified, the judges, while conducting theirs judicial reasoning, use three methods: balancing, reasonabless and proportionality. Being in a situation of limitation of right, the most important tools of the judges is the proportionality principle. Indeed, it implies that legislative provision does not go beyond what is strictly necessary to achieve the objectives prescribed by the law. [183] As, Justice Barak argues, at the foundation of the modern understanding of human rights, is the distinction between the scope of the constitutional right and the justification for its limitation which determines the extent of its protection or realization. [184] According to Barak, which is one of the main scholar on this principle, proportionality represents a legal tool and is composed of four parts: 1) proper purpose; 2) rational connection;3) necessary means; and 4) balancing. [185]These four elements are at the stake of the concept of limitation of a right. Indeed, only if these components are fulfilled, a right can be constitutionally limited. However, this argument will be deepened at the third Part of this work.

In conclusion, we can argue that depending on the approach implemented, the Supreme or Constitutional Court is able to influenced more or less its impact on a state's constitutional life. As we will see in the next paragraph, the Israeli Supreme, using the purposive interpretation, played an active role in shaping the constitutional text of Israeli.

4.2. Israeli constitutional interpretation: the pivotal role of the HCJ

As we have seen in the previous Chapter, judicial review in Israel was very restricted by the actions of the Knesset. However, given the Knesset's failure to draft a constitutional bill of rights, the Supreme Court through its constitutional interpretation expanded the rights protected by the Basic Laws.

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[183] Michel Rosenfeld., Andras Sajò (ed.by), "Oxford Handbook of Comparative Constitutional Law", Oxford University Press, Oxford 2012

[184] Aharon Barak., "Proportionality. Constitutional Rights and their Limitations", Cambdrige University Press, Cambridge (2012)

[185] Ivi p.131

Constitutional interpretation in Israel has played and is playing such an important role that Suzie Navot affirms that "Israeli constitution is amended in a process that is mainly interpretative in nature". [186] Thus, it can be said that through constitutional interpretation, the Israeli Supreme Court played a more pivotal role than in performing judicial review. In this regard, also Daphne Barak Erez argued that the Israeli constitutional adjudication relies very much on the interpretation of the Basic Laws, "particularly with respect to scope of the rights protected by them and the availability of judicial review". [187] Indeed, as Aharon Barak argues, the scope of a right is identified by the interpretation of the legal text in which the right resides.[188] Given its active interpretative role, the Supreme Court's constitutional interpretation represents one of the main feature of what it was called above "constitutional revolution". Indeed, the judicial interpretation, made by the Israeli Supreme Court, can be considered as an informal constitutional change of unamendable constitutional provisions or principles, in such a way that the interpretation can replace the constitution with a new one. [189]

As we have seen, the Israeli constitutional development is very much shaped by Professor Aharon Barak's writings and believes. And, as exposed in the previous paragraph, among the several interpretation's theories, the one considered the best from Aharon Barak is the purposive interpretation, which is also the main approach applied in Israel. However, an exception is present in the Israeli constitutional interpretation's history, which is the *Bank Hamizrahi* case[190]. Indeed, this case is one of the most engaging examples of the interpretation of the original intent of a text's authors. Indeed, in that case Justice Aharon Barak and the Court as whole attempted to examine the intention of

[186] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart publishing (2014)
[187] Daphne Barak Erez, "From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective", 26 Colum. Hum. Rts. L. Rev. 309 (1995)
[188] Aharon Barak., "Proportionality. Constitutional Rights and their Limitations", Cambdrige University Press, Cambridge (2012) p.45
[189] Yaniv Roznai, "Unconstitutional Constitutional Change by Courts", New England Law Review, Vol. 51, No. 3 (2018)
[190] CA 6821/93 *United Mizrahi Bank Ltd. V. Migdal Cooperation Village*, 49(4) (1995)

legislators who enacted the basic laws in order to giving them a constitutional status.[191]

However, usually constitutional interpretation in Israel was concentrated on the Basic Laws on human rights, mainly for the reason that they include fundamental rights and clauses referring to their purpose.[192] However, the constitutional interpretation of the Israeli Supreme Court was not focused only on Basic Law related to human rights, but also to the others. Indeed, as we mentioned in the Part One of this work, the Basic Laws enacted before 1992 were considered to be ordinary legislative laws, thus they were modifiable with another ordinary legislative act. However, the Supreme Court in 2003 with the *Herus case* paved way for the consideration of Basic Laws as having a constitutional status. [193] President Aharon Barak in this case, stated that Art. 15 of Basic Law: the Judiciary has a constitutional supra-legal status and that an ordinary law cannot modify it, unless this is permitted by a limitation clause. [194] Given the fact that, constitutional interpretation was used mainly relating to Basic laws related to human rights, from now on this work will dealt with them. The clause that give fundamental principle to Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty is the following one:

"*Fundamental human rights in Israel are founded upon the recognition of the value of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel*" [195]

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[191] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart publishing (2014) p.59

[192] *Ibidem* p.60

[193] Gary Jacobson, Yaniv Roznai, "Judicial Activism, Courts and Constitutional Revolutions: The Israeli case" p. 13; HCJ 212/03 *Herut – The National Movement v. Central Elections Committee for the 16th Knesset, 57/1) (2003)*

[194] Ivi p. 13

[195] Section 1 of Basic Law: Freedom of Occupation and Section 1 of Basic Law: Human Dignity and Liberty

This clause provides a textual basis for making interpretative use of the Israel Declaration of independence, which highlighted the value of equality, not explicitly pointed out in the Basic Laws.[196]

This provision establishes the fundamental guiding principles of human rights in Israel and plays an interpretative role in understanding the scope of those rights. Moreover, the two Basic Laws above mentioned also have a clause that set their purpose, which is to anchor the values of the state of Israel as Jewish and democratic state.[197] Thus, here it is emphasized the Israel's values which are the Jewish and the democratic one.

Since the execution of the two Basic Law: Human Dignity and Liberty, judgements have allowed a huge expansion in the constitutional interpretation of it. Indeed, in the right of human dignity it was included freedom of expression, rights of equality, freedom of faith and some other rights in criminal proceedings. [198]A direct consequence of this expansion was the change of the constitutional law of Israel, since the Knesset found itself unable to infringe those rights with laws that do not meet the terms of the limitation clause.[199]

According to Yaniv Roznai, the series of judgement since the 1995 generated a fundamental constitution, "transforming Israeli "parliamentary sovereignty" system into a "constitutional democracy" without formal constitutional amendments".[200] Thus, the Israeli Supreme Court took a key role in the national constitutional process with its constitutional interpretation work.

The case in which this capable work of interpretation from the Israeli Supreme Court is seen is the *Adalah* case.[201] One of the main claims against the law was that it illegally infringed the right to equality, not included in Basic Law: Human Dignity and Liberty. President Barak in one of his opinion on the case

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[196] Daphne Barak Erez, "From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective", 26 Colum. Hum. Rts. L. Rev. 309 (1995) p. 335

[197] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart publishing (2014)

[198] Yaniv Roznai, "Unconstitutional Constitutional Change by Courts", New England Law Review, Vol. 51, No. 3 (2018)

[199] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart publishing (2014) p.61

[200] Yaniv Roznai, "Unconstitutional Constitutional Change by Courts", New England Law Review, Vol. 51, No. 3 (2018)

[201] HCJ 7052/03 *Adalah v Interior Minister,* ver 51(2),202 (2006)

argued that "the equality right is an inseparable part of human dignity". Although the right to equality is not explicitly guaranteed by the Basic Law, some aspects of it are included in the human dignity, so as it is protected by the Basic Law.[202] Another case related to the protection of the right to equality within the right of dignity is the *Tal Law* case. [203]

To conclude, the fact that the Knesset did not reply to the decision, made think to Suzie Navot that "the introduction of new human rights, which are missing from the Israeli constitution – is mainly achieved through a process that is essentially interpretative and led by the HCJ". [204] At the end, it has been analyzed the important of constitutional interpretation for introducing new human rights within the basic laws framework in Israel, now the work will move to study the constitutional interpretation in Morocco and Jordan.

4.3 Constitutional interpretation in Morocco and Jordan: the dichotomy between liberal democracy and respect of the tradition

As analyzed in the Chapter 3, Morocco and Jordan have very recent Constitutional Courts, which were established after the Arab springs in 2011. For this reason, their works is difficult to comment with concretes cases, as it has been done in the Israeli case. However, analyzing the constitutional text of both countries, it can be notice the presence of ambiguity in the words for the interpretation of certain norms. According to Art. 132 and 133, Moroccan Constitutional Court is in charge of judicial review and constitutional interpretation of the text in the methods and times specified by the Constitution. As well, in the Jordanian Constitution, Art. 59 of Chapter 8 attribute to the newly established Constitutional Court the power of constitutional review and constitution interpretation.

However, in Jordan the decision of the interpretation needs to depart from by the Cabinet, the House of Senate and the House of Representative. Rephrasing, in Jordan, the Constitution Court can interpret the constitution only

[202] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart publishing (2014)
[203] HCJ 6427/02 *Movement for Government Quality v The Knesset,* ver 61 (1), 619 (2006)
[204] Ibidem p.63

under request of these three institutions. Thus, it can be argued that in Jordan the constitutional interpretation is limited within the boundaries requested by the institutions cited.[205] However, there is also a judicial access to the Constitutional Court, which is regulated by Art. 11 of the Constitutional Court Law, which sanction the *ex-post* review during a proceeding. In this case, there is a direct connection between the society and the Court. [206]

At the contrary, in the Moroccan constitution none limitations are given to the Constitutional Court for the implementation of constitutional interpretation. Still, the challenge dwells in the way of interpreting the provision. In several points, the Moroccan constitution is ambiguous in its statement. Indeed, the constitutional text stress, on the one hand, human rights as universally recognized and, on the other, the Islamic identity and the 'permanent character of the kingdom'.[207] This dual allusion makes challenging the understanding and the interpreting of the text, which seems to aspire both to the principle of liberal democracy and to rely also on the interpretation of "tradition." [208]

In particular, a similar dualism can be found looking at the translation of the constitutional text. Some important words have different meaning depending in which language are written. Indeed, it can be found in the Moroccan constitution several words traduced in different way, which give a more open space for interpretation to the Constitutional Court. For example, the word in Art.2 of the Moroccan Constitution has a different meaning if you read it in the French or Arabic languages. Indeed, the French text refers to the fact that "sovereignty" belongs to the nation. However, the equivalent word of nation in Arabic is translated in "*ummah"* which has a religious connotation.[209] For this

[205] Ahmed Mohamed El-Refaie, "A Study about the Law of Jordanian Constiutitonal Court", Journal of Law, Policy and Globalization, Vol. 76, (2018)
[206] Laith Nasrawin, "Protecting Human Rights Through Constitutional Adjudication – Jordan as a case study", Digest of Middle East Studies, Volume 25, Number 2 (2016) p.272
[207] 2011 Moroccan Constitution
[208] Mohamed Madani, Driss Maghraoui, Salona Zerbouni, "The 2011 Moroccan Constitution: A critical Analysis", International Institute for Democracy and Electoral Assistance, (2012) p.18
[209] *Ummah* stands for the whole community of Muslims bound together by ties of religion

reason, the literature considers such discrepancies as a on open space for diverging interpretations.[210]

Moreover, according to Bernoussi, misleading interpretations can happen also in relations to the priority of international conventions over national law. [211] For example, regarding the law of succession, which is considered to breach the Convention on the elimination of all forms of discrimination (CEDAW), what will happen if it is challenged on the ground in a case of exception of unconstitutionality? Will the Court implement the provision according to which the international conventions are superior to the national one? Or, will it decide to follow the national tradition, strictly embedded to the Islamic law? The same argument can be brought regarding Art. 19 on the quality between men and women.[212]

Nevertheless, we have seen some progress made in the field of constitutional review with the introduction of an *ex-post* control, which give the power to the Court to be a counter-majoritarian force in the country. Since 2011, several organic laws were passed in order to regulate the functioning of the Constitutional Court. In this regard, in 2018, Law No. 15.68 was established in order to regulate the modalities of raising the issue of unconstitutionality of law in a proceeding.[213]

As it has been seen, the Islamic religion plays an important role in the constitutional life of Morocco, but also of Jordan. Indeed, some traditional pillars of Islam can make the constitutional interpretation of some provisions quite hard. According to the literature, the contrast between the principles of the liberal democracy and the national tradition is a current challenge of the MENA region and of Morocco and Jordan in particular. [214] Moreover, thanks to my personal

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[210] Ibidem p. 17

[211] Nadia Bernoussi, "La constitution de 2011 et le juge constitutionelle" in "La constitution marocaine de 2011. Analyses et commentaires.", ENSA (2017)

[212] Mohamed Madani, Driss Maghraoui, Salona Zerbouni, "The 2011 Moroccan Constitution: A critical Analysis", International Institute for Democracy and Electoral Assistance, (2012)

[213] International Commission of Jurists, "Morocco: removes obstacle to access to the constitutional court", International Commission of Jurists, (2018)

[214] Rainer Grote, Tilmann Roder, "Constitutionalism in Islamic countries. Between Upheaval and Continuity", Oxford University Press (2012)

stay in Morocco, I had the possibility to see the improvement made by the institution to secularize the society. However, this argument will be further developed in the Part Three of this work.

In conclusion, we have seen that around the theme of constitutional interpretation in Jordan and Morocco, there are several challenges, which especially in Morocco are trying to deal with.

Conclusion

Part Two had the aim of introducing to the reader the constitutional review of legislation and interpretation in Israel, Morocco and Jordan. It has been seen how the Israeli Supreme Court took an important role in introducing judicial review and constitutional interpretation in Israel. In particular, with the interpretation work, the HCJ could create new fundamental rights. Moreover, with the *Bank Hamizrahi* decision (1995) the Supreme Court paved way to a sort of constitution in Israel, represented by the elevation to superior law of the Basic Law: Human Dignity and Basic Law: Freedom of Occupation. This sort of revolution brought by the Israeli Supreme Court, happened in a different way in Morocco and Jordan. The revolution in these two countries consisted in the establishment of a Constitutional Court in 2011, after the Arab Springs. In both countries, the Courts have the power of constitutional review of legislation and interpretation in the constitution. However, in practice this power is limited, given to boundaries represented by the other institutions, in the case of Jordan, and to the misleading words used to draft the Moroccan constitutional text. In conclusion, it has been seen that in these two countries, there is a broad margin of growth in this field, especially in the separation between the principle of liberal democracy and the respect with the tradition.

PART III – The constitutional protection of religion through courts in Israel, Morocco and Jordan

Chapter 5 – International debate on the role of religion and the protection of freedom of religion in constitutional law

Introduction

The last part of this work deals with the role of religion in Israel, Morocco and Jordan. In particular, it wants to underline how the freedom of religion is protected in these countries, where the religion has played and plays a crucial role in the constitutional order, and by whom this protection comes from.

First, in Chapter 5, a general discourse on the role of the religion in society is presented, underlining the concept of secularism in the Western world and how the concept is different in the Arab one. Then, the International Covenants negotiated in the framework of the UN, the Council of Europe and bilateral agreements on freedom of religion will be analyzed, like the International Covenant on Civil and Political Rights (1966) and the Cairo Declaration on Human Rights (1966), stressing the ones that were signed by the three countries object of interest.

Chapter 6 is focused on the Israeli constitutional experience concerning the protection of freedom of religion. The Jews' historical revenge and the Jewishness character of the laws and customs of Israel will be studied. Moreover, the pivotal role of the Israeli Supreme Court will be investigated. Indeed, thanks to its work of interpretation, freedom of religion in Israel is protected. The last section of Part III will figure out the Moroccan and Jordanian constitutional treatment of religion, pointing out how important is the Sharia law in these two systems. At the end, a reflection on the independence of the Constitutional Courts in protecting fundamental rights will be presented with the aim of underlining that the freedom of religion in Morocco and Jordan is constitutionally protected but, in practice, the effectiveness of it is monopolized by the monarchy.

5.1 Evolution of the role of the religion in society

The separation between church and state is a philosophical and jurisprudential concept to explain the political distance between the nation-state and religious institutions.[215] One of the main authors of this concept is Thomas Jefferson, one of the founding fathers of the United States of America, who spoke about the notion of separation between church and state in the early nineteen centuries, right after the establishment of the American constitution. His belief sums up the behavior adopted by the modern states to create a constitutional order in which the legislature should no regulate matters relating to religion. Indeed, in the pre-modern society, common practice was to base the understanding of the state's legitimacy power on divine origins.[216] In the famous letter addressed to the Danbury Baptist Association Connecticut in 1802, Thomas Jefferson stated:

"*Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof", thus building a wall of separation between Church and State*". [217]

[215] In particular, the separation between church and state is a concept that refers to the distance between the public and the private spheres. For more information about the topic: Susanna Mancini, "The power of symbols and symbols as power: secularism and religion as guarantors of cultural convergence", Cardozo Law Review (2009)

[216] Dawood Ahmed, "Religion-State Relations", International IDEA Constitution-Building Primer 8 (2017) p.6

[217] Thomas Jefferson, "Jefferson's Letter to the Danbury Baptists: The Final Letter (1802)", The Library of Congress Information Bulletin in June 1998, (1998)

According to the literature, the content of this letter was often used by the US Supreme Court in its judgements, attributing to it the automatic effect and scope of the First Amendment. [218]

Since the Greco-Roman era, religious and civic authorities were regarded as a whole and both part of the constitutional order of the polity. In the medieval era, in what is today's Europe kingdoms were unified into a transnational framework headed by a religious authority, represented by the Pope. In the Islamic world, the system of law had traditionally a religious basis, where the role of caliph and sultan was unified in one person.[219] Given the close alignment between the religious and the temporal spheres, political revolutions were often motivated by religious reasons. An example of this is the Thirty Years War (1618-1648), which was fought by Protestant and Catholic and ended up with the Treaty of Westphalia, which modified the European asset of powers.

As a consequence, the multiple political tumultuous generated by religious reasons, provoked a general request for freedom of religion, which properly means "the right to practice whatever religion one chooses".[220] As a consequence, several acts having constitutional value were enacted, such as the French Declaration of the Rights of the Man and the Citizen (1789) and the First Amendment of the American Constitution (1791).

After World War II and the huge violations of several human rights perpetrated, freedom of religion was internationally recognized as a fundamental human right. And, since the Universal Declaration on Human Rights (1948), almost every country in the world has adopted a written constitution in which

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[218] For more information: Randall Balmer, "Thy Kingdom Come: How the Religious Right Distorts the Faith and Threatens America" Basic Books, New York (2006); Daniel Conkle, "Religious Liberty in America: The First Amendment in Historical and Contemporary Perspective", Catholic Historical Review (2009); *Reynolds v. United States* (1879); *Emerson v. Board of Education* (1947), *Engel v. Vitale* (1962), *Lemon v. Kurtzman* (1971)

[219] Dawood Ahmed, "Religion-State Relations", International IDEA Constitution-Building Primer 8 (2017) p.6

[220] Oxford English Encyclopedia

fundamental human rights, including freedom of religion, were constitutionally protected.[221]

Nowadays religious freedom and freedom from religious coercion are not only an international norm but they are also recognized as important requirements for a state to be considered liberal-democratic. This historical tradition paved the way for the setting of some baselines for the regulation of the relationship between the state and religion in the constitution.[222] Thus, it can be argued that constitutionalism, especially the Western one, is rooted in "the secularist legacy of the Enlightenment."[223] This is explained by the fact that the secularist movement, as already mentioned above, has its roots in the historical domination of the church over the state and the successful reversion of this order after the Restoration. [224] All considered, it can be argued that secularism is the child of the Western culture; among others, the French concept of *laicité* is an example. [225]

Constitutionalism in the Islamic world, combined with secularism, means a different concept and need to be clarified why. As said above, the Western tradition is characterized by the fear of the coercive authority of the state that was able to violate the citizens' rights and liberties. The written constitution was a mean found to protect the citizens' right from the state. On the other side, the Islamic tradition gave a unitary order to the society based on the concept of *tawhid* (Oneness of God) which serves as the bridge between the citizens and the state.[226] In other words, in the Muslim world, the religion is not seen as interfering in a negative way in the state level, but as a positive means to

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[221] Article 18: "*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."*

[222] Dawood Ahmed, "Religion-State Relations", International IDEA Constitution-Building Primer 8 (2017) p.7

[223] Rainer Grote, Tilmann Roder, "Constitutionalism in Islamic countries. Between Upheaval and Continuity", Oxford University Press (2012) p.20

[224] Ibidem p.21

[225] Dawood Ahmed, "Religion-State Relations", International IDEA Constitution-Building Primer 8 (2017) p.8

[226] Rainer Grote, Tilmann Roder, "Constitutionalism in Islamic countries. Between Upheaval and Continuity", Oxford University Press (2012) p.20

let talk together the citizens and the state. However, with the colonial era, the Muslim countries took a lot of features of the Western model of governance. These actions paved the way for the birth of resurgence movements in the late twentieth century. Indeed, until the end of the colonial era, almost all the Muslim states were governed by Islamic law, although the Sultan's decrees and local customs were present.[227] The Islamic religion incorporates a set of principles and norms (*sharia*) ruling also the civic, social and economic life. For many Muslims, sharia is an important source of legitimacy and is considered to be a source of rule of law and rights.[228]

Secularism for the Islamic world[229] invoked temporal power and is usually taken to imply the liberation of politics from religion. This is a concept came from the colonial period together with concepts of modernity.[230] As a consequence, in certain case it is difficult to define an Islamic state – ruled by the Islamic law- or a civil one. In order to discover it, the scholar should look at how Islamic the state is, regardless of how the state defines itself. The focus of this work has been – besides Israel - on Morocco and Jordan, thus in the next Chapter would be presented an analysis regarding the role of religion in both of them. The same would be done for the Israeli case

An important aspect strictly related to the role of religion in a state is how the state provides constitutional means to protect the freedom of religion, that, as anticipated, given its historical tradition, has become an international norm and a condition for being considered a liberal democracy. Thus, if and how the Israeli Supreme or Constitutional Courts of Morocco and Jordan ensure the respect of freedom of religion?

In this regard, it is pivotal to point out that the English language has the privilege to choose between the words "liberty" and "freedom", whereas the

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[227] Léone Buskens, "Sharia and national law in Morocco" in Otto Jan Michiel, "Sharia Incorporated. A comparative overview of the legal systems of Twelve Muslim Countries in Past and Present", Leiden University Press (2010)

[228] Dawood Ahmed, "Religion-State Relations", International IDEA Constitution-Building Primer 8 (2017) p.28

[229] In the Arabic language the term secularism is *alaminiyyah, dunyawiyyah*

[230] Rainer Grote, Tilmann Roder, "Constitutionalism in Islamic Countries. Between Upheaval and Continuity", Oxford University Press (2012) p.21

Dutch or French languages have respectively the unique words of *Freiheit* and *Liberté.*[231] This dualism opened a discussion in the literature on whether the two English words mean the same concept or not. Being this work not focused on this, we will just present the theory of an important author of the twentieth century, Hannah Arendt. Indeed, Hannah Arendt in her book *On Revolution* drew a separation between the two words, arguing that "liberation could be a condition of freedom but by no means leads automatically to it".[232] Indeed, liberation, according to her, can bring to a condition of freedom from oppression but not to freedom in general. Again, her theory is that liberties can exist also in non-democratic countries, being them able to be enjoyed also in a private sphere. Instead, freedom is a concept connected to the admission and participation in the public affairs of the state. [233] In this work, for a matter of space and time, we will focus only on the condition of freedom of religion as a whole and not on religion liberty.

Returning to the freedom of religion, considered to be an international norm, at this moment we will continue by analyzing the international conventions adopted at the UN level to protect the freedom of religion.

5.2 International Conventions

After World War II, and the atrocities that characterized it, the international community decided to build a new international organization, the United Nations, with the scope of maintaining peace and protect fundamental human rights.[234] The founding United Nations Charter "deliberately does not have a theist or non-theist nature".[235] The primary sources of law at the basis of the mandate of the UN Special Rapporteur on freedom of religion or belief is Article

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[231] Hanna Fenichel Pitkin, "Are Freedom and Liberty Twins?", Sage Publications, Vol. 16, No.4 (1988)

[232] Hannah Arendt, "On Revolution", Penguin Books, (1963)

[233] Hannah Arendt, "On Revolution", Penguin Books, (1963)

[234] Charter of the United Nations and Status of the International Court of Justice, San Francisco, (1945); Benedetto Conforti, Carlo Focarelli, "The Law and Practice of the United Nations", NIJHOFF Mybook (2016) \

[235] Daniel Wehrenfennig, "The Human Right of Religion Freedom in International Law", Peace Review: a Journal of Social Justice (2006)

18 of the Universal Declaration of Human Rights (1948), Article 18 of the International Covenant on Civil and Political Rights (1966) and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981). Article 18 of the Universal Declaration of Human Rights, enacts:

"*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."*

If this article states the right to freedom of religion, though and conscience, it is also possible to say that it allows a variety of interpretations. For instance, according to Linde Lindkvist, this article never specifies the controversial question of how the relation between state and religious institution should be base or the fact that none mention regarding the possibility to disregard the religious liberty right.[236] Perhaps, this latter case could have been inserted with a limitation clause.

Also, Article 18 and 27 of the International Covenant on Civil and Political Rights state the right to freedom of religion. According to this Covenant, derogation from the respect of the right to freedom of religion is not accepted. If it is possible, according to Article 4, to derogate from the respect of some human rights during "a time of public emergency", this provision does not apply to freedom of religion. Indeed, freedom of religion as many other rights, such as right to life are considered to be non-derogable from the Convenant.[237] This document has been ratified by Israel, Morocco and Jordan.

[236] Linde Lindkvist, "The Politics of Article 18: Religious Liberty in the Universal Declaration of Human Rights", An International Journal of Human Rights, Humanitarianism, and Development (2013)

[237] Linda Camp Keith, "The United Nations International Covenant on Civil and Political Rights: Does it make a difference in Human rights behaviors?", Journal of Peace Research (1999)

The right to freedom of religion has then further developed within national and regional agreements. The Council of Europe has a particularly strong and progressive legislation on the matter. Article 9 of the European Convention on Human Rights (1953), states:

"Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

This convention also states the rights to freedom of religion. However, it provides also a sort of limitation clause in accordance with law and when is "necessary in a democratic society". It is important to underline that Israel is a member of the Council of Europe and thus subject to this provision. Moreover, both Morocco and Jordan benefit of the status of "Neighbourhood", participating to the Organisation's Neighbourhood Policy.[238]

With the simultaneous work of the European Court of Human Rights, it has been verified an increase in case concerning religious freedom. This practice not only shaped the understanding of freedom of religion in the Council of Europe's member states but also worldwide.[239]

In the MENA region, the Cairo Declaration on Human Rights in Islam has been enacted in 1990 and, according to the literature, it has been a response to the Universal Declaration of Human Rights. The Cairo Declaration, which has seen ratified by both Morocco and Jordan, appears to be based on Sharia law and fails to guarantee certain right, among which the freedom of religion. In this regard, it is useful to mention the theory of the author, Robert F. Drinan, which says:

"When it comes to religious freedom, it is clear that the nations where a religion is a part of the entrenched establishment will not so readily accept outside

[238] Available online on the Council of Europe website

[239] Daniel Wehrenfennig, "The Human Right of Religion Freedom in International Law", Peace Review: a Journal of Social Justice (2006) p.404

authorities. Furthermore, in nations with a long-standing relationship between government and religion, many will claim that any weakening of the hegemony of the traditional religious belief would threaten the morality and wellbeing of the country:"[240]

This concept will be pivotal for the analysis of the role of the religion in Israel, Morocco and Jordan in Chapter 6. However, it is also useful to mention that in 2004 it has been adopted the Arab Charter on Human Rights, which states the principles of the Universal Declaration of Human Rights, the International Covenant on Human Rights and the Cairo Declaration.

Summing up, the right to freedom of religion has been protected in several Conventions and Treaties, making the signatory states legally binding to the protection of freedom of religion. However, in the recent years, it can be seen as the role of the religion in society took again an important role in shaping the regional and international contrasts. Moreover, it has to be underlined that at the international level, there is no a biding instrument or tribunal embedded with the power of monitoring in cases regarding freedom of religion. As it is, in the contrary, the case for several other covenants for torture, freedom of press, rights of women and rights of refugees. Indeed, according to Daniel Wehrenfennig, the international arena seems to be striking to find a balance between having a pluralistic society and preserving freedom of religion. [241]

As a conclusion for these two paragraphs, it appears that religion is an integrant part of the constitution-building process of a country, together with the identity and culture. For example - and it is the case of the three countries object of studies of this work – when a country has a dominant religious group, where the membership of that religion has been traditionally connected to the national identity, it might be possible to give a particular status to certain religion

[240] Robert Drinan, "Can God and Ceasar Coexist? Balancing Religious Freedom and International Law", Yale University Press (2004) second hand
[241] Ibidem p.403

precepts, in matters related to marriage or succession. [242] We will analyse these particular cases in the Chapter 6, beginning with the Israeli case.

Chapter 6 – Constitutional protection of freedom of religion in Israel, Morocco and Jordan

6.1 Israel: the Jewish character and the purposive interpretation of Basic Law: Human Dignity and Liberty

During the course of the history, for almost two thousand years, Jews people experienced segregation and persecution and lived as a religious minority in many countries. When they finally established a State in 1948, they defined it as a Jewish one in order to commemorate themselves as the religious majority. [243] Moreover, as we have seen in Part One of this work, Israel is composed of plenty of different identities, belonging to various ethnic, religious and language tradition. This heterogeneity caused several problems to the First Knesset, who was in charge of drafting the constitution, which at end was not written. Moreover, this heterogeneity is reflected also in the religion professed within the country. Indeed, the land of Israel is considered to be a holy place for four religions: Judaism, Islam, Christianity and Baha'i.[244] Of course, the cohabitation between these religions, especially the Jewish and the Islamic one, has not been easy since the establishment of the State of Israel. The recent events in international politics are proof of this conflict.

If we come back analyzing the text of the Israeli Declaration of Independence and others Laws and customs of the State of Israel, we will find several signs of the Jewish character of the State in the legal and customary framework. Indeed, we can notice that the Declaration of Independence defines Israel as a Jewish and democratic state that is committed to respect the principle

[242] Dawood Ahmed, "Religion-State Relations", International IDEA Constitution-Building Primer 8 (2017)
[243] Ruth Lapidoth, "Freedom of Religion and Coscience in Israel", Catholic Universitary Law Review, Volume 47, Issue 2 Winter (1998) p.441
[244] Ibidem p. 442

of equality and, together with others right and principles, the freedom of religion. [245] Indeed, literally it proclaimed "*the establishment of a Jewish State in Erez Israel .. the State of Israel".* [246] Several authors, as Suzie Navot and Ruth Lapidoth, questioned on the duality between Jewish state and democratic value, as expressed in the Declaration

Indeed, we can find in the legislation and customs of Israel, several aspects that underlines the Jewishness of the state. First, if we look at the establishment of the 1950 Law of Return[247], which, according to Suzie Navot, could be defined as the most tangible expression of Israel as a Jewish state. [248] According to her, this Law represents the legal expression of the fact that Zionism is a pivotal concept on which the state was created and reflect the "everlasting link between Diaspora Jews and the State of Israel". This may seem as a non-egalitarian provision, since all the non-Jews residents must follow the procedure defined by the Citizenship Law. However, Suzie Navot also pointed out that the nationalization and settlements rights of states are not subject to the equality principle.[249] And this concept was also the main subject of the International Covenant on the Elimination of Racial Discrimination (1965). All considered, it still remains that the Law of Return can be subject to misunderstandings in the interpretation.

Another sign of the Jewishness of the state can be found in the fact that Sabbath and the Jewish holidays have been recognized as official days of rest for the population.[250] An example for that is that the day of Yom Kippur, the international airport of Ben Gurion remained close, as all the public transports. Also, the national flag has the Jewish star as a symbol.

Moreover, the Law of the Foundations of Law (1980) stipulates in the Article 1 that:

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[245] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart Publishing (2014) p.240

[246] Declaration on the Establishment of the State of Israel (1948)

[247] Law of Return (1950)

[248] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart Publishing (2014)

[249] Ivi p. 240

[250] Ruth Lapidoth, "Freedom of Religion and Coscience in Israel", Catholic Universitary Law Review, Volume 47, Issue 2 Winter (1998)

"*when the court cannot find answers to legal questions within existing legal sources, Israeli courts will reach a decision "in the light of the principles of freedom, justice, equity, and peace of Israel's heritage*," [251]

This provision, according to the Adalah centre, which is the legal centre for Arab minority rights in Israel, grants Jewish law official status within the Israeli legal system.[252] Also, according to Ruth Lapidoth, the term Israel, in this context, refers to the Jewish character. [253]

As a final point in order to have a general framework of how the Jewish character is present in the Israeli legal provisions and customs, it is correct to mention the fact that several matters regarding personal status, such as marriage and divorce, are given to be judged by religious courts. Indeed, this attitude is typical in many countries in Africa and India and comes from the Ottoman *millet* system of semi-autonomous jurisdictional enclaves for religious minorities. [254] In Israel, each religious community has autonomous religious courts that hold jurisdiction over its respective members' marriage and divorce affairs. According to Ran Hirschl, this model of relation between the state and religion is called religious jurisdictional enclaves model.[255] Israeli Supreme Court is often defining the scope of the jurisdictional autonomy granted to religious tribunal. [256] Indeed, the Rabbinical Court Jurisdiction Law (1953) stipulates that:

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[251] Foundations of Law (1980)

[252] Available online on the Adalah center website

[253] Ruth Lapidoth, "Freedom of Religion and Coscience in Israel", Catholic Universitary Law Review, Volume 47, Issue 2 Winter (1998)

[254] The term *millet* in the Ottoman Empire referred to a non-Muslim religious community. The Turkish term *millet* originally meant both a religion and a religious community. It was also used to define an independent court of law pertaining to "personal law" under which a confessional community was able to rule itself under the laws derived by its religion (Muslism Sharia, Christian Canon law, Jewish Halakha). This concept was then adjusted to local circumstances by colonial empires, and then inherited by the post-colonial world.

[255] Ran Hirschl, "Comparative constitutional law and religion", Edward Edgar Publishing (2011)

[256] Ivi p. 433

"*.marriage and divorce of Jews shall be conducted in Israel according to Torah law*". [257]

Being this topic a matter of civil law, we will not go through in analysing it. However, it was useful to mention in order to add more characteristics to our description of the role of religion in Israel. Also, because this would be a characteristic present also in the jurisprudence of Morocco and Jordan. Indeed, both of them relied on the Ottoman tradition of the *millet* system.

To sum up, the Jewish character, depending on the interpretation of some provisions, could be present. However, according to Aharon Barak argued that in no official text the Jewish character has been defined.[258]

At this moment, it is necessary to move on analysing the constitutional treatment of freedom of religion in Israel. As we know, Israel does not have a written constitution, but thanks to the work of interpretation of the HCJ, after 1992 were enacted two Basic Laws, having constitutional values. As we have seen in the previous Chapter, there several models of managing the relations between the state and the religion; for example, France choose the "assertive secularism"[259], deriving from the concept of *laicitè.*

Now, it is important to analyse how the freedom of religion is implemented in Israel by the Supreme Court. Religious freedom is granted by the Declaration of Independence. This Declaration represents neither a constitution or a statute, as we know, but the Supreme Court stated that it should be taken into consideration when it interprets the constitution, since the Declaration express the nation's vision and credo. [260] Also, as already explained in Part II of this work, the two Basic Laws enacted in 1992 recognized the important of the Declaration by stipulating that:

"*Fundamental human rights in Israel are founded upon recognition of the value*

[257] Rabbinical Court Law (1953)

[258] Aharon Barak, "*Interpretation in law: constitutional interpretation",* (1994) (Hebrew) second hand

[259] Ibidem p. 423

[260] Ruth Lapidoth, "Freedom of Religion and Coscience in Israel", Catholic Universitary Law Review, Volume 47, Issue 2 Winter (1998)

of the human being, the sanctity of human life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration on the Establishment of the State of Israel "[261]

Moreover, according to Aharon Barak, Basic Law: Human Dignity and Liberty incorporates a short list of "independent freestanding rights", such as the rights to life, dignity etc. Instead, other civil, political, social economic rights, to whom freedom of religion is integrant part, are not recognized as "independent standing rights".[262]

However, these rights are recognized by the common law and by several International Covenants that Israel has ratified. Indeed, Israel ratified the International Covenant on Civil and Political Rights which provides for freedom of religion.[263] Moreover, Israel signed a Fundamental Agreement in 1993 with the Holy See, committing itself to the respect of this freedom.[264] In addition, this Agreement made legally binding for both the parties the provisions enlisted in the Universal Declaration of Human Rights.

Out of these provisions, freedom of religion has been implemented by criminal law and by the Israeli Supreme Court. The HCJ in its interpretation work of the Basic Law: Human Dignity, which has constitutional value from 1992, implemented the freedom of religion in several cases.[265] The Israeli Supreme Court decided that also some civil, political and economic rights can be derived from the constitutional right to human dignity. Human dignity is considered to be a constitutional value that determines the humanity of a person as a human being. For this reason, human dignity represents the condition of a person to have a free will and the autonomy of that will. [266] This freedom act

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[261] Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, Section 1 (1992)

[262] Aharon Barak, "Human Dignity in Comparative Law", Cambridge University Law (2015) p. 286

[263] Ruth Lapidoth, "Freedom of Religion and Coscience in Israel", Catholic Universitary Law Review, Volume 47, Issue 2 Winter (1998) p.446

[264] Fundamental Agreement between the Holy See and the State of Israel (1993)

[265] Ruth Lapidoth, "Freedom of Religion and Coscience in Israel", Catholic Universitary Law Review, Volume 47, Issue 2 Winter (1998) p.447

[266] Aharon Barak, "Human Dignity in Comparative Law", Cambridge University Law (2015) p. 286

within the society, thus it should be recognized in all its forms. In this sense, according to Aharon Barak, "the core of the human dignity is included in the scope of the right".[267] Then, we can speak about human dignity right as a mother-right that have a package of daughter-rights which reflects the various parts of it. The right to freedom of conscience and religion is considered from the Supreme Court part of these daughter-rights.

Thus, the Supreme Court started ruling on matters relating to freedom of religion. For example, in *Movement of the Faithful of the Temple Mount v. Commander of Police in the Jerusalem Area (*1996), the Court said:

"*Every person in Israel enjoys freedom of conscience, of belief, of religion, and of worship. This freedom is guaranteed to every person in every enlightened democratic regime, and therefore it is guaranteed to every person in Israel. It is one of the fundamental principles upon which the State of Israel is based .... This freedom is partly based on Article 83 of the Palestine Order in Council of 1922, and partly it is one of those "fundamental rights which 'are not written in the book' but derive directly from the nature of our State as a peace-loving democratic State .... On the basis of these rules- and in accordance with the Declaration of Independence- every law and every power will be interpreted as recognizing freedom of conscience, of belief, of religion and of worship*."[268]

In this case, the Supreme Court clearly recognized the freedom of religion as a fundamental principle on which the State of Israel is found.

As in the case of the *Movement,* in several other cases, the Supreme Court declared the foundation of the State of Israel on freedom of religion. [269] An attitude undertaken by the Supreme Court regards the question on whether the religious freedom is limited when the state forbids a person to do what a religion does not command him to do, yet allows him to do.[270] The Supreme Court

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[267] Ivi

[268] H.C. 7128/96, *Movement of the Faithful of the Temple Mount v. Commander of Police in the Jerusalem Area*

[269] HCJ 1514/01 *Gur Aryeh v. Second Television and Radio Authority* (2001); HCJ 1890/03 *Bethlehem Municipality v. Ministry of Defense* (2005)

[270] Aharon Barak, "Human Dignity in Comparative Law", Cambridge University Law (2015)

decided that such limitation is not a limitation of religious freedom. This approach was applied in the *Malhem v. Judge of the Sharia Tribunal* (1954), stating that prohibition of polygamy is not a limitation of a Muslim right.[271] Again in another case, was established that transmitting television during the day of Shabbat do not represent a limitation of a person that undertake Shabbat.[272]

Thus, it has been pointed out that, freedom of religion is not expressively granted in the two Basic Laws of 1992 but, in the facts, the Supreme Courts has been acting in order to protect this right, being considered as a daughter-right of the human dignity right.

In conclusion, it can be said that Israel tried to find a balance between the Jewish and the democratic character of its state, as expressed in the Declaration of Independence. Even if it has to be mention that with the Nation-State Law enacted by the Netanyahu government in 2017, several doubts were raised by the international arena against a possible discriminatory policy against the Arab and Druze minorities.[273] Now is the time to pass at the last paragraph of this work, which will deal with the role of the religion in Morocco and Jordan and how their Constitutional Courts implement the respect of freedom of religion.

6.2 Morocco and Jordan: the role of Shari'a and the constitutional treatment of the freedom of religion

The role of religion in countries where Islam is declared as the official religion, mostly all Arab states and this is the case of Morocco and Jordan, it is very interesting to explore. The relationship between Islam and the constitutional state arises because the constitution has the main role to define the identity of the state, the source of power and way in which norms are created and

[271] HCJ 49/54 *Malhem v. Judge of the Sharia Tribunal*

[272] HCJ 287/69 *Meron v. the Minister of Labor, the Broadcasting Authority and the Minister of the Post* (1970)

[273] https://www.vox.com/world/2018/7/31/17623978/israel-jewish-nation-state-law-bill-explained-apartheid-netanyahu-democracy

respected.[274] And, Islam is a religion that does not consider itself as a simple faith of its believers but also tries to regulate political, civil and social aspect of the society. [275] As we have underlined in the first paragraph of Chapter 5, Islamic religion assume a unitary order based on the concept of the Oneness of God *(tawhid*), which provide for a set of principles that join the common interests between the state and the individuals.[276] This is the reason why, usually the Arab states, combined the notion of Islamic and democratic to defined themselves. This combination has led foreigners to automatically speak about a theocratic composition, given the imposition of certain Islamic laws. However, it is not only – and possibly not mainly - due to the Islamic character, that many Arab states were and are dictatorships. Rather, during the Arab springs the requests coming from the youth required more respect of fundamental rights and a system based of rule of law, but do not demanded a restriction in the Islamic ruling. [277] This is because Islam is viewed from the Muslims as something that unifies the individuals and the state.

Thanks to the Arab Springs, various Arab countries, and in particular Morocco and Jordan, strengthened their constitutional justice in order to quieten the upheavals and granting the respect of fundamental human rights. According to Francesco Biagi, there are several reasons why constitutional justice has assumed such a central role in the Arab world. On the one hand, it was a way to meet the demands of protesters during the 2010-2011 riots (which called for the creation of a state based on the rule of law and more effective protection of fundamental rights), on the other hand, the will to adopt Constitutions more in line with international standards - even if only on a formal level- and, constitutional justice, as is well known, is considered an essential element of the

[274] Rainer Grote, Tilmann Roder, "Constitutionalism, Human Rights, and Islam after the Arab Spring", Oxford University Press (2016) p.199
[275] Ivi
[276] Rainer Grote, Tilmann Roder, "Constitutionalism in the Islamic countries. Between uphevals and continuity", Oxford University Press (2012) p.20
[277] Dawood I. Ahmed, Tom Ginsburg, "Constitutional Islamization and Human Rights: The Surprising Origin and Spread Of Islamic Supremacy in Constitutions", Public Law and Legal Theory Working Papers, Univesity of Chicago Law School (2014)

liberal democratic State. [278] In this regard, it is important to notice that both Morocco and Jordan signed the International Covenant for Civil and Political Rights (1966), which provide for the international protection of freedom of religion.

Given the strong boost arrived with the Arab spring, both Morocco and Jordan modified their constitutional justice, in a matter that the former increased the powers and functions of the Constitutional Court and the latter has established its first Constitutional Court.

Consequently, given this perception, we can declare that it is considered to be automatic for an Islamic state to include Islamic rules in the constitution. Thus, both Morocco and Jordan have provisions in the constitution stating that Islam is the religion of the state. However, only the Hashemite Kingdom of Jordan has in the constitution an articles which provide protection against discrimination for religious reason.

In particular, Article 3 of Moroccan Constitution states:

"*Islam is the religion of the State, which guarantee to all the free exercise of beliefs (cultes*)"[279]

As it can be noticed, the article grants also, freedom of religion. However, Morocco does not have any article in the constitution which provide protection against discriminatory policies implemented for religious reasons. Jordan, in the contrary, besides having the same provision declaring that Islam is the religion of the state[280], has also dedicated a full article of the constitution to the protection of freedom of religion, in the context of the equality right.

Indeed Article 6 and 14 of the Jordanian Constitution are reserved to the protection of the right to freedom of religion. In particular, it states the safeguard the free exercise of all forms of religious rites and provides a sort of limitation clause in accordance to law and with the "public order or morality".

[278] Francesco Biagi, "La giustizia costituzionale in Nord Africa e Medio Oriente in seguito alle primavere arabe", Quaderni costituzionali, Fascicolo 3, Il Mulino, (2019)
[279] Article 3 of Moroccan Constitution
[280] Article 2 of Jordanian Constitution

Jordan seems to give special constitutional importance to freedom of religion and according to a report made by the UN Special Rapporteur on freedom of religion, Jordan retain a reputation of a country that practices and promotes peaceful coexistence among followers of different religions, particular between Muslims and Christians. Even also Jordan is composed in vast majority of Sunni Muslims, as most its neighboring countries, the country has taken the lead in encouraging peaceful interreligious coexistence in the region. Also, according to this report, Jordan is seen as a voice of religious moderation in a regional environment where religion has taken an incredible role in politics.[281]

In the other hand, Morocco has a different relationship with religion. If it is true as Aharon Barak argues, that "the state limits freedom of religion when it forbids a person to do what his faith requires of him, then Morocco do not respect fully freedom of religion.[282] The word fully has been inserted because for what concern Islamic religion, this is totally recognized, meanwhile for what concern the others religions a misleading policy has been conducted by the government. According to Driss Maghraoui, the Moroccan state gives extensive importance to governing and maintaining "the control over the religious field and the moral order in the country". [283] He states that in Morocco the control over the religious field has gone beyond the electoral tactics, to reach the level of the core of the state legitimacy in Morocco. The reforms done for reaching more control over the religious and moral life of Moroccans comes from both the King and the government. [284]Especially these actions are needed to be seen as enter in the principle that has historically turned the monarch into the "Commander of the faithful" (Article 41)[285].

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[281] A/HRC/25/58/Add 2, Ahmed Shaheed, "Report of the Special Rapporteur on freedom of religion or belief. Mission in Jordan", Human Right Council (2014)

[282] Aharon Barak, "Human Dignity in Comparative Law", Cambridge University Law (2015) p.297

[283] Driss Maghraoui, "The Strengths and Limits of Religious Reforms in Morocco", Mediterranean Politics, Vol. 14, No. 2, 195-211, Routledge (2009) p.196

[284] Ibidem p.197

[285] Article 41, Section 1 of Moroccan Constitution: "The King, Commander of the Faithful [Amir Al Mouminine], sees to the respect for Islam. He is the Guarantor of the free exercise of

The influence of the monarchy in the Moroccan constitutional life is not a surprise. In Part Two of this work, it has been argued that Morocco is defined as a "surviving constitutionalism" by Francesco Biagi.[286] This term means that the reforms the monarchy has promoted in the country to meet the request of the population, never undermined the power of the monarch.[287] Thus, the Moroccan Constitutional Court does not grant of a total freedom of action. This is because, first of all, even if massive steps forward were done with the constitutional reform of 2012, still half of the Constitutional Court's components are nominated by the King. Secondly, since the access to the constitutional court is granted in an indirect manner during incidental proceedings. [288] the adoption of a direct access from the ordinary courts to the Constitutional Court has been suggested by the National Council for Human Rights, which has highlighted how the indirect way was difficult and risked to "making difficult for judges to access constitutional justice". [289] Also, the organic law n.86/15 on the exception of unconstitutionality has not yet entered into force since it has not passed the scrutiny of the Constitutional Court.[290] These factors can explain why the Constitutional Court of Morocco do not have freedom of action to protect the fundamental human rights, and within them, freedom of religion.

The same discourse can be made for Jordan, which have an even more recent constitutional justice system. Jordan not even has approved the power for an*a quo* judge to lift question of constitutionality. This means that also the Sharia courts, which have the powers to rule in matters of personal status, cases concerning blood money and matters pertaining religious endowments, cannot go to the Constitutional Court lifting an exception of unconstitutionality. [291]

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beliefs [cultes]"

[286] Francesco Biagi, "Will Surviving Constitutionalism in Morocco and Jordan Work in the Long Run: A Comparison with Three Past Authoritarian Regimes", Cambridge Journal of International and Comparative Law (3)4: 1240-1259 (2014)

[288] Francesco Biagi, "La giustizia costituzionale in Nord Africa e Medio Oriente in seguito alle primavere arabe", Quaderni costituzionali, Fascicolo 3, Il Mulino, (2019)

[289] Conseil National des droit de l'Homme (2013)

[290] Francesco Biagi, "La giustizia costituzionale in Nord Africa e Medio Oriente in seguito alle primavere arabe", Quaderni costituzionali, Fascicolo 3, Il Mulino, (2019)

[291] Article 150 of Jordanian Constitution

In conclusion, it has been seen as the role of religion in Arab countries is very different than in the Western one, both for the concept of secularism and both for the aspects covered by the religion. Thus, the constitutionalism in the Arab world should be seen in different perspective from the Western one. However, it is also true that the constitutional justice of Morocco and Jordan is very recent that it is not possible to affirm that their Constitutional Courts have not put efforts in protecting human rights. Already the establishment of a constitutional justice represents a step forward for both Morocco and Jordan.

Conclusion

Part III of this work presented an analysis on the role of religion in Israel, Morocco and Jordan. The difference in managing the relationship between the state and the church in the Western and the Arab world is analyzed, in order to stress the important place that Sharia law plays in the Moroccan and Jordan constitutional order. In this dichotomy, Israel has been difficult to place, given the relevant Jewishness character present in the Declaration of Independence and in the conventions law. However, from the constitutional interpretation of the Israeli Supreme Court it is possible to argue that the right to freedom of religion is guaranteed in Israel. Indeed, this part dealt also with the extraordinary work of the Israeli Supreme Court in interpreting in an extensive way the Basic Law: Human Dignity and Liberty (1992) for the sake of enhancing the constitutional protection of freedom of religion. Thanks to its case law, the Supreme Court has granted a full respect of the freedom of religion in Israel. Not the same could be said about the Moroccan and Jordanian Constitutional Courts, which being recently established and not independent from the monarchy, cannot properly operate in an autonomous way in matters relating to fundamental human rights.

CONCLUSION

The objective of this thesis was to analyze the role of the Israeli Supreme Court, the Moroccan Constitutional Court and the Jordan Constitutional Court in constitutional adjudication and constitutional interpretation, and thus to investigate whether they succeed in fulfilling their task of protecting fundamental rights, with a special focus on the protection of freedom of religion.

Accordingly, the thesis progressed as follows. In the first part, the constitutional history of the three countries was described, with the scope of stressing the role of the Supreme or Constitutional Courts in each constitutional order. The analysis turned towards the unique constitutional development of Israel in "stages" and the exceptionally new constitution and constitutional amendment implemented respectively by Morocco and Jordan after the protests during the Arab Spring in 2011. From this analysis emerged that Israel can be placed in a new model of constitutionalism. In this new model, as Stephen Gardbaum pointed out, "legislatures and courts are treated as joint rather than alternative exclusive protectors and promoters of rights".[292] In the case of Israel, it has been found out that the Supreme Court has become, after the *Bank Hamizrahi* judgement (1995), one of the most important actors in Israeli political life, gaining the authority to review primary legislation, political agreements and administrative acts.[293] Moreover, it has been argued that the Knesset had not been able to address the social and cultural fragmentation of the Israeli society. Thus, this led the Supreme Court to affirmed itself as the dominant body of decision-making of Israel polity vis-à-vis the Knesset.[294]

For what concerns Morocco and Jordan, even though the novelties introduced after the Arab Springs should be seen as a positive trend towards liberal-democracy, the constitutional reforms implemented by them were meant to preserve the power of the monarchy. Indeed, as Francesco Biagi stated, in

[292] Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism. Theory and Practice", Cambridge Studies in Constitutional Law (2013)
[293] Ran Hirschl, "Towards Juristocracy. The Origins and the Consequences of the New Constitutionalism", Harvard University Press (2004)
[294] Ivi p.35

both Morocco and Jordan it has been established, a "surviving constitutionalism", "a constitutionalism whose main purpose is not to democratize the country, but to guarantee the regimes' own survival". [295] Starting from these results, we moved on analyzing the actual process of constitutional adjudication and interpretation in Israel, Morocco and Jordan, to which Part Two is dedicated.

For what concerns Israel, the *Bank Hamizrahi* (1995) decision represented a landmark case for the constitutional justice development in Israel. Indeed, in this decision the Israeli Supreme Court gave itself the power to constitutionally review Knesset's legislations. Moreover, it gave to the Basic laws promulgated until pre-1992 era and Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation (1992), a supremacy and constitutional value. Thanks to the *Bank Hamizrahi* (1995), Israel is passed through having a substantive constitution to a formal one, composed of eleven "Basic Laws" serving as the formal core of Israeli constitutional law[296]. This because, when elevating the Basic Law Human Dignity and Liberty and Basic Law: Freedom of Occupation, the Supreme Court put a limitation clause in both the laws. In general, this decision was intended to limit the Knesset's legislative power and has put the Supreme Court in a position of power *vis-à-vis* the Knesset, succeeding to judge also on issues considered to be political.

On the contrary, Moroccan and Jordanian constitutional developments took a different path. If some merits should be given to the constitutional justice reforms implemented by Morocco and Jordan, both Constitutional Courts are bound by several royal prerogatives. Indeed, if the Israeli Supreme Court succeeded in acquiring counter-majoritarian powers, in Morocco and Jordan the Constitutional Courts experienced an accountability and independency problem. Indeed, both Constitutional Courts are still strictly related to the monarchy and

[295] Francesco Biagi, "Will Surviving Constitutionalism in Morocco and Jordan Work in the Long Run? A Compararison with three past authoritarian regimes.", Cambridge Journal of International and Comparative Law (2014)

[296] Ran Hirschl, "Towards Juristocracy. The Origins and the Consequences of the New Constitutionalism", Harvard University Press (2004) p.21

the leeway to access them are very limited. Even if improvements were made in the constitutional adjudication mechanism, with the introduction of an *ex-post* control, the access to the Courts remain problematic. Indeed, especially in Jordan, lower judges have not the possibility to reach directly the Constitutional Courts for an exception of unconstitutionality. [297]

The result of this analysis is that without any doubts the Constitutional Courts of Morocco and Jordan have seen their functions and powers increased. On the other hand, there are still numerous obstacles to the affirmation of the Constitutional Courts as effectively counter-majoritarian organs. A potential explanation of this can be found in the excessive influence of the executive power in the nomination process and also in the deficit present at the level of the constitutional drafting process, especially for what concern the regulation of the Courts.

The last Part was focused on how these Supreme or Constitutional Courts protect fundamental rights, in particular freedom of religion, chosen as a paradigmatic case because of the importance that is given to religion by Israel, Morocco and Jordan. In Israel, religion has been one of the main subject for social cleavages during the Knesset debate for drafting a constitution. Whereas, the Islamic religion is a religion that also comprise to rule some aspect of the political arena. Here, the intentions were to go deeply in the analysis of the protection of freedom of religion through constitutional adjudication and interpretation. In order to achieve this objective, it has been first described the role of religion in these three countries and then seen the constitutional protection of freedom of religion in their systems. The results found in the theoretical analysis of Part Two were confirmed. Indeed, Israel, with the active work of constitutional interpretation of the Supreme Court, succeeded in having a system of constitutional adjudication where fundamental rights are respected overall. Whereas, Morocco and Jordan are still trying to develop their model of

[297] Francesco Biagi, "La giustizia costituzionale in Nord Africa e Medio Oriente in seguito alle primavere arabe", Quaderni costituzionali, Fascicolo 3, Il Mulino, (2019)

constitutional review of legislation, given the overarching power of the monarchies.

The analysis of the constitutional jurisprudence in religious matters in Israel, Morocco and Jordan has shown two main concepts. First, that the constitutional adjudication and constitutional interpretation implemented by the Israeli Supreme Court succeeded in the protection of fundamental rights, as freedom of religion. This happens despite the still relevant presence of the Jewishness character in the Israeli laws and conventions. Second, not the same was possible to argue for Morocco and Jordan. Indeed, this last part has also demonstrated the limited space of action of the Constitutional Courts in Morocco ad Jordan in protecting human rights. This is due to the preeminent role the monarchies play in the political and religious life of the countries.

Overall, it has been argued that the Islamic religion took an important role in the shaping of the constitutionalism in Morocco and Jordan. Therefore, a relevant question that can be raised, which can be also object of a further thesis, is: whether constitutionalism in the countries of the MENA region should rely on a different model of constitutionalism, different from the models adopted by the Western world, which are based on secularism. Indeed, recent events in international politics have demonstrated that conflicts spread out for religion contrasts and for a Western imposition of a model of liberal democracy.

In conclusion, it is possible to argue that in Israel, after the "constitutional revolution" of the early 1990s, the Supreme Court acquired important powers in term of protection of the constitutional law of the country and of the protection of human rights, as for example freedom of religion. In the case of Morocco and Jordan, it should be recognized the important steps done after the Arab Springs towards the establishment of a constitutional justice meant to protect the constitutional values and the human rights. However, it should also be noticed that the Constitutional Courts established in 2011 cannot entirely fulfill their competences as guarantor of the constitution and protectors of fundamental human rights. This is due the still important powers the monarchy retains, which undermine the independence of the Constitutional Courts. In any case, these

improvements should be seen as important steps forward an establishment of a constitutional justice.

This thesis may have given two important contributions to the Comparative Public Law future research. First, this thesis attempted to analyze the constitutional justice development in Israel, Morocco and Jordan, which comprise the MENA region. In particular, it has demonstrated that, after the Arab Springs, Jordan and Morocco introduced and strengthen their Constitutional Courts. However, it has also shown that still several steps are missing in order to consider these Courts as guarantors of the constitution and protectors of the rights.

Finally, this thesis has attempted to prove that the Israeli Supreme Court, after the constitutional revolution of the early 1990s, increased its power considerably vis-à-vis the Knesset. An example of that was the extensive work of interpretation of the *Basic Law: Human Dignity and Liberty.*

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- HCJ 49/54 *Malhem v. Judge of the Sharia Tribunal*
- HCJ 287/69 *Meron v. the Minister of Labor, the Broadcasting Authority and the Minister of the Post* (1970)
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- HCJ 1514/01 *Gur Aryeh v. Second Television and Radio Authority* (2001); HCJ 1890/03 *Bethlehem Municipality v. Ministry of Defense* (2005)

EXECUTIVE SUMMARY

INTRODUCTION

This thesis had the aim to answer the following research question: how the Israeli Supreme Court, the Moroccan Constitution Court and the Jordan Constitutional Court implement constitutional adjudication and interpretation. In particular, the objective was to investigate to what extent are they effective in protecting fundamental human rights. In order to analyze deeply their work, the right to freedom of religion was taken into account.

The following hypothesis has been made: the "constitutional revolution" implemented by the Israeli Supreme Court changed the constitutional nature of Israel and introduced constitutional review and interpretation of legislation. The second hypothesis is that after the Arab Springs, Morocco and Jordan have experienced a strengthening of the Constitutional Courts, which have seen increased their competences and functions as guarantor of the fundamental human rights. This work has attempted to validate these hypotheses.

Chapter 1 – Constitutional history of Israel, Morocco and Jordan

Chapter One of this work has focused on the analysis of the constitutional order of Israel, Morocco and Jordan. The State of Israel was born in 1948 with the Declaration of Independence. This document was signed by the members of the Provisional Council of State, operating as a legislative authority.[1] The Declaration established the mechanism for electing the principal organs of the state and included several sections and procedures for the drafting process of a constitution for Israel. However, given the heterogeneous character of the Israeli society, consisting of immigrants from diverse cultural backgrounds with strongly-held opposing ideologies (nationalist, socialist and religious) [2], the domestic political debate regarding the content of the future Constitution found impossible to agree on a text which would gain a broad consensus. Therefore, in June 1950, the political parties decided to adopt a compromise formula proposed by MK Yizhar Harari, well known as the Harari decision.[3] This resolution declared that the constitution-drafting process would evolve in steps, in the shape of Basic Laws that would be unified only at the end of the

[1] Suzie Navot, *The Constitution of Israel. A contextual Analysis,* Hart Publishing, Oxford and Portland, Oregon (2014) p.4

[2] Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective,* 26 Colum. Hum, Rts, L. Rev. 309 (1995)

[3] Knesset protocols 1743 (1950)

process. Yet, the Knesset adopted a compromise that, in terms of comparative constitutional law, was unique: the adoption of a Constitution in stages[4]. Therefore, once the Constituent Assembly was elected in early 1949, it remained in charge and changed its name in First Knesset (Transition Law, 1949). According to this Law, the First Knesset should have been not only serve as a legislative body but should also maintain the constituent power of the previous Constituent Assembly. This meant that, from that moment on, the Knesset could be able to both draft a Constitution, given its constituent power, and pass the laws.

The Harari decision left mainly three issues unsolved: the real intentions of going ahead with the establishment of the constitution, the topic to be included in the future basic laws and the status of the basic laws vis-à-vis regular laws. These questions brought us to the final and pivotal question of *pouvoir constituant* (constituent power). We are used to see constitution-making process led by a constituent power, mainly an assembly, to which is granted the only function of drafting a constitution in a fixed period of time. In Israel, we have seen an ordinary Parliament pursuing a constitution-making process in a relative long period of time, about forty years. This conundrum attracted the title of "the problem of constituent continuity" [5], strongly argued by the Israeli Supreme Court during its pivotal judgment *Bank Hamizrahi (1995)*[6]. In this decision, the Israeli Supreme Court provided Israel with a constitutional bill of rights, establishing also a judicial review on the basic laws enacted pre – 1995 and on the *Basic Law: Freedom of Occupation* and *Basic Law: Human Dignity*. The novelties introduced by this judgement has been analysed in Chapter Three of this thesis.

With respect of Morocco, after the independence in 1956, it passed through the adoption of six different constitutions (1962, 1970, 1972, 1992, 1996, 2011). The salient characteristic of the constitutions approved until 2011 is that were used as an instrument to maintain and strengthen authoritarian/semi-authoritarian rules[7]. In particular, every constitution until 1996, gave to the king the role of Commander of the faithful and consecrate his absolute power over the political life of Morocco (Article 19 of Moroccan Constitution, 1996). However, the Arab Springs brought a wind of change in Morocco, so that it is considered to

[4]Susie Navot, *The Constitution of Israel. A contextual Analysis,* Hart Publishing, Oxford and Portland, Oregon (2014)

[5]Melville B Nimmer, "The Uses of Judicial Review in Israel's Quest for a Constitution", 70 Columbia Law Review (1970)

[6] HCJ 6891/93 *United Mizrahi Bank v. Midgal Cooperative Village.* For an English translation of the judgment, see *Israel Law Report* 1995 (2) – Special Volume

[7]Francesco Biagi, "Will Surviving Constitutionalism in Morocco and Jordan Work in the Long Run: A Comparison with Three Past Authoritarian Regimes", Cambridge Journal of International and Comparative Law (3)4: 1240-1259 (2014)

be the only country that approved a new constitution in 2011 after the upheavals. Indeed, after the outbreak of the 20 February Movement, Morocco has faced an improvement in both the institutional arrangements, establishing a sort of principle of separation of power, and in the protection of human rights. The protests were deemed so important that King Mohammed VI responded with a promise of constitutional reforms.[8] The new constitution was adopted with the 98.5% of the vote with a turnout of 73.5% and was enacted by a *dahir* (royal decree) the 29 of July, 2011. It has to be notice that the *dahir* is a royal decree that does not require countersignature by the executive and that is therefore classified as a symbol of the quasi-absolute power of the king. However, as respect to the main novelties introduced by the 2011 Moroccan constitution, there is no doubts that the most important innovation was represented by the split of the famous Art. 19 into two provisions: Art. 41 and Art. 42. This article embodied the cornerstone of the Moroccan constitutional system and the most important source of the near-absolute power of the king. [9] Mainly, the split was intended to make a separation between the spiritual power (Art. 41) and the temporal power (Art. 42) of the king. However, despite the efforts to establish a principle of separation of powers, the split of Article 19 does not lead to the impossibility for the king to legislate. Rather, he retained the legislative power shared with the Parliament, to which the constitution has granted the exclusive legislation on matters, such as for example on family status. The second most important novelty of the 2011 constitution, central for this work, is the introduction of a Constitutional Court, in charge of constitutionally review the legislations. Although Morocco is not new to constitutional justice, since it had before a Constitutional Council, this novelty should be seen as an important step forward for the achievement of a liberal-democracy.[10] Indeed, Morocco increased in a significant way the competences of the Constitution Court, which would be analysed deeply in Chapter Two.

Moving to the Jordanian constitutional history, it has been noticed that did not differ much from the Moroccan one. Jordan experienced three constitutions: one in 1928, the second in 1947 and the last in 1952, which is the constitution still in place, although amended in 2011. The main characteristic of the 1928 was the absence of reference to a parliamentary monarchy. Indeed, no governmental accountability whatsoever toward the Parliament was

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[8]Bendourou O., "La nouvelle constitution marocaine du 29 juillet 2011", Presses Universitaires de France, 2012/3 n°91

[9]Grote T., Roder T., "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press (2016)

[10] Francesco Biagi, "La giustizia constituzionale in Nord Africa e Medio Oriente in seguito alle primavera arabe", Quaderni constituzionali (ISSN 0392-6664), Il Mulino (2019)

required. Rather, it has been noted a fusion between the legislative and the executive branches. After the independence in 1946 and the short experienced of the 1947 constitution Jordan enacted a new constitution in 1952. This is the long-lived of Jordan and still currently in place, though revised. Examining the 1952 constitutional text, it is clear that some efforts were made to move forward a parliamentary monarchy, such as the provision stating that king shall exercise his function by a royal decree, which needs to be signed by the Prime Minister and/or ministers concerned (Art. 40). Moreover, the 2011 amendment results to be important since it established a vote of confidence between the government and the Parliament. Nevertheless, the king maintained important powers, as of dissolving the House of Representatives and dismissing the prime minister (Art.34 and Art.35).[11]

The Arab Springs represented a driving factor of change also in Jordan. Even if, in comparison to Morocco, in Jordan the 2011 constitutional amendment was lighter, several steps forward were made towards the establishment of a parliamentary monarchy. A Royal Committee was put in charge of reviewing the constitution and to come with amendments' proposal. However, the work of this committee was done in total secrecy and the personalities inside of it were all faithful to the king.[12] Indeed the King Abdullah, as King Mohammed VI in Morocco, took a crucial role in the shaping of the constitutional reform. In only one month, the constitutional amendments were approved in October 2011. Thirty-six articles that contained seventy-eight amendments to the constitution represented the Jordanian constitutional reform of 2011. One year later, the Parliament passed the new electoral law, which modified the 'single non-transferable vote' system.[13] The most important novelty of this amendment represents the introduction of the Constitutional Court, of which we will speak about in Chapter Two. The Court was established to monitor the constitutionality of laws and regulations.

Chapter 2 – The Constitutional or Supreme Courts in Israel, Morocco and Jordan: procedures of appointment and composition

Chapter Two of this work has dealt with the composition and competences of the Israeli Supreme Court, the Moroccan and the Jordanian Constitutional Courts. With regard of the Israeli Supreme Court, it has two main roles. First, it works as the court of final resort for

[11]Rainer Grote, Tilmann Roder, "Constitutionalism, Human Rights, and Islam after the Arab Spring", Oxford University Press (2016) p.123

[12]Salameh M., Ananzah A., "Constitutional Reforms in Jordan: A Critical Analysis", Digest of Middle East Studies, Volume 24, Number 2 pp. 139-160 (2015)

[13]As we have seen, the electoral legislation is a sensitive issue in Jordan for historical reason: such as the period (1957-1992) where the political parties were banned

appeals against decisions passed on by district courts and as a consequence rules on civil, administrative and criminal matters. Secondly, it sits as the High Court of Justice (HCJ), and hears petitions against state authorities and other tribunals.[14] It is composed of fifteen judges who are appointed by the President of Israel from names suggested by the Judicial Selection Committee, which is composed of nine members: three Supreme Courts Judges (comprising the President), two cabinet ministers (one of the being the Minister of Justice), two Knesset members, and two representatives of the Israel Bar Association. In order to appoint the judges, a majority of 7 of the 9 committee members is required, or two less that the number present at the meeting. Once appointed, judges are meant to serve "for life" and in practice until the age of 70, unless prior resignation. A comparison can be made between the Israeli Supreme Court and the European Constitutional Courts, both acting as "quasi-political" ruler. Indeed, according to Mauro Cappelletti "in the European centralized constitutional, it often happens that the constitutional court ruled on political questions.[15] In the Israeli Supreme Court, this characteristic is extremely present, also thanks to the work of Aharon Barak and in particular during the so-called "constitutional revolution" in 1992.

The Moroccan Constitutional Court, compared to the Israeli Supreme Court, is much less active also because of its recent establishment in 2011 constitution. Even if, constitutional justice was not new to Morocco. Indeed, Morocco established a Constitutional Council in 1996, having the duty of constitutionally review the laws. The 2011 Constitution reserves one chapter (Title VIII) to the newly established Constitutional Court. According to Art. 130, the Constitutional Court is composed of twelve members appointed for nine years non-renewable term. Six members are chosen by the King, of which one member is designed by the Secretary General of the Superior Council of the Ulema, and six elected, half by the Chamber of Representatives and half by the Chamber of Councilors. The vote is done by secret ballot and with the majority two-thirds of the members composing each Chamber. The President of the Constitutional Court is appointed by the King, from among the members appointed, which are chosen from among the notable persons disposing of a high knowledge in the juridical domain and of a judicial competence and have exercised their profession for more than fifteen years.[16] The Court, besides deciding on the validity of the election of the members of Parliament and the organization of referendums, has to make

[14] Susie Navot, *The Constitution of Israel. A contextual Analysis,* Hart Publishing, Oxford and Portland, Oregon (2014)

[15] Mauro Cappelletti, "Judicial Review in Comparative Perspective", California Law Review, Volume 58, Issue 5 (1970) pp. 1040-1041

[16] Moroccan Constitution of 2011, Title VIII (Arts.129-133)

sure that organic laws, ordinary laws and regulations of both House of Parliament are not in conflict with the constitution (Art.132).[17]

Moving to the Jordan, the Constitutional Court has been established with the constitutional amendment of 2011. This represented an important novelty, since marked the introduction of constitutional justice in Jordan. According to Art. 58 of Jordanian Constitution, the new Constitutional Court is to be composed of nine members at least, president included, to be appointed by the king through a Royal Decree for a non-renewable term of six years. This non-renewable term represents an important safeguard to ensure the independence of the justices, which are in charge with constitutional duty of protecting individuals' human rights. Article 60 of the Jordanian Constitution specifies the criteria and qualification that a judge must meet to be eligible to the Court, among which are the Jordanian nationality. However, unlike Morocco, Jordan left the door open to the membership of former politicians. With regard to the new Constitutional Court's functions, we can affirm that its power is to control the constitutionality - *ex ante* and *ex post* - of applicable laws and regulations, and interpreting the provisions of the constitution.

Chapter 3 – Constitutional Review in Israel, Morocco and Jordan

Chapter Three dealt with the constitutional review of legislation in the three countries but first wanted to give an overview of the principal questions about the topic. Saying that an act must obey or be in compliance with the constitution, it means to attribute the constitution a superior level in the legal hierarchy of law. According to Mauro Cappelletti, this tendency represents one aspect of "man's never-ending attempt to find something immutable in the continuous change that is his destiny". The power that was given to the Supreme or Constitutional Court to review the actions of the other branches of government always represented a controversial issue. According to Aharon Barak, giving this power to the Constitutional judges is respectful of the principle of separation of power and rule of law. [18] During the history, two main models of constitutional review were established. The first one is the centralized model, which give to the Constitutional Courts the power of constitutionally review the laws, and is mainly applied by the Western Europe states. The second one is the decentralized model, which allow any judge to constitutionally review the laws. This model is adopted by the US and usually by common law countries. If it is possible

[17] Francesco Biagi, "The 2011 Constitutional reform in Morocco: more flaws than merits", Jean Monnet Occasional Paper 07/2014

[18] Aharon Barak "The Judge in a Democracy", Princeton University Press (2016)

to say that Morocco and Jordan follow the path of the centralized model, the same is not possible for Israel, whose basic laws provide both models' characteristics. Judicial review in Israel was introduced with the *Bank Hamizrahi's* judgement (1995). This decision established that if a law infringed any of the fundamental rights contained in a basic law and failed to meet the conditions of its limitations clause, that law could be invalidated by the Court regardless of Knesset majority that enacted it.[19] In so ruling, the Supreme Court gave herself the power and the right to judicially review Knesset legislation. This was possible because the court elevated any Basic Law enacted before 1995 and the *Basic Law: Freedom of Occupation* and *Basic Law: Human Dignity and Liberty* to a constitutional level.

For this self-recognition made by the Israeli Supreme Court, the *Bank Hamizrahi's* decision is usually assimilated to the US Supreme Court *Marbury v. Madison*'s judgement. Therefore, the Israeli Supreme Court, while considering the question of judicial review, ruled that even though Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation do not involve a primary provision establishing that any norm that does not meet the requirement of the above mentioned basic laws is void, the Court has the power to declared it void. From this moment, Israel is considered to have a formal constitution, represented by each Basic Law. Of course, the Israeli Supreme Court's approach has been extremely criticised by the Knesset and the Israeli society.

The procedure established for the judicial review are two: 1) direct judicial review, which means that any person declaring a violation of his protected rights may present a petition to the HCJ, challenging the constitutionality of that violation; and 2) indirect judicial review, which means that any judge, as part of the legal proceeding over which that judge presides, has the power to examine the constitutionality of laws. However, the latter case has only happened once.[20] However, it is commonly accepted that the HCJ act the judicial review. In addition, it has to be said that the Israeli judges are forced to follow the stare decisis principle, but in an exceptional way. All the lower courts are bound to follow the HCJ judgements, but not the Supreme Court itself, which has the possibility to deviate from them.[21] Although, in practice, this deviation happened rarely, it is important to notice the presence of this principle, being an important feature of the decentralized model. Thus, it can be affirmed that, stating the similarities with both the decentralized and the centralized model, Israel has a constitutional review model more similar to the Western countries. Due

[19] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart publishing (2014) p.31-32; also for the Israeli constitutional history see Chapter 1

[20] *Ibidem* p.204

[21] *Ibidem* p. 63

to the fact that, it has been mainly the HCJ to have the right to exercise a constitutionality control on legislation until today.

For what concern Morocco and Jordan, as we have seen their constitutional justice is very recent. In Morocco, a sort of judicial review already existed with the constitution of 1996, which established and delegated to a Constitutional Council, an independent judicial body, the power of control over the constitutionality of ordinary laws. However, until 2010, the Constitutional Council's judicial review was very restricted. For this reason, the new constitution of 2011 replaced the Constitutional Council and established a Constitutional Court. This new court has the power to control that organic laws, ordinary laws, and regulations of the Parliament are in conformity with the constitution. However, the important novelty introduced by the 2011 constitution Morocco is the *concrete* and *ex-post* constitutional review. The introduction of such *ex post* review - which from 2011 existed alongside the *ex-ante* review – appears to be extremely important to strengthen the position of the Constitutional Court *vis à vis* the other branches. Therefore, Moroccan Constitutional Court reinforced its position as a counter-majoritarian body and enhance the democratization process of Morocco.[22] According to Nadia Bernoussi, two tendencies are expected from this novelty, said to create a "living law". Firstly, the concrete constitutional review will establish the "democratization" of the constitutional law, which will no longer address only the rights of the state but also ordinary matters. Secondly, it will settle a dialogue or, in the worst-case scenario, a conflict, between judges, if the Court of Appeal decides not to refer a matter to the Constitutional Court.[23] However, the effectiveness of this provision will depend on its implementation and in particular on the question whether it is in power to refer question of constitutionality to the Constitutional Court. Indeed, the organic law for the concrete and ex-post constitutional review was not promulgated.

For what concern Jordan, Article 59 of the Constitution establish that the Constitutional Court has the power to check the constitutionality of laws and regulations, as well as the right to interpret the provisions of the constitution if so requested either by virtue of a decision of the Council of Ministers or by a resolution taken by the Senate or the Chamber of Deputies passed by an absolute majority. Also in Jordan, it was introduced a *concrete* and *ex-post* constitutional review. Up to now, despite the disposal of a

[22] Francesco Biagi, "The pilot of limited change" in Frosini J., Biagi F., "Political and Constitutional Transitions in North Africa. Actors and Factors, Routledge, New York (2015)

[23] Nadia Bernoussi, "Morocco's Constitutional Court after the 2011 Reforms", in Grote T., Roder T., "Constitutionalism, Human Rights and Islam after the Arab Spring", Oxford University Press (2016)

Constitutional Court and a judicial review process, very few cases were brought to the Court by the government or the Parliament. Indeed, out of the twelve judgements, until 2016, which the Constitutional Court has issued so far, 8 cases were dismissed without any logical or persuasive reasoning.

Chapter 4 – Constitutional Interpretation in Israel, Morocco and Jordan

Chapter Four addressed the provisions for constitutional interpretation in the three countries objects of this thesis. In the literature, there are several theories that tried to give some tools of constitutional interpretation, that are: textualism, originalism, systematic interpretation, "living tree" and the purposive interpretation, on which there are ongoing debates. If the first two theories are considered to be more attached to the intentions of the framers, their negative aspect consist in the fact that if the norm is old, it does not adapt to the changing of the society, especially if the constitution is rigid and hard to amend.[24] Instead the other three theories, the meaning of the Constitution is never fixed; rather, it changes over time to accommodate altered circumstances and evolving values.[25] One of the challenge in which constitutional interpretation is required is when there are two rights at stake. Indeed, when this is verified, the judges, while conducting theirs judicial reasoning, need to use three methods: balancing, reasonabless and proportionality. Being in a situation of limitation of right, the most important tools of the judges is the proportionality principle. This principle implies that legislative provision does not go beyond what is strictly necessary to achieve the objectives prescribed by the law. [26] Overall, we can argue that depending on the approach implemented, the Supreme or Constitutional Court is able to influenced more or less its impact on a state's constitutional development. For what concern Israel, constitutional interpretation has played and is playing such an important role that Suzie Navot affirms that "Israeli constitution is amended in a process that is mainly interpretative in nature".[27] It can be said that the Israeli Supreme Court played a more important role through constitutional interpretation than in performing judicial review. The approach used by the Israeli Supreme Court mainly rely on Justice Aharon Barak's belief. Aharon Barak is one of the most ardent

[24] Sotirios A. Barber and James E. Fleming "*Constitutional Interpretation: the Basic Questions*", Oxford Scholarship Online (2009)
[25] Terrance Sandalow, "Constitutional Interpretation", University of Michigan Law School" (1981)

[27] Susie Navot, *The Constitution of Israel. A contextual Analysis,* Hart Publishing, Oxford and Portland, Oregon (2014)

promotor of the purposive interpretation theory. According to this theory, the purpose is the *ratio juris*, which means the ultimate purpose the text was designed to achieve.[28] Israeli Supreme Court mainly applied this approach during constitutional interpretation. However, an exception can be made for the *Bank Hamizrahi* case[29]. Indeed, this case is one of the most engaging examples of the interpretation of the original intent of a text's authors.[30] Since the *Bank Hamizrahi* decision, the Supreme Court allowed a huge expansion in the constitutional interpretation of basic laws, especially of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. Indeed, in the right of human dignity it was included freedom of expression, rights of equality, freedom of religion and some other rights in criminal proceedings.[31] Overall, it can be argued that though constitutional interpretation, the Supreme Court introduced new human rights and the Knesset found itself unable to infringe those rights with laws that do not meet the terms of the limitation clause.[32]

Moving to Morocco and Jordan, the development of their constitutional interpretation is similar to the constitutional adjudication one. Both Constitutional Courts are in charge of constitutional interpretations. However, the challenges in these two countries, especially in Morocco, dwells in the ambiguity of the constitutional texts. Indeed, in Morocco the constitutional text stress, on the one hand, human rights as universally recognized and, on the other, the Islamic identity and the 'permanent character of the kingdom'.[33] According to the literature, these two provisions can generate misleading interpretation of the constitutional text. According to Bernoussi, misleading interpretations can happen also in relations to the priority of international conventions over national law. [34] Overall, it can be said that the Islamic religion plays an important role in the constitutional life of both Morocco and Jordan. Therefore, according to the literature, the contrast between the principles of the liberal democracy and the Islamic tradition represents a current challenge of the MENA region and of Morocco and Jordan in particular.

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[28] Aharon Barak., "Proportionality. Constitutional Rights and their Limitations", Cambdrige University Press, Cambridge (2012) p.46

[29] CA 6821/93 *United Mizrahi Bank Ltd. V. Migdal Cooperation Village*, 49(4) (1995)

[30] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart publishing (2014) p.59

[31] Yaniv Roznai, "Unconstitutional Constitutional Change by Courts", New England Law Review, Vol. 51, No. 3 (2018)

[32] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart publishing (2014) p.61

[33] 2011 Moroccan Constitution

[34] Nadia Bernoussi, "La constitution de 2011 et le juge constitutionelle" in "La constitution marocaine de 2011. Analyses et commentaires.", ENSA (2017)

Chapter 5 – International debate on the role of religion and the protection of freedom of religion in constitutionalism

Chapter 5 was dedicated to a general overview of the role of the religion in the society and to the international provisions in freedom of religion. The separation between church and state is a philosophical and jurisprudential concept to explain the political distance between the nation-state and religious institutions. Since the Greco-Roman era, the religious and civic authorities were regarded as a whole and both part of the constitutional order of the state. In the medieval era, the kingdoms were unified into a transnational framework headed by a religious authority, represented by the Pope. In the Islamic world, the system of law had traditionally a religious basis, where the role of caliph and sultan was unified in one person.[35] Given the close alignment between the religious and the temporal spheres, political revolutions were often motivated by religious reasons during the course of the history. An example of this is the Thirty Years War (1618-1648), which was fought by Protestant and Catholic. As a consequence, several acts having constitutional value were enacted, such as the French Declaration of the Rights of the Man and the Citizen (1789) and the First Amendment of the American Constitution (1791).

After the World War II, and the atrocities that characterized it, also due to religious conflict, the international community decided to build a new institution, the United Nations, with the scope of maintaining peace and protect fundamental human rights. It is interesting to underline that the founding United Nations Charter deliberately does not have a theist or non-theist nature.[36] The primary sources of law at the basis of the mandate of the UN Special Rapporteur on freedom of religion or belief is Article 18 of the Universal Declaration of Human Rights (1948), Article 18 of the International Covenant on Civil and Political Rights (1966) and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981). In the MENA region, the Cairo Declaration on Human Rights in Islam has been enacted in 1990 and, according to the literature, it has been a response to the Universal Declaration of Human Rights. The Cairo Declaration, which has seen ratified by both Morocco and Jordan, appears to be based on Sharia law and fails to guarantee certain right, among which the freedom of religion.

[35] Dawood Ahmed, "Religion-State Relations", International IDEA Constitution-Building Primer 8 (2017) p.6

[36] Daniel Wehrenfennig, "The Human Right of Religion Freedom in International Law", Peace Review: a Journal of Social Justice (2006)

Summing up, the right to freedom of religion has been protected in several Conventions and Treaties, making the signatory states legally binding to the protection of freedom of religion. However, in the recent years, it can be seen as the role of the religion in society took again an important role in shaping the regional and international contrasts. Moreover, it has to be underlined that at the international level, there is no a biding instrument or tribunal embedded with the power of monitoring in cases regarding freedom of religion.

Chapter 6 – Constitutional protection of freedom of religion in Israel, Morocco and Jordan

Chapter Six addressed how the freedom of religion is granted in the Israeli, Moroccan and Jordanian constitutional provisions. Indeed, the role of religion has been found as an important feature in the three countries and an element in which the comparative analysis could be implemented deeply. It was seen as both the Jewishness and the Islamic characters played an important role in shaping the constitutional order and the customary laws of Israel, Morocco and Jordan. In Israel, for example, we can notice that the Declaration of Independence defines Israel as a Jewish and democratic state that is committed to respect the principle of equality and, together with others right and principles, the freedom of religion. [37] Indeed, literally it proclaimed "*the establishment of a Jewish State in Erez Israel .. the State of Israel"*. [38] Many others reference to the Jewishness character in the legislation and customs of Israel, can be found: as the 1950 Law of Return or the Citizenship Law. Therefore, several authors, as Suzie Navot and Ruth Lapidoth, questioned on the duality between Jewish state and democratic value, as expressed in the Declaration.[39] Regarding the constitutional treatment of freedom of religion, this is granted by the Declaration of Independence. Moreover, the Israeli Supreme Court with its work of constitutional interpretation on Basic Law: Human Dignity, extensively protected the right to freedom of religion. This tendency was introduced by Aharon Barak, who considered the freedom of religion, and many others, as daughters-rights of the right of human dignity. [40]

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[37] Suzie Navot, "The Constitution of Israel. A contextual Analysis", Hart Publishing (2014) p.240

[38] Declaration on the Establishment of the State of Israel (1948)

[39] Ruth Lapidoth, "Freedom of Religion and Coscience in Israel", Catholic Universitary Law Review, Volume 47, Issue 2 Winter (1998)

[40] H.C. 7128/96, *Movement of the Faithful of the Temple Mount v. Commander of Police in the Jerusalem Area*

With regard of the constitutional treatment of religion in Morocco and Jordan, a similar analysis can be made. The Islamic character is present in many laws and conventions and Islam is proclaimed to the official religion of the state. The presence of the Islamic character is due to the fact that the Islamic religion does not consider itself as a simple faith of its believers but also tries to regulate political, civil and social aspect of the society. [41] The Islamic religion assume a unitary order based on the concept of the Oneness of God *(tawhid*), which provide for a set of principles that join the common interests between the state and the individuals.[42] This is the reason why, usually the Arab states, combined the notion of Islamic and democratic to defined themselves. Regarding the respect of freedom of religion, Jordan seems to give constitutional importance to freedom of religion and according to a report made by the UN Special Rapporteur on freedom of religion, Jordan retain a reputation of a country that practices and promotes peaceful coexistence among followers of different religions, particular between Muslims and Christians. Instead, Morocco is considered to follow a different path. Indeed, given highly monarchy's monopolization over the religion and moral lives of Moroccans and the relative independence of the Constitutional Court, freedom of religion is considered not always respected. Overall, it can be said that because of the fact that the Constitutional Courts in Morocco and Jordan do not have the fully independence to persecute their competences, the fundamental human rights in practice are not always protected.

CONCLUSION

In conclusion, the hypothesis made at the beginning of the thesis were partially confirmed. For what concern Israel, it is true that after the "constitutional revolution" in the early 1990s, the Israeli Supreme Court started a process of active work of constitutional adjudication and interpretation, having the scope of protecting fundamental human rights.

In the case of Morocco and Jordan, it should be recognized the important steps done toward the establishment of a constitutional justice meant to protect the constitutional values and the fundamental human rights. However, it should be also notice that, because of the still important powers that the monarchy retains, the Constitutional Courts established in 2011 cannot entirely fulfill their competences as guarantors of the constitution and protectors of fundamental human rights.

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[41] Rainer Grote, Tilmann Roder, "Constitutionalism, Human Rights, and Islam after the Arab Spring", Oxford University Press (2016) p.199

[42] Rainer Grote, Tilmann Roder, "Constitutionalism in the Islamic countries. Between uphevals and continuity", Oxford University Press (2012) p.20