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THE ARAB CHARTER ON HUMAN RIGHTS: THE NAISSANCE OF NEW REGIONAL HUMAN RIGHTS SYSTEM OR A CHALLENGE TO THE UNIVERSALITY OF HUMAN RIGHTS?

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Abstract. *The issue of human rights has always been a matter shared by politicians, lawyers, philosophers and sociologists. Since the adoption of the Universal Declaration of Human Rights scholars and human rights activists have discussed whether the Declaration has become a symbol of human rights universality. Two decades later Muslim states have started discussions if human rights are indeed universal. They argued that human rights is a product of western imperialism and therefore the Arab states are not bound by the human rights catalogue proposed by the West. In 2008, the Arab Charter on Human Rights drafted within the framework of the League of Arab States came into force. This fact was welcomed by the international community, non-governmental organizations, and High Commissioner for Human Rights. The Arab Charter on Human Rights was seen as a possibility for the Arab States to confirm the commitment to the universality of human rights. However, the adopted text was disappointing and once again raised the doubt that Arab States are not truly committed to universal human rights. This article analyses the quest for the universality of human rights.*

Keywords: *human rights, Arab Charter on Human Rights, regional human rights systems, universalism, cultural relativism.*

Introduction

The Universal Declaration of Human Rights is a document regarded as a common standard of achievement for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected.¹ Despite the fact that the text of the Declaration was drafted by representatives from different regions, cultures and backgrounds, twenty years after, the universality of human rights was challenged by a particular group of states. As an open opposition to the universality of human rights, the group of states acting within framework of Organisation of the Islamic Conference has prepared the Cairo Declaration of Human Rights in Islam (CDHRI). CDHRI provides an overview of the Islamic perspective on human rights and affirms Islamic Sharia as its sole source. Since the adoption of CDHRI, Arab States have sought to develop a legally binding document and to establish a regional catalogue of human rights. The first draft of the regional human rights catalogue was adopted in 1994. However, the document was severely criticised and therefore never came into force. The second revision of the regional human rights catalogue was more successful and came into force in 2008. The entry into force of the Arab Charter on Human Rights had to signify the reconciliation and compromise between the proponents of cultural relativism and universalism. However, the final text of the Arab Charter on Human Rights has raised repeated doubts on the commitment of the Arab states to the universality of Human Rights.

This article is divided into four parts. The first part deals with the concept of universality of human rights and cultural relativism. The second part describes the role of regional human rights systems and their inter-relations with the universal human rights system. The third part is dedicated to the structure and provisions set in the Arab Charter on Human Rights. The fourth part reveals the inadequacy of the Charter's provisions with respect to international human rights standards.

1. Cultural Relativism and the Universality of Human Rights

Any discussion of the universality of human rights law inevitably evokes the question of whether human rights are based on a concept of human dignity shared by all cultures.² Although human rights are embodied in treaties drafted within the framework of the United Nations, the issue at hand is whether their validity is based on universal ethical, moral or religious convictions.³ As Peter R. Baehr points out, universal human rights instruments are based on the assumption that they reflect universally accepted norms of behaviour. Unless human rights—or at least the nucleus of such rights—are

1 Website of the Office of the High Commissioner for Human Rights [interactive]. [accessed 27-01-2010]. <<http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx>>.

2 Bertrand, M. *Universality. Is Universality in jeopardy?* New York: United Nations Department of Public Information, 1987, p. 21–23.

3 Lijnzaad, L. *Reservations to United Nations Human Rights Treaties: Ratify or Ruin*. Leiden: Martinus Nijhoff Publishers, 1995, p. 103.

universally accepted, the United Nations will lack the basis on which its supervision activities are founded.⁴ Despite some attempts to question universality of human rights, at the time of the adoption of the Universal Declaration of Human Rights (‘UDHR’) no member-state of the United Nations (‘UN’) voted against adoption of the UDHR in 1948. Eight states—the Soviet Union and five of its allies, plus Saudi Arabia and South Africa—abstained.⁵ Therefore, the general acceptance of the Declaration gives merit to the claim that the text of UDHR was acceptable to all UN member states in 1948.

Later developments in human rights law as well as provisions of UDHR, UN Charter as well as the Vienna Declaration had left much room for cultural differences and the application of divergent interpretations of human rights issues. The famous wording in the Vienna declaration, as the outcome of the World Conference on Human Rights,⁶ has recognized the importance of various historical, cultural, and religious backgrounds and denoted that these elements should be born in mind. As a result of the questioning of the universality of human rights, the High Commissioner for Human Rights (‘OHCHR’) has addressed those who are sceptical about universality and claim that the fundamental rights set out in the Universal Declaration and other human rights instruments may not apply in some countries or societies. OHCHR referred to the text of the UDHR and the intentions of the drafters: ‘The preparatory work on drafting the Universal Declaration demonstrates that it was not simply a product of Western thought as is sometimes claimed. Representatives of African, Asian and Latin American countries contributed substantially to the drafting which took place in the Commission on Human Rights and the General Assembly. The record shows that the drafters sought to reflect in their work the differing cultural and religious traditions in the world. The result is a distillation of many of the values inherent in the world’s major legal systems and religious beliefs including the Buddhist, Christian, Hindu, Islamic and Jewish traditions.’⁷

Through the decades since the adoption of the UDHR it seemed that the world had adopted a unified approach to the concept of human rights and recognized the importance of it. However, the recent changes affecting the modern world, the threat of terrorism, globalization and fear of the loss of identity have re-opened the discussion on the universality of human rights and put into question the importance and the role of regional

4 Baehr, R. P. *Human Rights: Universality in Practice*. Palgrave: New York, 2001, p. 9–12.

5 *Ibid.*

6 The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

7 United Nations Commissioner for Human Rights. Statement by Robinson, M. United Nations High Commissioner for Human Rights [interactive]. [accessed 19-01-2010]. <<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/2370024D1ECEAC0B8025682A003DE864?opendocument>>.

human rights systems. On the other hand, the growth of Islamic influence in Europe provokes a discussion on this complex human rights issue.⁸

Today many Arab states are keen to reject the universality of human rights and claim that the concept of human rights was inherited as a particular form of colonization. To the relativist, these instruments and their pretension to universality may suggest primarily the arrogance or ‘cultural imperialism’ of the West, given the West’s traditional urge—expressed, for example, in political ideology (liberalism) and in religious faith (Christianity)—to the view of its own forms and beliefs as universal, and to attempt to universalize them. Moreover, the push to universalization of norms is said by some relativists to destroy the diversity of cultures and hence to amount to another path toward cultural homogenization in the modern world.⁹

In the international debate on human rights that has evolved over the past two decades, the Islamic countries of the Middle East have occupied a position both common and specific—articulating, on the one hand, views that are shared with other third world and non-Western countries, and, on the other, defining a specific position on human rights derived from the particular religious (in this case Islamic) character of their societies and beliefs.¹⁰ Fred Halliday argues that as such, the debate on human rights in the Islamic context reflects the convergence of at least five distinct processes. First of all, it is a part of, and a response to the development of the international debate, arising with the UDHR and leading to subsequent, more specific codes, particularly in the 1970s and 1980s. Secondly, the Islamic debate reflects the way in which, partly influenced by the UN-centred debates, a broader set of *political* questions affecting the Muslim world has come to be phrased in human rights terms—the Palestinian, Kashmir and Bosnian issues, and the treatment of Muslims in Western European society being cases in point. Thirdly, the discourses are a response to the particular use of human rights as an issue for criticizing abuses by governments, be this on the part of non-governmental organizations, such as Amnesty International, or, as with the Carter and subsequent United States administrations, and with the former UN Human Rights Commission, by governments. Fourthly, the debate reflects the pressure from within Islamic states for greater democratization and respect for human rights in the direction of greater compliance with international codes. Finally, and quite separately, it is affected by the current of what can broadly be termed as ‘Islamization’, both from above—by governments, and from below—by mass Islamist movements, that has been growing since 1970s onwards: this tendency seeks to alter legal codes and state practice so that they conform more to what is deemed to be ‘traditional’ or correct Islamic practice.¹¹

8 For further reading see Vakulenko, A. Islamic Dress in human Rights Jurisprudence: A Critique of Current trends. *Human Rights Law Review*. 2007, 7: 717–739; McGoldric, D. Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs From Generally Applicable Laws. *Human Rights Law Review*. 2009, 9: 603–645.

9 Steiner, J. H.; Alston, P. *International Human Rights in Context: Law, Politics, Morals*. Oxford University Press: New York, 2000, p. 367.

10 Halliday, F. Relativism and Universalism in Human Rights: the Case of the Islamic Middle East. *Political Studies*. 1995, XLIII: 152–167.

11 Halliday, F. Relativism and Universalism in Human Rights: the Case of the Islamic Middle East. *Political Studies*. 1995, XLIII: 152–167. p. 157.

In both, Western and Islamic countries, human rights have become a matter of debate and controversy. The multiplicity of positions voiced in this debate range from theocratic claims to outspoken secular ideas. Hence, there is no such thing as the *Western* or the *Islamic* conception of human rights. Historical analysis shows that human rights have always been a political issue, not the natural result of any ‘organic’ development based on the genes of a particular culture. Therefore, any cultural essentialist endeavour, such as ‘Occidentalization’ or ‘Islamization’ of human rights should be rejected.¹²

As an example of a possible solution to this debate, the Arab Charter on Human Rights adopted in 2004 will be discussed more explicitly. It is noteworthy that the adoption of this newest regional human rights document resulted in positive developments in creating an Arab human rights system.

2. Regional Human Rights Systems: General Overview

At present there are three regional human rights systems—European, Inter-American and African. The in line could be Arab and Asian human rights systems. The formation of the former has raised many discussions on the possibility of a threat to the universality of human rights and fuelled the discussions on the influence of cultural relativism on universal human rights standards. Development of the question of the Islamic response to human rights issues is rather complicated. Since there is no *single* ‘Islamic’ body of thought on this question, attempts, declamatory or benign, to ‘identify’ an Islamic position are as misguided as those seeking to produce an ‘African’ or an ‘Asian’ stance. There are over fifty Muslim states in the world, with a variety of legal and political systems, and there is no single body, political or religious, that speaks for Muslims as a whole. The Muslim religion is not only highly fragmented, but is, in contrast to Christianity, one that operates without even a purported theological and legal authority: what we have is a range of bodies (political, legal, academic) which interpret law and tradition as they see fit and which appeal to all Muslim to follow them.¹³ Like other religious texts and traditions, the canonical texts of Islam are capable of having multiple and significantly divergent ideological interpretations. Based on the Qur’anic principles of brotherhood, freedom and equality of humankind, Muslim jurists of all schools of jurisprudence have recognized the human rights to life, property, fulfilment of basic needs, social security, dignity, lineage, intellect, and have held that a government should concern itself with protecting these rights. There is a unanimous consensus among Muslim scholars concerning the equality of human beings irrespective of race, ethnicity or class. However, this is where the agreement among the Muslim scholars and government officials ends.¹⁴ Therefore, human rights activists could raise the question

12 Bielefeld, H. ‘Western’ versus ‘Islamic’ Human Rights Conceptions? A critique of Cultural Essentialism in the Discussion on Human Rights. *Political theory*. 2000, 28(1): 90–121.

13 For further reading see Halliday, F., *supra* note 10, p. 157.

14 Chowdhury, N. The Quest for Universal Human Rights: A Brief Comparative Study of Universal Declarations of Human Rights by the UN and the Islamic Council of Europe. *The International Journal of Human Rights*. 2008, 12(3): 347–352.

of whether we can speak about a new (Arab) human rights system as such and what would be the inter-relation of this regional human rights system with the universal human rights system? In the author's opinion, the answer to those questions may be found in the text of the Arab Charter on Human Rights and analysis of the relationship between regional and universal human rights systems.

Regional human rights systems existing alongside a universal human rights system should be seen as complementing each other. A regional human rights mechanism is given a mandate to promote and protect human rights in accordance with the human rights commitments of the individual States parties. Currently existing regional human rights mechanisms (namely European, Inter-American and African) are entitled to exercise *monitoring functions* (i.e., observe the general human rights situation in the region, request States parties to provide information, carry out on-site visits to States parties to investigate specific human rights concerns, prepare and issue progress reports on a periodic basis, and develop an early warning system¹⁵), *to receive, investigate, analyse and decide on individual communications* as well as communications submitted by groups of persons or non-governmental organizations, and, lastly, are responsible for *capacity building and education*.¹⁶

Indeed, the maintenance of regional human rights regimes could have advantages even if the rights were understood identically at both levels. Favourable conditions within a region may lead states to trust their neighbours more, and to be more willing to empower regional bodies—to adjudicate human rights disputes by finding facts, evaluating them against the governing legal standard, and ordering appropriate remedies—in comparison with more distant global institutions. Interdependence within a region may make human rights implementation more effective by giving other participating states more leverage to influence the conduct of a state found to be in violation. Regional institutions may be regarded as possessing local expertise, better able to perceive the significance of historical and juridical facts in evaluating human rights claims or in designing remedies. Other advantages of regional regimes arise if rights are not understood identically at the global and regional levels.

The relatively greater cultural and ideological homogeneity of a region may permit agreement on a fuller list of human rights, or their more detailed definition, than the 'universal' processes have achieved. For example, although the American Convention was drafted against the background of the Universal Declaration of Human Rights and the two Covenants, its enumeration of rights goes beyond them both, by including the right of reply against injurious statements in the media, and by protecting the right to property. A regional body may thus serve the additional purpose of articulating region-

15 Early warning systems are developed to help prevent gross violations of human rights, including crimes against humanity, war crimes and genocide.

16 Office of the High Commissioner for Human Rights. Principles for Regional Human Rights Mechanisms [interactive]. [accessed 05-01-2010]. <http://bangkok.ohchr.org/asean/principles_regional_human_rights_mechanisms.aspx>.

ally specific conceptions of shared human rights concepts, or interpreting locally identified human rights norms.¹⁷

Therefore, the Arab Charter attempts to create a new formula to address the historic and fundamental question of whether Islamic principles can be compatible with the universality of human rights. The Charter does not refer to cultural, religious or other relativism. On the one hand, the Charter's Preamble refers to international standards, recognizing the close link that exists between human rights and international peace and security, reaffirming the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and on the other hand—to the Cairo Declaration on Human Rights in Islam, namely, the document that is seen as a major compromise on human rights.

3. The Arab Charter on Human Rights

Today many scholars are keen to question the universality of human rights.¹⁸ The Arab Charter on Human Rights seems to be in this special position. Interestingly enough, despite the lack of a single political or religious body, the Arab Charter on Human Rights was adopted by League of Arab States in 2004 and entered into force on 15 March 2008. The provisions of Charter contained some similarities to previous documents adopted by regional human rights systems and established the Arab Human Rights Committee responsible for the supervision of the implementation of these provisions. The question remains open on whether the Committee can be viewed as a body that has authority to speak in the name of the States belonging to League of Arab States¹⁹ and whether we can consider this document to be the sole basis for the establishment of the regional human rights system.

The original Arab Charter on Human Rights was adopted by the Arab League in 1994. However, it was widely criticized at the time by many human rights organizations both within the region and beyond as failing to meet international human rights standards, and not one Arab League state was prepared to ratify it.²⁰ The revision of the Charter was part of an overall modernization package suggested by the Secretary General of the Arab League and the Council to reform existing institutions and to create new ones, such as an Arab parliament, which would have the competence to further human

17 Neuman, G. L. Import, Export, and Regional Consent in the Inter-American Court of Human Rights. *The European Journal of International Law*. 2008, 19(1): 101–123.

18 For further reading see Goodman, R.; Jinks, D. Incomplete Internalization and Compliance with Human Rights Law. *The European Journal of International Law*. 2008, 19: 725–748; O'Connell, P. On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights. *Human Rights Law Review*. 2007, 7: 483–509.

19 As of 2010 it would be Jordan, Bahrain, Libya, Algeria, the United Arab Emirates, Palestine, Yemen, and Saudi Arabia.

20 For further reading see Rishmawi, M. The Revised Arab Charter on Human Rights: A Step Forward? *Human Rights Law Review*. 2005, 5: 361–376.

rights, as well as to review legislation in Arab countries; and a Regional Security Council that would promote conflict prevention and resolution in Arab countries, as well as develop a strategy to maintain peace. The package also included the establishment of an Arab Court of Justice. The proposed statute of the Court of Justice would give it competence on human rights issues, as well as disputes related to principles of international law.²¹ Since support for the proposals was obviously lacking at the Arab States Summit Meeting in 2004, the only concrete step taken to reform the system was the revision of the Charter. The Arab League, under pressure from non-governmental organizations (NGOs) and the Office of the High Commissioner for Human Rights, agreed to allow independent experts to prepare a new draft. The OHCHR has concluded a bilateral agreement with Arab League to assemble a group of independent Arab experts to carry out the task. The redrafting process included consultations with NGOs and outside experts.

The final version of the Charter on Human Rights is composed of 52 articles. In comparison with the Charter adopted in 1994, the new Charter was significantly revised and new rights were added. The language of the Charter resembles various international human rights treaties. It is noteworthy that the Charter includes many provisions that are largely consistent with the standards found in the international treaties and to some degree reflects developments in international human rights jurisprudence. The Charter borrows the expanded list of non-derogable rights developed in Human Rights Committee General Comment No. 24²²:

In exceptional situations of emergency which threaten the life of the nation and the existence of which is officially proclaimed, the States parties to the present Charter may take measures derogating from their obligations under the present Charter, to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.

Regrettably, the conservatism of the Cairo Declaration is reflected in some provisions of the Arab Charter. Article 26 of the Charter states:

Everyone lawfully within the territory of a State party shall, within that territory, have the right to freedom of movement and to freely choose his residence in any part of that territory in conformity with the laws in force.

This provision limits the rights to freedom of movement for women, as is the case in Saudi Arabia, which imposes limitations on the basis of certain interpretations of Sharia. Another example of conservatism may be found in the Article 8 of the Charter. Article 8 prohibits *physical or psychological torture or cruel, degrading, humiliating or inhuman treatment*. However, the continuous use of corporal punishment and the imposition of the death penalty under Sharia puts this provision in doubt.

On a more optimistic note, it must be said that the Charter's language is directed towards universalism rather than relativism. The revised Article 1 declares that the aim of the Charter is 'to place human rights at the centre of the key national concerns of the

21 For further reading see Rishmawi, M., *supra* note 20.

22 Human Rights Committee. General Comment No. 29. States of Emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/add.11.

Arab States’ and that there is a need ‘to entrench the principle that all human rights are universal, indivisible, interdependent and interrelated’. Whilst to the outsider versed in human rights discourse these might seem obvious points, this is not the case among Arab States who have traditionally and systematically sought to challenge the universality of human rights. Consequently, this Article did not exist at all in the 1994 version of the Charter. The new Article 1 is clear and unambiguous on the commitment to universality, as is the Charter generally to the importance of the role of human rights in the life of the individual and his or her relation with others. However, the Charter still omits equally clear and strong statements about human rights being the foundation for good governance, which is vital given the political context of the region.²³

4. The Arab Charter on Human Rights: a Critical Approach

The preparation of the new Arab Charter on Human rights did not go very smoothly. Despite the efforts of the OHCHR and NGOs, the final result was disappointing. The prepared draft did not ensure the Charter’s full conformity with international standards. As Mervat Rishmawi points out, reasons for this failure, which has resulted in a compromised document, may have included the drafter’s consideration to omit some rights (or elements of them), possibly because they questioned the applicability of certain human rights with religion.

Despite the process of re-drafting of the Charter of 1994, the new Charter on Human Rights still maintains strong language related to Zionism. Article 2 of the Charter states:

All forms of racism, Zionism and foreign occupation and domination constitute an impediment to human dignity and a major barrier to the exercise of the fundamental rights of peoples; all such practices must be condemned and efforts must be deployed for their elimination.

This text echoes the provision embedded in the Preamble of the Charter ‘Rejecting all forms of racism and Zionism, which constitute a violation of human rights and a threat to international peace and security’ and therefore invoke the concern of the OHCHR. The equation of Zionism with racism was embodied in the resolution of the General Assembly 3379 (XXX), which concluded that Zionism [was] a form of racism and racial discrimination.²⁴ However, this determination was revoked by the General Assembly in 1991.²⁵

Because of several other provisions that have attracted the attention of the OHCHR, the Charter was found to be incompatible with international standards for women’s,

23 Rishmawi, M., *supra* note 20, p. 361–376.

24 UN General Assembly resolution A/RES/3379 (XXX) on Elimination of All Forms of Racial Discrimination. Adopted on 10 November 1975 [interactive]. [accessed 01–02-2010]. <<http://www.un.org/documents/ga/res/30/ares30.htm>>.

25 Amnesty International. *Middle East and North Africa Region: Re-drafting the Arab Charter on human Rights: Building for Better Future*. AI Index MDE 01/002/2004 [interactive]. [accessed 23–01–2010]. <<http://web.amnesty.org/library/index/ENGMDE010022004>>.

children's and non-citizens' rights, and in that it continues to equate Zionism with racism.²⁶ These and other concerns should be discussed in more detail.

The first issue of concern would be the right to life. The Arab Charter foresees the safeguard to impose the death penalty only for the most serious crimes *in accordance with the laws in force* at the time of commission of the crime and pursuant to a final judgment rendered by a competent court.²⁷ The wording in the Arab Charter is identical to the one of the International Covenant on Civil and Political Rights. The Human Rights Committee also stressed the importance of a fair trial and all procedural guarantees allowing a fair trial, applying the presumption of innocence, the right to review the case by a higher tribunal and minimum requirements for defence. However, this interpretation of the Arab Charter Article 6 may cause some problems for countries in the Middle East that impose the death penalty without the guarantee to a fair trial.²⁸

Another problem would be the possible imposition of the death penalty according to national legislation. Despite the exemptions made for minors and pregnant women under international law treaties, the Arab Charter allows the imposition of the death penalty according to national legislation. Therefore, both vulnerable groups of individuals may not be the subject of exemption. Furthermore, provisions of the Charter regarding the prohibition of the use of the death penalty against children and pregnant women²⁹ can be derogated from during a state of emergency pursuant to Article 4 of the Charter despite the fact that the right to life as guaranteed in Article 5 can never be the subject of derogation.

Finally, the Charter does not include a provision to guarantee the right to seek pardon or commutation of sentence in the case of a death penalty, a right recognized in Article 6(4) of the ICCPR.³⁰

The other aspect worth noticing is the issue of torture, inhuman and degrading treatment or punishment. Article 8 of the Arab Charter prohibits physical or psychological torture and inhuman and degrading treatment. However, in comparison with international human rights treaties (namely, the UN Convention against Torture, 'CAT') the Charter lacks a provision requiring the State to take effective legislative, administrative, judicial or other measures to prevent acts of torture.³¹ Unfortunately, the Charter does

26 UN press release. *Statement by UN High Commissioner for Human Rights on the entry into force of the Arab Charter on Human Rights* [interactive]. [accessed 23-01-2010]. <<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/6C211162E43235FAC12573E00056E19D?opendocument>>.

27 Article 6 of the Arab Charter on Human Rights. Available at University of Minesota, Human Rights Library [interactive]. [accessed 18-01-2010]. <<http://www1.umn.edu/humanrts/instree/arabhrcharter.html>>.

28 Rishmawi, M., *supra* note 20, p. 361-376.

29 Article 7 ensures that sentence of death shall not be imposed on persons under 18 years of age, unless otherwise stipulated in the laws in force at the time of the commission of the crime. As to the death penalty to women, the wording of Article 7 is as follows 'The death penalty shall not be inflicted on a pregnant woman prior to her delivery or on a nursing mother within two years from the date of her delivery; in all cases, the best interests of the infant shall be the primary consideration.'

30 Rishmawi, M., *supra* note 20, p. 361-376.

31 Compare to the wording of Article 8 'Each State party shall protect every individual subject to its jurisdiction from such practices and shall take effective measures to prevent them. The commission of, or participation in, such acts shall be regarded as crimes that are punishable by law and not subject to any statute of limita-

not include a number of important principles related to torture, such as the prohibition to use statements obtained under torture in any legal proceedings, or the prohibition of extradition or return to countries where the person concerned may face serious human rights violations. The Charter also does not contain a provision analogous to Article 2 (2)³² or 2 (3)³³ of the CAT.

The third aspect of the concern is the discrimination of non-citizens. Article 24 of the Charter grants the right to peaceful assembly and association to ‘citizens’, thereby excluding non-citizens. Article 41 (b) also guarantees free basic and primary education to citizens.

The fourth aspect of concern would be the issue of fair trial, liberty and security, since Article 16 (g) states that a convicted person has the right to challenge his conviction according to the law before a higher court. However, it is not clear if this amounts to the right to appeal both conviction and sentence as recognized in the Article 14(5) of the ICCPR. Article 16 of the Arab Charter includes a commendable list of guarantees for trial. However, it does not guarantee trial ‘without undue delay’ and by an ‘independent and impartial tribunal established by law’ as it is stated in the ICCPR.³⁴

A fifth issue was recognized by the OHCHR. Sadly, the Charter retains its conservative stance on marriage, stating that national legislation should regulate the rights and duties of men and women to enter marriage, during it, and upon its dissolution, thereby failing to recognize that legislation in some Arab countries does not guarantee equality between a man and a woman. In a similar vein, the Charter, in relation to the family, retrogressively modifies the equivalent provision of the ICCPR. For example, the Charter states that marriage is the basis for forming a family, clearly not reflecting the multiple arrangements that people can and should embrace in a modern society. The Charter also states that the foundation of the family should be accorded to the conditions of marriage (Arkan al-Zawaj), a concept which is not defined but which is derived from Sharia, based on several different interpretations, some of which have resulted in discrimination between spouses. The Charter also states that national legislation should regulate nationality and the possibility of children gaining the nationality of their mother.³⁵

Last but not the least is the absence of a mechanism for individual petitions. The final text of the Charter is rather disappointing, especially because the option of establishing an independent court was discussed during the drafting process. The lack of a stronger supervision mechanism may indicate the fact that Arab states are not keen on having a judicial body capable of not only dealing with individual petitions but also rendering legally binding decisions. This fact raises several questions. First, it is debatable

tions. Each State party shall guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation.’

32 Article 2(2) CAT states ‘no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.’

33 Article 2(3) CAT prohibits the justification of torture on the grounds of an order from a superior officer or public authority.

34 Rishmawi, M., *supra* note 20, p. 361–376.

35 *Ibid.*

whether the Committee could be considered as the body responsible for the formation of guidelines for the regional human rights system. Second, the choice of non-judicial body raises the question of whether the Arab States are truly willing to grant the jurisdiction to monitor the human rights situation in the State parties.

Indeed, the lack of a mechanism for individual petitions is rather disappointing. Nonetheless, the institutional choice could be easily explained. Analogous tendencies are seen within the framework of the United Nations human rights system. The idea of establishing the World Court for Human Rights is still pending in the political agenda since the 1950s. Therefore, the most probable outcome of future human rights system reform would be the establishment of a unified treaty body.³⁶ On the other hand, one may expect that the developing Arab human rights regional system will follow the steps of the African human rights system and will reform the existing institutional system in the future as it was done by adopting additional protocol establishing a binary system (keeping the Human Rights Commission and establishing the Court) within the framework of the African human rights system.

The lack of a complaints mechanism, as established in each of the other regional systems, is a major constraint on guaranteeing effective access to justice for victims, especially as most Arab countries have yet to sign up to the UN complaints system, though a number of them are subject to the complaints mechanism of the African Charter on Human and People's Rights 1982.³⁷ The missing individual complaints mechanism in the Charter constitutes a greater problem than just a lack of a supervision mechanism. Above all, it means the lack of an effective remedy for those whose rights and freedoms have been violated; therefore, it does not guarantee any other forms of reparation (namely, restitution, satisfaction, rehabilitation, and the guarantee of non-repetition).³⁸

To sum up, the revised Arab Charter on Human Rights was a significant step forward from its predecessor. The previous document was never ratified and never came into force. Meanwhile the new Arab Charter came into force in 2008. The new Charter is largely consistent with international law; however, some provisions of the Charter raise certain concerns. Particular attention should be paid to women's, children's and non-citizens' rights and other issues. Sadly, these inconsistencies with international law will continue to perpetuate the perception that Arab States are not truly committed to universal human rights, when, in reality, the Charter provides the best opportunity in a generation to advance their protection and promotion through religion.³⁹

36 Further reading see Trechsel, S. *A World Court for Human Rights?* [interactive]. [accessed 29-11-2008]. <<http://www.law.northwestern.edu/journals/JIHR/v1/3>>; Nowak, M. *Protecting Dignity: An Agenda for Human Rights* [interactive]. [accessed 2009-02-09]. <www.UDHR60.ch>.

37 Rishmawi, M., *supra* note 20, p. 361–376.

38 *Ibid.* The forms of reparation were also identified in the resolution adopted by the UN General Assembly A/RES/60/147. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

39 Rishmawi, M., *supra* note 20, p. 361–376.

Conclusions

Some authors, such as Halliday, have raised doubts as to whether we can speak of an Islamic response to human rights issues, since there are over fifty Muslim states in the world, with a variety of legal and political systems, and there is no single body, political or religious, that speaks for Muslims as a whole. It may seem that the League of Arab States has initiated progress in this area and has developed the first regional human rights document—the Arab Charter on Human Rights. Even if it is doubtful that the newly created Arab Human Rights Committee could represent such a body in the nearest future, the establishment of the Committee could signify a point of departure for solving this issue. Also, one cannot be certain that the Arab Charter on Human Rights has instantly established a new regional human rights system. The Arab Charter on Human Rights could have become a great example blending both concepts—universality of human rights and cultural relativism. However, the adopted text of the Arab Charter on Human Rights has revealed the ambiguous position of the Arab States on the universality of human rights. The provisions of the Charter disclose some inconsistencies with international human rights law. Among the most criticized provisions would be the imposition of the death penalty for pregnant women and minors, the insufficient regulation of the positive obligations of the states dealing with issues of torture, and cruel and inhuman treatment, discrimination against women and non-citizens, and women's rights. In addition to the divergent interpretation of the rights mentioned above, the provisions of the Charter fail to establish the right to individual petition and effective remedy to the victims of human rights violations. The provisions of the Charter do not foresee the possibility to consider individual petitions by the Arab Human Rights Committee. Lack of an effective mechanism diminishes the Committee's ability to defend the rights that were violated according to provisions of the Charter. Thus, the final text of the Charter has failed to justify the expectations of NGOs, the international community and the OHCHR, and has left the discussion on the universality of human rights open.

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ARABŲ ŽMOGAUS TEISIŲ CHARTIJA: NAUJOS REGIONINĖS ŽMOGAUS TEISIŲ SISTEMOS KŪRIMAS AR IŠŠŪKIS ŽMOGAUS TEISIŲ UNIVERSALUMUI?

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Santrauka. *Pasitelkus žmogaus teisių universalumo ir kultūrinio reliatyvizmo šalininkų polemiką straipsnyje analizuojama besiformuojanti Arabų žmogaus teisių regioninė sistema. Kalbėti apie Arabų žmogaus teisių sistemą yra problematiška. Viena vertus, todėl, kad šiuo metu egzistuoja apie penkias dešimtis musulmoniškų valstybių su skirtingomis teisinėmis bei politinėmis sistemomis ir kol kas nėra jokios politinės arba religinės institucijos, kuri vienytų visą pasaulio musulmonų bendruomenę. Kita vertus, ir todėl, kad vargu ar Arabų lygos rėmuose įsteigtas Arabų žmogaus teisių komitetas galėtų būti laikomas tokia institucija.*

Nors įprasta manyti, kad Visuotinė žmogaus teisių deklaracija padėjo pagrindus žmogaus teisių universalumui, vis dėlto jų universalumas buvo kvestionuotas po dviejų dešimtmečių, kai dauguma musulmoniškų valstybių tapo nepriklausomomis. Laikydamos žmogaus teisės kolonializmo liekana ir joms primestu svetimu katalogu, išpažįstančios islamą valstybės teigė, kad jos nėra saistomos žmogaus teisių universalumo idėjos. Kaip atsaką į Visuotinės žmogaus teisių deklaracijos nuostatas islamiškos valstybės parengė Kairo žmogaus teisių deklaraciją, kurioje žmogaus teisių katalogas buvo atspindėtas pagal šariato prizmę. Nuo pat 1990 m. islamiškos valstybės ėmėsi rengti privalomą žmogaus teisių dokumentą, kuriame būtų įtvirtintas pagrindinis žmogaus teisių katalogas. Antrasis bandymas parengti tokį tekstą buvo sėkmingas. 2008 m. įsigaliojusi Arabų žmogaus teisių chartija pateikė žmogaus teisių katalogą ir įkūrė Arabų žmogaus teisių komitetą. Atrodė, kad dalyvaujant arabų valstybėms ir tarptautiniams ekspertams bei nevyriausybinėms organizacijoms atstovams, taip pat tarptautinėms bendrijoms reikalaujant bus užtikrinti tarptautiniai žmogaus teisių standartai atitinkantys reikalavimus Žmogaus teisių katalogui parengti, tačiau rezultatas buvo kitoks nei tikėtasi. Jungtinių Tautų vyriausiajai žmogaus teisių komisarei pareiškus kritiką dėl kai kurių priimto dokumento nuostatų suabejota ar Arabų valstybės iš tiesų pripažįsta žmogaus teisių universalumą. Jungtinių Tautų pareigūnė atkreipė dėmesį į kelias susirūpinimą keliančias problemas: sionizmo prilyginimą rasizmui bei į moterų, vaikų ir asmenų, neturinčių pilietybės, teisių aiškinimą. Mokslininkai nustatė ir daugiau problemų, nei anksčiau minėtos, t. y. teisės į gyvybę užtikrinimo problemą, valstybių pozityvių išpaigojimų vengimą draudžiant kankinimus, žiaurų, nežmonišką elgesį arba baudimą bei individualių peticijų mechanizmo nebuvimą. Visos šios aplinkybės, autorės nuomone, leidžia pagrįstai suabejoti, kad sukurta Arabų žmogaus teisių sistema. Straipsnio autorės nuomone, šio dokumento priėmimą greičiau galima laikyti tik dar vienos regioninės žmogaus teisių sistemos užuomazga.

Reikšminiai žodžiai: žmogaus teisės, Arabų žmogaus teisių chartija, regioninės žmogaus teisių sistemos, universalizmas, kultūrinis reliatyvizmas.

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