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Multicultural Challenges in Modern Nation-States

A Global and European Perspective on Multiculturalism

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ABSTRACT

The objective of this dissertation is to deeply examine the implication of the multicultural challenge on different level of analysis, social, political, cultural and juridical. Given the international relevance of multiculturalism, as recent phenomenon sometimes jeopardizing the integrity of nation-states, the purpose of this paper is to retrace the historical and contemporary stages of evolution of this social and political process to provide the reader with a comprehensive overview on the topic. The first part provides some theoretical definitions of the notions of culture, multiculturalism and multicultural society, also through the different juridical instruments concerning cultural diversity and cultural rights. Indeed, since the post-WWII period International law has significantly increase its work and commitment towards the protection and promotion of human rights and among these, cultural rights, by means of the promotion of several conventions and declarations internationally endorsed. The second chapter deals with the multicultural challenge in Europe and attempts to analyse the existing political and juridical instruments to cope with cultural diversity focusing especially on the political and ethnic structure of France and Switzerland and the different models of integration of minorities applied. The following, third chapter analyses instead, the status of multiculturalism in the world, with special reference to the Canadian cultural mosaic, being the first country in the world to adopt and promote a multicultural polity and a legislative act on multiculturalism, and the Israeli-Palestinian conflict, assessing its ethnic, cultural, religious roots and focusing on the status and rights of Palestinian minorities in the occupied territories. The fourth part outlines the delicate topic of cultural offence, defence and culturally motivated crimes, probably the most complicated issue concerning cultural pluralism and normative conflict, with an emphasis on female genital mutilation, an internationally widespread practice deriving from social, cultural and religious traditions. As a matter a fact, as the reader will realize, even the most progressive supporter of integration would face a deadlock when it comes to evaluate the admissibility of cultural norms and customs infringing international humanitarian law. In this regard, the paper dwells on the topic of gender discrimination and human rights in relationship with multiculturalism and then proceeds with the following and finale part that presents the possible, contemporary factors of crisis of multiculturalism.

INTRODUCTION

Culture is a complex notion embodying diverse and sometime combined elements - language, nationality, religion, customs and traditions, economy and polity- determining people's identity. Culture is indeed that element which defines the nature of individuals, their origin, their personality and their attitudes and actions, a core feature that since the early age shapes the personal identity of human beings.

With the advent of globalization diverse cultures approached one another and sometimes melted, blending traditions, languages and customs, thus creating different and renewed societies. However, multiculturalism, triggered by a more and more pervasive and expansive globalization, poses complicated challenges to the modern nation-states that are affected by cultural diversity. People are deeply anchored to their culture and identity; therefore, they seek to eagerly protect and preserve it, against any possible threat, including diversity. On the other hand, those who belong to a minority claim the recognition and valorisation of their distinct traits, against the oppression of a dominant group, asking hence their rights to be guaranteed in respect of that same cultural diversity. Multiculturalism is hence, first of all, a social and political movement concerning the recognition of marginalized communities and minority groups. Today, almost every society might define itself as multicultural, since each state enshrines elements of cultural alterity within their social structure, some inherent in the very nature of the population - multinational society-, some others created as a result of immigration waves -polyethnic society-. The multicultural challenge is then an increasingly topical issue. Governments sought to develop several methods of integration of minorities in their social, political and work environment and despite some of those models having already been proven unsuccessful, international commitment towards universal principles such tolerance, respect for diversity and non-discrimination, have grown over the years, with the aim of reconciling unity and diversity, creating a peaceful and secure environment.

This dissertation has the objective of outlining the evolution and characteristics of multiculturalism, by providing a global and European, historical and contemporary framework of such phenomenon and the related challenges. The choice of approaching this subject matter stems from my personal interest and experience. I have decided to conclude the cycle of studies with a research that could combine what I have learned from the academic courses with my interest towards a topic of current and global relevance.

Words like multiculturalism, melting pot and intercultural exchange are increasingly recurring and sometimes misused within contemporary debates, rising the need of giving clear definitions of such notions. The current perspective on cultural pluralism and multiethnicity of western world appears to be prejudicated by errors and lapses. It is frequently said that issues like terrorism, welfare reduction, increase criminality and labour shortage are outcomes ascribable to states' multicultural policies open towards immigration and cultural pluralism. Therefore, it seemed necessary to draw an explanatory framework to cast a light on the nature and principles of multiculturalism and the related issues at stake, considering though, also the evident drawbacks that the clash of cultures triggers, such as the evident normative conflict that emerges when referring to culturally motivated crimes.

One purpose of this thesis is to assert if multiculturalism really represents a challenge undermining the social, political and economic stability of modern societies and whether it does, to determine how it should be handled and managed by national governments and the international community. Is it conceivable for a state within the modern and more and more globalized world, to go back to protectionism and refuse any element of cultural diversity on its soil? Does it exist an example of good or bad state practice to face the multicultural challenge, if so, which are the elements influencing and shaping such practices? It will be also argued that multiculturalism might display some inherent limits and the feminist theory will help identify such boundaries. But are these limits the result of a neutral perspective, or are they arising from a uniquely western point of view that might hide inherent flaws, hindering our capacity to investigate with an unbiased eye other cultures values and principles?

The first chapter deals with the relationship between multiculturalism, cultural rights and the international law. As a matter of fact, recent legal instruments to deal with cultural diversity and discrimination have been provided by International law. The International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the UNESCO Universal Declaration on Cultural Diversity and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression are just some of the international conventions and legal instruments which specifically cope with cultural diversity. Among their merits, there is the one of giving a universal definition of culture from a juridical point of view and more importantly, that of ascribing culture as a characteristic of humanity, hence recognizing

cultural rights as human rights. Nonetheless, many scholars asserted that the terms used in the Covenants and Conventions to delineate and describe such notions as “cultural life” or “cultural activities” were rather broad and vague, thus not providing a truly binding instrument for the international community and treating cultural rights as a neglected category of human rights. International law in fact, should be regarded as a valuable support in such issues, but not as the only and univocal solution.

Shifting to the second chapter, my aim is to focus the attention on multiculturalism in Europe. I have argued that Europe represents in the first place a wide multicultural society, especially considering the very nature of the European Union, a community gathering 28 countries with distinct political, juridical, economic and cultural systems and structures, under the commitment of mutual cooperation and solidarity and the control and assistance of a supranational authority. Given that, it can be asserted that multiculturalism consists of a fundamental component of Europe and as such, the European Union attempted to promote it and preserve the flourishing of cultures by including cultural diversity in its constitutive treaties and by adopting specific measures and conventions, such as the European Cultural Convention, the Framework Decision 2008/913/JHA of the Council of the European Union, convicting racism and xenophobia, the Racial Equality Directive and the institution of the European Commission against Racism and Intolerance. In addition to the European Union system, I have also examined the several instruments produced by the Council of Europe, which by means of its increase commitment towards human and cultural rights, provided powerful conventions protecting and preserving democratic principles and values relating to multiculturalism.

Furthermore, I have analysed the social and cultural structure of two European countries in particular: France and Switzerland, which are both displaying cultural diversity in their social structure but formed as a consequence of different social and political events. Focusing the attention on the ethnic composition of those states, it can be drawn that despite the formally different state and political structures, France and Switzerland have also a totally different manner to deal with minorities and they applied different models of integration. Yet, this assumption is certainly influenced also by the very nature of the state formation; indeed, Switzerland is a multinational federation of which institution was represented by the willingness of the several cantons to unified, whereas the multicultural nature of France is just the result of various immigrations flows towards the

country, making the assimilation of the new components more though due to their deep social and cultural diversity.

The third chapter instead, presents a more global perspective on multiculturalism, taking into account two specific and opposite multicultural contexts: the Canadian one and Israeli-Palestinian one. On the one hand, Canada is a fundamental example for the scope of this dissertation because it represents the environment where multiculturalism, in the modern political sense, was coined. As a matter of fact, Canada was the first country in the world to implement a polity addressed to multiculturalism in the late 1970s, further proven by the adoption of the Canadian Multiculturalism Act in 1988, which endorsed the Canadian commitment to promote, preserve and recognize all forms of cultural diversity without discrimination or inequalities, whose various representations portrayed the composition of Canadian society, now defined as *cultural mosaic*. On the other hand, the Israeli-Palestinian case, perhaps the most complex cultural clash, consists of a conflict of two different populations over the same land, where Israel represents a so-called *ethnocracy*, of which grounds were laid down on the membership to a particular religion and culture: the Jewish one; while Palestinians disclose a social composition made of different religious, linguistic and ethnic groups. Diversity is at the basis of this clash and despite the several international declarations solidifying the “two-states” solution, the negotiation process and UN attempts to reach a peace agreement, motives that are so deeply diving these societies seem insurmountable.

Within this framework, the final section of the third chapter gives a brief overlook on minority rights in the Arab world. The classification of minorities in the Arab world is basically made on religious and ethnic grounds, specifically related to the notions of Arabs and Sunni Muslims. Such classifications depict a very varied society, but when dealing with the recognition and protection of minority rights in the Arab world, it emerges a complex and not completely endorsed discourse; indeed, discrimination and inter-ethnic conflicts are rather widespread in the Arab countries, despite the impulse given and the commitment demonstrated by the international organizations to respect and foster such cultural diversity also in the Arab world.

The following chapter instead tries to assess probably one of the most controversial and complex issue related to the multicultural challenge: culturally motivated crimes. Such crimes are more often the result of a cultural and normative conflict between the immigrants’ culture and the culture of their country of destination. This concept is strictly

tied to those of cultural offence and cultural defence. In fact, cultural offence corresponds to culturally motivated crimes, whereas cultural defence is intended as the response to a cultural offence and it concerns the measures adopted by the accused to contextualize his actions within his cultural background. Culturally motivated crimes, before representing a challenge to multiculturalism itself, represent a dare to human rights, since the respect and the pursuit of one's own customs and tradition, for some cultures consists on infringing universally recognized human rights. One very wide-spread culturally motivated crime is female genital mutilation. This practice, despite being internationally condemned, is very common especially in Middle-Eastern and African countries and in some immigrants' communities within western states. Furthermore, I have tried to posit the recent debate concerning the relationship between feminism and cultural relativism, by examining the reciprocal critics moved and assessing the mutual limits of such theories.

The final part attempts to depict the possible present challenges to multiculturalism in contemporary societies. The first challenge handled is the contemporary refugee crisis mostly affecting European countries. Such phenomenon is toughly challenging European governments, whose instruments and policies are evidently unprepared to face such an emergency. Brick by brick, many European countries have attempted to build fences at their borders in a desperate attempt of blocking the relentless stream of human beings in seek of asylum. But numbers and statistics show that the migratory flows are under many perspectives unprecedented and therefore, demand unprecedented responses by the states affected. European countries are currently trying to develop mechanisms to manage the migratory crisis, by operating directly on the sources of such exodus, while establishing stronger cooperation with the countries considered direct doors on the Mediterranean. But what is causing great concerns is also the reaction of European population, inasmuch intolerance and fear of the new "foreigners" is increasing and leading populism to gain more and more consent among public opinion. Such trends have been fed by the recent terrorist attacks perpetrated in Europe by some affiliates of Daesh, contributing to the spread of an Islamophobic feeling within the population and to the rejection of new immigrants from Middle-Eastern and African countries for fear of their cultural belonging (notwithstanding the fact that most, if not all terrorists that committed the attacks in Europe were naturalized citizens). As will be explained, international law mechanisms to counter the terrorist threat are several and they have been implemented especially after the 9/11 attacks in New York. However, international law lacks a comprehensive and

universal definition of terrorism, due to the divergent visions in determining if the violent actions of groups fighting for self-determination could be ascribed as act of terrorism.

Moreover, the following section copes also with the Brexit referendum. This latter seems to be strictly connected with the migrant issue, given the fact that the leave campaign significantly focused on multiculturalism and social liberalism as elements damaging the welfare of British citizens. Despite the withdrawal of a member state being a clause provided by the TUE (article 50), such outcome opens a period of instability and a complex negotiation processes for the European Union, which is currently facing a multiplicity of problematic issues undermining both its state members and the Union itself. The last part ends with a further perspective on the likelihood of the failure of multiculturalism. Focusing on American social history, the chapter attempts to cast a light on the potential causes of the populist turn in the United States, culminated with the election of Donald Trump as US president. Such an event could not be neglected, especially considering the fact that it happened in the self-proclaimed melting pot state.

CHAPTER I

MULTICULTURALISM AND CULTURAL DIVERSITY IN INTERNATIONAL LAW

1. Defining the Concept of Culture, Multiculturalism and Multicultural Society

In the aftermath of migration flows through improvements in transportation and the implementation of new forms communication over the centuries, several and diverse social, political, economic and demographic changes have been caused around the globe. The 19th century Globalization has accelerated and increased this phenomenon, leading inevitably to identity conflicts between minority cultures and dominant ones, a clash of culture and civilizations. Nonetheless, “the process of globalization, facilitated by the rapid development of new information and communication technologies, though representing a challenge for cultural diversity, creates the conditions for renewed dialogue among cultures and civilizations”.¹

The notion of culture is notoriously difficult to define because of ambiguity of its multiple shapes; indeed, it can assume distinctive connotations in different contexts. The concept of culture has been defined in several and different ways in international law and discourse. Culture is commonly perceived as the set of several common, shared elements, such as language, religion, customs, nationality and social and historical background², but each of these factors displays aspects of alterity towards other components, that makes it difficult to identify and delineate a unified and fixed assumption of culture. Being articulated at different levels, culture embodies primarily language, including syntax, grammar, but also body language, jokes and proverbs; at another level it reflects arts, music, literature and finally; it is also closely tied up with the economic and political sphere.³

According to the *Enciclopedia Treccani*, culture is the set of intellectual knowledge, acquired with studying, reading, experience, the influence of social environment and that is elaborated in a subjective and autonomous way by an individual, becoming a constitutive element of personality. In ethnology, sociology, and cultural anthropology,

¹ UNESCO Universal Declaration on Cultural Diversity, Paris, 2 November 2001, Preamble

² HUNTINGTON, *The Clash of Civilizations and the Remaking of Common Order*, New York, 1996, Huntington defined the concept of civilization also as the subjective self-identification of people, the sense of belonging to a particular community, highlighting the significant role of religion.

³ PAREKH, B., *Rethinking Multiculturalism, Cultural Diversity and Political Theory*. Basingstoke, MacMillan, 2000, pp. 142-178.

culture is the set of knowledge, values, symbols, conceptions, beliefs, behaviour models and material activities that characterize the way of life of a social group.⁴ Anthropologists have tried to reconceptualise the notion of culture over the years, searching among the various definitions of the term.⁵ But the first formal and scientific definition of culture, from an anthropologic point of view, was given by Edward Tylor in 1871, translated from the German term *Kultur* “Culture[...]is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by a man as a member of society.”⁶ Tylor’s work has been crucial in determining the scientific notion of culture. As it emerges from these definitions, society or social group has a significant role in determining the characteristics of a culture, indeed the man as human being, is by nature a rational and social animal, shaped by the interactions with other men. However, culture assumes diverse forms across time and space. A more contemporary definition is given by Schweder in *The International Encyclopedia of Social and Behavioral Science*, that going through the many interpretations of different anthropologists outlined the standard view saying that “Culture refers to community-specific ideas about what is true, good, beautiful, and efficient. To be ‘cultural’ those ideas about truth, goodness, beauty, and efficiency must be socially inherited and customary. To be ‘cultural’ those socially inherited and customary ideas must be embodied and or enacted meanings; they must actually be constitutive of (and thereby revealed in) a way of life.”⁷ Again, the idea that something cultural is something customary and socially accepted or inherited is recurrent, still placing communities and social groups in a relevant position for the definition of what culture stands for.

Yet, the concept of culture has been reconceptualised by the recent globalization. The weakening of state borders, allowing people to move easily to other countries, caused possible conflicts between diverse cultures. Moreover, we can no more rely on the fact that people living in the same territory, having the same nationality or speaking the same language, share the same culture.

⁴ La Piccola Treccani, Dizionario Enciclopedico, Marchesi Grafiche, Roma, 1995, trans.

⁵ Kroeber and Kluckhohn, two American anthropologists, sorted out a list of 164 various definitions of culture given by different academics in 1952.

⁶ TYLOR, E.B., *Primitive Culture. Researches into the Development of Mythology, Philosophy, Religion, Language, Art and Custom*, London, 1871, p1.

⁷ SHWEDER R. A., *Culture: Contemporary Views*, in *The International Encyclopedia of Social and Behavioral Science*, vol. V, Oxford, 2001, p. 3153.

In the wave of the terrorist attacks of 11 September 2001, the UNESCO general conference adopted the Universal Declaration on Cultural Diversity, that as the Director-General Koichiro Matsuura pointed out “is one of the founding texts of the new ethics promoted by UNESCO”⁸. In his preamble, we can find the first juridical definition of culture, although it is clearly inspired by the anthropological studies:

” Culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”⁹

The concept of culture has indeed evolved over time, broadening its notion and including more forms of cultural expression, developing from a mere product of few elites, the “high culture” produced by artists and intellectuals, to the expressions and creativity of everyone, including mass and popular culture of non-elites.¹⁰ The concept of culture evolved also in International Law and legal discourse over the years, embodying three different notions: culture as “high culture”, the traditional notion defined above; culture as popular culture, including mass public and folks creative expressions, contemporary music, movies, sports and social events; and culture as a way of life, which involves beliefs, practices, values and the ways of thinking and acting of people in everyday life.¹¹

Cultural diversity is now the core element of many societies, thus intercultural dialogue and cooperation are essential to guarantee understanding and trust among different cultural groups, and to build a peaceful and secure global environment. Four years after the Universal declaration on Cultural Diversity, the General Conference of UNESCO adopted the Convention on the Protection and the Promotion of the Diversity of Cultural Expressions, which has been one of the first international juridical instruments for the protection of the multiplicity of expressive forms of culture. The complexity of the subject required the major elements discussed to be understood in an all-encompassing manner by the ratifying countries and it brought the following definition of cultural diversity, compiled in the convention:

“Cultural diversity” refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.

⁸ UNESCO Universal Declaration on Cultural Diversity, Paris, 2 November 2001

⁹ Ibid., preamble

¹⁰ SSENYONJO M., *Economic, social and cultural rights in international law*, Oxford and Portland, Hart Publishing, 2009, p. 626.

¹¹ CHOW P.Y.S., *Culture as Collective Memories: An Emerging Concept in International Law and Discourse on Cultural Rights*, *Human Rights Law Review*, 16 October 2014, 14, pp. 611–646.

Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.”¹²

The Convention represents a significant document for three main reasons; first, it defines culture as a characteristic of humanity, implying that cultural rights could be treated as human rights; second, it says that within a democratic framework of tolerance, dialogue and mutual respect, diversity build a rich and varied world, thus considering cultural diversity as a benefit and a strength; third, while emphasising the perks of cultural diversity, it recognizes at the same time that it represents a challenge for modern nation states and it can be seen as a risk produced by globalization.¹³ Cultural diversity is often a direct consequence of immigration and a distinctive feature of multicultural societies, but before approaching the interpretation of multicultural society, it is necessary to define what multiculturalism means.

Multiculturalism is by definition a word that refers to diversity and alterity in a public context, populated by individuals or communities that reach for the self-determination of their cultural identities. Multiculturalism is essentially the set of policies orientated to the protection of cultural and linguistic identities of each ethnic component of a state.¹⁴ John Rex defines it as “a term used to denote a broad political process which may be translated into a variety of different policies in different spheres and with different aims.”¹⁵ But before becoming a school of thought, multiculturalism was a social movement, arose mainly in United States and Canada when diverse social groups, such as Indians, Afro-Americans, women and homosexuals, started complaining about the discriminations and oppression by political institutions.¹⁶

The term multiculturalism and the political theory associated with it, were coined during the 80s of the 20th century in North America.¹⁷ The debate arose when the American universalistic *nation building* and melting pot assimilationist model started showing their flaws, granted as cultural flaws, in the social state.

¹² UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression, Paris, 20 October 2005, art. 4.

¹³ Ibid. preamble.

¹⁴ <http://www.treccani.it/vocabolario/multiculturalismo/>

¹⁵ REX J., DRURY B., *Ethnic Mobilisation in a Multi-Cultural Europe*, Avebury, 1994, pp. 3-12.

¹⁶ FACCHI A., *I Diritti nell'Europa multiculturale*, Milano, Laterza, 2001 pp. 3-11.

¹⁷ LANZILLO M. L., *Multiculturalismo e società multiculturale in Europa*, Atlante Geopolitico 2012 <http://www.treccani.it/enciclopedia/>

Minority groups rejected the assimilation imposed by the melting pot model and claimed for the recognition of their own specificities at political level. Hence, the fading of universalism brought to the emergence of cultural relativism, with the affirmation of the right to particularity. In fact, multicultural policies support and endorse the rights of different ethnic groups to preserve their distinctive characteristics. Today we refer to this shape of multiculturalism as *salad bowl* or *cultural mosaic*, that stands for a new perception of the composition of society, a more varied and differentiated one.¹⁸ “Proponents of multiculturalism reject the ideal of the “melting pot” in which members of minority groups are expected to assimilate into the dominant culture in favor of an ideal in which members of minority groups can maintain their distinctive collective identities and practices”¹⁹. Therefore, multiculturalism is the complex of challenges to inclusive policies and most of all, it is the recognition of a large-scale phenomenon: the differentiation of societies on a cultural basis.

However, the debate over multiculturalism in Europe is relatively recent, it started by the end of the Cold War, with the new policies of the European Union, the Migration flows emphasizing the relation with the colonial past of European countries and with the major political and economic changes caused by the globalization.²⁰ Modern nation states have more and more to deal with the demand of recognition of identity of minority groups in their territory, facing the challenge of cultural pluralism.²¹ But there are diverse ways in which minorities can be incorporated in larger communities. The Canadian Philosopher Charles Taylor has been one the first to raise the question of whether universalism, that is blindness to difference, could actually best guarantee equality than the recognition of difference.²² There are essentially two orientations of multiculturalism. The first one consists in a simple coexistence of more than one culture, that don't relate to each other, in a society. This type of pluralism of cultures results in a neutrality model characterized by blindness to difference, where individuals are deprived of their single and particular identities in the public sphere. It corresponds to the assimilationist model, that seeks to integrate a foreigner in the national society, through the surrender of his ethnic and cultural roots.²³

¹⁸ GALLI C., *Multiculturalismo, Ideologie e Sfide*, Bologna, Il Mulino, 2006, p. 82.

¹⁹ Stanford Encyclopaedia of Philosophy, <https://plato.stanford.edu/entries/multiculturalism/>

²⁰ Supra footnote 11.

²¹ See also TAYLOR C., HABERMAS J., *Multiculturalismo, Lotte per il Riconoscimento*, Milano, Feltrinelli, 1998.

²² TAYLOR C., *The Politics of Recognition*, Princeton University Press, 1992, pp. 25-37.

²³ UBERTIS G., *Multiculturalismo e Processo Penale*, Prospettive interdisciplinari per la giustizia penale, Cass. pen. N. 09, 2006, pp. 3030-3046.

The second approach represents the contemporary pluralism, in which an integration of the identity demands and a consideration and a respect of cultural differences and specificities of each individual, is required. The lack of recognition, viewed as a humiliation, produces inferiority and marginalization of minority groups, who perceive the denial of an equal consideration and respect as a public injustice.²⁴

Thus, public legitimization of differences is necessary in contemporary societies. Following this point of view, a multicultural society is a political community, whose identity results from the interaction and communication, implying a dialogue, among distinct cultural identities, not to considered as closed universes, self-sufficient and immutable, but fluid, open, in a multilateral logic, that generates new practices of common life within a context of pre-existing principles and institutional rules, specific to a constitutional state of law.²⁵ Multicultural societies are seen though, as political societies, where there is not a dominant culture, but several cultures with equal rights of recognition. Therefore, multiculturalism is the pluralism of cultures within the same political, local, or global society and it constitutes a direct challenge to a political community.

However, it is necessary to distinguish two types of multicultural societies. The first type is the multinational society, or state, whose pluralism comes from absorption (following a process of colonization, conquer or confederation) in a larger state of cultures concentrated in a territory, that were previously self-governed. The main characteristic of a multinational society thus, is the presence of autochthonous national minorities. Canada, result of the union of the indigenous, anglophone and francophone communities, is an evident example of multinational state. The second type is the polyethnic state, in which the origin of multicultural pluralism comes from the immigration of individuals and families. The main characteristic of a polyethnic society is therefore the presence of groups of immigrants. For instance, France, with the massive presence of North Africa immigrants, and Germany, with immigrants coming from Turkey, are polyethnic states.²⁶

A third type of multicultural society is represented by the political society of the European Union itself. In fact, the European Union is an example of juridical multiculturalism, in which there are no claims for legitimization, because, despite a past of conflicts and wars,

²⁴ Ibid.

²⁵ Ibid.

²⁶ BASILE F., *Il diritto penale nelle società multiculturali: i reati culturalmente motivati*, Polít. crim. Vol. 6, N° 12, Dicembre 2011, Art. 4, pp. 339 - 386.

different societies are now used to coexisting and mutually recognizing each other. In some fields, such as religion, language, economy and politics, they share common roots. The only thing that differentiates them, is the national juridical system governed by the political one, hence the difference in the rule of law divides them into different states.²⁷ It follows that, the nature and the composition of a multicultural society strongly depends on the model of integration. The relationships build on the *liaison* between minority groups and society at large, are the result of the way in which diverse cultural groups have been integrated in the state and it can consequently have positive or negative resonances in the political and social system of that state.

As Will Kymlicka points out, the mode of incorporation affects the nature of minority cultures and their relationship with larger society. This incorporation may be involuntary, as in the case of conquests or invasions, or when a community is ceded from an imperial power to another²⁸. But the creation of a multicultural state might be voluntary, if the cultures recognize the mutual benefits of forming a federal state.

2. Models of Integration: Assimilation, Multiculturalism and Melting Pot

As stated in the previous paragraph, modern nation-states have more and more to deal with the claims of recognition and legitimization of diversity demanded by minority cultures, following massive migration flows. In this context, conflicting demands and needs arise as the state tries to foster a sense of unity, still respecting diversity, in the political structure. Generally speaking, societies tend to feel threatened by diversity and are unwilling to welcome and give confidence to differences. But as Parekh says, “By definition diversity is an inescapable fact of its collective life and can be neither be wished out of existence nor suppressed without an unacceptable degree of coercion”.²⁹

Over years, nations have developed their own systems to face the problems of minorities and these systems reflect the way in which they wish the composition and the degree of unity of society to be. Here, integration is considered as the process, through which immigrants become holders of equal rights and opportunities, based on the willingness of individuals that are part of the community to coordinate in an efficient way their

²⁷ Supra footnote 22.

²⁸ KYMLICKA W., *Multicultural Citizenship*, Oxford University Press, 1995, p.11.

²⁹ PAREKH B., *Rethinking multiculturalism: cultural diversity and political theory*, Basingstoke, MacMillan, 2000, p.196.

actions to those of other individuals belonging to different social contexts, with the aim of avoiding conflict and forming a peaceful and unified society.³⁰

The modes of political integration of minority cultures are multiple and varied, the principal ones are the assimilationist model, the multiculturalist model and the melting pot model.

The first model, the assimilationist one, that finds a classical application in France, aims at achieving a formal equity, giving equal treatment to all the subjects living in the national territory, regardless of their differences and it pursues integration in the form of adjustment of minorities to the majority population.³¹ Thus, it envisages the renouncement to the particular cultural identity in the public sphere, but that is accepted and safeguarded in the private domain, in return for a contractual citizenship based on the *ius soli* principle. A linear and progressive adhesion to the dominant cultural model is therefore inevitable for immigrants, who are the principal subjects of the mode of integration; they must adapt customs, language, way of thinking and living, without endangering the social balance of the society of destination. This model is mainly transmitted through the educational system, the public administration and the political institutions.³² Immigrants that wish to integrate completely in the new community, have to accept its rules, internalizing language, traditions, values and the habits of the hosting country.

Nevertheless, many critics have been moved to the assimilationist model. By forcing members of minorities to assimilate themselves to the larger culture, the state imposes them to lose their distinctive traits, traditions and social practices. Beneath this mode of integration lies a reality of inequalities, intolerance and social marginalization of the ethnic minorities, in which the “integrated” immigrant is incorporated in a hierarchical structure, where he is incorporated in the system, not by becoming equal to a native, but by accepting his subordinate role, working and to living in places that the natives refused or abandoned, giving up competing with the natives, but instead feeling satisfied with the role he was assigned for.³³ The French experience can be seen as an example of failed method, where there has not been a real integration of the new *citoyens*; the conflicting

³⁰ GALLI L., *Dizionario di Sociologia*, UTET, 2006

³¹ CAMPIGLIO C., *Identità Culturale, Diritti Umani e Diritto Internazionale Privato*, in Riv. dir. int. Volume XCIV, Fasc. 4, Giuffrè editore 2011, pp. 1029-1065.

³² AMBROSINI M., *Integrazione e Multiculturalismo: una dicotomia superata?*, in ROSSI G. (edited by), *Quali Politiche per l'integrazione nell'Italia del XXI secolo?*, Milano, LED edizioni, 2008, pp. 75-104.

³³ AMBROSINI M., *Sociologia delle migrazioni*, Bologna, Il Mulino, 2005, pp.221-227.

status of the *banlieues* and the more and more frequent process of violent radicalization of the second generations immigrants coming from the Sub-Saharan continent is direct evidence of a social and economic exclusion perpetuated.

The second model, known also as the British or Anglophone one, starts from a more substantial conception of equity, that deploys different practices in distinct situations. Integration is achieved through an effort of adaptation both from minorities and from the rest of the population, resulting in a society that lacks an actual dominant culture, but instead it produces a community composed by multiple cultural identities, with equal rights to recognition³⁴. This model developed from the critics moved to the assimilationist model, which was accused of fostering a neutral universalism in which differences are absorbed denying the value and dignity of minority cultures.³⁵

In this case, to safeguard minorities does not mean to incorporate them into the larger culture but let them flourish in an ethnic “container”, promoting diversity. Citizens and immigrants in Britain are not asked to abandon their cultural identities in return for integration and access to rights, they are just asked to respect the national law and the democratic rules. The central idea is that denying the collective identity means denying the individual one. The aim was to create a common space of “racial harmony”, in which different communities participate to political life, especially at local level and a dialogue with the central government is created.³⁶

The multicultural policy was developed in Great Britain starting from 1960s. This model of integration found his application and expression in several legislative dispositions, such as the *Race Relations Act* of 1965, condemning discrimination on the ground of colour, ethnicity, race and nationality in public spaces. The Act was successively incorporated to the *Race Relations Act* of 1976, which punished the same type of discrimination in employments, education, housing and advertising.³⁷ This last Act also established the *Commission for Racial Equality*, a non-departmental public body, whose aim was to encourage and promote racial equality and equal opportunities. The commission was replaced in 2006 with the *Equality and Human Rights Commission*.³⁸ Although the Multiculturalist model advocates equality and mutual recognition, by

³⁴ Supra footnote 28.

³⁵ COLOMBO E., *Le società multiculturali*, Roma, Carocci, 2002 pp. 46-51.

³⁶ FACCHI A., *I Diritti nell'Europa multiculturale*, Milano, Laterza, 2001, p.15.

³⁷ <http://www.legislation.gov.uk/>

³⁸ <https://www.equalityhumanrights.com/en/about-us/who-we-are>

promoting the preservation of cultural diversity, it may lead as well to a process of auto-ghettoization of minorities, who reject the ideal of integration, avoiding the mixing with the other culture to preserve their distinctive traits.

The Third model of integration is the melting pot, first developed in United States by the end of the 19th century, when millions of people from the old continent started crowding the piers of American harbours. It consists of a social process of redefinition of identities, through the mix of diverse ethnic and cultural groups, engaged in reciprocal fusion. The key concept here is the homogenization of the population with the subsequent emergence of a dominant cultural pattern that resets differences, fostering an environment of peaceful coexistence and reducing social conflicts.³⁹ Differences among ethnic groups are initially present, but are suppressed within the share territory.

This model of incorporation emerged in America throughout the nineteenth century, precisely in the last decade of 1800, after the growth of migration waves coming especially from Europe. Before: "For almost one hundred years the federal government played almost no role in controlling immigration. [...] It was minimally regulated by the individual states through their use of police powers, subject to review of the courts."⁴⁰ Right before War World I, several states and the federal governments provided structures designed to aid immigrants and promote their *Americanization*. Yet, the first to use the term "Melting Pot" was Israel Zangwill, an English Jew emigrated in the United States, author of a comedy titled *The Melting-Pot, Drama in Four Acts* that takes place in New York and that is a clear allegory of the American amalgamation.⁴¹ The melting pot ideology perceived differences as a brake to development and growth, by blending them the aim was to create a new humanity, better than the precedents. This concept served as basis for integration policies, which rested on the belief that the modern Western model was the most progressive, rational and winning one.⁴²

Nonetheless, the melting pot was also criticized for being too utopian and universalistic and for creating a phenomenon of discrimination and ghettoization.⁴³ Today it has been reclassified into the modern *Salad Bowls* model, that still envisages a medley of cultures

³⁹ BERTI F., *Esclusione e integrazione: uno studio su due comunità di immigrati*, Milano, Franco Angeli, 2002, pp. 47-51

⁴⁰ JOPPKE C., LUKES S., *Multicultural Questions*, New York, Oxford University Press 1999, pp.199-211.

⁴¹ BERNARDI U., *Culture e Integrazione, Uniti dalle diversità*, Milano, Franco Angeli, 2004, pp.126-137.

⁴² COLOMBO E., *Le società multiculturali*, Roma, Carocci, 2002 p.15.

⁴³ ROSSI G., *Quali modelli di integrazione possibile per una società interculturale*, BRAMANTI D. (edited by), *Generare luoghi di integrazione. Modelli di buone pratiche in Italia e all'estero*, Franco Angeli, Milano, 2001.

but giving at the same time value and enhancement to the peculiarities and distinctive traits of each ethnic group.

An alternative and further distinction identifies several other models of integration. The most relevant ones are the functionalist model of German origin and the non-model. The functionalist model is based on an exclusively utilitarian and self-serving logic, that sees migrants as temporary workers (*gastarbeiter*), instruments for the economic development of the nation. It does not involve a real cultural conflict, because the autochthonous culture remains the dominant one.⁴⁴ Citizenship for immigrants here is regulated with the *ius sanguinis* principle. John Rex describes the German approach as a “Refusal to recognise the existence of immigration”.⁴⁵ The non-model instead is widespread in southern European countries, especially Italy, Greece and Spain. Being that the immigration trends are relatively recent for these countries, it is almost impossible to identify a model of integration for minority cultures. The Non-model represents the lack of a systematic management of integration practices for migrants, who are provisionally integrated in the work environment and only after that, is there an evaluation, according to the single arrival contexts, if some rights should be granted to them.⁴⁶

Integration, in the different shapes and forms through which it can be achieved, represents the answer to one big challenge of multiculturalism: tolerance. The pluralism of personal identities, cultures and groups is a complexity that can cause conflicts, that can successively lead to aggressive behaviours, intolerance, xenophobia and racism. These attitudes are the main consequences of fear and anguish of the “others” and this fear is sometimes exorcized with forms of fundamentalism, that wish to uniform, culturally speaking, the political space, limiting the freedom of expression, or otherwise with the marginalization of the “others”. Hence, the choice stands between forced assimilation or subaltern ghettoization.⁴⁷ For this reason, considering the recent political and social events, as the sometimes evident sometimes veiled, racist and xenophobic manifestations, the rapid and increasing evolution of terrorism and the growth of migration flows, it is extremely important to understand the dynamics that lead to the development of intolerance and fundamentalism, relevant today more than ever.

⁴⁴ BRAMANTI D., *Generare luoghi di integrazione. Modelli di buone pratiche in Italia e all'estero*, Milano, Franco Angeli, 2011.

⁴⁵ REX J., DRURY B., *Ethnic Mobilisation in a Multi-Cultural Europe*, Avebury, 1994, pp. 69-77.

⁴⁶ BERTI F., VALZANIA A., *Le nuove frontiere dell'integrazione. Gli immigrati stranieri in Toscana*, Milano, Franco Angeli, Milano, 2010.

⁴⁷ GALLI C., *Multiculturalismo, Ideologie e Sfide*, Bologna, Il Mulino, 2006, p. 16.

3. The International Covenant on Economic, Social and Cultural Rights

Within the broad category of human rights, it can be argued that economic, social and cultural rights have long been treated as “poor relatives” of civil and political rights. Those two sub-categories were developed and set in two separate covenants of 1966, with the aim of juridifying the UDHR of 1948. As far as economic, social and cultural rights are concerned, the International Covenant on Economic, Social and Cultural Rights (ICESCR) is held as the most legally binding instrument on this subject. Adopted and opened for signatures and ratifications on the 16TH December 1966 by the General Assembly resolution 2200A (XXI), together with the International Covenant on Civil and Political Rights (ICCPR), the ICESCR converted the rights acknowledged in the UDHR into binding obligations for the ratifying parties.

The Covenant is articulated into five parts. Part I affirms the right to self-determination of peoples, stating that, by means of this right, all peoples should freely determine their political status and dispose of their natural wealth and resources “without prejudice to any obligations arising out of international economic co-operation”, to pursue their economic, social and cultural development.⁴⁸ Part II defines the general obligations of the parties, affirming also that states have to guarantee the exercise of those rights without discrimination of any type [art. 2.1 and art. 2.2] and adding in the article 3 of that same part, that states have to ensure the enjoyment of equal rights, set in the Covenant, to men and women. Part III contains the specific rights outlined by the Covenant, namely the right to work, the right to form trade unions, the right to strike⁴⁹, the right to social security and insurance, the right of everyone to an adequate standard of living for himself and his family, the right to education, recognized in the article 13, which recognizes also that “Primary education shall be compulsory and available free to all”⁵⁰ and the right of everyone “To take part in cultural life; To enjoy the benefits of scientific progress and its applications; To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”⁵¹.

⁴⁸ ICESCR, Part I, art. 1 and 2.

⁴⁹ Yet, article 8 par.2 of the ICESCR states as well: “This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.”

⁵⁰ ICESCR, Part III, art. 13, par. 2, a).

⁵¹ ICESCR, Part III, art.15, par. 1, a), b), c)

Finally, Part IV of the ICESCR Covenant deals with the international implementation and the system of supervision, whereas Part V focuses on the procedures of entry into force of the treaty, fixing the “critical date” for the entry into force at three months after the deposit of the thirty-fifth instrument of ratification and on the procedures of proposition of amendments, to be approved by the General Assembly of United Nations.⁵²

For the scope of this chapter, article 15 of Part III embodying cultural rights will be the main focus. Article 15 of the ICESCR is basically the translation into binding obligation of the first explicit provision to protect cultural rights, expressed in article 27 of the UDHR and it is the principal and only article coping directly with cultural rights. Article 15 can also be interpreted as a development and further commitment to the principles and values embodied in the UNESCO constitution (article 1), the UN organization established with the specific purpose of promoting international cultural and educational cooperation.⁵³ But even though cultural rights are explicitly mentioned even in the title of the Covenant, they are here treated as part of a neglected category of human rights. The article, in fact, does not provide a definition of what “cultural life” means, and this concept is as complex as the notion of culture, defined above in the paragraph 1.1, to determine. However, culture has been recognized as an essential part of human nature in many official statements, such as the UNESCO Mexico City Declaration on Cultural Policies, concluded in 1982, which affirmed that “It is through culture that we discern values and make choices. It is through culture that man expresses himself, becomes aware of himself, recognizes his incompleteness, questions his own achievements, seeks untiringly for new meanings and creates works through which he transcends his limitations.”⁵⁴

The term “cultural life”, as well as the right to “take part in cultural life”, despite being vaguely defined in the text of the Covenant, have been renamed and secured to particular groups in numerous later conventions, such as the CRC⁵⁵, the ICERD⁵⁶, the CMW⁵⁷ and the CEDAW⁵⁸. The International Covenant on Civil and Political Rights as well, mentions some

⁵² ICESCR, part V, articles 26-31.

⁵³ SAUL B., KINLEY D., MOWBRAY J., *The International Covenant on Economic, Social and Cultural Rights, commentary, cases, material*, Oxford University Press, 2014, pp.1176-1177.

⁵⁴ UNESCO, *Mexico City Declaration on Cultural Policies*, World Conference of Cultural Policies, Mexico City, 6 August 1982, preamble.

⁵⁵ *International Convention on the Rights of the Child*, 20 November 1989, art.31, par. 1.

⁵⁶ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, art.5 (e), (vi).

⁵⁷ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, art.43 and 45.

⁵⁸ *International Convention on the Elimination of All Forms of Discrimination against Women* 18 December 1979, art.13 (c).

aspects of cultural practices, addressing more on cultural rights of minority groups: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”⁵⁹ The right to take part in cultural life is also restated in non-binding and soft law instruments, while, at regional level, it is recognized by several binding instruments such as the Arab Charter on Human Rights (art.42), the African Charter on Human Rights and People’s Rights (art.17) and through the work of the European Court of Human Rights, pursuant article 10 of the ECHR, protecting freedom of expression.⁶⁰

However, the main concerns arose exactly on the interpretation of the notion of culture, laid down in article 15. There was a great deal of discussion on what was meant by such terms as “cultural life”, questioning whether cultural products and the access to them was included and if the anthropological sense of culture, as “way of life”, thus involving the preservation of cultural traditions and practices was embodied too. In this regard, the most relevant interpretations came from work of the treaty body of the ICESCR, the UN Committee on Economic, Social and Cultural Rights (CESCR).⁶¹

Specifically analysing article 15 of the ICESCR, the CESCR issued on the 20th November 2009, within the context of its forty-third session, the General Comment no 21. This comment specifies and examines in further detail the concepts connected to the realm of cultural activities, that lacked clarity in article 15 of the Covenant. For instance, it states that the right to take part in cultural life:” Can be characterized as a freedom. In order for this right to be ensured, it requires from the State party both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).”⁶² As we can see, this comment is far more precise than article 15 of the ICESCR, indeed, the Committee

⁵⁹ ICCPR, art.27.

⁶⁰ See SAUL B., KINLEY D., MOWBRAY J., *The International Covenant on Economic, Social and Cultural Rights, commentary, cases, material*, Oxford University Press, 2014, pp.1178-1179.

⁶¹ “The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant.” <http://www.refworld.org> and <http://www.ohchr.org>

⁶² CESCR, General Comment 21, par.6.

on Social, Economic and Cultural Rights was meant for the implementation of the Covenant and it adopted an more specific approach but endorsing a broader conception of culture. Further on, the General Comment examines in depth the single terms used to describe cultural activities in article 15, namely “everyone”, “to take part”, “to participate” and above all “cultural life”. To define this last concept, the CESCR referred to the broader and more recent sense of culture, the one that goes beyond simple isolated manifestations of individuals, considering instead culture as a “living process, historical, dynamic and evolving, with a past, a present and a future”⁶³. As a matter of fact, the Committee specifies in that same part that, aiming at the implementation of the article 15 (1) (a), it believes that culture: “encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.”⁶⁴

Therefore, the General Comment oversteps the negligence given to cultural rights in the Covenant, according them the same status and importance of social, political and economic rights, as it states also that: “Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities”.⁶⁵ The Committee clarifies also that the rights intended in article 15, are to be considered as human rights and being even more precise, it mentions also the measures to be taken by the states parties to guarantee the effective protection of the interests of populations.

Moreover, the committee specified also the three main components of the right to take part in cultural life: participation in (“right to act freely, choose his or her own identity, identify or not with one or several communities”)⁶⁶, access to (“right to know and understand his or her culture and that of others through education and information”)⁶⁷ and contribution to cultural life (“right to be involved in creating the spiritual, material,

⁶³ Ibid., par. 11.

⁶⁴ CESCR, General Comment 21, par.13.

⁶⁵ Ibid.

⁶⁶ CESCR, General Comment 21, par.15.

⁶⁷ Ibid.

intellectual and emotional expressions of the community”⁶⁸). Concerning minority and indigenous groups, the Committee focused specifically on the importance of preserving and fostering the culture and way of life of such groups, stating that: “article 15, paragraph 1 (a) of the Covenant also includes the right of minorities and of persons belonging to minorities to take part in the cultural life of society, and also to conserve, promote and develop their own culture. This right entails the obligation of States parties to recognize, respect and protect minority cultures as an essential component of the identity of the States themselves”.⁶⁹ The same provision is extended to indigenous peoples in paragraph 37. Yet, the Committee went further, suggesting states to allow and foster the participation of minority members in the decision-making process and to take measures assuring the protection of minorities even outside their jurisdiction.⁷⁰

Furthermore, an interesting and relevant concept for the scope of this dissertation concerns the protection of national cultures, for it was not just minority cultures that the committee sought to protect. In the Comment 21, it inquired also into the effects of particular phenomena, namely “migration, integration, assimilation and globalization”⁷¹, arguing that such circumstances have brought diverse cultures closer, perhaps with the associated risk of homogenization of culture; yet, given the fact that “Far from having produced a single world culture, globalization has demonstrated that the concept of culture implies the coexistence of different cultures”⁷², states should seek to avoid the negative “effects” of globalization, enacting measures to protect and promote diversity of cultural expressions in a sustainable manner and it emphasised it by adding that “particular attention should be paid to the adverse consequences of globalization, undue privatization of goods and services, and deregulation on the right to participate in cultural life”⁷³. Therefore, the challenging issue is that of managing to balance the protection of national cultures with the promotion of freedoms of diverse cultural expressions.

Another relevant aspect handled by Comment 21, is the influence and impact of cultural rights on the realization of other human rights. Such topic is quite delicate since it concerns the risk that the right to take part in cultural life may allow extreme cultural

⁶⁸ Ibid.

⁶⁹ CESCR, General Comment 21, par.32.

⁷⁰ SAUL B., KINLEY D., MOWBRAY J., *The International Covenant on Economic, Social and Cultural Rights, commentary, cases, material*, Oxford University Press, 2014, pp.1194-1198; CESCR, General Comment 21, par.55.

⁷¹ CESCR, General Comment 21, par. 41.

⁷² Ibid., par.42.

⁷³ Ibid., par.50 (b).

relativisms undermining the enjoyment of other universal human rights. Aware of the complexity related to the issue of universalism and cultural relativism, the Committee affirmed: “No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope”⁷⁴ and it added, being more precise: “Applying limitations to the right of everyone to take part in cultural life may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights.”⁷⁵

As a matter of fact, the ICESCR requires a constant implementation, provided by the CESCR, that is also in charge of monitoring the compliance of states parties with their obligations under the Covenant. Furthermore, through the mechanism of reports on measures and policies adopted that concern the observance of rights and obligations under the Covenant and the amendments to be submitted by the parties, the ICESCR requires a progressive commitment, an institutionalized dialogue, an evolution and in-depth analysis of the issues covered, assured mainly by virtue of the work of the CESCR.

The importance and centrality accorded to culture, cultural rights and cultural diversity, are thus affirmed once again in International Law. The ambiguity and the vagueness of the terms used, despite being a sign of dereliction deriving also from the complexity of the notion of culture itself, are not to be considered a deterrent to the respect of these rights and concepts. After all, the instruments analysed here are legally binding, hence they imply a serious commitment of the parties. Surely, further steps are still to be taken to ensure the effective promotion and protection of cultural diversity and cultural rights.

4. The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE), preceded by the UNESCO Universal Declaration on Cultural Diversity of 2001, is one of the most recent instruments and a major step towards the developments of an International cultural law. By means of this convention “The United Nations Sustainable Development Agenda for 2030 acknowledges, for the first time, the key role of culture, creativity and cultural diversity to solving sustainable development challenges,

⁷⁴ Ibid., par.18.

⁷⁵ CESCR, General Comment 21, par. 19.

to advance economic growth and foster social inclusion.”⁷⁶ The convention was adopted by the General Conference of UNESCO on the 20th October 2005 in Paris, a date that marks the acceptance of the final version of the text and the end of the two years negotiation phase. The CDCE was approved with 148 votes in favour, 2 votes against (Israel and USA) and 4 abstentions (Australia, Honduras, Liberia and USA).⁷⁷ The procedures for the entry into force are stipulated in article 29, which states:

“This Convention shall enter into force three months after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession, but only with respect to those States or regional economic integration organizations that have deposited their respective instruments of ratification, acceptance, approval, or accession on or before that date.”⁷⁸.

Thus, in order for the Convention to become a binding document with full legal effects, States have to express their individual willingness to comply through the instrument of ratification, which is determined by the domestic law and that explains the broad terminology used in article 29 to specify the means of expression of approval, namely “ratification, acceptance, approval or accession”.⁷⁹ The limit imposed by the text for the entry into force, or as Bernier and Ruiz Fabri [footnote 50] calls it the “critical date”, is therefore three months’ timeframe after the 30th ratification, a number that does not include any instrument deposited by a regional economic integration organization over and above those deposited by its member States. The “critical date” is very important for the efficiency and the implementation of the Convention, the more ratifications in the shorter period of time the Convention gains, the more internationally valuable and legitimate it is.

As Bernier and Ruiz Fabri observed, the rapidity with which States undertake the procedures for ratification are a relevant evidence of the importance given at international level to the Convention and of their resolute willingness to implement it quickly.⁸⁰ As a matter of fact, the CDCE obtained a great support and approval by the international community and currently 145 States are part of the Convention, included

⁷⁶ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression, Paris, 20 October 2005, Foreword

⁷⁷The stages that led to the adoption of the Convention are specified in the UNESCO website <http://en.unesco.org/creativity/what-were-stages-led-adoption-convention>

⁷⁸ UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression, Paris, 20 October 2005, art. 29 (1)

⁷⁹ Ibid.

⁸⁰BERNIER I., RUIZ FABRI H., *Implementing the UNESCO Convention*, Ministère de la Culture et des Communications du Québec, 2006, p.7

the European Union, where the CDCE was approved on the 18th December 2006 and it entered into force on the 18th March 2007.⁸¹

Among its merits, the Convention has the one to give equal importance and dignity to all cultures and a willingness to promote intercultural dialogue, despite the risk of homogenization and forced assimilation caused by globalization. From the very first article, the CDCE affirms and underlines the importance of fostering interculturality, of encouraging dialogue among different cultures to ensure respect and peace. It promotes the connection between culture and development and of strengthening cooperation and solidarity internationally. Of particular relevance is the objective to “give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning;” [CDCE art.1 par (g)] and to “reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory;” [CDCE art.1 par.h]. Yet from the beginning, a clear reference can be found to the need of regulation of the trade of cultural goods and services.

In fact, some commentators asserted that the Convention was originally negotiated in response to the “trade and culture debate”, that expresses the complications in facing the need to implement cultural policies and measures and non-discrimination provisions included in trade treaties.⁸² The initial proposal was put forward by France and Canada, that wished to strengthen their ability to endorse national cultural policies and actions against trade liberalization.

But despite being a binding legal instrument, the convention has been considered weak in terms of binding force and also in terms of language and terminology used, so that it does not strengthen legal obligation for Parties to reject liberalization in cultural fields: “The weak wording of the CDCE (e.g. the Parties “shall endeavour”, “facilitate”, “encourage”, or “may take” measures); the clear statement in article 20 according to which nothing in the CDCE should be “interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties”; the strong opposition expressed to it by United States of America; [...] brought doubts regarding the normative

⁸¹ European Council Decision 2006/515/EC, in the Official Journal of The European Union, 18 May 2006

⁸² HANANIA L.R., RUIZ FABRI H., *The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, in HANANIA L. R. (edited by), *Cultural Diversity in International Law*, New York, Routledge, 2014, pp. 2-16.

strength of the CDCE and its capacity to effectively conduct the Parties behaviours notably regarding trade and culture issues.⁸³

Notably, the Convention contains several provisions formulated in a generic and vague manner. In part I the guiding principles of the Convention are also enunciated; namely the respect for human rights and fundamental freedoms [art.2 par.1], the principle of sovereignty [art.2 par.2], of equal dignity and respect for all cultures [art.2 par.3], of international solidarity and cooperation [art.2 par.4], of the complementary of economic and cultural aspects of development [art.2 par. 5]. However, in article 4, where the definitions of the major concepts dealt within the Convention are explicated, the terminology used is, as stated before, vague and broad. For instance, the definition given for Cultural expressions is “those expressions that result from the creativity of individuals, groups and societies, and have a cultural content” [art.4 par.4]. Despite having a clear anthropologic reference, those definitions appear to be too broad, making broad and limitless the scope of the Convention itself.⁸⁴

The rights and obligations of the parties are delineated in the articles 5 to 19, in which the Convention specified the regulatory measures for the promotion and protection of cultural expressions, however the parties can formulate and implement these measures in diverse ways. A fundamental role is also given to civil society, whose active participation should be encouraged by the parties through educational and public awareness programmes [art.10 and art.11]. One of the noteworthy points that the Convention promotes is the cultural pluralism, since cultural diversity is considered a universal value, regardless of its commercial value. This topic disclosed inherent contradictions; the liberalization of trade represents a new opportunity for cultural interaction, that favours intercultural dialogue, but the process of globalization rather than fostering mutual cultural growth, risks developing a unilateral flow of information, to produce the annihilation of traditional cultures and an imbalance between rich and poor countries.⁸⁵ Article 6 of the *UNESCO Universal Declaration on cultural Diversity* cites:

“While ensuring the free flow of ideas by word and image care should be exercised that all cultures can express themselves and make themselves known. Freedom of expression, media pluralism, multilingualism, equal access to art and to scientific and technological knowledge,

⁸³ Supra footnote 82, pp. 3-20.

⁸⁴ BARUFFI M.C., *Cittadinanza e diversità culturale nello spazio giuridico europeo*, Milano, CEDAM, 2010, pp. 165-182.

⁸⁵ ZAGATO L., *Le identità culturali nei recenti strumenti Unesco, Un approccio nuovo alla costruzione della pace?*, Venezia, CEDAM, 2008, p.163.

including in digital form, and the possibility for all cultures to have access to the means of expression and dissemination are the guarantees of cultural diversity.”

In this regard, cultural diversity is considered a universal good that should be accessible to everyone and it is intended in the CDCE as “a common heritage of humanity and should be cherished and preserved for the benefit of all”⁸⁶. Hence, the protection and conservation of this heritage is much more important since “As a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations”.⁸⁷ From this standpoint, the CDCE encourages the formation of partnerships, between and within the private and public sectors, including non-profit organizations, with the purpose of establishing cooperation with developing countries and with the aim of reducing the imbalance between developed and developing countries.⁸⁸ For this reason, a preferential treatment for developing countries is envisaged in the Convention:

“Developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries.”⁸⁹

Moreover, article 18 of the Convention established an International Fund for Cultural Diversity, which the use, decided by the Intergovernmental Committee, is mainly designed to support cooperation for development and activities meant for the reduction of poverty. In the part VI, the Convention established also its Organs, namely the Conference of the Parties and the Intergovernmental Committee. The article provides that the Conference of the Parties is a plenary and supreme body of the CDCE, that shall meet every two years, in conjunction with the General Conference of UNESCO. The first task of the Conference of the Parties is to elect the members of the Intergovernmental Committee, which:” shall be composed of representatives of 18 States Parties to the Convention, elected for a term of four years by the Conference of Parties upon entry into force of this Convention pursuant to Article 29.”⁹⁰ The election is based, according to the article 23 paragraph 5, on equitable principles of geographical distribution and rotation.

⁸⁶ CDCE, preamble.

⁸⁷ UNESCO Universal Declaration on Cultural Diversity, Paris, 2 November 2001, art.1.

⁸⁸ CDCE, art.15

⁸⁹ CDCE, art.16

⁹⁰ CDCE, art.23 par.1

The committee is in particular responsible for the promotion of the goals of the Convention and the implementation and the compliance of the CDCE and it can “make appropriate recommendations to be taken in situations brought to its attention by Parties to the Convention in accordance with relevant provisions of the Convention”.⁹¹ These organs are assisted by the UNESCO secretariat pursuant to article 24. Article 20 is also of significant importance, it hardens the relationship of the CDCE with other treaties, according to the principles of mutual supportiveness, complementarity and non-subordination. Indeed, the article provides for the non-subordination of the convention to any other treaty, it encourages the respect and mutual supportiveness between the CDCE and the other treaties that parties have ratified, while taking into account the provisions of the Convention. Moreover, the article states that: “Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.” [art.20, par.2]. The article is particularly relevant because it is destined for the regularization of the relationship between the CDCE and the agreements on trade negotiated at the WTO. The complexity of this relationship has been widely discussed.⁹²

But this complexity derives mainly from the difficulties of treating and regulating the economic dimension of culture.⁹³ Nonetheless, even if the ambiguity of the redaction risks producing no useful effects to clarify the relationship between the CDCE and the trade agreements, the relation with the several treaties on the protection of fundamental freedoms and human rights is indisputable, since, as stated in article 2, paragraph 1 of the Convention, those rights are considered guiding principles of the CDCE and “No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.”⁹⁴ Article 21 is instead considered complementary to the article 20, as it enunciates:

⁹¹ CDCE, art.23 par.6

⁹² See HANANIA L. R. (edited by), *Cultural Diversity in International Law*, New York, Routledge, 2014, and BERNIER I., *The Relationship between the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and Other International Instruments : The Emergence of a New Balance Interface Between Commerce and Culture*, 2009, <http://www.diversite-culturelle.qc.ca>

⁹³ For instance, the measures envisaged in article 6 of the Convention, such as public financial assistance, or the measures of safeguard for the protection of cultural expressions at risk of extinction or under serious threat enunciated in article 8, may contrast with the obligations taken under the WTO.

⁹⁴ ZAGATO L., *Le identità culturali nei recenti strumenti Unesco, Un approccio nuovo alla costruzione della pace?*, Venezia, CEDAM, 2008, p.179.

“Parties undertake to promote the objectives and principles of this Convention in other international forums. For this purpose, Parties shall consult each other, as appropriate, bearing in mind these objectives and principles.”

Article 20 is indeed a norm of interpretative nature, designed to harden the relationship between the Convention and other international treaties, while article 21 has an operative nature, which envisages that the parties respect and promote the principles and objectives of the Convention, in other international forums as well.⁹⁵

4.1 The Role of the CDCE in the European Legal System

The CDCE assumes a major role within the European Union. In conformity with article 167 of the TFEU ⁹⁶(Treaty on the Functioning of the European Union) and article 22 of the Charter of Fundamental Rights of the European Union⁹⁷, the protection and the promotion of cultural diversity are placed in a prominent position within the cultural policies of the Union and constitute major objectives of EU cultural programs. The UE ratified the CDCE on the 18th May 2006, with the Council Decision 2006/515/EC, thus issuing the instrument of accession to the convention, accompanied of the “Declaration of the European Community in application of Article 27(3)(c) of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions”.⁹⁸ However, the Convention represents a so called “mixed agreement” for the European Union System.

“To say that the CDCE is a mixed agreement implies that, from the EU law perspective, it has been concluded vis-à-vis third parties by EU and by its Member States, all acting within the limits of their respective competences”⁹⁹. Therefore, an agreement is mixed when the competences are partly of the EU and partly of the member states. Those agreements can be stipulated both by the Union and by its members and they are concluded by the European Council, as it concerns the EU, and ratified by the single states. Hence, member states and European institutions must cooperate and collaborate both for

⁹⁵ FERRI D., *La Convenzione UNESCO sulla Diversità Culturale: Sviluppi e Prospettive della sua Attuazione nell'Unione Europea*, in BARUFFI M.C. (edited by), *Cittadinanza e diversità culturale nello spazio giuridico europeo*, Milano, CEDAM, 2010, p. 171.

⁹⁶ Article 167 deals with the safeguard of the common cultural heritage and with the promotion and implementation of activities by EU Member States and the Union in the cultural field.

⁹⁷ Article 22 is about the respect of cultural, religious and linguistic diversity.

⁹⁸ Council Decision 2006/515/EC, on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 18 May 2006, annex 1(b).

⁹⁹LICKOVA M., *The CDCE in the European Union – a mixed agreement and its judicial application*, in HANANIA L. R. (edited by), *Cultural Diversity in International Law*, New York, Routledge, 2014, pp 225-237.

the negotiation and conclusion of a mixed agreement.¹⁰⁰ As it is specified in the Council Decision 2006/515, through which the Union ratified the UNESCO Convention, the Community and its member states have both and shared competences in the fields covered by the CDCE; therefore, both must become contracting parties to it, in order to fulfil the obligations established by the CDCE and so as to exercise the rights invested in them, since it consists of a situation of mixed competence¹⁰¹.

In this regard, the European law is very clear, asserting that mixed agreements bind the EU as well as its members states [TFEU, art.216 par.2]. The Court of Justice has also stated that: “Mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as the provisions fall within the scope of Community competence”¹⁰² thus, the UNESCO Convention, is in the EU sources hierarchy, subordinated to the treaties, but foreordinated to the acts of the institutions. The Convention is indeed considered an efficient pillar of the promotion of cultural diversity and cultural exchanges, to which the Union and its members give extreme importance, as enunciated in the Council Decision 2006/515.

Therefore, the CDCE represents in the EU practices an important step towards the development of cultural policies, respectful of cultural diversity, local cultures and minority cultures. The European commission itself, which negotiated the CDCE on behalf of the Union, jointly with the presidency of the Council representing the member states, acted as spokesperson of the global importance of intercultural dialogue and cultural diversity for the peace and reciprocal comprehension and it recognized the relevance of the CDCE in the communication 2007/242 : “As parties to the UNESCO Convention on the Protection and the Promotion of the Diversity of Cultural Expressions, the Community and the Member States have reaffirmed their commitment to developing a new and more pro-active cultural role for Europe in the context of Europe's international relations.”¹⁰³

Moreover, the commission underlined the important role played by the convention and the legitimacy of public policies addressed to the promotion and protection of diversity

¹⁰⁰ Supra footnote 94, p.175.

¹⁰¹ Council of Europe, Decision 2006/515/EC, 18 May 2006, on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

¹⁰² Court of Justice, case C-239/03, 7 October 2004, *Commission of the European Communities v French Republic*.

¹⁰³ COM(2007) 242, European Commission, *Communication the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a European agenda for culture in a globalizing world*, 10 May 2007, Brussels.

of cultural expression, stating that culture lies at the heart of human development and civilisation and despite cultural diversity representing a challenge for global peace, mutual understanding and respect for universal values, it should be fostered as a fundamental pillar of international community.

CHAPTER II

EUROPEAN STATES FACING THE MULTICULTURAL CHALLENGE

1. The European Union as a Multicultural Community: Citizenship, Identity and Discrimination.

Europe has been the place of destination of many immigrants for several decades, coming mainly as guest-workers from outside the European territory. The places of origin were the African continent, the Caribbean, Turkey, the Middle East and Asia. The economic development that characterized Western Europe from the 1940s to the 1970s, attracted workers from less developed countries in response to labour shortage. But when the recession hit the European continent in the 1970s, due to the oil shock, and the demand for labour diminished, migrants and their families had already settled in the region, creating an environment of ethnic heterogeneity that was “qualitatively different from diversity of personal lifestyles or cultural differences of historic, territorially based minorities that already characterise some western European countries.”¹⁰⁴. However, the migration flows did not cease, nor decrease, they were simply addressed to different areas of the European continent, or labelled as clandestine, causing new issues for integration of migrants.

Nonetheless, it is the very nature of Europe as a European Union that makes it a multicultural society in the first place. The European Union was firstly instituted as the European Economic Community (EEC) by Belgium, France, Germany, Italy, Luxembourg and the Netherlands in 1957 with the Rome treaty, in response to the necessity of creating a common market and a tariff union. From that moment on, the EEC developed and expanded more and more over the years, including Denmark, Great Britain and Ireland in 1973 and embodying and regulating several sectors, beyond the simple economic realm.¹⁰⁵ With the fall of authoritarian regimes and the process of democratization of Spain, Greece and Portugal in the mid-1970s, their perspectives of entrance into the European Community became real and in the 1980s the Community enlarged once again,

¹⁰⁴ MODOOD T., WERBNER P., *The Politics of Multiculturalism in the New Europe, Racism, Identity and Community*, New York, Zed Books Ltd, 1997, pp. 1-19.

¹⁰⁵ History of the European Union, https://europa.eu/european-union/about-eu/history_en

embracing those three new members.¹⁰⁶ But the real turning point for the creation of the Union happened in 1992, with the adoption of the Maastricht treaty (TEU), which inaugurated the European Union and a new phase of European integration, by building a federation of nations and instituting the three pillars on which the Union was based: the European Communities, regulated by the institutive treaties of the European Community (ECSC and Euratom), the Common Foreign and Security Policy (CFSP) disciplined by Title V of the Treaty on the European Union and the Cooperation in the Field of Justice and Home Affairs (JHA), contained in Title VI of the TEU.¹⁰⁷ In that same year, four more countries requested the admission to the EU; in 1995 three of those countries became formally members of the Union, namely Finland, Austria and Sweden. Today the Union counts 28 members, including most of Eastern European countries that adhered from 2004 on and Croatia that was the last one to be accepted in 2013.¹⁰⁸

The originality of the structure of the European Union indeed, consists on reuniting politically independent nation states around the concepts of interdependence and solidarity. The union gathers countries that have already a clear and marked political, economic, cultural and juridical identity. These countries are bound, to a certain extent, by some common economic, religious or philosophical characteristics, yet, they are divided by the law, since each respond to an autonomous and independent national legal system and national public law. In this sense we can interpret the Union as a community characterized by juridical multiculturalism.¹⁰⁹

The common acceptance of juridical, cultural and political differences by European population substituted the historical divisions that had torn states apart and translated them into a state of coexistence. Multiculturalism, under several forms, is thus the fundamental and constitutive element of the European Union, recognized in the Treaty establishing a Constitution for Europe, concluded in Rome in 2004, that states that the Union: " shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."¹¹⁰

¹⁰⁶ *Compendio di Diritto dell'Unione Europea*, Napoli, IX edizione, Edizioni giuridiche Simone, 2009.

¹⁰⁷ Treaty on the European Union, Maastricht, 7 February 1992.

¹⁰⁸ On the European Union members and their admission, see <https://europa.eu/european-union/about-eu/countries>.

¹⁰⁹ VIOLA F., *Diritti Fondamentali e Multiculturalismo*, in BERNARDI A. (edited by), *Multiculturalismo, Diritti Umani e pena*, Giuffrè Editore, 2006, p. 40.

¹¹⁰ Treaty establishing a Constitution for Europe, Rome, 2004. The treaty, that would have substituted all the precedent European agreements, has not been ratified by all European members, on the contrary it encountered the strong opposition of France and Netherlands, which blocked the ratification process.

Within the European Union, we can distinguish two types of multiculturalism: intern and extern. The first one considers the relationship between different European cultures, the second type deals with the relationship between European cultures and extra-European cultures, the main result of migration flows that have interested Europe over the centuries.¹¹¹ Intern multiculturalism was already regulated by article 151.1-2 of the Treaty establishing the European Economic Community (TEEC) of 1957, that said:

” The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action [...].”¹¹²

Nevertheless, the regulation of the coexistence of so many different nation states has not always been easy and peaceful. European countries certainly share common geopolitical roots but because of the religious, economic, ideological and national differences, they have experience over the course of history, tragic examples of discrimination and racism towards one another. To cite some of them: the Jacobin slaughters committed from 1793 to 1796 in Vendée and Bretagne by the general Cordelier and his soldiers, where 250.000 people were massacred for the fault of being catholic and opposing the cultural and linguistic assimilationist policy of the revolutionary movement; The massacre of thousands of catholic Irish in 1640 by Cromwell; The *pogroms* anti-Jews in the czarist Russia; the genocide of Armenians perpetuated by the Turkish Ottoman Empire between 1915 and 1916; the massacre of Italians in the foibas in Dalmatia, Fiume, Istria and Trieste from 1943 to 1945; the Holocaust perpetrated by the third Reich against Jews, Rom, Sinti, homosexuals, disabled people, and many other exponents of different religions of minority groups considered racially inferior; and the massacre of Srebrenica, where thousands of Bosnian Muslims were killed by the Bosnian-Serb troops of general Mladic in 1995.¹¹³

By learning from its history, the EU developed over the years several strategies and legislations against any form of discrimination. These strategies are based on articles 18 and 19 of the TFUE, which state:

¹¹¹ MARLETTA M., PARISI N., *Multiculturalismo e Unione europea : atti del convegno*, Università degli studi di Catania, Torino, G. Giappichelli Editore, 2008, pp. 19-34.

¹¹² Article 151 was incorporated in the Treaty on the Functioning of European Union (TFEU), as article 167.

¹¹³ BERNARDI U., *Culture e Integrazione, Uniti dalle diversità*, Milano, Franco Angeli, 2004, p. 50.

” Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”¹¹⁴

And again:

“Acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”¹¹⁵

In 2003 this article was modified by the Nice Treaty to allow the adoption of measures of implementation and this consequently brought the adoption of a series of dispositions, such as the Racial Equality Directive (2000/43/EC), the Employment Equality Directive (2000/78/EC) and the Equal Treatment Directive (2006/54/EC).¹¹⁶ The non-discriminatory principle is certainly one of the fundamental guidelines of European cultural policies. Indeed, it is also one of the contents of the EU Charter of Fundamental Rights, that was proclaimed in 2000 and it entered into force and therefore it became a legally binding document, with the Treaty of Lisbon in 2009.¹¹⁷

“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”¹¹⁸

Article 21 of the EU Charter is thus reaffirming and quoting what had already been stated in different times and forms by the EU branches, entrenching both the rights enshrined in the Court of Justice case law and the fundamental freedoms and rights of the European Convention on Human Rights. The willingness to combat these forms of discrimination was strengthened in 2008 by the Framework Decision 2008/913/JHA of the Council of the European Union, which constitutes an instrument of conviction of racism and xenophobia by means of criminal law, since it states that “Racism and xenophobia constitute a threat against groups of persons which are the target of such behaviour. It is necessary to define a common criminal law approach in the European Union to this phenomenon in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties are provided for natural and legal persons having committed or being liable for such offences.”¹¹⁹.

¹¹⁴ TFEU, Article 18.

¹¹⁵ TFEU, Article 19.

¹¹⁶ EU policies to fight poverty, social exclusion and discrimination. <http://www.europarl.europa.eu>

¹¹⁷ <http://ec.europa.eu/justice/fundamental-rights/charter/>

¹¹⁸ Charter of Fundamental Rights of European Union, 7 December 2000, art. 21 par.1.

¹¹⁹ European Council Framework Decision 2008/913/JHA, 28 November 2008, preamble.

Hence, a more direct manner to cope with racism is here envisaged, as well as the measures to be taken in case of violation of these rights.

As a matter of fact, the terms “to punish”, “punishable” and “condemn” are recurrent in the text of the Decision. Members are really pushed to ensure by means of criminal law, that crimes of xenophobia, racism and even denial are punished. Those crimes include: public incitation to violence and hatred, also through the issue of papers, pictures or any other material and “publicly condoning, denying or trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court”¹²⁰. The Decision enshrines also the criminal penalties (“proportionate and dissuasive criminal penalties [...] of a maximum of at least between 1 and 3 years of imprisonment.”¹²¹) and penalties for legal persons (“exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from the practice of commercial activities; placing under judicial supervision; a judicial winding-up order.”¹²²) to be carried out by the member states.

In this regard, the European Commission has published a report on the implementation of the Framework Decision, with the intent of guaranteeing a full and correct application of the provisions of the text, by member states and their leaders¹²³. Both these acts cope actually with the main problem that arises when diverse cultures meet and clash; it deals with the issues of ensuring common security and defence to European citizens within the European territory, a target that can lead to the development of forms of populisms, nationalist and racist movements. Protecting and reinforcing the concept of the *European identity* and implementing a unitary cooperation between the political and juridical institutions of member states, must be considered a priority, specially to face and to hinder terrorism, whose aim is to destroy and tear apart any kind of civilization.

But what is European citizenship then? Who can be shown to be part of the European *demos*? The notion of European citizenship and the rights derived by it, were introduced for the first time into the Maastricht Treaty¹²⁴, under impulse of the Spanish government. At present, it is regulated by article 20, 21, 22, and 23 of part II of the Treaty of Lisbon:

¹²⁰ European Council Framework Decision 2008/913/JHA, 28 November 2008, art., par. (a), (b), (c).

¹²¹ Ibid. art.3, par. 1,2.

¹²² Ibid. art.6, par. (a), (b), (c), (d).

¹²³ COM (2014) 27 final, European Commission, Brussels, 27 January 2014.

¹²⁴ Treaty on the European Union, Maastricht, 7 February 1992, art. 8.

” Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”¹²⁵

Article 20 explicitly lists the rights of European citizens, which have also been incorporated in part V of the Charter of Fundamental Rights of the European Union:

“They shall have, inter alia: the right to move and reside freely within the territory of the Member States; the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence [...]; the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.”¹²⁶

Therefore, European citizenship is not constitutive, but complementary, as it derives from the possession of national citizenship of one of the member states and it cannot be substitutive to the national one. It means thus that, when someone loses the national citizenship, he will also lose automatically the European one. The dispositions established by the Treaty of Lisbon have reinforced the rights of European citizens within the European juridical space, without modifying the norms already stated in the preceding treaties, such as the Maastricht and the Amsterdam Treaty.¹²⁷ But the substantial implementation occurs in article 24, which adds the basic necessity for giving juridical effect to the right of initiative of individual European citizens. This change represents, even though in small part, the willingness of the member states and the European institutions to give voice and space to the expressions of will of private citizens and not just to national government representatives. Indeed, the right to popular initiative consists of a very important instrument for the participation of citizens to the process of forming and editing communitarian acts.¹²⁸

Hence, European citizenship has gained more and more relevance throughout the years; it has evolved from a supplemental element to national citizenship, to a political and democratic type of citizenship that guarantees to its members equal fundamental rights

¹²⁵ TFEU, art. 20, par. 1.

¹²⁶ TFEU, art.20, par. 2, comma (a), (b), (c), (d).

¹²⁷ BARUFFI M.C., *Cittadinanza e diversità culturale nello spazio giuridico europeo*, Milano, CEDAM, 2010, pp. 20- 24.

¹²⁸ *Ibid.*, pp. 69-76.

and equal opportunities, while the national one, intended as ethnic and national belonging, has to some extent eroded.¹²⁹ This sense of belonging to a supranational democratic organization goes beyond cultural and linguistic diversity. In fact, there exists an element whereby some European citizens feel entirely European, without renouncing their local or national identity, on the other hand, as Cermel points out in his essay, other European citizens perceive only the ethnic belonging, without considering the political one, that is embodied in the concept of European citizenship. It is on these considerations, that many Eurosceptic movements rely on for the dissolution of the European Union, basing their claims on the fear of and enclosure to *others*, the return to the concept of national sovereignty and independence and sometimes racist and xenophobic claims.¹³⁰

2. The Protection of Cultural Rights in the Council of Europe Instruments

Cultural diversity, intended as cultural pluralism has thus been more and more often recognized as characterizing element of the Europe and it is the object of policies oriented towards integrative development and international cooperation, promoted and enacted not only by the European Union institutions, but also by the Council of Europe.

The first CoE instrument specifically dealing with this subject matter was The European Cultural Convention, concluded in 1954 in Paris, that even then envisaged to “achieve a greater unity between its members for the purpose, among others, of safeguarding and realising the ideals and principles which are their common heritage”¹³¹; it wished to foster reciprocal understanding by European people, inviting state members to respect and encourage the study of the languages, history and the civilizations of their *neighbours* and fostering a common action policy.

However, one of the most relevant Conventions which has dealt with protection and promotion of fundamental rights and freedom of European citizens is the European Convention on Human Rights (ECHR). The ECHR has a long history, proclaimed under the name of *Convention for the Protection of Human Rights and Fundamental Freedoms* on the 4th November 1950 in Rome and entered into force three years later, it has been the subject of amendments and protocols since its birth and among its merits, it has the one of having instituted the European Court of Human Rights, the main organ that implements

¹²⁹ CERMEL M., *Cittadinanza europea, diritti culturali, esclusione sociale*, in ZAGATO L., VECCO M. (edited by), *Citizens of Europe, Culture e Diritti*, Venezia, edizioni Ca' Foscari-Digital Publishing, 2015, pp. 63-76.

¹³⁰ Ibid., p. 73.

¹³¹ European Cultural Convention, Paris, 19 December 1954, preamble

the convention and watches over its application. In the text of the Convention *freedom of expression, freedom of thought, conscience and religion* and the *prohibition of discrimination* on any ground, are included as human rights and they have been implemented and modified through the years by means of the several amendments and protocols deposited.¹³² Such Convention represents a very significant work since the freedoms and rights provided by it, are extended to everyone within the jurisdiction of contracting parties, including regular and irregular foreigners, migrant workers and refugees.¹³³

Moreover, article 8 affirms also *the right to respect for private and family life* and this right entails also minority groups having a traditional lifestyle. Speaking of article 9, the Council of Europe adds: “One of the present-day issues of respect for freedom of thought, conscience and religion is embodied, at both international and national level, in the upsurge of religious intolerance”¹³⁴, though, one of the provisions included in the article states that: “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.”¹³⁵ thus, the article suggests the respect and comprehension of one’s religion, thought or belief, but at the same time it envisages some restrictions on the assurance of public order and common peace. In this regard, despite Protocol 4, article 4, to the Convention prohibiting collective expulsion of aliens, article 1 of Protocol 7 lists and assures so procedural safeguards for a state party to be allowed to expel a foreigner. As a matter of fact, both the Convention and its Protocols do not provide the right to seek and to enjoy asylum and neither a right to citizenship, and contracting parties freely decide who is allowed to pass their borders, reside in their territories and to whom grant citizenship.¹³⁶

However, the European Court of Human Rights has more times casted a light on such issue, underlining the relevance and applicability of the obligations that contracting parties must respect and fulfil. For instance, on the basis of article 3 of the Convention, prohibiting torture, the Court affirmed that such obligation prevents contracting parties

¹³² European Convention on Human Rights, Rome, 4 November 1950, art. 9, 10, 14.

¹³³ Ibid., art.1; MEDDA-WINDISCHER R., *Nuove Minoranze, Immigrazione e Diversità Culturale e Coesione Sociale*, Milano, CEDAM, 2010, p.73.

¹³⁴ <https://www.coe.int/en/web/human-rights-convention/conscience>

¹³⁵ European Convention on Human Rights, Rome, 4 November 1950, art. 9, par. 2.

¹³⁶ MEDDA-WINDISCHER R., *Nuove Minoranze, Immigrazione e Diversità Culturale e Coesione Sociale*, Milano, CEDAM, 2010, p.75.

from extradite or expel people towards a country where they could be subjected to torture or inhuman and degrading treatment.¹³⁷ In 2000 the Council of Europe also issued Protocol 12 to the ECHR, entered into force in 2005, in order to strengthen the provision for the protection against discrimination that in the ECHR text resulted weak, thus broadening the scope of application of article 14. Nevertheless, both article 14 of the ECHR and article 1 of Protocol 12, do not specifically discern direct and indirect discrimination, undermining their future application and interpretation of what actions are meant to be discriminatory. In this regard, the jurisprudence of the European Court of Human rights has once again helped to clarify the terminology and to increase the efficiency of the CoE instruments, by means of interpreting the concept of discrimination in its opinion on the Protocol 12, which asserts: “a difference of treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized”¹³⁸

Great significance is given also to language, indeed spoken interactions are the first instruments of socialization. As a matter of fact, cultures that were once marginalized or even despised, are now the object of studies and great consideration, also by virtue of the work of important institution such as the Council of Europe¹³⁹.

In 1992 the Council of Europe issued the European Charter for Regional and Minority languages, the first treaty in the world of which scope is to promote and preserve traditional, regional and national minorities’ languages. The Charter considers “the right to use a regional or minority language in private and public life as an inalienable right”¹⁴⁰ and stressed “the value of interculturalism and multilingualism [...]Realising that the protection and promotion of regional or minority languages in the different countries and regions of Europe represent an important contribution to the building of a Europe based on the principles of democracy and cultural diversity within the framework of national sovereignty and territorial integrity.”¹⁴¹

¹³⁷ Council of Europe: European Court of Human Rights, *Soering v. The United Kingdom*, 1/1989/161/217, 7 July 1989.

¹³⁸ Opinion of the European Court of Human Rights on draft Protocol 12 to the European Convention on Human Rights, Doc 8606, 5 January 2000, para 5.

¹³⁹ CERMEL M., *Cittadinanza europea, diritti culturali, esclusione sociale*, in ZAGATO L., VECCO M. (edited by), *Citizens of Europe, Culture e Diritti*, Venezia, edizioni Ca’ Foscari-Digital Publishing, 2015, pp. 63-76.

¹⁴⁰ European Charter for Regional and Minority languages, Council of Europe, Strasbourg, 5 November 1992.

¹⁴¹ Ibid.

The charter hence emphasises the relevance, among cultural rights, of the right of expression in one's own language, as distinctive element of identification of a community. From a juridical point of view, the language used in public forums has been for a long time of exclusive jurisdiction of the nation state; In several countries the one who did not, or did not want, to speak the national language was excluded or even persecuted, as it was the case of Bretons in France and Basque people in Spain.¹⁴² Having only one national language was considered to be a sign of homogenization and supremacy, that unified citizens and the nation, here envisioned as ethnicity. After the second world war, the path for the complete affirmation of the right to speak, other than the official nation state language, also a different or minor language, has been long and complex and not yet fully accomplished. For instance, in the countries that were under the USSR and went through the forced *russification*, despite the achievement of independence after the dissolution of the ex-Soviet Empire, Russian-speaking minorities settled there are still facing problems with integration, conserving the use of their own language.¹⁴³ Indeed, ethnic nationalism endures in Europe, in response to the fear of losing some kind of primacy and without considering that the coexistence in the same territory of several linguistic and cultural identities constitutes an enriching element for society.

Therefore, despite the political and juridical acknowledgements and developments of European institutions, the progress of social phenomenon is not following the same track. For example, in many European states, as it is in Italy, the right to express one's own sexual orientation without being discriminated against is formally recognized, but homophobia is still an evident and serious matter, that a part of society does not accept and sometimes reacts to with even stronger aggressiveness.¹⁴⁴

Nonetheless, the European organizations have increased and boosted their work, seeking to promote forms of intercultural dialogue and an active cooperation among states and minorities, getting also to the creation of diverse executive branches in charge of preventing, combating and increasing the awareness on the topic, such as the European Commission against Racism and Intolerance (ECRI). In fact, multi-ethnic pluralism of Europe requires, besides the traditional liberal, political and social rights, individual cultural rights. The principal and more frequent claims concern indeed the opportunity

¹⁴² Supra footnote 139, p. 65

¹⁴³ Ibid. p. 66

¹⁴⁴ Ibid. p. 67

to practice some behaviour connected to one's own tradition, religion or right.¹⁴⁵ Furthermore, with the purpose of maintaining peace, security and tolerance in the European continent, the Council of Europe developed a legally binding instrument, whose aim is the full recognition and respect of minorities: The Framework Convention for the Protection of National Minorities, adopted in Strasbourg on the 10th November 1994, which is the first binding instrument on the protection of national minorities worldwide. Anyway, the Convention does not contain a definition of a minority group, so it is necessary to take a step back to the first official definition of the term within an international framework, which was given by UN Sub-commission on Prevention of Discrimination and Protection of Minorities in 1979. One of the most thorough report of the Sub-commission, entitled "*Etude des droits des personnes appartenant aux minorités ethniques, religieuses et linguistiques*" suggests the following definition of the term, mainly drawn up on the ground of article 27 of the International Covenant on Civil and Political Rights:

"A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members -being nationals of the State- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."¹⁴⁶

Resting on this definition, we can deduce that every European state has in its territory at least one minority group, speaking a different language or professing a different religion. The framework Convention is the most inclusive instrument safeguarding those minorities. Sure enough, the Council of Europe, aware of the violent past of discrimination in Europe¹⁴⁷, agreed already in the preamble that " the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace in this continent; -and added- a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity"¹⁴⁸.

¹⁴⁵ FACCHI A., *I Diritti nell'Europa multiculturale*, Milano, Laterza, 2001, p. 26.

¹⁴⁶ CAPOTORTI F., *Etude des droits des personnes appartenant aux minorités ethniques, religieuses et linguistiques*, Report of the UN Sub-commission on Prevention of Discrimination and Protection of Minorities, 1979, p.102, par. 568.

¹⁴⁷ See above par. 2.1, p. 28, on the different massacres and genocides committed towards minority cultures throughout European History.

¹⁴⁸ Framework Convention for the Protection of National Minorities, Council of Europe, Strasbourg, 10 November 1994, preamble.

The Convention embodies several essential aspects of the rights of minority cultures, which can be gathered in different thematic areas: from article 2 to 6 it deals with non-discrimination, tolerance and protection of cultural identity and it stands directly against forced assimilationist policies; from article 7 to 9 with freedom of expression, thought, religion and opinion, also through the access to mass media; articles 10 and 11 are committed to the right to use minority languages in public and private forums - “the right to use his or her surname (patronym) and first names in the minority language and the right to official recognition of them [...] the right to display in his or her minority language signs, inscriptions and other information [...] to be informed promptly, in a language which he or she understands, of the reasons for his or her arrest, and of the nature and cause of any accusation against him or her, and to defend himself or herself in this language”¹⁴⁹- ; articles 12, 13 and 14 concern the sector of education and research and promote equal access to education “ at all levels for persons belonging to national minorities.”¹⁵⁰; article 15 instead deals with participation of minority groups to decision making in public, social, economic and cultural affairs and finally articles 17 and 18 are about the cross-border relations between states and people belonging to minorities and encourage cross-border cooperation among parties.

A specific issue is the rights to education. Education is indeed the most powerful means of knowledge of history and culture of populations and of the rights, duties and freedoms of people. But education can be also one of the most efficient ways of teaching respect and tolerance and combating discrimination and racism. The Convention devotes three articles on educative systems and it affirms in this way the value accorded to education, not only as a right, but as a precondition and means to assure full enjoyment of all the other rights too – right of participation and association [art.5 and art.7] and freedom of expression and opinion [art.8 and art.9]-.

Nonetheless, the Council tried to balance the development and preservation of minority cultures with a peaceful and respectful integration in societies where minorities live; article 14 indeed, states that the learning of the minority language must not jeopardize the official language, according at the same time to minority groups the right to institute private educational and training establishments.¹⁵¹ As a matter of fact, besides rights and

¹⁴⁹ Ibid., art. 10, par. 3, art. 11, par. 1 and 2.

¹⁵⁰ Ibid., art. 12, par. 3.

¹⁵¹ Supra footnote 148, art. 12, 13, 14.

freedoms, the Convention enshrines, even if briefly, also the duties of minorities to respect national legislations and other's people rights.

The Convention was ratified by 39 states, signed by 4 and neither signed nor ratified by France, Andorra, Monaco and Turkey; it entered into force in 1998, after an intense period of discussions. The efficacy and the implementation of the Convention does not fall directly on the contracting parties, since the text leaves them a margin of reserve for the achievement of the purpose of the Convention, exemplifying the lack of an actual definition of *minority*, which let parties reinterpret the concept in a narrow or a broader way. Therefore, its implementation depends on a monitoring mechanism assigned to the Committee of the Ministers of the Council of Europe¹⁵², with the collaboration of an Advisory Committee, an independent expert committee established in 1998 and composed by 18 experts on a four years mandate.¹⁵³

Another important convention drafted within the Council of Europe framework and specifically related to culture, is the Framework Convention on the Value of Cultural Heritage for Society, concluded in Faro in 2005. The Faro convention, stressing the value and potential of cultural heritage, represents a new strategy in cultural policies for the CoE system, since it states that cultural heritage, "a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions"¹⁵⁴, constitutes a valuable means to build a democratic environment. Such perspective is soon posited in article 1, where parties commit themselves to implement provisions concerning: "the role of cultural heritage in the construction of a peaceful and democratic society, and in the processes of sustainable development and the promotion of cultural diversity".¹⁵⁵

It appears clear from the very beginning of the Convention, that one of the aims that the CoE wanted to achieve was unity among European citizens, emphasizing the common heritage that Europe shares, founded on respect for human rights, democracy and the rule of law. It emphasises the relevance as well of fostering social cohesion, promoting integration and enrich cultural development, so as to better preserve and respect cultural

¹⁵² The mechanism of implementation and modalities of monitoring of the Convention are settled in articles 24 and 25 of the FCNM text.

¹⁵³ <https://www.coe.int/en/web/minorities>.

¹⁵⁴ Council of Europe Framework Convention on the Value of Cultural Heritage for Society, Faro, 27 November 2005, preamble.

¹⁵⁵ Council of Europe Framework Convention on the Value of Cultural Heritage for Society, Faro, 27 November 2005, art.1, par d.

environments, which represents valuable goods and resources to everyone. It can also be argued that the means for the valorisation of cultural heritage expressed in the text of the Convention, have a further purpose, that of increasing dialogue between diverse cultures, and hence boosting cooperation, integration among the ethnically, culturally and socially different components of Europe, in respect of human and cultural rights.

The incompatibilities between different cultures arise often on the interpretation of rights themselves and the diverse contents that are bestowed upon them. It is hard to talk of universal human rights when looking at actual different situations; for instance, in the context of migrants' communities, the interpretation of universal human rights for Islamic associations, especially in regards to women's rights, is rather different from the one of the western world.¹⁵⁶ Indeed, for the Islamic culture the idea of fundamental rights has to agree with the religious law, a conception that is sanctioned even in some official documents as the Cairo Declaration of Human Rights in Islam of 1990 and the Arab Charter on Human Rights of 1994.¹⁵⁷ The most complicated multicultural challenges in Europe derive in fact from the requests of migrants' groups of applying norms or tolerating attitudes and behaviours that for liberal western cultures are against the fundamental rights of individuals, as it is the case of some religious-juridical norms of Muslim families or the customary practice of female genital mutilation of some African cultures.¹⁵⁸ Therefore, conflict between diverse cultures is nearly unavoidable, due to relativism on the interpretation of fundamental rights and the sometimes profound differences concerning not only language, religion or tradition, but most of all of the conception of what is right or even legal and what is not. At present Europe counts 300 ethnic minorities living in its territory, that means that one European citizen in seven belongs to a minority group; the spoken languages are more than ninety, but just thirty-seven of them are recognized as official ones.¹⁵⁹

3. The Multicultural Challenge in Europe: Case Study of Multicultural Societies

As mentioned in the previous paragraph, Europe copes with two types of multiculturalism: intern, that characterizes the very structure of the European Union as *federation* of nation-states and extern, caused by the migration waves that has affected

¹⁵⁶ FACCHI A., *I Diritti nell'Europa multiculturale*, Milano, Laterza, 2001, p.32.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid. p.35.

¹⁵⁹ "People in the EU – statistics on origin of residents", Eurostat, <http://ec.europa.eu/eurostat>

Europe since the 19th century. Therefore, a multicultural society like the European one, as Parekh states:” faces two conflicting demands and needs to devise a political structure that enables it to reconcile them in a just and collectively acceptable manner.”¹⁶⁰

Hence, cultural diversity has no homogenous traits. The presence of national minorities creates multinational states, whether the presence of ethnic groups give rise to polyethnic states; two types of political organizations that correspond to different models of multiculturalism, where the source of diversity might be a degree of institutional and territorial autonomy or the simple coexistence.¹⁶¹ European societies display both these kinds of multiculturalism. Indeed, in some parts of Europe we might find ethnic, linguistic and geographic minorities hailing from the territory and successively absorbed by nation states, such as the Basques, the Flemish or the Tyrolese, and on the other side the presence of ethnic groups appearing over the years through immigration, such as Senegalese, Indians and Chinese people. Generally, the relationship with national minorities is more problematic to handle, because those groups are strongly and historically bound to their territory and their tradition, which they feel to be their home and roots and they tend to advance more complexed and radical demands, concerning the recognition of their cultural specificity and the achievement of political autonomy – as it is in the case of Québec, Scotland, Cataluña and Veneto.¹⁶²

The cases in which groups of immigrants advance claims for specific treatments or for the realization of norms designed to ensure a special recognition, are relatively rare. Anyhow, the implicit assumption that the choice to emigrate means already an acceptance of the characteristics of the society of destination and the abandonment of one’s own cultural heritage and traditions, is erroneous.¹⁶³ For most of the migrants of this and the past century, emigration was not a choice, but a need; people emigrated to escape from a situation that threatened their survival and that of their families, or, as it was in the 19th century, to run away from poverty, disease and famine. None of these cases involves an evaluation or renouncing of one’s own cultural background, nor a real will to assimilate to the society of destination.

¹⁶⁰ PAREKH B., *Rethinking multiculturalism: cultural diversity and political theory*, Basingstoke, MacMillan, 2000, p.196

¹⁶¹ KYMLICKA W., *La cittadinanza Multiculturale*, Bologna, Il Mulino, 2002, p. 11.

¹⁶² FACCHI A., *I Diritti nell’Europa multiculturale*, Milano, Laterza, 2001, p. 8.

¹⁶³ Ibid. p.11.

Five ideal types of multicultural state can be distinguished, on the basis of how they cope with the contemporary challenge of multiculturalism and the way in which they organize their political structure in response to ethnic diversity.

The first one is the *Decentred self*¹⁶⁴, characterized by the impossibility to create a unified and stable society, which is seen as a utopia, consequence of the changes occurred with globalization and migrations. Some scholars asserted that the idea of the multicultural states as homogenous and unitary bodies is unrealistic, “the fully unified, completed, secure and coherent identity is a fantasy. Instead, as the systems of meaning and cultural representation multiply, we are confronted by a bewildering, fleeting multiplicity of possible identities”¹⁶⁵. Thus, this postmodern version of the multistate expect the state to confine cultural diversity in private life.

The second type is the *Liberal State*. Liberals consider citizens as individuals, not as groups or communities, hence they expect them to survive to social changes through adaptation to multiplicity and adjustment of their “sense of self”¹⁶⁶. The liberal state has not to bring about major changes, if not to fight discrimination, since it recognizes just the rights of individuals and not the groups. The state is “group-blind, it cannot see colour, gender, ethnicity, religion or even nationality”¹⁶⁷, it is basically neutral to differences and leaves this matters to the private domain. Therefore, no sense of “we-ness”, nor unity among inhabitants is fostered by the political institutions.

The third type is *Republic*. The republic has the same conception of citizenship as the liberal state, that is considering citizens as individuals and not as part of distinctive groups that compose the population. But unlike the Liberal State, the Republic represents itself as a collective project, it seeks to make its citizens part of the same civic group, as such, citizens respond to universal values like *liberté, égalité, fraternité*, or they speak the same language or share the same culture. In a Republic, the creation of groups based on diversity is dissuaded through the assimilation policies aimed at the integration to one national identity.¹⁶⁸

¹⁶⁴ MODOOD T., WERBNER P., *The Politics of Multiculturalism in the New Europe, Racism, Identity and Community*, New York, Zed Books Ltd, 1997, p.21.

¹⁶⁵ HALL S., *The Question of Cultural Identity*, in HALL S., MCGREW T., (edited by), *Modernity and Its futures*, Polity Press, Cambridge, 1992, p. 277.

¹⁶⁶ Supra footnote 164.

¹⁶⁷ Ibid. p. 22.

¹⁶⁸ Ibid.

Another model of multicultural state is the *Federation of Communities*. Unlike the precedent three models, the Federation believes that the real subjects and agents of social and public life are communities, composed of citizens that are shaped by the interactions within this social sphere. The state relates primarily to these units, which organize and create society, thus the state is “a federation of communities and exists to protect the rights of communities”¹⁶⁹. This system lets communities have a reasonable degree of autonomy in the public administration of the community itself. Modood and Werbner cite the example of the Ottoman Empire, in which some powers, in respect to the different legal system, were assigned to the Jewish and Christian communities. However, not being the herald of equality and democratic values, since different regimes are applied in diverse communities, this system is not likely to be the more suitable and appropriate in contemporary Europe, where communities are several and more and more different from one another and each demand equal recognition.¹⁷⁰

The last type of multicultural state is the *Plural state*. This type recognizes both individuals and groups as forming parts of the public and social life. Therefore, both need to be recognized and involved in the political and administrative systems, through the presence of their proponents in state’s offices and public boards or the access to public forums. On one hand, some rights are granted to citizens as individual, on the other they are represented by institutions like trade unions, immigrant associations, neighbourhoods and churches, that mediate with the state and are active agents with administrative powers in public forums. Citizenship here has an ethnical nature other than a simply instrumental one, because the state recognizes that individuals are shaped by their sense of belonging to a community, by the culture of their families and friends. The real challenge is the way in which people belonging to a new transplanted culture are integrated into a system characterized by a long-established, national culture.¹⁷¹ The response of the Plural state is to “extend, reform and syncretise in new ways existing forms of public culture and citizenship”¹⁷², hence, in contrast with the already cited assimilationist theory, integration here is seen as an interactive process, where both parties are expected to reorganize and play as ingredients of the new product.

¹⁶⁹ Ibid.

¹⁷⁰ Supra footnote 164, p.23.

¹⁷¹ Ibid.

¹⁷² Ibid.

Nonetheless, despite the political and social structure that a country envisages and tries to foster, citizens react in different ways to diversity and sometimes display resistance towards the acceptance of immigrants in their territory.

As already explained, European nation states have been the places of destination of years and years of migratory movements. The refugee crisis of the recent years, that concerns massive arrivals mainly from Nigeria, Syria and Guinea¹⁷³ through Mediterranean routes, has stiffened the situation in Europe, where states have to deal with an increasing rate of illegal immigration, without having the necessary instruments to manage the flows and subsequent integration or reallocation. The following statistics carried out in January 2016 by the Eurostat, show the percentages of non-national population in Europe¹⁷⁴:

	Total		Citizens of another EU Member State		Citizens of a non-member country		Stateless	
	(thousands)	(% of the population)	(thousands)	(% of the population)	(thousands)	(% of the population)	(thousands)	(% of the population)
Belgium	1 327.4	11.7	875.9	7.7	450.8	4.0	0.7	0.0
Bulgaria	73.8	1.0	13.1	0.2	58.8	0.8	1.9	0.0
Czech Republic	476.3	4.5	195.4	1.9	280.9	2.7	0.0	0.0
Denmark	463.1	8.1	189.4	3.3	267.2	4.7	6.5	0.1
Germany	8 652.0	10.5	3 801.0	4.6	4 840.7	5.9	10.3	0.0
Estonia	197.6	15.0	15.4	1.2	182.3	13.9	0.0	0.0
Ireland	586.8	12.4	384.0	8.1	201.1	4.3	1.6	0.0
Greece	798.4	7.4	206.7	1.9	591.7	5.5	0.0	0.0
Spain	4 418.2	9.5	1 934.3	4.2	2 483.0	5.3	0.9	0.0
France	4 408.6	6.6	1 529.1	2.3	2 879.4	4.3	0.0	0.0
Croatia	40.9	1.0	13.5	0.3	26.7	0.6	0.8	0.0
Italy	5 026.2	8.3	1 517.0	2.5	3 508.4	5.8	0.7	0.0
Cyprus	139.6	16.5	109.1	12.9	30.5	3.6	0.0	0.0
Latvia	288.9	14.7	6.0	0.3	282.8	14.4	0.2	0.0
Lithuania	18.7	0.6	4.9	0.2	12.3	0.4	1.4	0.0
Luxembourg	269.2	46.7	229.5	39.8	39.6	6.9	0.1	0.0
Hungary	156.4	1.6	85.1	0.9	71.1	0.7	0.2	0.0
Malta	30.9	7.1	15.5	3.6	15.4	3.5	0.0	0.0
Netherlands	834.8	4.9	458.7	2.7	367.7	2.2	8.3	0.0
Austria	1 249.4	14.4	615.6	7.1	629.8	7.2	4.0	0.0
Poland	149.6	0.4	25.1	0.1	123.9	0.3	0.6	0.0
Portugal	388.7	3.8	105.2	1.0	283.5	2.7	0.0	0.0
Romania	107.2	0.5	48.0	0.2	58.9	0.3	0.3	0.0
Slovenia	107.8	5.2	17.6	0.9	90.2	4.4	0.0	0.0
Slovakia	65.8	1.2	50.4	0.9	13.9	0.3	1.5	0.0
Finland	228.2	4.2	94.2	1.7	133.1	2.4	0.9	0.0
Sweden	773.2	7.8	304.0	3.1	447.7	4.5	21.6	0.2
United Kingdom	5 640.7	8.6	3 204.6	4.9	2 436.0	3.7	0.0	0.0
Iceland	26.5	8.0	21.8	6.6	4.5	1.4	0.1	0.0
Liechtenstein	12.8	34.0	6.7	17.8	6.1	16.2	0.0	0.0
Norway	534.3	10.3	341.7	6.6	190.2	3.6	2.4	0.0
Switzerland	2 047.2	24.6	1 357.6	16.3	689.3	8.3	0.3	0.0

Note: the values for the different categories of citizenship may not sum to the totals due to rounding.
Source: Eurostat (online data code: migr_pop1ctz)

As we can see, for countries like France, Italy, Germany and Spain, the amount of non-nationals population is undoubtedly high and most of them are citizens of non-EU member countries. If we compare this figure with the same statistics of 2009¹⁷⁵, we can notice a quantitative rise of the rate of non-national population of at least one million in the countries mentioned, which are the main landing place, for different reasons (Italy it's the first and main port of the Mediterranean, in Germany and France live many families

¹⁷³ Source: <http://data2.unhcr.org/en/situations/mediterranean>

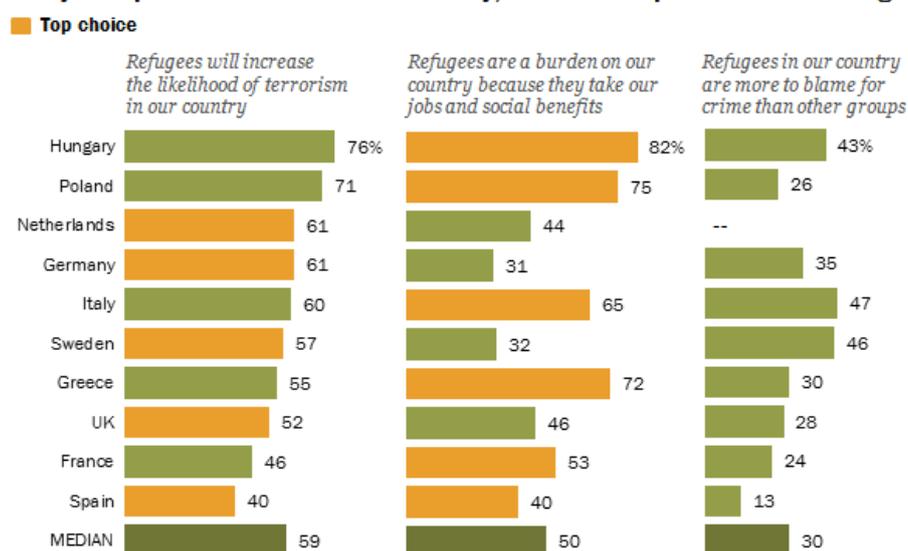
¹⁷⁴ Eurostat statistics, *Non-national population by group of citizenship*, 1 January 2016.
<http://ec.europa.eu/eurostat/statistics-explained>.

¹⁷⁵ See Annex 2

of today's immigrants, with which they want to reunite). Moreover, the number of first time asylum seekers in European countries has doubled in 2015, compared to 2014, reaching the record number of over 1.2 million asylum applicants principally from Syria, Afghanistan and Iraq.¹⁷⁶ As a consequence, this phenomenon, increasing the level of cultural and ethnic diversity in European states, has focused once again attention on the danger of discrimination and racism towards the new immigrants.

According to the Pew Research Center in fact, an anti-immigrant sentiment is now spreading among Europe, hostility that clashes with the traditional values of tolerance and openness. Here, a survey shows what are the main concerns of EU citizens¹⁷⁷:

Many Europeans concerned with security, economic repercussions of refugee crisis



Note: Netherlands excluded on question about crime (Q51b) due to administrative error.

Source: Spring 2016 Global Attitudes Survey, Q51a-c.

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As it can be noticed, the main concerns of European citizens are about the increase of the likelihood of terrorism and the burden that immigrants put on the place of destination. To prevent the advent of racist, xenophobic and populist movements, Nation states should implement policies addressed to integration and cooperation without jeopardising the security and stability of their citizens. However, the reaction of many European countries facing this dilemma caused by the refugee humanitarian crisis, has been the opposite of the hoped cross-border cooperation; brick by brick, from Calais to

¹⁷⁶ Source: <http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP>, see also the Eurostat File: First time asylum applicants in the EU-28 by citizenship, Q2 2016 – Q2 2017, for a more recent version.

¹⁷⁷ Spring 2016 Global Attitude Survey on Europeans concerned with security, economic repercussions of refugee crisis, Pew Research Centre, <http://www.pewglobal.org/2016/07/11>.

Melilla, walls are being built on the national borders to keep migrants out. The British and French project of the Wall in Calais represents just the most recent barbed-wire put up across Europe.¹⁷⁸ The first fence that has been built to resist mass migration, has been the one commissioned by the Hungarian prime minister Orban, along the frontiers with Serbia and Croatia to block the Balkan route in 2015.¹⁷⁹ The following was a barbed-wire fence built in November 2015 by the Slovenian government along the Croatian border.¹⁸⁰

In the same period, the Macedonian authorities have commanded the construction of a wall on the Greek border, near Idomeni, where a refugee camp was settled. In addition, the works on a barrier between Nea Vyssea and Edirne started in 2012, a barbed-wire wall of 20 kilometres that divides the Greek territory from the Turkish one, to obstruct the passage on the Evros river.¹⁸¹ Bulgaria has also started building in 2014 a long fence -30km- along the Turkish frontier, which hasn't yet been completed. It is estimated that it will measure 60 kilometres when finished. The reason why the Bulgarian government is willing to build the barrier is said to be the demonstration to European authorities "that the country deserves to be admitted into the Schengen group of nations whose members do not require visas or passports to travel between them. Bulgaria was admitted to the European Union in 2007, but has been denied Schengen approval, partly because of border issues."¹⁸² A subsequent project of building a barrier has been envisaged in 2016 by the Austrian government on the Brenner to repel Middle East and North African immigrants coming from Italy and directed to northern Europe. Although the project seems to have been put aside, Austria mobilised around two thousand soldiers to defend its frontiers.¹⁸³

Wall or not, the general policy of European countries has been restrictive and a demonstration of closure, nonetheless, it has to be considered that the proportions and timing of the refugee crisis have been by far greater than the capacity and resource availability of these countries to stem and stabilise in a peaceful manner such a delicate issue.

¹⁷⁸ *Da Calais a Melilla, tutti i muri anti-migranti che dividono l'Ue – Interattivo*, La Repubblica, 8 September 2016.

¹⁷⁹ SMALE A., *Migrants Face Deportations and Walls in Europe, Too*, The New York Times, 23 February 2017.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² LYMAN R., *Bulgaria Puts Up a New Wall, but This One Keeps People Out*, The New York Times, 5 April 2015.

¹⁸³ Ibid.

3.1 France and the Assimilation Model of Integration

Among the models of multicultural states mentioned above, France obviously falls into the Republic type. The country has been the ambassador of the concept of popular sovereignty and democratic values since the 1789 upheavals of the *révolution française*, which indeed made it the driving force of the process that revolutionized the course of modern history, questioning the traditional absolute power of monarchies and establishing liberal democracies, whose powers derive from citizens. Today, the French Republic defines itself as “Une République indivisible, laïque, démocratique et sociale”¹⁸⁴, whose principles and republican motto are “Liberté, Égalité, Fraternité”¹⁸⁵ assured to all its citizens. Furthermore, according to the French law, all the citizens are formally equals and enjoy equal rights, duties and freedoms, regardless of their ethnic, racial, cultural, religious or gender diversity; in fact, the French Republic “assure l’égalité devant la loi de tous les citoyens sans distinction d’origine, de race ou de religion. Elle respecte toutes les croyances.”¹⁸⁶. Therefore, we can deduce that no specific treatment or privilege is granted on the grounds of cultural, political or social status. This attitude is translated into a blindness to differences and an apparent disinterested policy towards integration; indeed, as already mentioned, in France the assimilationist model of integration prevails, where differences are not recognized but denied by society.

France was hit too by the 19th century migration wave that characterized Europe in a period of industrial and economic development, yet, it was the only country that took advantage of this situation not just to obviate to labour shortage but also to cope with demographic decline. As a matter of fact, France experienced a demographic crisis, characterized by peaks and lows after the 1789 revolution, at first due to the revolution and Napoleonic wars and subsequently because of the several European conflicts and those in the colonies (notably, in Algeria and Vietnam).¹⁸⁷

Therefore, the state exploited the constant non-Western migratory trends and let some migrants establish themselves permanently on its soil. Although French society is characterised by a homogenous and universalistic orientation, no ethnic or local

¹⁸⁴ Constitution de la République Française, 4 Octobre 1958, art. 1.

¹⁸⁵ Ibid. art. 2. These principles are also included and affirmed in the *Déclaration des droits de l’Homme et du Citoyen de 1789*, the declaration of the rights of the man and the citizen of 1789.

¹⁸⁶ Ibid. art.1.

¹⁸⁷ MODOOD T., WERBNER P., *The Politics of Multiculturalism in the New Europe, Racism, Identity and Community*, New York, Zed Books Ltd, 1997, p.75.

minorities are recognized, but a French man is such only if he responds to the values and principles of the French Republic. The problem of integration arose mainly after 1960s, when the new immigrants arrived from countries culturally and geographically far more distant from France: the Maghreb, where the language spoken was primarily Arabic and the religion professed Islam; West Africa, that observed Islam and Southeast Asia.¹⁸⁸ Those immigrants came mainly for work reasons and through family regrouping and marriage, they gradually settled on the French territory and became residents.

At the same time, the assimilationist policy began to collapse and appeared to be less and less legitimate, as it asked for a total annihilation of the cultural distinctiveness of minorities in the public sphere, causing a crisis of identity among the immigrant population. In the late 1970s, the local governments began to use quotas in housing and schools, mainly as a message to encourage temporary residents to return home. This policy developed in a thin racial pattern, that spread also into the educational system, with the institution of Arabic classes in collaboration with the countries of origin, with the hope that it would foster the return of North African immigrants.¹⁸⁹

Several direct dispositions were hereafter realized to assist immigrants and implement their integration, starting from the election in 1974 of the First Minister of the State for Immigrant Workers, that developed a programme to fund immigrant housing (and thus creating the contemporary banlieues) and then with the foundation in the 1980s of the FAS -*Fond d'action sociale pour les travailleurs immigrés et leurs familles*-, which rapidly became the main agency to fund the associations that arose within migrants communities.¹⁹⁰ Nonetheless, the increasing presence of Muslims and Arabs in France, has also boosted xenophobic and racist movements and successively lead to the proposal of a radical reform to the concept of citizenship by the Right-wing party (Front National), which demanded a return to the *ius sanguinis* principle¹⁹¹. Despite the several contestations, such as the one of the president Mitterand, who defined the reform “ill-fated not only for the immigrants, but for the French citizens too, as well as for the French

¹⁸⁸ Ibid., pp.76-77.

¹⁸⁹ JOPPKE C., LUKES S., *Multicultural Questions*, New York, Oxford University Press 1999, p.208.

¹⁹⁰ Ibid. pp.209-213.

¹⁹¹ Since the middle of the nineteenth century, France adopted the principle of the *jus soli* (right of place) to regulate the acquisition of citizenship, instead of the *jus sanguinis* (right of blood), so as to let immigrants' children to retain citizenship. MODOOD T., WERBNER P., *The Politics of Multiculturalism in the New Europe, Racism, Identity and Community*, New York, Zed Books Ltd, 1997, p.75.

Republic itself"¹⁹², the proposal was approved in 1993, with some restrictions¹⁹³, affirming again the willingness to reduce migration trends, to avoid dialogue among different cultures and pushing instead towards a type of integration that resembles more to an ethnic segregation in the banlieues, to restrain and keep their cultural distinctive traits in the private sphere. Yet, in 1998 the law Guigou (n°98-170), by modifying the civil code, institutionalized the *ius soli* principle for the acquisition of citizenship for the children of foreign parents, having reached the age of 18 and having spent a period of at least 5 years of residency in the French territory. One of the most discussed and challenging topics related to integration and multiculturalism, concerns religion and the associated practices, mainly in respect to Islam. As its constitution affirms, the French Republic declares itself as a laic state and according to the assimilationist policies, every French citizens should adapt to this feature at least in public life, since the individualistic French system demands indeed to abandon one own's culture, in favour of the French one.¹⁹⁴

The debate arose already in 1989, when some students of the Creil College started to wear the hijab, the traditional veil, in school. This event was intended as a refusal to respect the traditional values of French society and the neutrality and laicity that is implicit in its citizenship. The situation was taken into account by the Conseil de d'état, which issued on the 27th November 1989 an *avis* where it stated that this act was not really going against the constitution and thus it was not to be considered incompatible with the principle of laicity of the country and public school, since they were exercising their freedom to express and manifest their religious beliefs, without giving signs of pression, incitements nor propaganda, hence without biasing the equal freedom of their fellow students nor of the rest of the community. ¹⁹⁵

Despite this last innovative standpoint for the French law, in 1993, under the administration of the Minister of Education Bayrou, an opposed ministerial circular was issued, stating that any mark of religious ostentation was not to be accepted in public schools, as it showed the cultural differences among students and it did not foster integration. This provision was confirmed in 2004, when the French National Assembly

¹⁹² MODOOD T., WERBNER P., *The Politics of Multiculturalism in the New Europe, Racism, Identity and Community*, New York, Zed Books Ltd, 1997, p.77.

¹⁹³ See details on the website <https://www.immigration.interieur.gouv.fr/Archives/Les-archives-du-site/Archives-Integration/Historique-du-droit-de-la-nationalite-francaise>.

¹⁹⁴ BERTI F., *Esclusione e integrazione: uno studio su due comunità di immigrati*, Milano, Franco Angeli, 2002, pp. 47-51.

¹⁹⁵ GALLI C., *Multiculturalismo : ideologie e sfide*, Bologna, Il mulino, 2006, p115.

approved a law that prohibited students and teachers to wear any sign or clothe that openly manifests their faith, putting an end to the debate over religious ostentation.¹⁹⁶ Once again, the universalistic vision of French society is affirmed, but to what extent? “Islam is today the second religion of France, as is often pointed out in a tone of fear and foreboding”¹⁹⁷, several Muslim associations, federations and solidarity chains emerged throughout French contemporary history mainly addressed to intellectuals and scholars, such as the UGEMA – General Union of Muslim Algerian Students-, the AEIF – Association of Islamic Students in France- and Muslim Brotherhood, born in 1907.¹⁹⁸

The associations considered not only the views and sentiments of intellectuals and students, but also the concerns of migrant workers. This evolution and Islamic enthusiasm favoured the flourishing of other formal associations and federations of religious character that sometimes crossed the national borders, namely the UOIF -Union of Islamic Organizations in France-, the FNMF -National Federation of French Muslims- and the FAICA – Federation of Islamic Associations of Africa, the Comores and the Antilles-.¹⁹⁹ The claim mostly discussed by these associations was about the non-recognition of Islam by the French state. As a matter of fact, the vast majority of French society doesn’t welcome the Islamic presence on her territory. The leaders of Muslim associations have more and more lamented that the Islamic community has been marginalized and used as a scapegoat for any sort of trouble or public disorder, for which they were accused of being fanatics or fundamentalists and discriminated even by governmental institutions, while this stereotype hides instead a discreet and respectful attitude.²⁰⁰ But these marginalisation and denial of differences caused ultimately the violent radicalization of some young exponents of the Muslim communities.

Since 2015 France has been the target of several tragic terrorist attacks carried out by second generation Islamic immigrants that went through the so called “radicalisation violente”, after having spent a period as foreign fighters in the territory of the ISIS. On the 7th and 9th January two terrorist attacks hit Paris, causing the death of 12 people in the offices of Charlie Hebdo and 4 others in a Jewish supermarket in the periphery of Paris. Then, in the night between the 13th and 14th November, Gunmen and suicide bombers

¹⁹⁶ Ibid.

¹⁹⁷ MOUSTAPHA DIOP A., *Negotiating Religious difference: The Opinions and Attitudes of Islamic Associations in France*, in MODOOD T., WERBNER P. (edited by), *The Politics of Multiculturalism in the New Europe, Racism, Identity and Community*, New York, Zed Books Ltd, 1997, p.111.

¹⁹⁸ Ibid.

¹⁹⁹ Supra footnote 197 p. 116.

²⁰⁰ Ibid., pp.118-119.

attacked the Bataclan concert hall and simultaneously some bars, restaurants and the main Stadium in Paris, killing 130 people. The year after, during the celebration of the Bastille day on the 14th July in Nice, a truck driven by an Islamic fundamentalist killed 86 people on the Promenade des Anglais, slamming through the crowd for 2 kilometres.²⁰¹ Those are just some of the terrorist attacks that hit the country and caused a great number of innocent victims in recent years and basically all of them had religious motive. The succession of events led the state to adopt extraordinary measures to counter terrorism, namely the so called *Vigipirate plan*, which entails a close collaboration among all national actors to reinforce the prevention and protection of citizens against terrorist attacks.²⁰² The state of emergency indeed permits to conduct house searching without judicial mandates, to control or precautionarily arrest people without authorisation, limiting also their right to privacy and their freedoms to move. This situation exacerbated with the refugee crisis, that affects France a great deal too. In 2014 the INSEE – National Institute of statistics and Economic studies- registered around 6 million immigrants and 210.940 residency permits delivered. In 2016 these permits grew to 227.923, delivered mainly to Algerians, Moroccan and Chinese people.²⁰³ Besides, many of the migrants were refugees that sought for asylum and in 2016 the applications reached the number of 85.726, advanced principally by migrants coming from Sudan, Afghanistan, Haiti and Syria.²⁰⁴ According to the European Union Agency for Fundamental Rights, the conditions and the outcomes of the right of asylum requests were influenced and jeopardized by some particular events which happened in 2016:

“1. Several camps known as ‘wild’ camps, as they were built outside the public framework, were dismantled: in the north of France in Calais: on 24 October, between 6,400 and 8,100 people were evacuated, according to figures recorded, including approximately 1,500 children; in the north at Grande-Synthe: the authorities planned to progressively evacuate approximately 1,000 people; in Paris: 3,852 people were evacuated from an informal camp at the Stalingrad underground station on 4 November, according to the Prefecture of Police.

2. The state of emergency was extended because of events related to terrorism.”²⁰⁵

²⁰¹ <http://www.bbc.com/news/world-europe-33288542>.

²⁰² The *Vigipirate plan* has been active since the Charlie Hebdo attacks and it consists in 3 levels of vigilance, security and urgency. <http://www.gouvernement.fr/risques/comprendre-le-plan-vigipirate>.

²⁰³ Source of the data : <https://www.immigration.interieur.gouv.fr>.

²⁰⁴ *L'essentiel de l'Immigration, chiffres clefs*, n°2017-2, Juillet 2017, Ministère de l'intérieur - Direction générale des étrangers en France, Département des Statistiques, des Etudes et de la Documentation, <https://www.immigration.interieur.gouv.fr>.

²⁰⁵ *Monthly Data Collection on the Migrant Situation in EU*, European Union Agency for Fundamental Rights, January 2017 monthly report. p.53.

The reality of wild reception camps of illegal immigrants, like the *Jungle* in Calais, is indeed quite widespread all over Europe. French authorities, by means of new legal and administrative instruments, dismantled those camps to substitute them with controlled centres, where immigrants are taught how to apply for asylum and in parallel are offered incentives to leave the country and voluntarily return home.

In this case, the fear of terrorism in France and the universalistic tradition of this nation state produced policies and measures, that may be useful in preventing further terrorist attacks and avoid the creation of new cells on the territory, but that are surely not helpful in managing the humanitarian crisis, which sees immigrants as the only victims.²⁰⁶

3.2 Federalism and Multi-ethnic State, the Swiss Case

“Switzerland is not a nation-state, not a unitary state, not a state based on homogenous unity. [...] Switzerland is nothing other than an alliance of medieval particularisms against the historical tendency towards unification of territorial, dynastic, administrative or national states in central structures, and this historical consciousness forms the Swiss political civilization.”²⁰⁷

Switzerland consists of a multinational confederation of cantons, which express cultural, linguistic and ethnic diversity. Its origins can be traced from the thirteenth century, when a cooperation among three different communities -Uri, Schwyz and Unterwalden- was established after the achievement of independence from the Holy Roman Empire in 1273. This signed cooperation gradually evolved and expanded geographically, coming to include several cantons, which displayed different languages and religions. In 1798 it became the Helvetian Federation with Napoleon’s occupation and after some conflicts over deep political and religious divisions- mainly between the rural catholic cantons and industrialized protestant ones-, they managed to declare in 1847 a federal constitution, which sanctioned a certain degree of autonomy to the several cantons.²⁰⁸ Over time, this first constitution went through further revisions up to the final version of 1999, that still remains the current one. It is immediately clear from the very first words of the constitution the nature bestowed to the Swiss confederation:” *The Swiss People and the Cantons*, renew their alliance so as to strengthen liberty, democracy, independence and

²⁰⁶ Ibid., p.58.

²⁰⁷ LÜTHY H., *Politische Probleme der Mehrsprachigkeit in der Schweiz*, Civitas, 1966, Vol. 22, pp. 38–45.

²⁰⁸ ERK J., *Explaining Federalism, State society and congruence in Austria, Belgium, Canada, Germany and Switzerland*, Routledge, New York, 2008, pp. 73-75.

peace in a spirit of solidarity and openness towards the world, determined to live together with mutual consideration and respect for their diversity"²⁰⁹; indeed it is considered a cooperative *alliance* of 26 sovereign cantons, which preserve their autonomy (according to article 47 of the constitution) and distinctiveness in accordance with the Federal law and constitution.

As a matter of fact, there are four official languages of Switzerland declared by the constitution: German, French, Italian and Romansch, each of them are fully recognized, since each canton may freely decide their official one and this freedom is intended as a fundamental right.²¹⁰ The most spoken language is German, which 63% of the population speaks, then, around 23% of Swiss citizens speaks French, while Italian is spoken by 8% of the population and finally less than 1% of citizens speaks Romansh; these linguistic features, expressed mainly by the use of various types of dialects, are strictly related to the distinct identities of Swiss inhabitants.²¹¹

It is also important to note the different religions professed in Switzerland -the most widespread religion is the Roman Catholic one (46.1%) followed by the Protestant (40%) and at least seven other religious orientations-; languages, customs, practices and festivities differ indeed in every canton, but the central state was able to harmonize those characteristics translating them into a lasting frame of peaceful coexistence.²¹²

Therefore, the peculiarity of Switzerland consists mainly in the degree of autonomy and independence given to the cantons and communes, which possess almost all the means of a sovereign state; they indeed dispose of their own judiciary, executive board and cantonal legislature; thus they organize themselves their internal structure, which differs from canton to canton, yet responding to the main dispositions of the federal law and taking part to the federal decision-making.²¹³ Switzerland is indeed a direct democracy, whose citizens directly participate in the political process through the right of initiative -regulated by title 4 chapter 2 of the constitution- which enables them to propose revisions, influence federation's activities or even modify legislative amendments.

²⁰⁹ Federal Constitution of the Swiss Confederation, 18 April 1999, preamble.

²¹⁰ Ibid., art.4 and 70.

²¹¹ BHATTACHARYYA H., *India as a Multicultural Federation, Asian Values, Democracy and Decentralisation in comparison with Swiss Federalism*, Fribourg, Helbing & Lichtenhahn, 2001, pp.311-321.

²¹² Ibid.

²¹³ BASTA L. R., FLEINER T., *Federalism and Multiethnic States, The case of Switzerland*, Institut du Fédéralisme Fribourg Suisse, 1996, pp.76-80.

All these democratic mechanisms realized by the state have hence the effect of combining and connecting otherwise diverse and possibly conflicting realities; “The Swiss system is the first modern federation built on indigenous ethnic and linguistic differences that were considered permanent and worth accommodating.”²¹⁴ This accommodation of diversity is all in all successful in Switzerland, precisely because it was able to combine multiculturalism and democracy to achieve unity among its socio-culturally diverse communities. This multicultural society succeeded in settling an internal, national, political unity, where many others failed. Inside the state several different minority groups coexist and sometimes their relationship become conflictual, nonetheless the central government can resolve ethnic conflict by means of different techniques, namely giving local autonomy and through power sharing. Minorities thus are provided with some benefits coming from the dual sovereignty and can represent themselves and their political view through direct democracy.

Moreover, one of the efficient solutions historically adopted by Switzerland to solve ethnic problems has precisely been the creation of cantons, that separated different religious or linguistic entities. This territorial technique has been used more and more in Swiss history, when cantons faced internal conflicts over cultural differences, as a result some cantons were split up or newly created – as it was the case of the independence of the Jura canton in 1979 from the Bern one-²¹⁵ The confederation and its cantons consider indeed diversity as a resource and a strategy, more than a burden or a problem; it can be argued that Switzerland was actually born from cultural diversities, its very existence derives from a *concert of cultures*, therefore an assimilationist attempt to amalgamate differences would have been devastating for the institution of the confederation, which otherwise chose a multiculturalist and differentialist strategy to cope with the claims of diverse minority groups.²¹⁶

However, the Swiss federalism encountered some inherent limits when it had to face external immigration. As far as non-structural minorities are concerned, the way of accommodating diversities of the Swiss state reveals to be weak. Immigrant workers and cross-border commuters in Switzerland increased over time reaching 22% of the total population, as a matter of fact it is the country with the highest rate of foreigners in

²¹⁴ ELAZAR D. J., *Exploring Federalism*, University of Alabama Press, 1987, p.42.

²¹⁵ BHATTACHARYYA H., *India as a Multicultural Federation, Asian Values, Democracy and Decentralisation in comparison with Swiss Federalism*, Fribourg, Helbing & Lichtenhahn, 2001, pp. 392-399.

²¹⁶ Ibid.

Europe, which were attracted by the economic growth and higher level of income.²¹⁷ But despite being an expression of socio-cultural diversity, the political institutions don't really recognize immigrants, and citizenship for them is not easily achievable, though it constitutes a strong means of integration. Indeed, the Swiss national identity is quite exclusive from this point of view, since the accommodation of diversity occurs just with internal differences, but it fails to encounter the needs of non-structural minorities.²¹⁸ This political and cultural enclosure is translated into the *ius sanguinis* principle, that is applied to foreigners when it comes to the acquisition of citizenship. Furthermore, immigrants are divided in distinct categories (EU members and non-EU members); human rights as well as welfare, public care and services are recognized to all categories but "free movement of labour is limited to EU citizens [...] Non-naturalised immigrants have no political rights"²¹⁹, besides, only after twelve years of residency and having proved the knowledge of the official language and Swiss form of government, an immigrant can be naturalised -not counting the status of refugees and asylum seekers-.

A similar limit, that stands on the disproportion of political rights granted to the inhabitants of Switzerland, is represented by the strong inequalities in the distribution of capital wealth within society. The Swiss Confederation is extremely rich economically speaking, it has one of the highest GNP in the world, but this wealth is not at all equally shared. As a matter of fact, the country represents the "most unequal society in the west and stands fourth in the world in terms of distribution of income"²²⁰, notwithstanding its prominent levels of economic and social wealth, there exists in Switzerland a small part of the population (20%) that detains 44.6% of the total capital wealth, a gap that arose over time due to the rising rate of unemployment.²²¹

Nonetheless, these conditions of extreme inequality haven't caused conflicts so far, nor were they perceived as unfair and that is because the government was able to readdress and prevent conflict through many efficient and strategic instruments (such as direct democracy, referendums, autonomy of cantons and communes), that still result in positive outcomes for the wellbeing and peaceful environment of the Swiss Society.

²¹⁷ LINDER W., *Multicultural Switzerland and the challenge of Immigration*, in *Journal of Minority Studies*, vol.5, 2011, p. 207.

²¹⁸ Supra footnote 215, pp. 404-406.

²¹⁹ Supra footnote 217, p. 209.

²²⁰ BHATTACHARYYA H., *India as a Multicultural Federation, Asian Values, Democracy and Decentralisation in comparison with Swiss Federalism*, Fribourg, Helbing & Lichtenhahn, 2001, p. 305.

²²¹ Ibid.

CHAPTER III

MULTICULTURALISM IN THE WORLD

This chapter aims of providing a broader framework of analysis of multicultural challenges, examining two different examples of state practice when dealing with cultural diversity, whether and when the intention is to cope with such plurality. For this reason, the first paragraphs deal with Canadian cultural mosaic, the pioneering country of multicultural policies, which was the first in the world to set up and spread multiculturalism as a political thought, contrasting and discrediting the liberal, universalistic approach. The last paragraphs instead, discuss the Israeli-Palestinian case, inasmuch it consists of a multicultural environment in a deeply divided society. Israel's nature represents a so-called *ethnocracy*, with a state apparatus, a citizenship and educative and political structure based on a particular, well-defined dominant ethnic group; while Palestinian population, whose part of territories is still under Israeli occupation, displays linguistic, religious and cultural pluralism, hence creating the grounds for continuous cultural clashes, given the lack of recognition.

1. Canadian Society as an Example of a Cultural Mosaic

"Today, Canadians from coast to coast to coast join together to celebrate the multiculturalism and openness that make us who we are as a country. Canadians come from every corner of the world, speak two official languages and hundreds more, practice many faiths, and represent many cultures and as Canadians, we recognize that our differences make us strong."²²²

As the words of the current Prime Minister Justin Trudeau during Canadian Multiculturalism Day state, multiculturalism is the core of Canada's heritage and identity, indeed Canada is essentially the result of several migration waves, which since 1400 characterized the multi-ethnic and pluralist nature of the country. Nonetheless, this country disclosed multicultural traits even before becoming a British dominion²²³, when different, small and strewn tribes populated its vast territory. The native population -*First Nations*- could have been already classified into 12 different linguistic groups and 6

²²² Statement by the Prime Minister Justin Trudeau on Canadian Multiculturalism Day, Ottawa, 27 June 2017.

²²³ The birth of Canada can be traced in 1867, date of the British North America Act and of the first Constitution of Canada, that institutionalized the union of the British Provinces in Canada. GROPPi T., *Canada*, Bologna, Il Mulino, 2006, pp. 18-23.

distinct regional cultures, yet over the centuries migrants from British Islands and French colonies enriched this multicultural and pluri-linguistic framework; a survey of 2001 revealed that over 100 different languages are spoken in Canada.

In terms of ethnicity, the Canadian population is composed of the autochthone groups: Inuit, Amerind and Metis; the British and French communities, which characterize the main cultural, dominant dualism in the land; and finally, several narrower ethnolinguistic groups of different origins and formed through more or less recent immigration. These groups are spread around the country, but each of them is internally cohesive and transmit its own characteristics to the region populated by the community: Québec represents the francophone community, Manitoba the Metis one, the Inuit's land is considered to be the Québec's Arctic and North-Western territory, whereas the Anglophone majority is represented by a significant quantity in almost every region, except Québec.²²⁴

The percentage of immigrant population rose more and more, in a certain way damaging the status of autochthone, indigenous groups, who have been marginalized for a long time, deprived of their own cultural identity and rights (they obtained the right to vote only in 1960).²²⁵ Between 1991 and 2001, at least 2,2 million immigrants arrived and settled in Canada, yet a relevant change in immigration trends was observed, the majority of immigrants were not anymore from the United Kingdom or Europe, but instead 57,04% came from Asia.²²⁶ This modification of migratory flows demonstrates how the phenomenon has never ceased, but was simply readdressed from different areas, creating an even more multicultural society.

From a multicultural point of view, Canada assumes great geopolitical relevance as it was the first country in the world to introduce a law that didn't differentiate citizens born in Canada from the naturalised ones (*Canadian Citizenship Act 1946*) and the first country to abolish immigration quotas based on religion, culture and geographical areas (*Immigration Act 1967*), that were instead quite widespread requisites in most destination areas.²²⁷ Hereafter, the Canadian commitment towards an integrative and legitimated multicultural polity constantly developed, in response to the challenges of an

²²⁴ BENIER J., *Il Mosaico Etnico Canadese*, in *Limes – Rivista Italiana di Geopolitica, Il richiamo dei Balcani, dalla guerra Jugoslava al caso del Québec*, Editrice Periodici Culturali, n°3, 3 June 1995.

²²⁵ Ibid. p.23.

²²⁶ Ibid. p.21.

²²⁷ Ibid. p.19.

increasing multi-ethnic society and made it one of the countries with the most elevated rate of immigration, yet not always without objections or difficulties.

As a matter of fact, the unity of the state was jeopardized by ethnic tensions during the 1960s, when the crisis of the universalistic melting pot model hit both USA and Canada. The anglophone majority had always pushed towards a nation shaped on the British tradition, adopting an assimilationist and individualist policy towards integration and sometimes prohibiting the use of languages other than English; in this context, movements of auto determination and identity claims arose in Québec, Canada's francophone region.²²⁸ The secessionist attempts and the political actions directed towards independence or at least meant to adjust the constitution, represent the efforts of the nationalist government of Québec to be recognized as a distinct society, which displays a different vision about federalism, citizenship and the nation itself.

The most notable event was the *silent revolution* of the 1960s, guided by the populist government of Lesage, where, by trying to modernize and revitalize Québec's identity, brought about the emergence of nationalist and separatist movements.²²⁹ This revolution took on a more violent role when the British Consul and the Minister of labour were kidnapped, and the latter was killed, forcing Prime Minister Trudeau to adopt extraordinary emergency measures to cope with the so-called *October crisis*. Those events severely marked the francophone province (whose regional motto *je me souviens* refers indeed to the events of the silent revolution), which gradually isolated from the federation.²³⁰ Despite federalism in Canada developed in response to the claims of self-government of some territories, it turned out to be insufficient to contain the secessionist drives of Québec, that besides the constitutional reforms proposed, held also two separatist referendums in 1980 and 1995.²³¹ It is important to notice that all this happened within a democratic and federal context, where peace and wealth exist, but cultural identities clearly represent stronger driving forces.

The political unity of Québec is based on ethnicity, a conception that rests on the sense of belonging to a community sharing the same culture and language, thus it expected to be recognized as such, a distinct society. Instead, the idea of the Canadian demos is founded

²²⁸ BERNARDI U., *Culture e Integrazione, Uniti dalle diversità*, Milano, Franco Angeli, 2004, p.225.

²²⁹ GROPPI T., *Il Canada tra riforma della costituzione e secessione*, in ROLLA G., *Lo Sviluppo dei Diritti Fondamentali in Canada*, Milano, Giuffrè, 2000, pp.21-23.

²³⁰ Supra footnote 222, pp. 32-34.

²³¹ Supra footnote 224.

upon a unity that goes beyond the simple ethno-cultural belonging, rather it is based on sharing some common values, expressed by the Canadian Charter of Rights and Freedoms of 1982, and on the equality deriving from citizenship. This substantial difference is the main source of conflict between the Canadian federal government and the Québec government.²³² 1982 was a very significant year for Canada, in a certain manner, it signed the “juridical” independence of the country from the British motherland, when the Queen proclaimed a law that officially untied Canada from Westminster and called off the efficacy of United Kingdom laws in the territory, followed by the promulgation of the *Constitution Act*, that included some revisions to the old structure of a Canadian set of rules and the insertion of the *Canadian Charter of Rights and Freedoms*.²³³

The Charter, besides including the classic liberal fundamental rights and freedoms, such as “freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association”²³⁴, embodies specific rights of linguistic minorities, of aboriginals and concerning multiculturalism.

The rights of native populations were recognized only in 1982, and more specifically through article 25 and 35 -*Rights of the Aboriginal People of Canada*- of the *Constitution Act*; this event was extremely important because it consisted of an admission of the relevance of the indigenous populations within the Canadian society and a recognition of the importance they played in its construction.²³⁵ Those populations -Indians, Inuit and Metis- enjoy some inherent rights that they acquired inasmuch they were sovereign people in Canada, before the migration flows that brought British and French colonizers to this vast land. But the events that followed the mass migration flows brought about a new perspective of the Canadian society, which can be defined as an ethnic mosaic, thus raising constitutional demands for the protection and integration of the different and several minorities composed in this mosaic. The principle of non-discrimination has been indeed enunciated by the 1982 Charter in article 15, which sanctions the equal treatment “without discrimination based on race, national or ethnic origin, colour, religion, sex, age

²³² GROPPI T., *Il Canada tra riforma della costituzione e secessione*, in ROLLA G., *Lo Sviluppo dei Diritti Fondamentali in Canada*, Milano, Giuffrè, 2000, pp. 36-40.

²³³ CECCHERINI E., *La Carta dei Diritti e Libertà del 1982: un difficile equilibrio fra il riconoscimento di diritti Universali e Salvaguardia delle competenze provinciali*, in ROLLA G., *Lo Sviluppo dei Diritti Fondamentali in Canada*, Milano, Giuffrè, 2000, pp.41-54.

²³⁴ Canadian Charter of Rights and Freedoms, Constitution Act, 1982, art.2.

²³⁵ GROPPI T., *Canada*, Bologna, Il Mulino, 2006, pp.115-117.

or mental or physical disability”²³⁶. Non-discrimination, equal treatment, maintenance and recognition of rights and traditions of native people, recognition of Québec’s nature of distinct society, affirmation of common fundamental rights and freedoms as part of a universal and unified citizenry; finding a unity within pluralism, an equilibrium among these different principles and claims without jeopardizing any elements of society is the main aim of every multicultural state and also its greatest challenge. Canada has opted for a multicultural strategy that resembles the Swiss direct democracy, since integration is achieved by means of self-governing mechanisms, through the direct participation of the decision-making process and by pursuing a line of dialogue with minorities, taking into consideration that, especially for Canadian multiculturalism, societies and cultures are dynamic and variable, they reciprocally influence each other.²³⁷

Canada indeed accepts and asks for the preservation of the distinctive cultural traits of the different ethnicities settled in its territory, inasmuch, by defining itself a multicultural state, it considers these peculiarities as a matter of pride and constitutive part of the nation itself. Usually, in countries where a strong sense of national identity and unity is perceived, immigrants tend to be considered more as threats or sources of trouble; but here, the Canadian multicultural policy functions as a constructive means to create a connection between the native citizens and newcomer immigrants: “immigrants are a constituent part of the nation that citizens feel pride in [...] multiculturalism provides a link by which immigrants come to identify with, and feel pride in, Canada.”²³⁸ This model of integration provides a healthy and respectful environment both for citizens and for immigrants, that gradually develop a sense of Canadian citizenship, without losing the original one.

The respect and consideration of ethnic groups have been longstanding and prominent themes in Canada. As already mentioned, the assimilationist approach was the prevailing one up to the 1960s, which gradually eroded and has been rejected since. In substitution to such model, the multicultural theory emerged that fostered the recognition of diversity and a neutral (not based on gender, religion, race or ethnicity) admission of migrants, whose peculiar identities were not to be discriminated or annihilated, but to be accepted and their expression to be encouraged. Public institutions were expected to provide new

²³⁶ Canadian Charter of Rights and Freedoms, Constitution Act, 1982, art.15, par.1.

²³⁷ ROLLA G., *La Tutela Costituzionale delle Identità Culturali*, in ROLLA G., *Lo Sviluppo dei Diritti Fondamentali in Canada*, Milano, Giuffrè, 2000, pp.120-123.

²³⁸ BANTING K., KYMLICKA W., *Canadian Multiculturalism: Global Anxieties and Local Debates*, in *British Journal of Canadian Studies*, vol.23, issue 1, May 2010, p.60.

mechanisms of integration and to assist and accommodate members of different ethnic groups.²³⁹

The Canadian national identity is thus given by the presence of regional cultures and ethnic groups in its territory, which makes Canada the sum of strong and distinct identities harmonized by local and federal policies. But first and foremost, Canadians themselves define, accept and legitimize their national identity as a cultural mosaic, ascribable to the different values, ethnic characteristics and traditions, combined by the common social, ideological and political sense of belonging of citizens to Canada.

1.1 The Multicultural Policy and The Canadian Multiculturalism Act

The multicultural Policy in Canada was developed starting from the late 1960s, under impulse of the federal government managed by the Prime Minister Pierre Elliot Trudeau. The first step was inspired by the work of the Royal Commission on Bilingualism and Biculturalism (Laurendeau-Dunton), which issued a report on the presence and status of non-Aboriginal, Non-French, Non-English minorities in 1969.²⁴⁰ Some analysts identified three diverse stages of the evolution of multiculturalism in Canada from a political point of view: the incipient stage, the formative period and the Institutionalization.²⁴¹ The first one concerns the period preceding 1971 and represents a gradual and progressive acknowledgement and integration of cultural diversity under all its shapes. As already stated, Canadian society and political structure were characterized by a strong British nature, since the state was firstly considered a British dominion and therefore, citizens were held to be British until the Canadian Citizenship Act of 1947 created the Canadian citizenship and distinguished it from British nationality. After World War II, following the new migration waves from Europe, the value and potential of ethnic diversity was reconsidered under a different light; assimilationist policies were delegitimized, and discredited and ethnic minorities gradually acquired more recognition.²⁴² The second stage, the formative one, started from 1971 to 1981 and began with the report of the Royal Commission on Bilingualism and Biculturalism, that recommended a better

²³⁹ Ibid. pp.48-52.

²⁴⁰ The Royal Commission was originally constituted to examine the relations between the Anglophone majority and the Francophone one, but later ethnic minorities formed from immigration, demanded the analysis of their situation too. WOHERLING J., *Le Politiche della Cittadinanza in Canada e Québec*, in ROLLA G., *Lo Sviluppo dei Diritti Fondamentali in Canada*, Milano, Giuffrè, 2000, pp. 255-261.

²⁴¹ DEWING M., *Canadian Multiculturalism – Background Paper*, Parliamentary Information and Research Service, no. 2009-20-E, Ottawa, Library of the Parliament, 2012, pp. 2-8.

²⁴² Ibid.

integration, guaranteeing equal rights and participation of ethnic groups within society. A year after the federal government implemented the multicultural program, which rested on four fundamental aims: give public support to ethnic minorities to let them preserve and develop their cultural identities; assist their members in an active participation and integration to Canadian society; promote cultural exchanges among the distinct cultural groups, to support national unity; and help newcomers to learn at least one of the official languages – French and English- of Canada.²⁴³

Therefore, the Canadian multicultural policy has two major purposes: the integration of immigrants in an anti-discriminatory perspective that promotes equality and the preservation of distinctive traits of immigrants' cultures, so as to allow the maintenance of peculiar identities of cultural subgroups within the whole society. Institutions participated and adapted to the new policies demanded, allowing different attitudes and behaviour, in the name of principles of equal treatment and freedom of religion; for instance, young Muslim girls are allowed to wear the traditional veil in school and young *Sikhs* can carry the *Kirpan*, the traditional knife intended as religious commandment.²⁴⁴

In 1973 another step forward was taken with the establishment of the Ministry of Multiculturalism, legitimized in 1982 in article 27 of the Canadian Charter of Rights and Freedoms. Many positive measures were taken by the Ministry to integrate the different ethnic groups, such as the revision of educational programs of history and literature, meant to underline the contributions of cultural minorities, the adaptation of working schedules to meet the needs of diverse religions, the allocation of public funding to cultural association, the institution of bilingual educative programs for the children of immigrants. Nevertheless, other actions intended to preserve specific cultural traditions were rejected, because their content violated some fundamental human rights, as in the case of female genital mutilation, arranged marriages and Muslim family law.²⁴⁵

The third phase was the Institutionalization, which began in the 1980s. This stage represents a growing politicization and legislative institutionalization of Multiculturalism, starting from the proclamation of the Canadian Charter of Rights and Freedoms, which included in the constitution the expressed principles of non-discrimination, equal treatment and freedom of expression. In 1985 the House of

²⁴³ GROPPI T., *Canada*, Bologna, Il Mulino, 2006, p.20.

²⁴⁴ WOHERLING J., *Le Politiche della Cittadinanza in Canada e Québec*, in ROLLA G., *Lo Sviluppo dei Diritti Fondamentali in Canada*, Milano, Giuffrè, 2000, pp. 255-261.

²⁴⁵ Supra footnote 243, p.21.

Commons standing Committee on Multiculturalism was also established and in 1988 the *Canadian Multiculturalism Act* was proclaimed and adopted by the Parliament, with the aim of enacting a new, direct multicultural policy.²⁴⁶ This act represents the first national legislative measure on multiculturalism in the world. Already in its preamble, the act affirms the very nature of Canadian society, stating that:

” The Government of Canada recognizes the diversity of Canadians as regards race, national or ethnic origin, colour and religion as a fundamental characteristic of Canadian society and is committed to a policy of multiculturalism designed to preserve and enhance the multicultural heritage of Canadians while working to achieve the equality of all Canadians in the economic, social, cultural and political life of Canada”.²⁴⁷

The act promotes the mutual understanding of the multiple cultures composing Canada and it fosters cross-cultural relations and cultural exchanges. It is a positive instrument of change that recognizes and promotes “the understanding that multiculturalism is a fundamental characteristic of the Canadian heritage and identity [...] and the full and equitable participation of individuals and communities of all origins”²⁴⁸, ensuring that “all individuals receive equal treatment and equal protection under the law, while respecting and valuing their diversity”²⁴⁹ and encouraging and assisting “the social, cultural, economic and political institutions of Canada to be both respectful and inclusive of Canada’s multicultural character.”²⁵⁰

As a matter of fact, the act enshrines a very significant and powerful tool; being the first of its kind, it expresses the evolution of a progressive policy that watches not only for the application of majority rights, but also for the protection and diffusion of cultures and populations that at the time, in other parts of the world, were still marginalized or despised. The provision encourages both citizens and public governments to be active participants of the positive change that the new multicultural policy triggers. According to this new political approach, the mutual acceptance and knowledge of languages and cultures among the several, diverse, ethnic groups, strengthen the sense of unity of Canadian people, since, as being characterized by different facets, each of them need to be fully recognized and legitimized by the authorities.

²⁴⁶ Supra footnote 241.

²⁴⁷ Canadian Multiculturalism Act, Minister of Justice, 21 July 1988, preamble.

²⁴⁸ Ibid., art. 3, par b) and c).

²⁴⁹ Ibid., art. 3, par e).

²⁵⁰ Ibid., art. 3, par f).

After the institutionalization of the Multicultural policy, the federal government gradually implemented and updated the provisions to meet more recent needs. In the following years, Canada also committed to non-discriminatory and multicultural policies internationally. For instance, it is important to note that Canada was the first country to accept the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005.²⁵¹ In this period of progressive development of multiculturalism, the *First Nations* were also the object of renewed attention and improvements of their status.

Despite representing 3% of the total population, Aboriginals or Native people are now considered one of the pillars of Canadian history. Initially, they were marginalized and Europeanised in the Native Residential Schools, managed by religious institutions and funded by the federation, where Indian children were uprooted from the families and tribes of origin. These institutes were closed only in 1969 and the federal government gradually engaged in a process of recognition and institutionalization of forms of self-government for the autochthonous populations, especially for those living in the natural reserves, the *registered* Indians, according to the *Indian Act* of 1985.²⁵² Concerning the commitment of the federal government for the integration of Aboriginals, it is also important to mention the Kelowna Accord between the federal government, the prime ministers of the provinces and the five leaders of the *First Nations*, whose purpose was improving living standards, employment and education of Native peoples, by means of federal programs and federal funding.²⁵³

The cultural and communitarian rights appear in this context as human rights, since they derive from the classic fundamental rights, such as equality, religion, expression. The Canadian philosopher Charles Taylor, one of the major exponents of the contemporary multicultural theory, affirmed in fact that real equality rests on the right to difference, of being recognized in the difference: "Non-recognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being".²⁵⁴ Therefore, the conceptions of the democratic and liberal state and the idea of a unified and individual citizenship are not enough in a framework of ethnic pluralism,

²⁵¹ Supra footnote 241, p.7.

²⁵² Canada government makes the distinction between the so called *registered* Indians and the non-registered ones. The firsts are enrolled in a register that allows them to live in the natural reserves and are about 700.000. The non-registered ones live scattered across the national territory and are over 340.000. GROPPi T., *Canada*, Bologna, Il Mulino, 2006, p.21.

²⁵³ Ibid., p.117.

²⁵⁴ TAYLOR C., *The Politics of Recognition*, Princeton University Press, 11 September 1994, p.25.

because they might convey and result in oppressive and discriminatory acts or unfair assimilationist policies that basically deny any difference, as it is the case of many European nation states analysed in the precedent chapters.²⁵⁵

As regards immigration, Canada remains an *open* country, faithful and compliant to the relatively recent neoliberal policies and its own origins. Citizenship is acquired according to the principles of the *ius soli* and *ius sanguinis* (for citizens born abroad from parents having the status of Canadian citizens at the moment of birth).²⁵⁶ Furthermore, three ways exist in which immigrants can acquire the status of permanent resident: for family reunification; being eligible for achieving the status of refugee; being useful to Canadian economy (the so called economic migrants). The requisites to acquire the status of permanent residence are established by the individual provinces and it still up to them to fix the quotas of immigration. Québec for instance, prefers an economic and linguistic type of immigration, favouring francophone immigrants.²⁵⁷

Although Canada still appears as an open country, some restrictions were applied in the aftermath of the 11th September 2001 terrorist attacks, since a too open policy was considered to be dangerous, due to the threat posed by terrorism. In 2001 the *Immigration and Refugee Protection Act* was adopted, effecting more rigid and strict controls on non-citizens for security reasons. From 2001 to 2005, Canadian authorities had resorted several times to the *security certificate*, a provision that deals in the expulsion of a suspected terrorist to his country of origin. The legitimacy of this mechanism has been more than once an object of criticism. As a matter of fact, in 2002 the Supreme Court of Canada intervened to judge the constitutionality of the expulsion of a refugee from Sri Lanka, to a country that practices torture, violating thus article 7 of the Canadian Charter of Rights and Freedoms.²⁵⁸ Consequently, the Court established that the necessity to fight terrorism and preserve national security, could not justify the expulsion of a refugee towards a country where he could be subjected to torture, hence the violation of a fundamental right.²⁵⁹

²⁵⁵ WOHERLING J., *Le Politiche della Cittadinanza in Canada e Québec*, in ROLLA G., *Lo Sviluppo dei Diritti Fondamentali in Canada*, Milano, Giuffrè, 2000, p. 258.

²⁵⁶ GROPPI T., *Canada*, Bologna, Il Mulino, 2006, p.99.

²⁵⁷ *Ibid.*, p.97.

²⁵⁸ Article 7 states that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

²⁵⁹ *Suresh v. Canada (Minister of Citizenship and Immigration)*, judgement of the Supreme Court of Canada, case n° 27790, 1 S.C.R. 3, 2002.

In conclusion, the path undertaken by Canada since the 1970s can be defined as one of the more progressive, functional and successful of recent times. This modern approach towards diversity was translated into several legislative provisions and social programs aimed at fostering and improving non-discriminatory behaviour and acceptance of the different ethnic facets, which Canada is made of. The central role was played by the integration process by means of Law, which meant a full and legitimate recognition of ethnic minorities rights and freedoms.

2. Cultural Pluralism in Deeply Divided Societies: The Israeli-Palestinian Case

The Israel case represents a complex framework of analysis for the multicultural discourse, given the fact that it consists of a highly diverse society, deeply divided over national, ethnic, religious and social flaws. Palestine indeed, had been under control of the Ottoman Empire from 1517 to 1917, where a Jewish community of about 24.000 people was already settled, while Arab-Palestinians represented the majority of the population in the territory.²⁶⁰ Nonetheless, both communities are culturally tied to that same territory and believe that it belongs to them. On the one hand, Arab Palestinians consider themselves to be the legitimized inhabitants, the native people, because they have lived and worked there for centuries and centuries, generation to generation as part of the Arab community – whereas Jews were forced to emigrate all over the world-²⁶¹

On the other hand, Jews have a sort of emotional and idealistic relationship with Palestine, which over centuries has been considered by the Jewish communities scattered around the world as the *promised land*, cradle of their civilization where the Jewish State could finally rise.²⁶² In this context, two nationalisms strengthened and clashed: the Arab one, stoked by the anti-Turkish insurrection led by Lawrence of Arabia and the Zionist one, reinvigorated by the likelihood of establishing a homeland in Palestine. ²⁶³ The events gave rise to a conflict between Israelis and Palestinians, especially for the fact that

²⁶⁰ Until 1947 Palestinians represented two thirds of the entire population. AL-HAJ M., *Multiculturalism in deeply divided societies: The Israeli case*, in International Journal of Intercultural Relations, n°26, 2002, pp. 169–183; EMILIANI M., *La terra di chi? Geografia del conflitto arabo-israeliano-palestinese*, Bologna, il Ponte, Settembre 2008, p.16.

²⁶¹ The idea and conception of Palestinians as a community and identity developed when the nationalist Zionist movement began to claim Palestine as their motherland, thus depriving Arab Palestinians of their traditional homeland. LANNUTTI G., *Israele e Palestina : due popoli, due Stati*, in Il Calendario del Popolo, Milano, Teti, n° 576, Maggio 1994, p.8.

²⁶² Ibid.

²⁶³ LANNUTTI G., *Israele e Palestina : due popoli, due Stati*, in Il Calendario del Popolo, Milano, Teti, n° 576, Maggio 1994, p.9.

Palestine was a territory of a people -Palestinians- granted to another population -Jews-, but that in the end represented the object of a partition agreements, which excluded both Arabs and Jews.²⁶⁴

Moreover, the fact that Israel since its birth, was formally declared as “the State of the Jewish People” a Jewish Democratic State, thus lacking a separation between state and religion, undermined the Jewish-Arab relations from the beginning, transforming Palestinians into minorities. In fact, the religious variable is the one causing the most problematic issue within this context. The state of Israel was proclaimed on the 14th May 1948, date of the issue of the Declaration of Israel’s Independence and it was immediately recognized by the United States and the USSR, followed by other states. The basic problem was that Israel was essentially established as an ethnic state, or *ethnocracy*, defined by some scholars as “a non-democratic regime which attempts to extend or preserve ethnic control over a contested multi-ethnic territory”²⁶⁵; Although the declaration of independence itself recognizes minorities and envisages their protection, it was proclaimed as the Jewish homeland, and not a laic state, thus favouring the largest majority group, through special policies and laws.²⁶⁶ However, Israeli society includes several distinct groups. The Jewish majority itself consists of secular, traditional and religious groups and each of these groups is further divided into “sub-categories”, such as Ashkenazi, Orthodox and Sephardi Jewish. The Palestinian-Arab community instead, presents three main separate groups: Muslims, Druze and Christians, this last group further includes over ten different religious communities.²⁶⁷

We have argued that minority cultures, within the multicultural discourse, should be recognized and protect by special rights, allowing their members to express their cultural traits and take part to cultural life both in the public and private sphere. The question is then, whether such cultural reproductions are able to take place and special rights are granted in Israel.²⁶⁸ In this regard, the accommodations granted to Palestinian-Arabs are

²⁶⁴ First, the Peel Commission Partition Plan of 1937 and then the UNSCOP Partition Plan, approved by the General Assembly in 1947.

²⁶⁵ YIFTACHEL O., *Ethnocracy: The Politics of Judaizing Israel/Palestine*, Constellations, 1999, Vol. 6, p.364-391.

²⁶⁶ SHEHABI Y., HUSSEINI S., MATAR H., BORDEN E., *Religious Freedom in Israel and the Occupied Palestinian Territory: Selected Issue*, Report to the United States Commission on International Religious Freedom, Washington, Palestine Works, 2016, p.15.

²⁶⁷ PROVOST R., *Mapping the Legal Boundaries of Belonging*, New York, Oxford University Press, 2014, pp. 228-234.

²⁶⁸ PROVOST R., *Mapping the Legal Boundaries of Belonging*, New York, Oxford University Press, 2014, pp. 228-234.

essentially different from those given to the Jewish majority. Palestinian-Arab religious communities are basically considered minority groups; thus, their accommodations take the form of minority groups accommodations within a supposed context of multicultural and liberal state. In fact, given the self-proclaimed democratic nature of state, Israeli authorities sought to establish a democratic justification for the jurisdiction granted to such diverse religious communities, relegating the minorities' religious affairs to their private spheres, while the Jewish ones are public and state matter. In other terms, the accommodations granted to Palestinian-Arabs are a reproduction of the Ottoman millet system "by which minority religions were granted prescriptive and judicial jurisdiction over their members."²⁶⁹

As a matter of fact, Palestinian-Arabs are now a real minority in Israel, since wars with the Arab states caused a real exodus of Palestinians towards the neighbouring Arab countries; Palestinian refugees were said to be over a million in number, whereas about 150.000 of them stayed in Israel, less than half of the original population.²⁷⁰ In this regard, the United Nations intervened and tried to regulate the situation of Palestinian refugees with the resolution n°194, which "*Resolves* that the refugees wishing to return to their homes and live in peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible;".²⁷¹

However, under the shadow of the several middle-eastern conflicts, Jews immigration to their "homeland" increased and brought with it the creation of several settlements – Jewish colonies- in the occupied Palestinian territories. At first, those settlements were meant to recognize and enhance the Jews status and culture and to gradually constitute the Jewish homeland by laying the social and human foundations of the future state. But after 1967, the settlements became a means to strengthen the Zionist presence and for Israeli advancement into the Palestinian territories.²⁷² Nonetheless, an agreement was signed in Washington in 1995, envisaging the election in the occupied territories of a Palestinian Parliament and a President of the newly constituted PNA (Palestinian

²⁶⁹ Ibid., p.231.

²⁷⁰ EMILIANI M., *La terra di chi? Geografia del conflitto arabo-israeliano-palestinese*, Bologna, il Ponte, Settembre 2008, p.42.

²⁷¹ UN Resolution 194, General Assembly, 11 December 1948, par.11.

²⁷² Ibid., p.25.

National Authority), and the partition of West Bank into three areas: the one including all Palestinian major cities would have been under control of the PNA; area B, where Palestinian villages and small cities were located, would have been entrusted both to Israeli and Palestinian authorities; and the last zone, that included Israeli settlements and military bases would have remained under Israel control.²⁷³

But as far as the Israeli territory is concerned, the figures speak for themselves; today, the Jewish majority represents 75.1% of the total population, while the remain Palestinian-Arabs are about 20% and the rest of the population, unidentified as Jews or Arabs, are immigrants who were granted with citizenship pursuant the Law of Return of 1950 (being a relative of a Jew).²⁷⁴ Within this context, the Committee on Economic, Social and Cultural Rights, treaty body of the International Covenant examined in the first chapter, expressed its concerns about and condemned the general closures in the West Bank and Gaza Strip since 1993, that cut off Palestinian residents from their land and resources, stating that: "Palestinian population within the same jurisdictional areas were excluded from the protection of the Covenant".²⁷⁵ Furthermore, the committee criticized also the Israeli *Law of Return* above mentioned, as discriminatory against Palestinians in the diaspora "upon whom the Government of Israel has imposed restrictive requirements which make it almost impossible to return to their land of birth"²⁷⁶ and it recommended it to revise and modify the re-entry policies for Palestinians, for article 1(2) of the ICESCR to be respected, hence ensuring equal treatment and non-discrimination.

There exist three reasons that guided Israel actions towards Palestinian minorities and determined the controversial status of Arabs in Israel: the self-proclaimed democratic nature of the state, its strong Jewish-Zionist character and security motivation. Indeed, the declared free and democratic character of the state, despite being restricted, as allowed Palestinians to enhance their status and improve their political activity, aimed at advancing equality and non-discrimination. Nonetheless, the ethno-national nature of Israel does not reflect such democratic principles; on the contrary, the very purpose of creating a Jewish homeland triggered discriminatory attitudes also in its institutional structure, allocation of resources, spatial policies, and determination of national

²⁷³ CARPINELLO G., VERCELLI C., *Israele e Palestina: una terra per due; Le radici della guerra, le parole del conflitto*, Torino, EGA, 2005, p.184.

²⁷⁴ CESCR, Concluding Observations: Israel, E/C.12/1/Add.27, 4 December 1998; PROVOST R., *Mapping the Legal Boundaries of Belonging*, New York, Oxford University Press, 2014, pp. 228-234.

²⁷⁵ SAUL B., KINLEY D., MOWBRAY J., *The International Covenant on Economic, Social and Cultural Rights, commentary, cases, material*, Oxford University Press, 2014, pp.54-55.

²⁷⁶ Supra footnote 274.

priorities. Finally, the security motivation stems out principally from the long Arab-Israeli conflict, which deepened the fractures between the two communities and led Jewish Israelis to consider Arabs in Israel as an “hostile minority” and “security risk”, legitimizing policies of control over such minorities : “In the shadow of the ongoing conflict, security has come to occupy the center of the political, social, and cultural experience and has legitimized the militaristic tendencies in Israel, at the expense of its civilian character.”²⁷⁷

After the umpteenth conflict, The UN Security Council approved Resolution n°242, which wished for “the establishment of a just and lasting peace in the Middle East ”²⁷⁸ to be achieved through the accomplishment and respect of the following actions: ” Withdrawal of Israel armed forces from territories occupied in the recent conflict; Termination of all claims or states of belligerency and respect for and acknowledgment of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force;”²⁷⁹ But the resolution did not have the expected results, considered by some scholars as a “diplomatic masterpiece of ambiguity”, it lacked clarity, so much so that both Israelis and the PNA found different and opposite interpretations to the text; and finally rejected its application.

As a consequence, fear and opposition to the peace process under terrorist threats of both extremist sides, rapidly spread and overturned the results of the 1996 Israeli election that brought to power the right-wing party with Netanyahu as prime minister, who stopped the implementation of further peace treaties, expanded Israelis settlements and suspended the withdrawal of the Israeli army, thus creating fertile ground for a renewed armed conflict and deepening the schisms between Jewish majority and Palestinian-Arabs in Israel .²⁸⁰ The multicultural challenge in Israel is therefore a really controversial matter. Israel is essentially a ethnic state, where cultural reproductions and linguistic identities are inherent in the state’s structure (one needs only to think to the national flag, depicting the Star of David). As a matter of fact, the state was constituted in response to the right of culture and the need to reunite the people belonging to the same ethnic and religious group and its constitution assumed in a way the characteristic of a self-determination process where Zionism culture was the core element upon which lay the

²⁷⁷ AL-HAJ M., *Multiculturalism in deeply divided societies: The Israeli case*, in *International Journal of Intercultural Relations*, n°26, 2002, pp. 169–183.

²⁷⁸ UN Resolution 242, Security Council, 22 November 1967, par.1

²⁷⁹ Ibid.

²⁸⁰ Ibid., p.135.

foundations. The social, economic and cultural characteristic of Jewish people took form and found expression in state's various institutions.²⁸¹

However, Israeli inhabitants don't belong to the same culture, since the state was created in a land where other cultural groups were the dominant ones. In Israel about 33 languages are spoken, but only two of them, Arabic and Hebrew have official status and the latter is the dominant one. Therefore, within Israel's boundaries, Arab minorities live and are considered to be national minorities, since they are groups that have been living within the territory. But their specific rights, their relationship with the majority group, their status and their protection had never been negotiated, nor taken into consideration during the state's formation process, since, for minorities, it didn't consist of a voluntary process, as it was for example in Switzerland. Arab minorities were indeed considered a threat on Israel's security, an "hostile minority". As a consequence, Israeli authorities never really looked for assimilation or forms of peaceful dialogue, at least until the soft efforts of 1993 peace process, but instead legitimized the use of harsh militaristic control over minorities for national security reasons.²⁸²

2.1 The Status of Palestinians in the Occupied Territories and the UN 2334 Resolution on Israeli Settlements in Palestinian Territory

The nature of the relationship between Israeli and Palestinian people in the occupied territories, which include the West Bank, East Jerusalem and the Gaza Strip, is rather complicated and disputable. Despite several agreements and UN resolutions forcing Israel's army to retreat from the occupied Palestinian territories, so as to leave room for the solidifying of the "two-states solution", those territories are still under control of Israel authorities, whose public policies and behaviour towards Palestinians have been raising the concerns of many international humanitarian organizations.

Some authors have the view that Israeli forces are perpetrating a form of apartheid against Palestinians. But before asserting if Israeli domination over Palestinian territories can be judged as apartheid or not, we must approach the definition that international law gives of apartheid. Condemned by the International Convention on the Elimination of All

²⁸¹ HOSTOVSKY BRANDES T., *The Voice of People: Language and State in Israel*, in SAGI A., NACHTOMY O. (edited by), *The Multi-cultural Challenge in Israel*, Boston, Academic Studies Press, 2009, p.53.

²⁸² AL-HAJ M., *Multiculturalism in deeply divided societies: The Israeli case*, in *International Journal of Intercultural Relations* 26, University of Haifa, 2002, pp. 169-183.

forms of Racial discrimination, as a form of racial segregation²⁸³ and recognized by the Resolution 2649 of the General Assembly as a denial of the right of self-determination of people that are under alien or colonial domination (referring in particular to South Africa and Palestine)²⁸⁴, Apartheid was defined by the Rome statute of the International Criminal Court as a crime against humanity involving “inhumane acts [...] committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime”²⁸⁵.

A foregoing text, the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the General Assembly of United Nations in 1973, gives a more detailed and precise definition of apartheid, stating that it consists in all those “policies and practices of racial segregation and discrimination”²⁸⁶ addressed to a racial group. It enlists also a series of actions that constitute and identify the crime, such as the denial of the right to life and liberty by “ the murder of members of a racial group or groups; the infliction upon the members of a racial group or groups of serious bodily or mental harm; or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment”²⁸⁷; or even “any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country”, thus denying basic human rights and freedoms to the exponents of such minorities, “including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association”.²⁸⁸ The Convention also further examined also the means and method through which this crime is committed, affirming that “the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property

²⁸³ International Convention on the Elimination of All forms of Racial discrimination, 4 January 1969, preamble and art.3.

²⁸⁴ UN Resolution 2649, General Assembly, 30 November 1970.

²⁸⁵ Rome Statute of the International Criminal Court, 1 July 2002, art.7, par. 2, h).

²⁸⁶ International Convention on the Suppression and Punishment of the Crime of Apartheid, General Assembly, 30 November 1973, art. 2.

²⁸⁷ Ibid., art.2, par. a), i), ii).

²⁸⁸ Ibid., art.2, par. c).

belonging to a racial group”²⁸⁹ are indeed practices related to the crime of apartheid, and as such to condemned.

Therefore, in the light of these definitions, can the domination of Israel over Palestinian territories be defined as apartheid? ²⁹⁰ The status of Israel occupation in the West Bank, East Jerusalem and the Gaza Strip has hence to be examined in a humanitarian point of view. The nature of the conflict and division between Israel and Palestine is not actually concerning race, but rather it has religious, cultural and national roots. As previously asserted, Israelis respond mainly to a religious and national identity, shaped by Zionism and their laws and cultural norms are primarily derived from Judaism. On the other hand, Palestinians cannot be identified with their religious belief, since they display mixed cultural and religious features and as such, they are unified just by nationality.²⁹¹ However, in the occupied territories Israel perpetrates discriminatory practices, based on religious laws and policies, typical of the state, against the non-Jewish inhabitants.

Many international Organizations have collected evidence of international and human rights violation at the expense of Palestinians. Extrajudicial killings, disproportionate use of force, denial of freedom of movement, arbitrary arrests and detentions, are just some of the violations reported. In the 2016-2017 Amnesty International report, Israel was found to have strongly limited, in a discriminatory way, freedom of movement of Palestinians in the West Bank, including the transit of entrepreneurs, agents of international organizations and patients in need of medical treatment.²⁹² Moreover, in the OPT (Occupied Palestinian Territories), Israel forces were reported to have made excessive use of force against Palestinian civilians: Many civilians were arbitrarily arrested, beaten and threatened, some others (minors too) were tortured by the members of the Israel Security Agency, which was also accused of routinely torturing and mistreating refugees and members of Ethiopian communities.²⁹³ In this regard, the UN Committee against Torture have more than once criticized Israel, after the complaints and reports of torture and abuse, for the lack of the condemnation of torture (thus a mechanism of punishment) in the national judicial system.

²⁸⁹ Ibid., art.2, par. d).

²⁹⁰ It is however important to notice that Israel has not ratified any of the two conventions (Rome Statute and Apartheid Convention) condemning the crime of apartheid.

²⁹¹ DUGARD J., REYNOLDS J., *Apartheid, International Law, and the Occupied Palestinian Territory*, in *The European Journal of International Law* Vol. 24 no. 3, Oxford University Press, 2013, pp. 889-890.

²⁹² Amnesty International Rappporto 2016-2017, *La situazione dei diritti umani nel mondo*, edizioni infinito, 2017, pp. 568-574.

²⁹³ Ibid.

Palestinians are also denied freedom of opinion and expression, through the ban of peaceful association and assembly; Palestinian press is indeed subjected to a censorship law adopted by the Supreme Court and their newspapers have to be approved by military forces before the issue. Military orders forbid unauthorized assemblies in the West Bank, and they often repress protests from Palestinian human rights defenders. The right to life is also endangered, since "Palestinian freedom of residence is severely curtailed by systematic administrative restrictions on both residency and building in East Jerusalem".²⁹⁴ Amnesty International reported the demolition of over 1.089 Palestinian dwellings and the evacuation of 1593 people.²⁹⁵

Therefore, this endemic domination of Israel over Palestinian territories, meant to repress any opposition to their control, has basically most requisites defined as apartheid, since a real segregation (proved by the denial of freedom of movement), combined with the perpetration of inhumane acts (such as torture, abuse, mistreatment of any kind) and the denial of basic human rights to the Palestinian population, is committed by the dominant force, Israel.

Despite the doubtful status of Palestine, that is not yet fully recognized as a sovereign state by the international community, the United Nations have recognized the national rights of the Palestinian population of sovereignty, independence and self-determination with the General Assembly Resolution n° 3236 and they have granted Palestine the status of observer in the sessions and works of the General Assembly.²⁹⁶ As a matter of fact, the UN have often underlined the importance of the two-state solution, "two states for two peoples", but when the appearance of a successful peace process vanished, Netanyahu made clear that he would not dismantle the Jewish settlements in Palestine, on the contrary he intensified the Israeli presence in the occupied territories, expanding the existing colonies.²⁹⁷ Recently, the Security Council, worried about the Israeli-Palestinian situation, has once more acted as spokesman for the Palestinian Question²⁹⁸, emphasizing the responsibilities and obligations of Israel, as occupying state, especially on the ground of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949. In the Resolution 2334 of 2016 indeed, the Security Council reaffirmed and

²⁹⁴ Supra footnote 291, p.896.

²⁹⁵ Supra footnote 292.

²⁹⁶ The status of observer was accorded to the PLO in 1974 with the General Assembly Resolution n° 3237.

²⁹⁷ LANNUTTI G., *Israele e Palestina : due popoli, due Stati*, in *Il Calendario del Popolo*, Milano, Teti, n° 576, Maggio 1994, p.36.

²⁹⁸ The security Council already adopted the 1515 resolution in 2003, which solicited the interruption of any activity and the dismantlement of Israeli settlements in the Occupied Palestinian Territories.

recognized once again the illegal nature of Israeli settlements, stating that it “constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace;”²⁹⁹ and it demanded again the immediate suspension of any activity in the settlements in the OPT and their dismantlement. Furthermore, the Security Council condemned and expressed concern on the violations of human rights committed by the Israeli government towards Palestinians, mentioning also some examples such as “confiscation of land, demolition of homes and displacement of Palestinian civilians”³⁰⁰, besides all those practices and measures intended at modifying “the demographic composition, character and status of the Palestinian Territory occupied since 1967.”³⁰¹ By means of this resolution, the Security Council stressed the importance of cooperation and collaboration between the two states, to prevent acts of terror and harming defenceless civilians. In this regard, the promotion of peace and security is to be achieved, according to the Council “with obligations under international law for the strengthening of ongoing efforts to combat terrorism”³⁰², by complying with humanitarian international law, by de-escalating the conflict and rebuilding trust and confidence, thus creating fertile ground for a renewed peace process in the Middle East and through “the intensification and acceleration of international and regional diplomatic efforts and support”³⁰³.

Therefore, the main objective to be achieved still remains the creation of “a region where two democratic States, Israel and Palestine, live side by side in peace within secure and recognized borders”³⁰⁴ and mostly in affair and non-discriminatory environment.

3. Multiculturalism and Minority Rights in the Arab World

The status of minorities in the Arab world is a delicate and controversial issue, carved by the singularity of the history and political process of the region. To better understand the status and degree of recognition that minorities acquired over time, we need to step back and retrace the history of the formation of the contemporary Middle Eastern nations.

²⁹⁹ UN Resolution 2334, Security Council, 23 December 2016, par.1.

³⁰⁰ Ibid., preamble.

³⁰¹ Ibid.

³⁰² Ibid., par.6.

³⁰³ Ibid., par.9.

³⁰⁴ Ibid. preamble.

The independent states of the Arab world arose after the fall of the Ottoman empire, despite this, they were still subjected to the influence of Western powers. Initially, the term “minority” did not exist in the Middle Eastern part of the Ottoman empire, but rather it was identified with the “millet” system, a sub-national political and social organization that represented the Ottoman policy toward minorities. The millets were different religious communities, provided with a certain degree of internal autonomy, that contained religious, linguistic and cultural diversity. Within this system, the *dhimmi* represented the second-class inhabitants that were non-Muslims and thus considered minorities. At first, the status of *dhimmi* was limited to the so-called “people of the book”, Jews and Christians, the only minorities recognized; but later it was extended to several religious identities. As one can notice, this system was deeply based on religious identity. Religious groups different from the greater Muslim one, were tolerated, subordinated and excluded through a political and social structure of division.³⁰⁵

When the Ottoman empire collapsed and the process of postcolonial nation-building began, the new Arab states sought to form and strengthen their national identity by means of a process of Arabization (and later Islamization) to create a homogeneous and loyal community and control and legitimize a sense of nationhood within their borders, thus excluding and suppressing minorities that were neither Arab nor Muslim (such as Kurds and Berbers), which were seen as a burden and threat to the unity and integrity of the States and the newly constructed national identities.³⁰⁶ For instance, in Iraq the Assyrian uprising of 1933 was violently repressed by the state, evidence of the refusal to tolerate any minority challenge to the states unity ; In Syria, where actually a Shiite minority, the Alawites, are in power, as consequence of the process of Arabization, many Kurds were repressed and deprived of their citizenship and became officially stateless.³⁰⁷

From this standpoint, we can argue that the Middle East has always been heavily shaped by religion. Arab states indeed failed to separate polity from religion, on the contrary some of them used Islam as a source of unity and identifying feature. In the late 1970s, constitutional amendments, adapting state’s legislation to Islamic norms, were introduced.

³⁰⁵ KYMLICKA W., PFÖSTL E., *Multiculturalism and Minority Rights in the Arab World*, Oxford University Press, 2014, pp. 1-23.

³⁰⁶ Ibid. p.14 and 46.

³⁰⁷ Ibid. pp. 45 and 109.

As a matter of fact, the main classification of minorities is made on religious grounds. The philosopher Will Kymlicka, drawing this classification from the work *Minorities in the Arab World* by Hourani, gives the following, bigger distinction of minorities in the Middle East: “Arab but not Sunni Muslim -Greek Orthodox and Catholic, Copts, Maronites, Shiites, Alawis, Druze, etc.-; Sunni Muslim but not Arabs -Kurds, Berbers, Turkomans, etc.-; Neither Arab nor Sunni Muslim – Jews, Armenians, Assyrians, etc.-”.³⁰⁸ Further classifications are based on ethnicity and language.³⁰⁹ However, minorities differ from country to country and some of them are scattered over several states, such as the Kurds. The minority discourse can be said to be almost absent in the Middle East, proof of the failure of Arab states to meet the claims of recognition of civil rights of minority groups, in the effort of affirming and legitimizing the identity of the majority and, in some cases, ruling class. This incapacity to cope with ethnic heterogeneity inevitably led to several internal conflicts and socio-political unrest in several Arab countries: Sudan, Lebanon, Iraq, Syria and Bahrain, are just some of them.

Nevertheless, the recent commitment of international organizations such as the UN and UNESCO to respect and foster cultural diversity and minority rights, triggered Arab countries willingness to implement, on the jurisdictional level, their compliance to international norms concerning the respect of multiculturalism, human rights and minority rights. In fact, in 2004 the Arab League adopted the Arab Charter on Human Rights, which included several provisions concerning multiculturalism and minorities. Article 3 of the Charter, deals with non-discrimination principle and commit the ratifying parties “to ensure to all individuals [...] the right to enjoy all the rights and freedoms recognized herein, without any distinction on grounds of race, color, sex, language, religion, opinion, thought, national or social origin, property, birth or physical or mental disability”.³¹⁰

This provision is extended in that same article to the principle of equality and non-discrimination between men and women, although with some restrictions especially represented by divine laws that, according to the charter, establish some “positive” discriminations in favor of women.³¹¹ Concerning minorities rights, article 25 states “Persons belonging to minorities shall not be denied the right to enjoy their own culture,

³⁰⁸ HOURANI H., *Minorities in the Arab World*, London, Oxford University Press, 1947 and KYMLICKA W., PFÖSTL E., *Multiculturalism and Minority Rights in the Arab World*, Oxford University Press, 2014, p.2.

³⁰⁹ The complete classification of minorities in the Middle East, from country to country and according to religion, ethnicity and spoken language can be found in HOURANI H., *Minorities in the Arab World*, London, Oxford University Press, 1947, p.2.

³¹⁰ Arab Charter on Human Rights, Tunis, 22 May 2004, art.3, par.1.

³¹¹ Ibid., art.3, par.3.

to use their own language or to profess and practise their own religion. The law shall regulate the exercise of such rights".³¹² As it is for the principle of equality between men and women, it is well known that in practice, a lot of improvements have yet to be undertaken by Arab states to achieve both equality and respect and to eliminate gender and cultural discrimination, but this charter already represents a step forward in the subject. Article 30 and 42 are also very important for the minority discourse, inasmuch they affirm "freedom of thought, belief and religion"³¹³ and the right to participate in cultural life and activities. The present charter was ratified by several Middle Eastern states, hence affirming the compliance to the international commitment on human rights, but some haven't yet ratified, or signed the charter, such as Egypt, Morocco, Oman, Mauritania, Somalia, Tunisia and Sudan.

³¹² Ibid., art.25.

³¹³ Ibid., art.30.

CHAPTER IV

CULTURAL DEFENCE AND CULTURALLY MOTIVATED CRIMES

1. Culturally Motivated Crimes, Cultural Offence and Cultural Defence

Cultural pluralism within a society leads inevitably to identity, cultural clashes between the various minority groups and the dominant one. These clashes have sometimes a normative nature, normative pluralism is indeed related to cultural and religious belonging of foreigners. Therefore, an immigrant has to confront himself with a normative dualism, on the one hand with the host country's normative system, on the other with the legal or cultural system of the place of origin and he often opts for his traditional one. Nonetheless, a host country usually demands an effort to adapt by the immigrant communities to the national normative and cultural system, but at the same time, the multicultural perspective presumes the creation of juridical reforms, which permit the realization of individual, cultural identities.³¹⁴

A process of juridical change must be enacted for the recognition of the several and different social and cultural components of a state, the introduction of a sort of right to cultural identity is thus expected. As a matter of fact, in recent years it has become more and more evident that the classical liberal, abstentionist and neutral approach, is not sufficient to meet the demands of multiculturalism. The principle of equality itself, which has different interpretations, needs to be revised, since it may have an assimilationist worth. Equality has to be considered as principle admitting different treatments, as human beings are fundamentally different. Therefore, to avoid discrimination, the law must establish differentiated regimes according to groups' characteristics; in this regard, equality before the law means particular, juridical regimes based on the different culture, religion and law, which the person belongs to.³¹⁵

But to what extent can the right to culture be respected and fostered? If cultural behaviour, a tradition or ethnic rite infringes humanitarian international law should it still be accepted or promoted as part of cultural expression? That is exactly the limit to which cultural motivated crimes arise, manifestation of the conflict between the dominant penal system, representing the values and ideologies of the dominant group,

³¹⁴ PASTORE B., LANZA L., *Multiculturalismo e Giurisdizione Penale*, Torino, Giappichelli Editore, 2008, p.16.

³¹⁵ FACCHI. A., *I diritti nell'Europa multiculturale*, Milano, Laterza, 2001, pp.52-57.

with the cultural background of the minority group. A culturally motivated crime happens when a behaviour, prohibited by penal law norms, is tolerated, accepted or even endorsed by the norms of a specific community. It represents thus a conflict between a juridical norm and a cultural one. A culturally motivated crime is by definition “an act by a member of a minority culture, which is considered an offence by the legal system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation”³¹⁶ referred to as cultural offence. Culturally motivated crimes are classified in several criminal categories, according to the juridical good offended, the relationship between offender and victim and the motivation of the crime: Family violence, which includes mistreatment, forced marriages, punishment of the members who infringe traditions; crimes to defend honour or blood, including family, sex or personal honour; crimes of enslavements of minors; crimes against sexual freedom towards young girls and wives; crimes on the use of drugs; and many others concerning cultural norms and values.³¹⁷

In the framework of these normative conflicts, the question of how penal law responds to the perpetrators of those crimes emerges. There are indeed three models of penal system that can be outlined in the context of culturally motivated crimes: Penal law of intolerance, which adopts a severe, punitive reaction to unconstitutional behaviour of cultural origin, considering cultural motivation as an aggravating factor; Penal law of indifference, which is essentially neutral and indifferent to the cultural motivation, hence it does not make any distinction between individuals belonging to majority or minority group, assuming a sort of assimilationist approach, where equality means excluding any form of ethno-cultural exemption or aggravating factor; and Penal law of tolerance, characterized by the acceptance of cultural behaviours unrelated to the dominant culture, as long as they don't jeopardize primary goods and interests of the dominant juridical system.³¹⁸ Moreover, it is important to notice that Penal law is a local product itself, derived from cultural values and norms that differs from country to country, therefore

³¹⁶ VAN BROECK J., *Cultural Defence and Culturally Motivated Crimes (Cultural Offences)*, European Journal of Crime, Criminal Law and Criminal Justice, 9/1, 2001, p.5; BASILE F., *Il diritto penale nelle società multiculturali: i reati culturalmente motivati*, Polít. crim. Vol. 6, N° 12, Dicembre 2011, p.357; FACCHI. A., *I diritti nell'Europa multiculturale*, Milano, Laterza, 2001, p.66.

³¹⁷ BASILE F., *Il diritto penale nelle società multiculturali: i reati culturalmente motivati*, Polít. crim. Vol. 6, N° 12, Dicembre 2011, pp.358-361.

³¹⁸ PASTORE B., LANZA L., *Multiculturalismo e Giurisdizione Penale*, Torino, Giappichelli Editore, 2008, p.18.

juridical literature on this subject might be extremely variable, especially when dealing with civil law and common law systems.

However, it is erroneous to think that culturally motivated crimes concern only immigrants in the countries of destination. There are indeed two circumstances in which this type of normative, cultural conflict may arise: when a colonizer (or the cultural legacy of a former colonizing country) or a dominant group impose on minorities a legal system deriving from the values of the dominant or colonial elite; and when immigrant communities face the normative system of a host country, that enshrines different values and norms.³¹⁹ In both situations, clashes are nearly unavoidable. The following examples show how cultural normative clashes might occur between cultures coexisting in the same state: In India, despite dowry being prohibited in 1961 by an official act and several legislative measures, it still remains a very practiced cultural tradition and major social issue, overt manifestation of the gap between the dominant group's culture and the rest of the population; following independence in some African countries, the new ruling, native elites adopted in some cases principles, values and codes of the former colonizers, thus imposing a normative system that differs from tradition and culture of their people.³²⁰

As a result, neither immigration nor domination imply, for minority groups, the abandonment of cultural heritage and traditional values; on the contrary social exclusion brings minorities to identify themselves more and more in the original set of values, leading them to withdraw and enclose themselves into the communities they originally belong to and to refuse the newly imposed norms and values, while continuing practicing their own, though in conflict with the law. ³²¹The next argument concerns how to determine when an offence can be defined and convicted as cultural offence. As Van Broeck states: "the offence, in order to be a cultural offence, has to be caused directly by the fact that the minority group, of which the offender is a member, uses a different set of moral norms when dealing with the situation in which the offender was placed when he committed the offence".³²² Socio-economic disparities, non-integration and a minorities inferior social position can be considered causes of "cultural" criminality. Even so, the most explicative element of cultural motivated crime is the cultural background of the

³¹⁹ VAN BROECK J., *Cultural Defence and Culturally Motivated Crimes (Cultural Offences)*, European Journal of Crime, Criminal Law and Criminal Justice, 9/1, 2001, p.11.

³²⁰ Ibid., p.5.

³²¹ Ibid., pp.13-14.

³²² Ibid., p.19.

offender, since the individual's actions, representing the crime, must be explained or motivated by his cultural context.

Furthermore, in order to ascertain the cultural ground of the crime, its motivation needs to be objectified. In other words, it is necessary to transcend, after having verified it, the subjective cultural justification of the offender and then objectifying it, by ascertaining whether or not the members of its ethnic group deemed its behaviour to be culturally appropriate in that specific case, namely if they approve and endorse his motivation as part of cultural norm or tradition. The circumstances of the crime and the environment of the offender have hence to be taken into account.³²³ On the other hand, cultural defence principally concerns the response to a cultural offence. These two can be considered the sides of the same coin. Cultural defence is defined as a specific doctrine (used especially in the United States), that the accused can refer to during his trial, as cultural evidence exonerating or limiting his criminal responsibility, to mitigate or exclude the charge and penal sentence, or in support of plea bargaining.³²⁴ Cultural defence consists therefore, as a defensive strategy used by the offender to justify his conduct on cultural basis, in some specific circumstances.

Nonetheless, no specific norms, nor legislative measures have yet been introduced into the penal law system of European countries affected by migration flows, related to culturally motivated crimes or meant to justify a sort of cultural defence. On the contrary, in the United States' doctrine, where a common law system is applied, cultural defence is a legal provision often accepted by judges, in the background of a cultural, normative conflict that an immigrant has to deal with when committing a culturally motivated crime.³²⁵ The defence, in general terms, includes causes of justification in favour of the offender in the Anglo-Saxons penal systems; the defence is indeed a means of excuse or exemption, namely an element that confers the absence of *mens rea* of the offender. Since the 1980s, American courts have more frequently resorted to cultural defence to solve trials in which the customs and traditions of immigrants clashed with the penal system. The offender had to demonstrate that he was acting in good faith, according to his cultural heritage, so he could end up less guilty or less responsible due to specific cultural

³²³ Supra footnote 319, pp.19-24.

³²⁴ LEE C., Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?, in *Arizona Law Review*, Vol. 911, 2007, p.915; VAN BROECK J., *Cultural Defence and Culturally Motivated Crimes (Cultural Offences)*, *European Journal of Crime, Criminal Law and Criminal Justice*, 9/1, 2001, p.29.

³²⁵ BASILE F., *Società multiculturali, immigrazione e reati culturalmente motivati (comprese le mutilazioni genitali femminili)*, *Riv. italiana di diritto e procedura penale*, 2007, p.35.

reasons.³²⁶ In this regard, two types of cultural defence may be identified: cognitive and volitional. The first occurs when the cultural background of the offender prevents him from understanding that his action constitutes a crime. The volitional cultural defence instead, is invoked when the offender is completely aware that his actions are legally forbidden, but he commits the crime anyway, because he is compelled by the binding nature of his culture.³²⁷ However, cultural defence has been the object of a heated debate within the American system. Many critics have been moved to cultural defence as exonerating or mitigating cause. For instance, it has been argued that the use of cultural defence may encourage members of immigrant communities to avoid acknowledging the laws of the host country. Moreover, cultural defence would legitimate violence on the weakest subjects of society (children, young girls and wives) and would even confirm their inferior and discriminate position within the minority group.³²⁸ In the following paragraph, some examples of cultural offence and some case studies in which cultural defence was applied will be given, so as to have a practical point of view and a better understanding of what culturally motivated crimes consist of.

2. Culturally Motivated Crimes: Some Case Studies

As already mentioned, in the United States cultural defence has been a strategy increasingly used in trials since the mid-1980s. The reason being of the more frequent and notorious use of this theory is due to two particular factors: on the one hand, the recent, quantitative growth of migration flows towards USA, from non-European countries where traditions, customs and cultural background are significantly and extensively different from the American one; on the other hand, the growing willingness of American society and institutions to open and deal with diverse and sometimes minor cultures. From 1985 and after, judicial review became richer with case-law involving cultural offence and cultural defence. The following are case studies taken from the American jurisprudence.³²⁹ The last case law examined instead, is taken from the Italian jurisprudence and concerns a crime of female genital mutilation, after the introduction of article 583 bis in the Italian penal code, specifically condemning female genital mutilations.

³²⁶ PASTORE B., LANZA L., *Multiculturalismo e Giurisdizione Penale*, Torino, Giappichelli Editore, 2008, p.27.

³²⁷ Ibid.

³²⁸ Ibid., p.30; FACCHI. A., *I diritti nell'Europa multiculturale*, Milano, Laterza, 2001, pp. 69-70.

³²⁹ BASILE F., *Diritto Penale e multiculturalismo: teoria e prassi della c.d. cultural defense nell'ordinamento statunitense*, rivista telematica Stato, Chiese e pluralismo confessionale, Luglio 2010, p.11.

A) *People v. Kimura*³³⁰

Fumiko Kimura was a thirty-two year old Japanese woman, who had been living for sixteen years in Los Angeles, California. After learning that her husband had an extramarital affair, she drowned her children in the Pacific Ocean and attempted suicide by drowning, but she was rescued and survived. At first, the state charged her with first degree murder. Her actions were due to an ancient Japanese practice of homicide-suicide of parent-child, *-oyako-shinju-*, caused by her husband being unfaithful to her and it had casted shame and dishonour on the family.³³¹ During the trial, Kimura's attorney resorted to her lack of *mens rea* when committing the crime. In fact, Fumiko's cultural background served as cultural defence, asserting that what she did was actually part of a cultural practice, proved also by the Japanese-American community intervention, which collected more than 25.000 signatures asking mercy for her to the prosecutor, since *oyako-shinju* is considered a respectful and honourable practice in Japan and despite now being a convicted practice for the Japanese law, it would be charged as manslaughter. As a result, her charge was changed from murder to involuntary manslaughter and the court admitted her defence based on temporal insanity, sentencing her to five years of probation and one in jail.³³²

B) *People v. Moua*³³³

Kong Moua was a twenty year old Hmong man from Laos, who in 1985 kidnapped with the help of his cousin, a Hmong girl from her dormitory in California and raped her, as part of the *zij poj niam* (marriage by capture) tradition of their tribe, with the consent of her family. Initially, Kong was charged with rape and kidnapping. However, Moua claimed in his defence that his actions were part of a cultural practice of the Hmong tribe, consisting of kidnapping the bride-to-be, taking her to his family's house and forcing her to consummate the marriage and he presented the evidence of such ritual to the prosecution. Given this tradition of "marriage by capture", Moua affirmed that he acted in the belief that she consented to the sexual intercourse (in court referred to as a *mistake*

³³⁰ *People v. Kimura*, No. A-09113, Los Angeles Superior Court, 21 November 1985.

³³¹ In Japan the *oyako-shinju* is illegal and as such it constitutes a crime, but it would be nonetheless judged as involuntary manslaughter and punished with a lenient sentence. VAN BROECK J., *Cultural Defence and Culturally Motivated Crimes (Cultural Offences)*, European Journal of Crime, Criminal Law and Criminal Justice, 9/1, 2001, p.16.

³³² LEE C., *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?*, in *Arizona Law Review*, Vol. 911, 2007, pp.951-953; LAMBELET COLEMAN D., *Individualizing Justice through Multiculturalism, the Liberal's Dilemma*, in *Columbia Law Review*, Vol. 96, n°5, June 1996, pp.1093-1167.

³³³ *People v. Moua*, No. 315972-0, Fresno County Superior Court, 7 February 1985.

of fact), according to the customs of their cultural background. His cultural defence strategy was quite successful, since the judge accepted his evidence, allowing Moua to negotiate a plea bargain, pleading guilty of *false imprisonment* and he finally was sentenced to three months in jail and a thousand dollars penalty.³³⁴

C) *People v. Chen*³³⁵

Dong Lu Chen was a Chinese immigrant who had been living for a year in New York with his wife. After learning that the woman was unfaithful to him, he bludgeoned her to death with a hammer. Initially, the state charged Chen with second degree murder. However, during the trial the accused claimed that his cultural roots significantly determined his conduct, since for Chinese culture, adultery is a severe insult that casts shame and dishonour on the husband, the entire family, the ancestors and on the progeny. To prove the validity of his cultural defence, Chen's attorney brought a sinology expert to testify in the trial saying that violent reactions after the revelation of extramarital affairs are quite frequent in China, but often mitigated by family members; nonetheless in the Chen case, there was no family mediation, since they lived in a state of socio-cultural exclusion and thus, his reaction was not unusual according to Chinese customs and traditions. Therefore, Chen's attorney argued that his actions were the result of the high pressure of his cultural background, preventing him from behaving rationally. The judge finally accepted his cultural defence arguments as causes of *extreme emotional disturbance* and found him guilty of *heat of passion manslaughter*, sentencing him to 5 years of probation.³³⁶

D) *The Ogowen and Osagie case*³³⁷

This Italian case law concerns the crime of female genital mutilation. The case examines two distinct, but correlated episodes which happened in Verona in March 2006. The first episode involves a Nigerian woman Obaseki Gertrude, an obstetrician in Nigeria, but with no qualifications to operate in Italy, who practiced an *auré*, a type of incision to the female genital organs, on the young daughter of another Nigerian woman -Omorouyi Ogowen-,

³³⁴ BASILE F., *Diritto Penale e multiculturalismo: teoria e prassi della c.d. cultural defense nell'ordinamento statunitense*, rivista telematica Stato, Chiese e pluralismo confessionale, Luglio 2010, p.44; LEE C., *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense?*, in *Arizona Law Review*, Vol. 911, 2007, pp.954-955

³³⁵ *People v. Chen*, No. 87-7774, New York Supreme Court, 2 December 1988.

³³⁶ BASILE F., *Diritto Penale e multiculturalismo: teoria e prassi della c.d. cultural defense nell'ordinamento statunitense*, rivista telematica Stato, Chiese e pluralismo confessionale, Luglio 2010, p. 20-21.

³³⁷ Tribunale di Verona, sent. 14.4.2010, n. 979 that was then decided on appeal at Corte d'appello di Venezia, sez. II penale, sentenza 23/11/2012, n. 1085.

under her request and with a financial payment. The second episode instead, concerns the same Nigerian obstetrician Obaseki, caught by the Italian police while she was entering the house of John Osagie with a bag full of medical supplies (including scissors, needles, lidocaine and gauze) with the intent of practicing an *auré* on his two month old daughter, at father's request.

Obaseki was charged as executor of the crime of injury to the female genital organs, pursuant article 583 bis, comma 2 and 3, with the aggravating circumstances of having committed it on a minor, for profit-orientated motivation and with a mitigating factor of mild lesions; the parents were charged for the same crime *in concorso*, still with the mitigating circumstance of mild lesions. In both episodes, the parents admitted the commission of the facts, yet explaining that it consisted of a widespread cultural practice for the Nigerian Edo-Bini community and that they were not aware it constituted a crime in Italy. The strategy of the defence indeed, was strongly based on their cultural motivations and on the fact that such practice was limited to a small incision, not finalized to compromise the functions of the female genitals. In order to prove it, the defence called to the stand several experts, such as a professor of anthropology of education, a professor of pedagogical mediation and an Edo-Bini priest of the Pentecostal Church, all asserting the cultural relevance of such a ritual, which did not constitute a form of malevolent control over female sexuality, but a way of "humanizing" the girls and instilling in them a sense of belonging to the Edo-Bini community.³³⁸ Nonetheless, despite the sentence giving relevance to the cultural practices, the defendants were finally found guilty of the charges and the related aggravating and mitigating circumstances recognized.

However, the two parents filed an appeal to the Court of Appeal of Venice two years after. The defendants had several grounds of appeal (three for each), two of which coincided for both: absence of specific malice and the *ignorantia legis*. In fact, both defences asserted that article 583 bis, comma 2, demanded the recognition of a specific aim, that of "maiming the sexual functions" of the offended person for the purpose of "altering under physical profile the sexual functions of a woman, compromising the desire and the practicability of the sexual act"³³⁹, an aim that was lacking in the parents' reasoning. Such

³³⁸ Tribunale di Verona, sent. 14.4.2010, n. 979 that was then decided on appeal at Corte d'appello di Venezia, sez. II penale, sentenza 23/11/2012, n. 1085; BASILE F., *Il reato di "pratiche di mutilazione degli organi genitali femminili" alla prova della giurisprudenza: un commento alla prima (e finora unica) applicazione giurisprudenziale dell'art. 583 bis c.p.*, rivista telematica Stato, Chiese e pluralismo confessionale, n°24, Luglio 2013.

³³⁹ Corte d'appello di Venezia, sez. II penale, sentenza 23/11/2012, n. 1085, pp.43-44.

implications were dismissed, according to the appeal court, especially in view of the cultural motivations of the Edo-Bini community, which the parents belonged to, proven by the several witnesses' statements asserting the purely "humanizing" and "identifying" purpose of the *auré*, hence not perpetrated with the objective of maiming the sexual functions. The second ground of appeal, concerning the *ignorantia legis*, was based on several elements: first of all, the episodes dated back to March 2006, whereas law 7/2006, introducing article 583 in the Italian penal code, entered into force just a few weeks before; second, no initiatives or informative campaigns were organized in Verona to raise the awareness of the people allegedly concerned; third, the two Nigerians were not well integrated in the Italian society, on the contrary they were strongly tied to the Edo-Bini traditions, especially the woman, Ogowen, who spoke just a few words of Italian and had a low education level, claiming moreover, that her relatives in Nigeria exerted strong pressure on her to submit her daughter to the *auré*.³⁴⁰ The court of appeal of Venice, considered the grounds of appeal for both, excluding in both cases the applicability of article 583 bis, comma 2, on the existence of specific malice, and attesting the *error iuris* of the defendant, acquitted the accused.³⁴¹

However, the judges seemed to take more into consideration the physical injuries of FGM, than the psychological and emotional ones, although the aim of legal instruments should be that condemning such violations and affronts to women dignity. Moreover, when it comes to criminalized an FGM perpetrated to children, the Istanbul Convention by means of considering also such elements as "assisting the perpetrator to perform acts [...] by inciting, coercing or procuring a girl to undergo the excision, infibulation or mutilation of her labia majora, labia minora or clitoris"³⁴², intends to criminalize "parents, grandparents or other relatives" which "coerce their daughter or relative to undergo the procedure."³⁴³

Several deductions can be drawn from the analysis of such cases. As a matter of fact, mechanisms to cope with or convict unlawful and unacceptable cultural customs were developed in western democracies following the emergence of increasingly numerous normative-cultural conflicts. Moreover, the assumption of cultural customs and traditions as exonerating or extenuating circumstances in criminal cases provides also examples of

³⁴⁰ Corte d'appello di Venezia, sez. II penale, sentenza 23/11/2012, n. 1085, pp.48-50.

³⁴¹ Ibid. 54-56.

³⁴² Council of Europe, Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11 May 2011, par. 201.

³⁴³ Ibid.

increased tolerance towards cultural diversity and of how multiculturalism deeply influences international legal systems. Concerning cultural defence however, it appears clear from the examination of the cases, that the objectification of the cultural background (through the assertions and statements of experts and of people belonging to the same community) as decisive and crucial motivation for one's own conduct, is necessary for the cultural defence strategy to be successful. Nonetheless, especially when dealing with FGM cases, we can argue that cultural norms or traditions should not serve as mitigating or exonerating causes and the Istanbul Convention indeed, prevents the use of cultural justifications³⁴⁴, in criminal proceedings. Therefore, the judges should rather consider the level of injury inflicted to women in order to sanction such practices and in the last case analysed, the Tribunale di Verona did it through the evaluation of the mitigating factor of mild lesions, but at the same time it took into account also the cultural defence of the defendants in the sentence.

2.1 Female Genital Mutilation: origins, diffusion and the impact of the Istanbul Convention

Female genital mutilation, despite being internationally condemned as an overt violation of human rights, is a very widespread practice consisting of “all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons”.³⁴⁵ The WHO, UNICEF and UNFPA drafted a list of the types of Female Genital Mutilation, classifying four types of FGM: The first is known as clitoridectomy and involves the total or partial removal of the clitoris, the second type is referred to as excision, while the third as infibulation and the last one consists of all other practices meant to manipulate female genitalia, such as pricking, incising or scraping.³⁴⁶ Therefore, several forms of FGM exist, according to the type of operation and physical and psychological lesions inflicted on the female body. Those practices vary mainly according to the ethnicity, community, culture and nation itself, where they are committed. FGM is a customary practice in ethnic communities of over forty countries

³⁴⁴ Article 45 of the CoE Istanbul Convention is very clear on this point stating that “culture, custom, religion, tradition or so-called “honour” shall not be regarded as justification for such acts”, and so it is the Explanatory Report above mentions.

³⁴⁵ In 1997, a joint statement of the WHO, UNICEF and UNFPA gave this definition of Female Genital Mutilation, classifying also the different types of practice.

³⁴⁶ WHO, UNICEF, UNFPA joint statement on female genital mutilation, 1997
<http://www.who.int/mediacentre/factsheets/fs241/en/>

around the globe, mainly in Sub-Saharan Africa, the Middle East and some areas of the Asian continent.³⁴⁷ Indeed, FGM is such a widespread practice that it affects between 120 and 130 million women and 2 million young girls every year, according to the WHO statistics. It happens to be one of the most complicated challenges of multiculturalism. But to better understand the scale of this phenomenon, the following figures will illustrate some of the statistics elaborated over recent years, on the diffusion of FGM, especially in some African countries where it is deeply seen as a cultural tradition.

Diffusion of Female Genital Mutilation		
Country	FGM prevalence among girls and women, aged 15 to 49 years (%)	Year of reference of the survey
Burkina Faso	76	2010
Djibouti	93	2006
Egypt	87	2015
Eritrea	83	2010
Gambia	75	2013
Guinea	97	2012
Mali	83	2015
Sierra Leone	90	2013
Somalia	98	2006
Sudan	87	2014

This data was collected by the UNICEF, based on the Demographic and Health Surveys DHS, the Multiple Indicator Cluster Surveys MICS and other national surveys.

As we can see, the percentages are considerably high and they represent a ritual which in some African regions has been practiced for 2000 years, although attention on this topic have been paid only over the last twenty years and overall, due to the growing presence of immigrants in Western societies, thus giving rise to the normative, cultural conflict that we discussed above.³⁴⁸ As a matter of fact, in the aftermath of increasing migration and a globalization process towards the Western countries, the debate on FGM took shape and attracted interest and awareness of Western public opinion. International Organizations, Humanitarian Organizations and national governments started to adopt firm positions against FGM and tried to enact direct measures aimed at its prohibition.³⁴⁹ The motivations of this practice are varied and sometimes in combination, the result of cultural norms, social obligations and ethnic beliefs that vary from region to region. For

³⁴⁷ BASILE F., *Società multiculturali, immigrazione e reati culturalmente motivati (comprese le mutilazioni genitali femminili)*, Riv. italiana di diritto e procedura penale, 2007, p.49.

³⁴⁸ FACCHI. A., *I diritti nell'Europa multiculturale*, Milano, Laterza, 2001, pp.78-92.

³⁴⁹ Ibid.

some cultures, it rests on deeply-rooted socio-cultural norms which are nearly impossible to avoid. Female excision is perceived as a rite of passage from childhood to adulthood and according to the communities, it can be practiced at different stages of childhood. It has no particular religious grounds, since it is a customary practice for the exponents of several and diverse religions, even though religious leaders assume different and sometimes confused stances on this regard. For instance, Muslims recognize the Sunni type of excision as a common rite, but in a less devastating form.³⁵⁰ Nevertheless, FGM is mostly considered a way for men to control the female body and sexuality, despite being almost always practiced by women on women. FGM is a social convention, meant to increase marriageability and it is a way to ensure premarital virginity and marital faithfulness; moreover, it is believed to “reduce a woman's libido and therefore believed to help her resist extramarital sexual acts”³⁵¹ and for some communities it is “associated with cultural ideals of femininity and modesty, which include the notion that girls are clean and beautiful after removal of body parts that are considered unclean, unfeminine or male”³⁵².

Women are pushed and forced by sociocultural factors to submit themselves to excision, if they should refuse, they would be considered impure, they couldn't get married and they would be a cause of shame for their own families; as a consequence, their community and family would reject and marginalize them. That is the reason why it consists of a nearly unavoidable rite, that in some countries it is almost unquestioned and universally performed. The positions taken by women belonging to tribes and ethnicities that preserve FGM as sociocultural tradition, are various; some of them passively accept it and subsequently submit their daughters to the same practice, others try to rebel or ask for help. However, in recent years African feminist movements have mobilized against this practice, criticizing this tradition. Broadly speaking, international involvement in stopping this phenomenon has increased, also thanks to the issuing of the joint statement of WHO, UNICEF and UNFPA in 1997, meant to raise awareness on the medically dangerous consequences of female genital mutilations.³⁵³ African government themselves have tried to introduced laws and direct measures designed to stop and prohibit FGMs, but in vain, because of the strong popular opposition. In Egypt instead, female excision has been prohibited since 1958, but it has not helped in preventing this practice, since

³⁵⁰ Supra footnote 348.

³⁵¹ <http://www.who.int/mediacentre/factsheets/fs241/en/>

³⁵² Ibid.

³⁵³ BUSONI M., LAURENZI E., *Il corpo dei simboli*, Firenze, SEID, 2007.

according to WHO statistics, 97% of women in Egypt undergo a form of FGM. Furthermore, in 1994 the Minister of Health and Population introduced a decree for the medicalization of FGM, with the purpose of exercising public control over it and possibly limiting the dangerous consequences for young girls; but local and international associations started to mobilize against this provision, as it represented a way of legitimizing excisions.³⁵⁴ From the late 1990s, several statements and official declarations condemning FGM have been proclaimed by almost all African governments, medical and educational campaigns have been organized by the Inter African Committee, to sensitize the population on the danger and cruelty of FGM, some countries tried to medicalize it, or prohibit at least some forms of this practice, but as statistics showed, the number of mutilations did not decrease, a sign of the conflict between the national-formal level and the local-customary one.³⁵⁵

However, FGM is recognized as being an offence to women's fundamental rights (physical integrity, dignity, etc.) and as such to be a direct violation of humanitarian international law. Nowadays, many international legal instruments safeguard human rights and some of those, enshrine articles and dispositions that can be shown to stop female excision: The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the CEDAW Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child.

On the national level several countries have also backed legislative acts punishing and directly prohibiting FGM, such as the *Federal Prohibition of Female Genital Mutilation Act* adopted in the United States in 1995; the amendment of article 268, comma 3 in Canadian penal code in 1997, specifying that "aggravated assault" includes infibulation, excision and female genital mutilation; the *Prohibition of Female Circumcision Act* adopted by United Kingdom in 1985; the introduction of ad hoc laws punishing any practice of FGM in Sweden, Norway, Belgium, Spain and finally in Italy in 2006.³⁵⁶ The same legal commitment was enacted and endorsed also in several African countries. In Burkina Faso, Djibouti, Ghana, Central African Republic and Egypt FGM is legally prohibited and criminalized, in Sudan just infibulation is forbidden, in Tanzania only if practiced on children, in Nigeria many states prohibited FGM (Cross River, Ogun, Rivers, Bayelsa, Osun,

³⁵⁴ FACCHI. A., *I diritti nell'Europa multiculturale*, Milano, Laterza, 2001, pp.78-92.

³⁵⁵ Ibid.

³⁵⁶ Ibid., pp-88-89; BASILE F., *Società multiculturali, immigrazione e reati culturalmente motivati (comprese le mutilazioni genitali femminili)*, Riv. italiana di diritto e procedura penale, 2007, p.53.

Edo Abia and finally the Delta state), in some other nations only doctors cannot practice it.³⁵⁷ International commitment for the elimination of this brutal cultural practice has grown in recent years. Another measure proposed by some government, meaning to reduce and eliminate the cruellest forms of genital mutilation, was that of introducing an “alternative rite”, to preserve also cultural rights and the right to difference.

The proposal of this symbolic, *soft*, alternative rite, arose in several African countries (Sudan, Egypt, Kenya, Gambia) and in countries of immigration such as the Netherlands, the United States and Italy, where it was introduced by a Somali doctor in a medical centre of Florence. But this proposal was strongly criticized and rejected mainly from feminist movements, claiming that it would be a manner of legitimizing this female genital mutilation, that under no matter what circumstance or form, consists of a direct violation of human rights on women and children; besides, the “alternative rite” did not entirely prevent the practice of other, brutal forms of FGM.³⁵⁸ Moreover, Manfred Nowak, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, while asserting that any act of FGM amount to torture, expressed its concerns over the envisioned possibility of medicalization, stating that it “does not in any way make the practice more acceptable. Even in contexts [...] where public hospitals offer this “service”, it constitutes torture or ill-treatment. Also in cases where FGM is performed in private clinics and physicians carrying out the procedure are not being prosecuted, the State de facto consents to the practice and is therefore accountable.”³⁵⁹

Although many international treaties recognize and protect human rights of women and children, an international convention, directly criminalizing female genital mutilations does not exist yet. However, some regional treaties prohibiting FGM have been endorsed and adopted in recent years, such as the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa introduced in 2003, whose article 5 condemns all forms of harmful practices on women, including the “prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation,

³⁵⁷ DE VIDO S., *Culturally motivated crimes against women in a multicultural Europe, The case of criminalization of FGM in the 2011 CoE Istanbul Convention*, in ZAGATO L., VECCO M., (edited by), *Citizens of Europe, Culture e Diritti*, Venezia, edizioni Ca’ Foscari-Digital Publishing, 2015, p.105; <http://www.npwj.org/FGM/Status-african-legislations-FGM.html>

³⁵⁸ BUSONI M., LAURENZI E., *Il corpo dei simboli*, Firenze, SEID, 2007, pp.92-100; GHIZZI GOLA E., *Multiculturalismo e diritti delle donne, Il trattamento giuridico delle mutilazioni genitali femminili in Europa: casi giurisprudenziali e soluzioni normative*, Centro di documentazione su carcere, devianza e marginalità 2012, <http://www.altrodiritto.unifi.it/ricerche/migranti/ghizzi/cap4.htm>.

³⁵⁹ Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, 15 January 2008, A/HRC/7/3.

scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them”³⁶⁰, and the Istanbul Convention on preventing and combating violence against women and domestic violence, adopted in 2011 by the Council of Europe.³⁶¹

The Istanbul Convention represents an important instrument to the prevention and elimination of violence against women under all its forms, ratified by 27 countries and entered into force in August 2014. Article 3 provides the general definitions of violence against women and domestic violence, which are relevant to the scope of this paragraph. Violence against women is intended hereby as “all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.³⁶² Domestic violence instead, is understood as “all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim”.³⁶³ Now that these definitions have been presented, it should be clear why they are so relevant within the FGM discourse; indeed, female genital mutilations consist of sociocultural practices that most of the time are perpetrated and forced by family members, under the threat of being physically, socially and economically isolated and marginalized and cause psychological damage other than physical and sexual injuries.

Furthermore, the convention deals directly with FGM. As a matter of fact, article 38 states: “Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised: a. excising, infibulating or performing any other mutilation to the whole or any part of a woman’s labia majora, labia minora or clitoris; b. coercing or procuring a woman to undergo any of the acts listed in point a.; c. inciting, coercing or procuring a girl to undergo any of the acts listed in point”.³⁶⁴ This provision represents an important step forward for combating this sociocultural, violent practice;

³⁶⁰ Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, 2003, art.5, par.B).

³⁶¹ DE VIDO S., *Culturally motivated crimes against women in a multicultural Europe, The case of criminalization of FGM in the 2011 CoE Istanbul Convention*, in ZAGATO L., VECCO M., (edited by), *Citizens of Europe, Culture e Diritti*, Venezia, edizioni Ca’ Foscari-Digital Publishing, 2015, pp.96-98.

³⁶² Convention on preventing and combating violence against women and domestic violence, Council of Europe, Istanbul, 2011, art.3, par.a).

³⁶³ Ibid. art.3, par.b).

³⁶⁴ Ibid., art. 38.

besides, and most importantly, this document enshrines also the answer to a significant question that concerns the topic of this dissertation : Can cultural defence be invoked, as it is in other cases of cultural motivated crimes, when it comes to criminalizing female genital mutilations? The answer is provided in article 45, affirming that “Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called “honour” shall not be regarded as justification for such acts”.³⁶⁵

Therefore, the Istanbul Convention gives a strict and undisputable response to this type of cultural offence: cultures, customs, traditions or religions cannot serve as justification for acts of violence against women, which female genital mutilation is. This last statement is once again asserting that, despite cultural rights being considered fundamental human rights, they cannot infringe or be used against any other fundamental human rights and that is exactly the reason why cultural defence should not intervene in the protection of the perpetrators of those crimes. The CESCR committee as well took a clear position when it came to specify the violations of the right to take part cultural life, stating that “harmful practices, including those attributed to customs and traditions, such as female genital mutilation and allegations of the practice of witchcraft, are barriers to the full exercise by the affected persons of the right enshrined in article 15, paragraph 1 (a)”³⁶⁶

Finally, it seems necessary to discuss another practice related to cultural norms and social environments and that can be partly associated with female genital mutilation. Recent studies have observed a relevant and dramatic increase of female genital cosmetic surgery in Western countries, a modern type of cosmetic surgery designed to alter or improve the appearance or functions of the female genital parts³⁶⁷. Such practice can be said to share common elements with female genital mutilation, as they are both non-therapeutic body modifications, resulting from the socio-cultural pressure exerted on women. As a matter of fact, female genital cosmetic surgery is seen as an attempt by women and girls to conform with the standards of beauty and physical stereotypes of modern western culture, obsessed with esthetical appearance. In western countries indeed, the beauty industry and mainstream media exert an enormous influence,

³⁶⁵ Ibid., art.42. par.1).

³⁶⁶ CESCR, General Comment 21, par.15.

³⁶⁷ GOODMAN M. P., Female Cosmetic Genital Surgery, in *Obstetrics & Gynecology Journal*, January 2009, Vol. 113, Issue 1, pp. 154-159.

especially on the youngest, female stratum of society, on their physical appearance based on rigid standards and the value of a woman according to her youthfulness and physical beauty, principles certainly tied to entrenching socio-cultural stereotypes.³⁶⁸ Nonetheless, some key differences can be identified between the two practices; especially the matter of consent the consent. In fact, female genital cosmetic surgery consists of an operation that women “voluntary” undergo, despite being psychologically suggested by the social pressure exerted on their physical appearance. On the other hand, FGMs are most of the time compulsory, as they concern girls that, either because too young to express their consent, or due to the pressure of the family or ethnic community they belong to, do not directly object to such practice. In fact, as the explanatory report to the Istanbul Convention states “this practice [...] is usually performed without the consent of the victim”³⁶⁹. As far as those women who voluntarily undergo FGMs are concerned, it must be considered that to decide otherwise could cause social exclusion, loss of family support and loss of economic livelihood and so these choices still classify as resulting from socio-cultural pressure.³⁷⁰

Therefore, if both practices can be ascribed as results of, or motivated by social and cultural pressures and stereotypes, what substantial difference can be found to discern them? Why is it imperative to criminalize one practice, while the other similar practice is tolerated and even fostered by the western beauty Industry? Western women might argue that limiting cosmetic surgery would mean limiting their freedom of choice, yet the same pretext might be used by an African woman that voluntarily chooses to undergo FGM. Does it exist a right or a wrong perspective through which judge and prefer some cultural norms rather than others? Western perspective might be seen as the most progressive one, which actually enacted and shaped human rights and women rights too; but precisely because this kind of rights were the product of the western world, a controversial and still male-dominated society, where an act of violence perpetrated by one of its members is more likely to be seen as an exceptional behaviour instead of a cultural practice, can this approach be considered flawed and its attempt to impose its

³⁶⁸ KELLY B. FOSTER C., *Should female genital cosmetic surgery and genital piercing be regarded ethically and legally as female genital mutilation?* In *International Journal of Obstetrics and Gynaecology*, 25 January 2012, pp.389-392.

³⁶⁹ Council of Europe, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, Istanbul, 11 May 2011, par.198.

³⁷⁰ *Female genital mutilation and cosmetic genital surgery: Do they have anything in common?*, Awid, Women’s Rights, 10 February 2011, <https://www.awid.org/news-and-analysis/female-genital-mutilation-and-cosmetic-genital-surgery-do-they-have-anything>.

own culture and set of values and principles on other “underdeveloped” cultures as an oppressive approach that fails to accommodate differences?³⁷¹

There is no universally right answers to such questions, for it is clear that different cultures may share diverse points of views even on the same subject matter, the conceptions of what is right and what is wrong themselves diverge throughout the world since “cultural relativists might accept a right with all its components and with its general interpretation but reject the classification of a particular cultural practice as a violation of that right”.³⁷² The following paragraph will try to better clarify such complex issue by examining the debate between the feminist theory and cultural relativism.

3. Multiculturalism, Feminism and Women’s Rights

As it has been already pointed out, before becoming a political and juridical process, multiculturalism was born as a social movement triggered by minorities and marginalized communities of homosexuals, lesbians and Afro-Americans, who claimed their recognition and political representation within society, under an egalitarian perspective. Therefore, multiculturalism rests essentially on the value of equality granted to all human beings and condemns all forms of intolerance and racism in favour of the respect and flourishing of cultural diversity. From this standpoint, feminism and multiculturalism seem to be allied, since both demand the recognition, protection, inclusion and valorisation of collective identities against the dominant cultures, male dominant group for feminists and the political and economic dominant group for multiculturalists.

They also share a common critical view of the liberal universalistic theory, strictly opposing blind universalism and the perspective of the man as universally shaped from the dominant group (male, white, western, wealthy), demanding the recognition of special rights and human rights as they should be conceived (granted to all human beings) and claiming cultural and sexual pluralism. However, on a closer look, it appears difficult to reconcile equality with multiculturalism. As a matter of fact, not all cultures consider equal rights and respect as principles that should be granted to all human beings and

³⁷¹ FORSTER C., JIVA V., *What would Gandhi Say? Reconciling Universalism, Cultural Relativism and Feminism Through Women’s Use of CEDAW*, in Singapore Year Book of International Law, 9 Sybil, 2005, pp.103-123.

³⁷² BREMS EVA, *Enimies or Allies? Feminism and Cultural Relativism as Dissent voices in Human Rights Discourse*, in Human Rights Quarterly, vol.19, 1997, p.144.

more importantly, women do not enjoy at all the same civil, political and economic status in all countries, cultures and ethnic groups.³⁷³ This is the point in which the multicultural discourse and the feminist discourse clash. We have asserted that discrimination and violence exist both de jure and de facto all over the world, but “In some states, women are inferior to men as a matter of law; they cannot inherit property, cannot obtain a divorce, cannot hold public office, cannot receive the same education as men, are forbidden to enter certain professions, are fined if they wear “improper” clothing, and can legally be beaten or raped by their husbands [...]they face mockery and harassment if they enter “male” professions, and they face extreme social pressures to conform to traditional and confining conceptions of proper female roles”.³⁷⁴ The conflict between multiculturalism and feminism is thus set off in a framework of a wider dichotomy concerning people’s rights: universalism and particularism (individual rights and collective rights).³⁷⁵

As Facchi and Okin assert, gender discrimination and female mistreatment are problems that afflict any class, society, country or culture; but what for some cultures or polities is classified as discriminatory or abusive, for some others is normal behaviour or proper cultural norm.³⁷⁶ Claiming for the recognition of collective rights of minority groups, multiculturalism does not take into account individual’s recognition, hence not considering private attitudes and internal cultural codes, especially those of third world cultures. But before facing the main argument of this paragraph, it is necessary to specify what is hereby intended with the word feminism: “the belief that women should not be disadvantaged by their sex, that they should be recognized as having human dignity equal to that of men, and that they should have the opportunity to live as fulfilling and as freely chosen lives as men can”.³⁷⁷

Susan Okin was the first exponent of the feminist discourse to suggest the question whether or not multiculturalism damages feminism. Women are frequently the object of discriminatory behaviour and mistreatment and sometimes they endure a subordinated position that is formally established by cultural or religious norms. As one may notice, the most controversial and serious normative conflicts, arising from religious, cultural and

³⁷³ FACCHI. A., *I diritti nell’Europa multiculturale*, Milano, Laterza, 2001, p.132.

³⁷⁴ BROOKS E. R., *Feminism and International Law: An Opportunity for Transformation*, in *Yale Journal of Law and Feminism*, Vol.14, Issue 2, 2002, p.354-355.

³⁷⁵ Ibid.

³⁷⁶ Ibid.; OKIN S. M., NUSSBAUM M. C., COHEN J., HOWARD M., *Is Multiculturalism Bad for Women?*, Princeton, Princeton University press, 1999, pp.3-21.

³⁷⁷ OKIN S. M., NUSSBAUM M. C., COHEN J., HOWARD M., *Is Multiculturalism Bad for Women?*, Princeton, Princeton University press, 1999, p.10.

juridical diversities in Western countries, affect principally women. The protection of cultural identity and cultural diversity often foster the recognition and legitimization of cultural codes that assert the subordinated status of women and of practices of violence and abuse against women, such as uxoricides and FGM.³⁷⁸

Feminism essentially started as a western movement, but after the increase of mass migration flows from the third world towards western countries and the settlement of immigrant communities in such countries, western feminism was shown to be inadequate in response to the needs, practices and values of immigrant women belonging to diverse cultures. In some cases, women that are subjected to what for the western culture is considered to be oppressive and discriminatory behaviour, do not consider themselves as victims of discrimination or abuse; on the contrary, they endorse and defend such cultural norms and practice. For instance, in the case of polygamy and the chador, some Muslim women consider these practices as their rights. Moreover, it is important to remark that a practice as FGM, which it has been defined as a way for men to exert control on a woman's body and sexuality, is most of the times accomplished by women on other women.³⁷⁹ As a matter of fact, immigrant women enjoy sometimes less freedom in countries of destination than in their countries of origin; that is because traditions and customs tend to freeze in a foreign country and immigrant communities and families close in on themselves, women's economical, psychological and social dependence on men stiffened, increasing the power and control of male figures on them.

There are three areas of difference and possible conflict that arise when it comes to immigrant women: woman vs man, foreign woman vs autochthonous woman and foreign woman vs western woman. Those dimensions are difficult to face all together, especially for the fact that multiculturalism looks for the recognition of collective rights, while feminism demands the adoption of an individualistic perspective for the protection and promotion of particular, special rights. Therefore, it becomes hard to reconcile women's rights with cultural rights, since, as it is for culture, different visions of feminism exist. The Canadian philosopher Will Kymlicka, who was one of the respondents to comment on the work of Susan Moller Okin on the conflict between feminism and multiculturalism, distinguished two types of group rights for ethnocultural groups: internal restrictions and external protections. Internal restrictions concern all those actions in which the aim is "to

³⁷⁸ Ibid.; SONG S., *Justice, Gender, and the Politics of Multiculturalism*, Cambridge, Cambridge University Press, 2007, pp.41-68.

³⁷⁹ FACCHI. A., *I diritti nell'Europa multiculturale*, Milano, Laterza, 2001, p.136.

restrict the ability of individuals within the group (particularly women) to question, revise or abandon traditional cultural roles and practices".³⁸⁰ External protection instead involves the recognition and formation of rights such as "language rights, guaranteed political representation, funding of ethnic media, land claims, compensation for historical injustice, or the regional devolution of power".³⁸¹ Kymlicka suggests that internal restrictions are condemned and refused also by the liberal theory, since they create injustice and violate the rights of individuals within a group, but it is exactly in the context of internal customs, norms and traditions that the critics of Okin take shape. The subordination and violence against women is often informal and private, it happens within the house walls, in the place that represents the core of culture, where ethnic customs and beliefs are preserved and handed down. Okin mentioned several examples of culturally motivated crimes against women, proving that violence and mistreatments were perpetrated by family members or with the consent of family members, such as the marriage by capture by Hmong men, the uxoricides by Asian or Middle-Eastern men and the female genital mutilations. In all such cases, as we have already seen, culture plays an important role in determining the actions of the people involved and on the other hand, culture serves also as a means of justification or an exonerating factor, that might drop the charges or reduce the sentences when it comes to taking the crime to trial.³⁸²

From this standpoint, it might be observed once again, that immigrant women sometimes enjoy less protection and freedom in countries of destination than in those of origin. Culture is thus used to justify atrocities and brutal actions of violence against women; in this regard, cultural defence violates human rights of women and young girls.³⁸³ Then, why would not the recognition of collective rights of minorities clash with feminism? Granting collective rights to minorities is not the obvious solution, rather it risks worsening the status of certain women belonging to strongly paternalistic cultures. Gender and culture are indeed deeply tied, some minority groups are structured on gender differences, according to different levels of power and privileges between men and women. Therefore, as Kymlicka points out, group rights can be accepted only if promoting equality and justice within its group.

³⁸⁰ KYMLICKA W., *Liberal Complacencies*, in OKIN S. M., NUSSBAUM M. C., COHEN J., HOWARD M., *Is Multiculturalism Bad for Women?*, Princeton, Princeton University press, 1999, p.31.

³⁸¹ Ibid.

³⁸² OKIN S. M., NUSSBAUM M. C., COHEN J., HOWARD M., *Is Multiculturalism Bad for Women?*, Princeton, Princeton University press, 1999, p.19.

³⁸³ HONIG B., *"My Culture Made Me Do It"*, in OKIN S. M., NUSSBAUM M. C., COHEN J., HOWARD M., *Is Multiculturalism Bad for Women?*, Princeton, Princeton University press, 1999, pp. 35-39.

The limit for cultural rights remains the same: the violation of basic human rights.³⁸⁴ This sort of theoretical conflict emerges because western liberal democracies are committed to the value of universal equality, but not all cultures believe that human beings are equal regardless of race, class, gender and religion. Granting special accommodation in the name of the recognition of minorities could mean disfavoured or infringing the rights of the weakest members of the community. Differentiated regimes are needed to face this dilemma.

Nonetheless, it is also erroneous to presume that minority culture represents the only threat to women rights and security. Western women might be considered far more independent, emancipated and enjoying a greater degree of freedom of choice, but as it has been already asserted discrimination and violence is not a mere product of third world cultures. The reason why minority cultures are believed to be more sexist and violent is sometimes due to the fact that when an act of violence against women is perpetrated by a western person, he is mostly thought as a deviant and exceptional behaviour by some members of an already modern society, rather than a cultural component. On the contrary, culture is invoked as a determining cause and a characterizing feature for forms of violence committed by members of third world and immigrant communities, contributing to the strengthening the western stereotypical views of other cultures.

From this point of view: “we identify sexual violence in immigrants of color and third world communities as cultural, while failing to recognize the cultural aspects of sexual violence affecting mainstream white women. This is related to the general failure to look at the behaviour of white people as cultural, while always ascribing the label of culture to the behaviour of minority groups”.³⁸⁵ Western cultures are indeed rarely accused of violating women’s rights, rather they are seen as a benchmark of feminism and ambassadors of the progressive and liberal vision of women. Under many aspects this assumption is true, but the belief that fundamentalism and women’s sexist cultures are the only source of discriminatory attitudes towards women risks hindering and obscuring the forms of violence committed in the most progressive and liberal western states. For instance, USA reservations to the Convention on the Elimination of All Forms

³⁸⁴ OKIN S. M., NUSSBAUM M. C., COHEN J., HOWARD M., *Is Multiculturalism Bad for Women?*, Princeton, Princeton University press, 1999, p.11.

³⁸⁵ VOLPP L., *Feminism versus Multiculturalism*, in *Columbia Law Review*, Vol. 101, No.5, June 2001, p.1189.

of Discrimination Against Women, based on the US Constitution, were eclipsed by Muslim countries' reservations on the basis of Islamic law.³⁸⁶

In conclusion, despite several critics moved on Okin's work, her essay pinpoints the controversial issues at stake when multiculturalism and feminism clash. However, the desirable solution that she outlines appears to be rather simplistic and in certain respects more harmful for immigrant women. Okin asserts indeed that a possible and preferable way out of discrimination and violence is to abandon one's own oppressive culture.³⁸⁷ But for some women this would result in the loss of any form of economic support and a marginalization from the dominant culture; also the renouncement to one's own culture for some people means losing one's own identity and roots, since traditions, customs and cultural codes are not just mere "accessories" to human life, but as many anthropologists have asserted, they are part of the nature and existence of human beings.

Multiculturalism and Feminism could instead find an alternative solution by working as sides of the same coin, allied once again, to overcome the conflicting dichotomy of universalism and particularism, women's rights and cultural rights and to find a compromise within and between cultures, so that oppressive, harmful, useless and discriminatory practices can be overcome and abandoned. In the clash between cultural relativism and feminist theory, parallels and similarities can indeed be posited. They both consist of strong movements advancing similar claims especially within the critic to human rights, as their assertions classify the liberal human rights theory as a western product of a dominant male group, thus not considering the concerns of women and non-western cultures. Moreover, they seek the same purpose, a "change in the human rights system so as to incorporate either a gender perspective or a perspective of cultural diversity"³⁸⁸, making such system more real and concrete, since human rights should be the rights of all human beings, regardless of gender and culture; and finally they both argue that human rights should however not be gender or culture blind, since they would end up favouring the same classes and categories.

In conclusion, multiculturalism and feminism are more allied than antagonists, their closer convergence has not necessarily to be translated into a challenge or a threat, but rather an opportunity. Diverse cultures do not always clash, but sometimes learn from

³⁸⁶ Ibid., pp.1212-1213.

³⁸⁷ Supra footnote 384.

³⁸⁸ BREMS EVA, *Enemies or Allies? Feminism and Cultural Relativism as Dissent voices in Human Rights Discourse*, in *Human Rights Quarterly*, vol.19, 1997, p.154.

each other, combine, endorse the best principles and share the healthiest values. The same interpretation may be adopted by the feminist and multicultural theories: women from different cultural background, enjoying different degree of freedom, respect and discrimination, may gather and support each other to enhance their status and fight for their rights throughout the world. For the same principle of *historia magistra vitae*, a different culture may enshrine new and better paradigms to achieve and reveal the structural flaws of other cultures.

4. State Practice: The Rights of Immigrants and Culturally Motivated Crimes in the Italian Legislation

Italy is one of the European countries that has been mostly affected by recent migration flows from the Middle East and several African Countries. The fact that Italy represents one of the main and nearest landing docks to the European continent, makes it the first receptor of migratory waves through the Mediterranean. According to the ISTAT (Istituto Nazionale di Statistica) statistics, 625 thousand immigrants arrived in Italy during the last six years, 118.914 new immigrants disembarked on the Italian southern coasts just in 2017. Most of them are asylum seekers in need of humanitarian protection, in fact resident permits for humanitarian reasons have reached an historical peak of 77.927 in 2016, demanded mostly by people from Nigeria, Bangladesh and Gambia, whereas the four main places of origin declared at the moment of disembarkation are Nigeria, Guinea, Cote d'Ivoire and Bangladesh.³⁸⁹

The so-called refugee crisis, besides troubling European governments that are evidently unprepared to face such a humanitarian emergency, is still claiming victims in the Mediterranean, where people smugglers set up multiple sea routes to take illegal immigrants packed in overcrowded boats, to Europe. According to the IOM, the International Organization for Migration, the number of immigrants who have died in shipwrecks while trying to cross the Mediterranean since 2000, are estimated to be about 22.000. Moreover, as far as Italian institutions are concerned, migrants' situation whether and when they reach one of the main Italian harbours (Augusta, Catania, Lampedusa) is not well managed. As a matter of fact, Italy is classified among those countries whose model of integration rests on the so-called *non-model*, which stands for a lack of a

³⁸⁹ ISTAT, archivio immigrazione, <https://www.istat.it/it/archivio/immigrati>.

systematic organization of immigration.³⁹⁰ This *non-model* is proven by the fact that immigrants are hardly accepted and integrated into the Italian social environment; many, if not all of the recent immigrants are refugee seekers that apply for asylum, whereas the legal ones, coming from other parts of the world and Europe (Morocco, Albania, China), despite enjoying all civil rights as possessors of resident permits, are not granted any political rights and the acquisition of citizenship for them, represent a long and complicated path. Indeed, in Italy the *ius sanguinis* principle (citizenship derives from that of parents and ancestors, acquired by naturalization or by marriage) has been in force since law n°91 of 1992, initially meant for the offspring of the Italians living abroad; but recently, the Italian government has seriously considered the eventuality of institutionalizing the *ius soli* principle too, in combination with another concept, the *ius culturae*. The *ius soli* principle in Italy, has a longer history than one may think.

The first draft law of the *ius soli* was proposed in 1999 by the minister Livia Turco, but the attempt failed. In 2006 another reform addressed to modify the means of acquisition of citizenship was proposed by the Minister Amato, yet, due to the strong obstruction of opposition parties, the reform had the same fate of the former.³⁹¹ Then again, other attempts followed in 2009 and 2012, but the innovative aspect of the last legislative draft consists exactly of the introduction *ius culturae*, according to which foreign children moved and settled in Italy before reaching the twelfth year of age, and having regularly attended an educational process within the national territory for at least 5 years, can acquire the Italian citizenship.³⁹²

Nevertheless, the legislative proposal 2092 concerning the *ius soli* principle, after being approved by the Chamber, has remained in a standstill in the Senate since 2015 and it is not likely to take any step forward, at least in the near future. The Italian Constitution though, was not initially meant and addressed to cope with the demands and challenges of multiculturalism. The basis upon which the state and the Constitution were laid down were essentially homogeneous, ethnically and religiously speaking, notwithstanding the fact that diverse cultures already coexisted. Therefore, apart from a few dispositions addressed to linguistic minorities, it was not considered necessary to establish policies and provisions for the protection of cultural diversity. The multicultural discourse and

³⁹⁰ *Infra* par. 1.1.1, p.13.

³⁹¹ CAMILLI A., *Ius soli, ius sanguinis, ius culturae : tutto sulla riforma della cittadinanza*, in *Internazionale*, 20 Ottobre 2017.

³⁹² *Ibid.*; see also Report of the Senato della Repubblica, *Una fattispecie nuova di acquisto della cittadinanza italiana, a seguito di percorso formativo (ius culturae)*, <https://www.senato.it/>

real need of a multicultural polity is thus a relatively recent debate for this country, result of the latest migratory flows that made cultural pluralism socially visible.³⁹³

Although multiculturalism was not one of the first concerns of Italy when established, the Italian constitution is anyhow devoted to the defence, promotion and valorisation of social and political pluralism, expressed by articles 8 and 19 dedicated to religious pluralism and freedom of worship, articles 3, 21 and 33, which enshrine the different forms of expression of cultural pluralism and freedom of thought, article 114 concerning institutional pluralism, and article 6 that is about linguistic minorities.³⁹⁴

Nonetheless, in the view of the nature of the constitution, the only way to guarantee a possible coexistence and to allow a certain degree of integration, is by means of a pragmatic and procedural process. When new immigrants began to land in the Italian territory and to advance claims of recognition and integration into the social and political national environment, Italian institutions gradually provided some specific accommodation to meet immigrants' demands, granting more and more attention to cultural rights.³⁹⁵ For instance, law n° 13 of 1995 envisaged the state's commitment to granting migrant workers and their families freedom of worship and the enjoyment of social and civil rights³⁹⁶, and law n°40 of 1998, which regulates immigration and concerns norms about foreigners' conditions in the national territory, affirms that public provisions must promote cultural and social integration of foreigners, respecting thus cultural diversity and particular identities of people, specifying also that cultural and linguistic differences are to be considered as relevant and fundamental aspects of reciprocal respect, exchange and tolerance. From that time, the state's national and regional, normative interventions aimed at protecting minorities, cultural and religious values, promoting social cohesion and fighting racial and ethnic discrimination, gradually increased and were implemented.

As a matter of fact, despite not being meant to meet the demands of a multicultural society, the Italian Constitution is essentially "open" to new pluralistic dimensions, more prone to recognize and valorise differences, whether they are immediately evident or not.

³⁹³ GROSSO E., *Multiculturalismo e Diritti Fondamentali nella Costituzione Italiana*, in BERNARDI A., *Multiculturalismo, Diritti Umani e pena*, Giuffrè Editore, 2006, p.116.

³⁹⁴ Costituzione della Repubblica Italiana, Assemblea Costituente, Dicembre 1947.

³⁹⁵ Supra footnote 393, p.120.

³⁹⁶ This law represents the Italian instrument of ratification of the European Convention on the Legal Status of Migrant Workers of 1977, through which Italy became one of the contracting parties of the Convention.

The Constitution indeed presupposes some “neutrality gaps”, as the application of its core fundamental rights is entrusted to the judges, thus creating the possibility of extending and adapting constitutional privileges and guarantees to new realities and situations.³⁹⁷ Nevertheless, the issue of the protection of cultural specificities, arises from the fact that, compared to the diversities already accounted in the Constitution, when considering an immigrant foreigner, a multiplicity of distinct characteristics and differences are involved (religion, ethnicity, customs, language) and the possibility of respecting and preserving them is harder to implement.³⁹⁸

In this regard, simplifying the acquisition of citizenship for foreigners may not be the most successful and evident answer; indeed, citizenship does not directly foster integration, nor offers it some specific rights meant at recognizing cultural diversity. On the contrary, political participation of minorities could better and positively influence their integration. It is precisely from the recognition of the rights of political participation (that could derive from the extension, made by a legislator of the provisions of article 48, granted as “legislative rights” to foreigners) that the most beneficial effects could come in terms of solving potential intercultural conflicts.³⁹⁹ Therefore, as we have already pointed out in the preceding paragraphs, the problem of inclusion and integration is not resolvable through an assimilationist approach. Citizenship presupposes an assertion and acceptance of given principles that sometimes are not endorsed, whereas political participation represents an instrument that enables exponents of cultural minorities to give relevance and voice to their specific issues, contributing to the establishment of balance among different entities, in a framework of social pluralism.⁴⁰⁰

Cultural pluralism hence, means also normative, juridical and political pluralism. As it has been already affirmed, clashes among different civilizations within a multicultural society are basically inevitable. Furthermore, another insidious conflict emerging when distinct ethnic groups coexist in the same territory is the one involving individual rights and collective rights. The latter has been affecting Italy as well, examples of culturally motivated crimes are indeed present in the Italian juridical experience, one of them is female genital mutilation.

³⁹⁷ Supra footnote 393.

³⁹⁸ Ibid., pp.126-127.

³⁹⁹ Ibid., p.128.

⁴⁰⁰ GROSSO E., *Multiculturalismo e Diritti Fondamentali nella Costituzione Italiana*, in BERNARDI A., *Multiculturalismo, Diritti Umani e pena*, Giuffrè Editore, 2006, p.129.

Until a few years ago, there was not any official regulation on FGMs in Italy. Given the lack of a crime and specific legal provisions, female genital mutilations were prosecuted pursuant to article 5 of the civil code, articles 583 and 582 of the penal code (criminalizing serious injuries, abuses and mistreatments on minors), article 32 of the Constitution (on the right to health), article 330 of the civil code (on the revocation of parental rights) and article 333 of the civil code (on the prejudicial conduct of a parent towards his children).⁴⁰¹ In Italy, the issue of FGMs emerged in 1997, when an Italian woman accused her Egyptian former husband for having submitted their two children to circumcision and infibulation during a holiday trip to his parents. When returned, the mother, became suspicious with the bad health of the girl (with reported haemorrhage, infections and fever), realized what had happened and reported the fact to the authorities. This first trial for a FGM case in Italy, ended with a plea bargain, mitigated by the arguments of cultural defence and resulted in two years of detention for the Egyptian man, for having violated articles 582, 583, 585 of the Italian penal code.⁴⁰²

Several similar cases were reported from that year, all of them involving traditional and customary practices inflicted on their children by foreign parents. The regulation of FGMs underwent a major change in 2006, when law n° 7, introducing article 583 bis, was proclaimed. This act established the crime of female genital mutilations, defining which actions are intended as FGMs (infibulation, excision, clitoridectomy), and settling the penalty and conviction.⁴⁰³

Moreover, law n° 7 *concerning prevention and prohibition female genital mutilations*, besides instituting article 583 bis, introduced also several dispositions and programs aimed at raising awareness of the dangers of these practices, such as informative campaigns addressed at immigrants, the involvement of non-profit organizations, voluntary associations and health facilities to develop socio-cultural integration, the promotion of informative courses for infibulated women, the introduction of programs of awareness of women's and children's rights in public schools, the institution of a hotline and the establishment of programs of international cooperation with the countries most

⁴⁰¹ DI PIETRO F., *Le Norme sul Divieto delle Pratiche di Mutilazioni Genitali Femminili*, <https://www.diritto.it>.

⁴⁰² Tribunale di Milano, Sentenza 26 November 1999, Circoncisione e Infibulazione: sussistenza del reato di lesioni personali volontarie, in *Diritto, Immigrazione, Cittadinanza*, Franco Angeli, 2000, n.2, p.148.

⁴⁰³ Italian Penal Code, art.583 bis.; BASILE F., *Il reato di "pratiche di mutilazione degli organi genitali femminili" alla prova della giurisprudenza: un commento alla prima (e finora unica) applicazione giurisprudenziale dell'art. 583 bis c.p.*, rivista telematica Stato, Chiese e pluralismo confessionale, n°24, Luglio 2013.

affected by these practices, despite the fact that they are prohibited by the national law.⁴⁰⁴ It is not yet clear if law n°7 has been successful in real reduction or eradication of this crime, since as Basile asserted, it is more likely that FGMs are still being clandestinely perpetrated, within the silence and complicity of the immigrant community, which are still tied to tradition; nonetheless, the informative tools, the means of prevention and awareness-raising campaigns instituted, might surely contribute to the emancipation and integration of those directly concerned: women and young girls. Realizing and acknowledging that women and young girls are granted and ensured some specific rights, human rights, is a very powerful tool in eradicating this type of submissive practices and subordination of women. As a matter of fact, more than legislation, or a single act of violence, what needs to mutate is the general perspective and gender stereotype associated with woman, on both sides, male and female.⁴⁰⁵

However, as far as the contemporary refugee crisis is concerned, despite being the country most affected by migratory flows, Italy is not retained as role model country in managing the multiple arrivals from the humanitarian crisis. On the contrary, Italy has been accused more than once of violating humanitarian norms. The country was twice condemned by the European Court of Human Rights for the violation of article 3 (prohibition of torture), article 4 protocol 4 (prohibition of collective expulsion of aliens), article 5 paragraph 1(right to liberty and security) and article 13 (right to an effective remedy)⁴⁰⁶ of the European Convention on Human Rights in the specific case of *Hirsi Jamaa and others vs. Italy*, dated back to 2009, when 24 Somali and Eritrean people were *refouled*⁴⁰⁷ to Libya by Italian authorities, in the case *Khlaifia and others vs. Italy*, concerning the repatriation in 2011 of three Tunisian citizens, and in a more recent case of 40 Sudanese men, who were stopped in Ventimiglia, at the Italian border and forcibly repatriated by the Italian government.⁴⁰⁸

⁴⁰⁴ Law 7/2006, Disposizioni concernenti la prevenzione e il divieto delle pratiche di mutilazione genitale femminile, 9 January 2006.

⁴⁰⁵ BASILE F., *Il reato di "pratiche di mutilazione degli organi genitali femminili" alla prova della giurisprudenza: un commento alla prima (e finora unica) applicazione giurisprudenziale dell'art. 583 bis c.p.*, rivista telematica Stato, Chiese e pluralismo confessionale, n°24, Luglio 2013, pp.20-21.

⁴⁰⁶ European Convention on Human Rights, Rome, 4 November 1950.

⁴⁰⁷ The non-refoulement principle is also defined by article 33 of the Geneva Convention related to the Status of Refugee, which cites "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

⁴⁰⁸ ZANDONINI G., *Migrazioni, l'Italia torna di fronte alla Corte Europea per i Diritti Umani*, La Repubblica, 17 February 2017.

Notwithstanding the reference to the several agreements concluded by Italy with Lybia, Sudan, Tunisia in the context of the management of the refugee's crisis, the Italian authorities have been already convicted by the ECHR for their conduct, evidence of the inadequacy of the measures adopted to cope with the emergency and the evident inefficiency of cooperation policies among the countries affected.

To sum up, the theories classifying the Italian model of integration as a non-model have proven to be correct. The state's method and measures applied to deal with the challenges of recent immigration and emigration trends⁴⁰⁹ are insufficient and sometimes non-existent, the key example is the deadlocked situation in which the *ius soli* reform has been standing for two years; integration policies are thus weak and confined in the sphere of economic migrants and they seem to retrace a universalistic model that has already been proven unsuccessful and discredited.

⁴⁰⁹ As a matter of fact, Italy is currently affected by strong and increasing emigration flows, interesting especially the youngest part of its population.

CHAPTER V

CHALLENGES TO MULTICULTURALISM IN CONTEMPORARY SOCIETIES

Western societies are currently experiencing multiple challenging phenomenon, namely mass migration from African and Middle Eastern states, an increase of Islamic terrorism, a growth of populist and racist trends and movements that are gaining support among public opinion and several political and institutional changes questioning the validity of the political, economic and social system. Such events are somehow correlated to globalization and multiculturalism. Some commentators claim that such challenges are the unexpected results and negative drawbacks of increased degrees of multi-ethnicity and cultural pluralism, some others believe that these negative backlashes and events are instead damaging the otherwise peaceful, globalized and multicultural western environment. The purpose of this last chapter is therefore to investigate on the recent phenomenon troubling contemporary societies, in order to draw the possible causes of the alleged failure of multiculturalism, or to assert if multiculturalism has not failed.

1. The growing phenomenon of migration flows in Europe

Immigration in Europe or any other part of the world is a phenomenon that has always caused political, economic and social instability within the countries affected. Urban conflicts, stemming from the clash between the dominant groups and minorities, are not some unexpected new events for western societies, on the contrary, history teaches that this kind of unrests is part of an almost inevitable process when newly arrived immigrants begin to settle into their own communities, characterized by evident cultural diversity. The collective global blindness towards the violent consequences of a weak or even inexistent integration has often been underestimated or translated into a simplistic racial fault in many parts of the world. The United States has experienced suburban riots in their major cities since the 1980s: in Miami (1980,1982,1984, 1989), in New York (Harlem in1990 and Brooklyn in 1991), in Washington D.C. (Mount Pleasant in1991), Los Angeles (1992) and New Orleans (2005).⁴¹⁰ In the American territory, Asian and Hispanic immigrants have grown in number over time, adding to the Afro-American autochthonous population but within a context of serious social exclusion, confined in

⁴¹⁰ MELOTTI U., *Le Banlieues, Immigrazione e conflitti urbani in Europa*, Roma, Meltemi, 2007, p.32.

different *ghettos* of the main cities. Ethnic riots were the result of conditions of marginalization and social and urban degradation that afflicted (and is still partly afflicting) the unprivileged immigrants' communities in those babel multiracial and multi-ethnic cities.

In the same way, European countries were not free from similar socio-cultural clashes. France, Germany and Great Britain, the countries most affected by migration flows in the past century, have experienced similar internal ethnic conflicts, echoing as an alarm bell against multi-exclusionary social policies. France has been the target of internal ethnic riots since the 1980s in its major cities, from Paris, to Lyon and Marseille, where marginalized people of the *banlieues* violently rose up against the severe condition of social deprivation: low levels of scalarization, unemployment, social exclusion and inadequate housing conditions.⁴¹¹

Those events began to raise the public awareness on the situation in which the *banlieues* (defined also as the districts of exile or segregation) inhabitants were living. Then again, in 2005 the so-called intifada of the *banlieues* broke out in the Paris suburbs; an uprising, insurrection, riot, "invasion verticale des barbares" according to some French media, whose main protagonists were the young immigrants of second or third generation, coming from the North-African former colonies, the Maghribs as French people called them, or *beurs* (arabes) as they called themselves in verlan language, followed by the *blacks* from the Sub-Saharan Africa.⁴¹² The riot lasted over a month with heavy consequences and the fierce reaction of many politicians: the sitting president Chirac ascribed it to a crisis of identity, the minister Sarkozy to the incivility of their "dregs", the philosopher Finkielkraut blamed the ill-fated preaching of Islam, others identified poverty, lack of social integration and a generational default of superficial people as possible causes of the riots.⁴¹³ All in all, those debates had the same lowest-common-denominator: the presence of immigrants, whose culture was far from the western, civilized one. The more these unrests were fiercely repressed and condemned on racial base, the more borders and frontiers, not only physical or territorial, but overall identarian and mental were erected. The French assimilationist model of integration is indeed the one which nowadays is suffering more from its flaws and inadequacies.

⁴¹¹ Ibid., p.36.

⁴¹² Supra footnote 410, p.10.

⁴¹³ Ibid.

The United Kingdom is another country hit by inter-ethnic conflicts. Despite the British model of integration being substantially different from the French one, its pluralistic vision and differential polity, allowing immigrants' communities to preserve their traditions and social structures, led also to the ghettoization of these communities, closed in a subordinated position under the autochthonous. That is what John Rex, one of the British most important experts on the subject who was from South-African origin, defined it as a condition of "segregated inequality".⁴¹⁴ Therefore, once again during the 1980s, ethnic conflicts spread even in many British cities: London, Birmingham, Liverpool, Manchester and many others.⁴¹⁵

The most significant riots in terms of violence and severe consequences, broke out in reaction to some actions of the British police, thought of as racial harassment. Several clashes followed in the years after, up to the insurgence of the most threatening phenomenon that today is plaguing every society: Islamic terrorism. Germany, the European country with the highest number of immigrants, was also the target of urban unrest, results of growing tensions between native and immigrant communities, which were the object of growing racism and xenophobic movements. During the 1980s, with the fall of the Soviet Union, the crisis in Eastern European countries and the reunification of Germany, an extraordinary flow of over a million immigrants arrived in the German territory. Nonetheless, migrants were valued for their economic contribution to the dominant group economy, that implied, under the vision of the *gastarbeiter* (guest worker) model, their temporary integration in the working environment and no more than that.⁴¹⁶

Therefore, after having considered all these events, it appears evident that the several European models of integration were already on the verge of failure and that the spread in western countries of inter-ethnic riots and the insurgence of Islamic terrorism is nothing but the backlash of obsolete policies addressing cultural diversity. When dealing with the integration of new, diverse elements of society, one needs to combine two fundamental principles: respect for diversity and promotion of a sense of belonging and unity.⁴¹⁷ Indeed, despite multiculturalism representing multiple challenges for the

⁴¹⁴ REX J., *L'atteggiamento verso gli immigrati in Gran Bretagna*, in Fondazione G. Agnelli, *Italia, Europa e nuove immigrazioni*, Torino, Edizione della Fondazione, pp.81-85.

⁴¹⁵ Supra footnote 410, pp.46-47.

⁴¹⁶ Ibid., pp.48-53.

⁴¹⁷ MEDDA-WINDISCHER R., *Nuove Minoranze, Immigrazione e Diversità Culturale e Coesione Sociale*, Milano, CEDAM, 2010, p.23.

countries affected by immigration and imposing strong limits posed by human rights, it is not multiculturalism in itself that causes ethnic conflicts within society, but rather the suppression of minorities' identity, as well as their exclusion from the social, political and economic life on the ground of their ethnic, religious and linguistic belonging.⁴¹⁸ Given the inadequacies of the several, already mentioned, models of integration, some scholars developed a new model of integration of minorities based on human rights (Human rights minority integration model, or Tree model).

This model was elaborated as a variant to the pluralistic or post-multicultural model and it is based on the assumption that the recognition, protection and promotion of minorities are to be listed as fundamental values for the constitution of a state and that within the public and private realms, minority and majority communities have to share some universal and fundamental principles, namely human rights, democracy, rule of law, gender equality, minority rights, which are the basis of a stable and flourishing society.⁴¹⁹ That is how this model attempts to reconcile on the one hand the recognition of religious, ethnic, linguistic and cultural identities and on the other hand the promotion and preservation of unity and social cohesion by means of the protection of some shared universal values, the core of human rights, which are endorsed by the state's institutions, constitution, legal system and the several international treaties ratified, under the supervision of supranational bodies such as the UN, The Council of Europe and the European Court of Human Rights.⁴²⁰

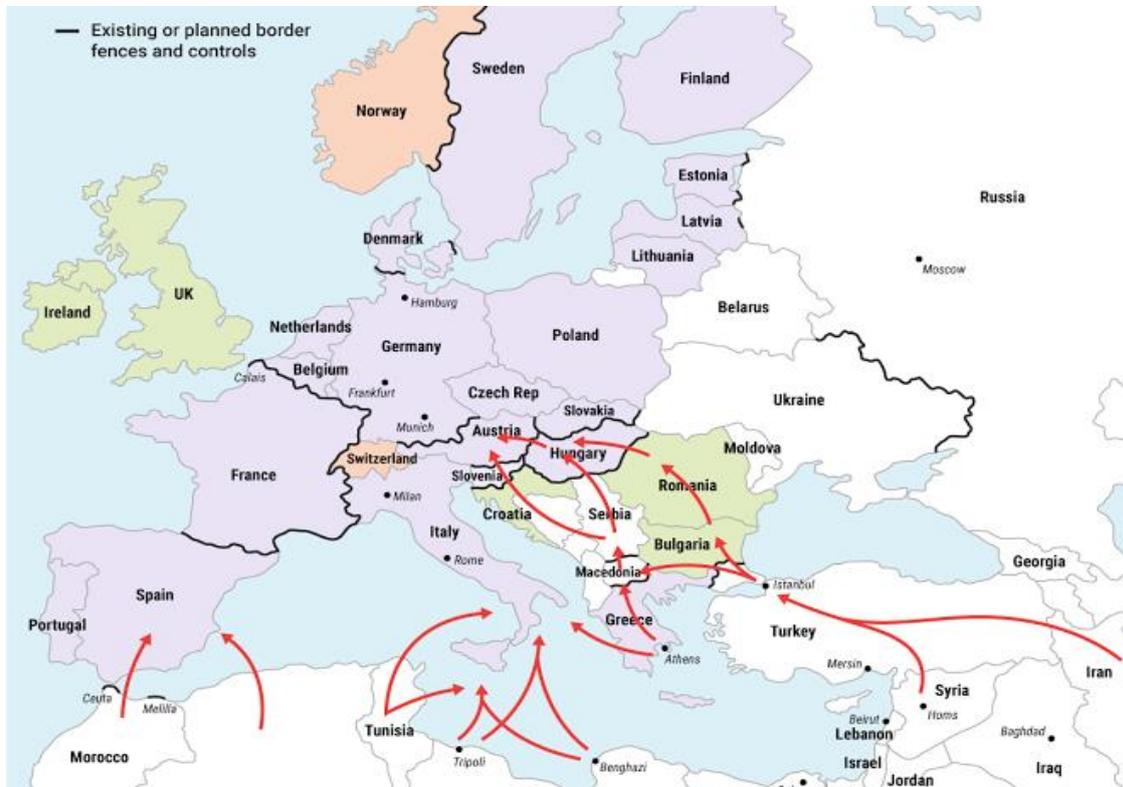
However, today Europe is facing a far tougher challenge. Living in the century where human rights are finally considered priorities, where their violation cannot be accepted anymore, shelved or hidden under the veil of ignorance, European nation states are being confronted with an unprecedented humanitarian crisis; and Western powers, bearers and ambassadors of liberal and democratic values, have the duty to intervene in the proper manner, under the watchful eye of the international community, the international organizations and a more and more scrutinizing media attention. In addition, the main issue concerning contemporary migration crisis is that it consists of illegal immigration based on human trafficking, hence out with any control by European countries and institutions.

⁴¹⁸ Ibid., p.19.

⁴¹⁹ Ibid. p.23. See also KYMLICKA W., *The internationalization of Minority Rights*, in International Journal of Constitutional Law, Vol. 6, issue 1, January 2008.

⁴²⁰ Supra footnote 417, pp.24-25.

The Frontex agency (European Border and Coast Guard Agency) registered 2.3 million illegal border crossings in the Mediterranean from 2015 to 2016. In actual fact, the Mediterranean does not represent the only route undertaken by migrants. Migratory routes are multiple and some of them are by land⁴²¹:



The central Mediterranean one is the most undertaken and dangerous routes, whose points of entry are concentrated in Italy and involve migrants mostly from Nigeria, Guinea and the Côte d’Ivoire; The western Mediterranean route instead affects the Iberian Peninsula, while the western African route concerns mainly the Canary Islands; another very important route is the Eastern Mediterranean, where illegal immigrants coming from Syria, Iraq and Afghanistan try to reach European borders passing through Turkey, Greece and then joining the Balkan route, where migrants coming from Pakistan, Afghanistan and Iraq walk down the Balkan Peninsula to reach central European borders.⁴²² The numbers of immigration have been really high, as the major agency for migration and border controls, such as the UNHCR, IOM, FRONTEX, are reporting. The following figures will illustrate the migratory trends from 2014 to 2016 in the countries most affected by illegal immigration⁴²³:

⁴²¹ *Map of Migratory Routes to Europe*, Business Insider, 15 September 2015, www.businessinsider.com.

⁴²² Frontex, *Migratory Routes Maps*, <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/>.

⁴²³ This data was collected by the Fondazione Ismu, Iniziative e studi sulla multiethnicità, on the basis of the analysis of international institutions and agencies such as the UNHCR, IOM, FRONTEX, EUROSTAT and EASO. Data available on the website <http://www.ismu.org>.

Mediterranean Sea Arrivals by Country					
Year	Greece	Italy	Malta	Spain	Total Med
2014	41.038	170.100	568	4.348	216.054
2015	856.723	153.842	105	4.408	1.015.078
2016	173.447	181.436	0	6.826	361.709

During 2017, data shows a substantial decrease in the number of arrivals with a total amount of 171,635 immigrants and 3,116 deaths while attempting to reach Europe through the several routes.⁴²⁴ The European states and the European Union have been relying on and have further elaborated different plans of action and policies to react and confront the refugee crisis on varying levels of the emergency. First of all, with the purpose of stemming and blocking illegal and clandestine immigration, the European Union faces the emergency with repatriation and expulsion policies, for those not classified as refugees; however, in 2015, of 533.000 migrants that received the order of expulsion just 43% of them actually left the country.⁴²⁵

Moreover, since 1990, year of the Dublin Convention, the European Union has been working on a common European asylum system “establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person”⁴²⁶; yet, this system includes some pitfalls and weaknesses and for this reason the European bodies in 2016 started working on a thorough review of the Dublin system to propose new regulation in view of the current migratory crisis, especially to avoid and balance the uneven distribution of responsibilities on the few states which are major receptors of migratory flows.⁴²⁷

Furthermore, the UE managed to reach a joint-statement and to establish an action plan with Turkey, whose work started in November 2015 and reached a joint-statement on the 18th March 2016. The statement was addressed “to end the flow of irregular migration from Turkey to the EU and replace it with organised, safe and legal channels to Europe”⁴²⁸. On the basis of this agreement: any new irregular immigrants crossing the Turkish border

⁴²⁴ Source: The UN Migration Agency IOM, International Organization for Migration, migration data portal on the website <http://migrationdataportal.org/>.

⁴²⁵ On the website <http://www.europarl.europa.eu>.

⁴²⁶ Dublin Regulation III, Regulation n°604/2013 of the European Parliament and of the Council, 26 June 2013.

⁴²⁷ The MEPs approved the Parliament proposal in November 2017, the Parliament, source: website <http://www.europarl.europa.eu>.

⁴²⁸ Council of the European Union, Press Release, EU-Turkey Statement, 18 March 2017.

with Greece will be returned to Turkey in full accordance with EU and international law (thus, also respecting the principle of non-refoulement), Turkey and Greece will collaborate with the assistance of EU agencies and their financial contribution (3 billion euros were allocated in 2016-2017 supporting Syrian refugees in Turkey), Turkey will prevent the creation of new illegal sea or land routes, "For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria".⁴²⁹

By means of these provisions, irregular immigration through the Balkan route and Eastern Mediterranean route has dropped by 97% and the number of deaths has decreased as well. Italy also developed a strategy meant at stopping irregular migration and human trafficking. As a matter of fact, in the summer of 2017 the Italian government instituted the Minniti Compact, an agreement with Libya made on three levels of action: the first level deals with the locals, it consists of an implicit agreement with the groups controlling smuggling and the legal system, that involves a centre of detention of migrants and the Coast guard; the second level is the maritime one, an agreement reached with the Libyan Coast guard which intercepts irregular migrants in the sea; and finally the third level on the Minniti compact involves the NGOs that rescued migrants in the Mediterranean, with which the Italian government negotiated a code of conduct.⁴³⁰

In this situation of feeble stability and in the midst of the refugee crisis, Europe is facing a multi-faceted crisis: demographic, economic, the impoverishment of the middle class and an identity crisis. Among the vectors of the crisis, terrorism and migration are identified as the sides of the same coin. In the minds of the more extreme, Muslim becomes a synonym of terrorist and the word immigrant stands as a synonym for Arab (in Europe) or Hispanic (in the USA). In this framework, fear foments the European refusal to share citizenship and the privileges of the welfare with immigrants and also, even with refugees, populist movements grow and feed a increasing islamophobia, which leads to unwillingness of mixing with diverse cultures.⁴³¹ According to recent statistics, 82% of Italians expresses themselves hostile with gypsies, the highest percentage in Europe, and 69% of Italians say that they are hostile to Muslims, intolerance overtaken only by Hungarians, whose hostility towards Muslims reaches 72%.⁴³²

⁴²⁹ Ibid.

⁴³⁰ TOALDO M., *Il Minniti Compact e alternative possibili alla frontiera Italia-Africa*, in *Limes, Africa Italiana*, Vol.11, Gedi, November 2017, p.71.

⁴³¹ *Paura di Perderci*, Editorial in *Limes, Chi Siamo?*, Gedi, Vol.7, July 2016, pp. 7-30.

⁴³² Ibid., p.13.

Another important symptom of the crisis of multiculturalism within Europe, was the Brexit referendum, the choice to leave the European Union. Indeed, concerning the referendum on Brexit, 47% of the supporters of “leave” identified immigration as one of the reasons of their choice, for being an attack to their economic well-being. Nonetheless, one seems to forget that immigrants, as many esteemed economists remind us, represent a relevant and valid resource for a country with a declining economy. Migrants constitute new elements of society where in many cases they are already well-educated and trained and could contribute to the growth of the national wealth, to a decrease in the cost of healthcare and retirement benefits, to the relative reduction of taxes, without considering the possible demographic benefit for a country like Italy, whose average age is 44,7 years and that without immigration would lose 8 million inhabitants by 2050.⁴³³

After all, several solutions could be envisaged in facing the refugee crisis: investing in the economic development of Middle Eastern and African countries, from energy, to infrastructure, healthcare and education; opening our education system to the Southern states, thus investing in new human capital; abandoning the assimilationist model of integration for a new type of social and political unity pact, for integration does not mean crushing the new elements of society, but it implies reciprocation and exchange.⁴³⁴

2. The Evolution of Terrorism and the Threat of Daesh

Islamic Terrorism has been a longstanding threat for every society around the world, and more precisely, since 1960's-1970's with the affirmation of the ideological and political project of *Jihadism* in the Middle East. It was the terrorist organization Al Qaeda, guided by its leaders Azzam and Bin Laden in Afghanistan, to expand and transform the *Jihad* “Holy war against the non-believers” into a transnational project. But the real turning point happened on the 11th September 2001, with the terrorist attacks on the Twin Towers, which marked a new chapter in the counterterrorist strategy.⁴³⁵ From that moment on, Islamic terrorism became a global, urgent threat to security.

However, despite the fact that over the last fifty years, many international juridical instruments addressed to fight terrorism which were developed following a sectorial approach (such as the 1963 Convention on Offences and Certain Other Acts Committed

⁴³³ Ibid., p.12.

⁴³⁴ Ibid., p.19.

⁴³⁵ MANCIULLI A., *Sconfiggere il Terrorismo*, Roma, Camera dei Deputati, 2017, p.10.

on Board of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the 1997 International Convention for the Suppression of Terrorist Bombings, the 1999 International Convention for the Suppression of the Financing of Terrorism and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism), international law does not yet provide a univocal and universally recognized and endorsed definition of terrorism. Already filed in humanitarian International law, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949, was already prohibiting “collective penalties and likewise all measures of intimidation or of terrorism”⁴³⁶, and so did its Additional Protocol II of 1977 stating that “acts of terrorism [...] are and shall remain prohibited at any time and in any place whatsoever”⁴³⁷, as well as “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population”⁴³⁸.

Nonetheless, not dealing specifically with counterterrorism, the Convention does not provide a universal definition of terrorism. For reaching a common definition, we must rely on the more recent work of the United Nations. As a matter of fact, after the 2001 attacks, the UN have more and more increased their commitment to fight terrorism; for instance with the creation of the Counter-Terrorism Committee (CTC), following the Twin Towers terrorist attacks, the Counter-Terrorism Committee Executive Directorate (CTCED), the Al-Qaida-Taliban Sanctions Committee, the United Nations Office of Counter-Terrorism established in 2017 and the adoption of several resolutions specifically concerning what is considered to be the most serious threat to peace and security.

Among these resolutions, one of them contains the most accurate, comprehensive and detailed definitions of terrorism and its related motivations, adopted so far. Indeed, the Security Council Resolution 1566, defines terrorism as follows “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions

⁴³⁶ Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, art.33.

⁴³⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, art.4.

⁴³⁸ Ibid., art.13.

and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature”⁴³⁹.

A precise definition of terrorism is required in international law, for the mechanisms to fight, convict and prevent it to be effective and efficient; but many divergences arose when it came to give a universally accepted, all-encompassing definition of this crime. Divergent opinions and obstacles concerning the views of the different states rest in particular on the political value of the term; indeed, the most discussed issue at stake was the legitimacy of the use of violence for political reasons like self-determination, over national liberation, by revolutionary factions against domination, or even by states’ authorities.⁴⁴⁰ These questions were salient matters on which many states were not able to agree. For instance, as Sami Zeidan points out “The Taliban and Osama bin Laden were once called freedom fighters [...] now they are on top of the international terrorist lists. Today, the United Nations views Palestinians as freedom fighters, struggling against the unlawful occupation of their land by Israel, yet Israel regards them as terrorists. Israel’ also brands the Hizbullah of Lebanon as a terrorist group, whereas most of the international community regards it as a legitimate resistance group”.⁴⁴¹

Therefore, these incertitude and conflicts over a choice of a comprehensive and universally agreed definition of terrorism prevent also the international community from adopting an instrument ad hoc, an international convention on terrorism that could be universally recognized, enacting a complete and efficient strategy to combat terrorism. However, today the most serious threat to global peace and security is represented by the terrorist organization named Daesh. The origins of Daesh can be traced from 2004, with the arrival in Iraq of Al Zarqawi, affiliated to the terrorist organization Al-Qaeda, who founded the movement “Al-Qaeda in Iraq”, later renamed “Islamic State of Iraq” to fight the Iraqi Shiite government and the American occupation.⁴⁴²

⁴³⁹ UN Resolution 1566, Security Council, 8 October 2004, par.3.

⁴⁴⁰ ZEIDAN S., *Desperately Seeking Definition: The International Community’s Quest for Identifying the Specter of Terrorism*, in Cornell International Law Journal, Vol.36, Issue 3, 2004; SAUL B., *Defining ‘Terrorism’ to Protect Human Rights*, in Sydney Law School Legal Studies Research Paper, No. 08-125, 2008.

⁴⁴¹ ZEIDAN S., *Desperately Seeking Definition: The International Community’s Quest for Identifying the Specter of Terrorism*, in Cornell International Law Journal, Vol.36, Issue 3, 2004, p.492.

⁴⁴² PARIGI G., *Il Califfato, Ovvero l’Arrocco Sunnita in Siraq*, in Limes *La strategia della Paura*, Gedi, Vol.11, December 2015, pp.49-55; MANCIULLI A., *Sconfiggere il Terrorismo*, Roma, Camera dei Deputati, 2017, pp.18-36.

Initially, the movement had not the expected success, especially because of the arrival of US troops in 2007, the apparent, but feeble national equilibrium after Al-Maliki elections in 2006 and overall, because of the lack of popular support by Iraqi population, who instead was the target of brutal terrorist attacks, factors that left the Jihadist group isolated. Nevertheless, when in 2011, the American forces were withdrawn from the country and the Arab spring occurred, destabilizing most middle eastern countries, already inefficient, the Islamic group found breeding ground in Syria, where the civil war created a strategic opportunity for the future IS.⁴⁴³

Daesh, with its intervention disguised as a popular uprising, started attracting the first foreign fighters (mainly from Iraq), englobing smaller militias and substantially increasing its ranks a great deal by means of the so-called *violent radicalization*, whose first theatre are prisons and with which Daesh managed to recruit his leaders (former officers of Iraq National Guard and army generals). On the 24th June 2014 Abu Bakr al Baghdadi announced the institution of a Caliphate in the “Islamic State of Iraq and the Levant”, of which Daesh is the Arab acronym, that same year, Raqqa would be conquered by the Jihadist.⁴⁴⁴ After 2004 the borders became blurred, the Islamic state came to control a territory extending from the periphery of Baghdad to Aleppo, including Mosul. The structure of Daesh itself consists of a very pragmatic organization, which accords a peculiar and fundamental characteristic to the Islamic state, differentiating it from Al-Qaeda, from which, moreover, the IS distanced itself and broke bonds since 2013.

The Islamic State indeed, is divided into several provinces, each controlled by a governor, who responds to the Caliph. A structure based on three levels: the first constituted by the core leadership, including the Caliph himself, the second level represented by local leaders and the third comprising the military commanders. Besides that, there exist at least 6 councils composing the “state” executive structure, each of them designed for a different task (military, mediatic, security and intelligence, religious)⁴⁴⁵. Furthermore, another characteristic distinguishing Daesh from every other terrorist organization is its *modus operandi*, which very quickly gets the attention of the international community: the spectacular public broadcasting of acts of violence, the use of media and internet as a communication strategy that crosses every border and finally the capacity to very quickly

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.; SPOCCI C., *Islamico ma pur sempre Stato*, in Limes, *Bruxelles il Fantasma dell'Europa*, Gedi, Vol.3 March 2016, pp.77-89.

⁴⁴⁵ MANCIULLI A., *Sconfiggere il Terrorismo*, Roma, Camera dei Deputati, 2017, p.25.

expand and take control of lands and major cities.⁴⁴⁶ Since its proclamation, the Islamic State has been recognized as being responsible of over 143 terrorist attacks over the world (and mostly concentrated in African and Asian regions), causing the deaths of thousands of innocent people.⁴⁴⁷

As a matter of fact its ideology rests on extremely radical beliefs, a rigid vision of the “true Islam” and a strict reading of religious texts, refusing any sort of modern interpretation, thus encouraging the use of violence and terrorism against non-Muslims, the non-believers, who cannot be included in the pure Islamic society, contemplated in a vision of “Sunni Islamic supremacy”. Their insane war opposes with strong hostility any society and culture not representing their own distortion of Islam. ⁴⁴⁸ But concerning the ideology, the terrorists that committed the slaughter in western societies have a superficial, distorted view of the Coran and of Islamic traditions.

The western foreign fighters can be easily considered marionettes in search for an identity, transformed into autonomous killers through violent radicalization. And it is actually the capacity to recruit foreign fighters in western society by means of radicalization, that is worrying western societies. According to a French study, 63% of the supporters of the Jihad are between 15 and 21 years old, 67% of them come from the middle class, 16% from the “milieux populaires”.⁴⁴⁹ Violent radicalization is a dangerous and oppressive issue for European countries, especially for France, which has been a more frequent victim of Islamic terrorist attacks perpetrated by naturalized citizens who underwent a period of violent radicalization. As a result, in response to the jihadist threat and the extraordinary migratory flows from outside Europe, several European countries decided to temporarily suspend the Schengen acquis and hence to reintroduce borders controls. Indeed, the Schengen Borders Code provides state parties with the foreseeable possibility to reintroduce border controls at internal borders in cases “where there is a serious threat to public policy or internal security, [...] where considerations of public policy or internal security in a Member State demand urgent action to be taken”, or for foreseeable events.⁴⁵⁰

⁴⁴⁶ Ibid., pp.17-27.

⁴⁴⁷ Running count kept by CNN, *ISIS goes global: 143 attacks in 29 countries have killed 2,043*, updated to February 2017, <http://edition.cnn.com>.

⁴⁴⁸ Supra footnote 445, p.18.

⁴⁴⁹ GRADT J.M., *Plus jeune, plus varié: le nouveau visage de la radicalisation islamiste*, Les Echos, 18 November 2015.

⁴⁵⁰ Regulation 562/2006 of the European Parliament and of the Council establishing Schengen Borders Code, 15 March 2006, art.23, 24, 25 and 26.

As a matter of fact, it is not the first time that border controls have been introduced in Europe, but most of the time it happened in relation to some specific events, such as the European Football Championship in Austria in 2008, the G7 summit in Germany in 2015, the G8 summit in Genova in 2001 and for the climate conference in Warsaw in 2013.⁴⁵¹ Nonetheless, in 2012 a reform to the Schengen agreement was approved on unanimity, introducing a provision that extends to six months (extendable to another 6 months) the possibility for one or more states to reintroduce internal border controls. This occurred following the increase of migratory waves from Libya and Italy's concessions of residence permits to new immigrants that allowed them to move freely in the Schengen area.⁴⁵² Yet, nowadays the framework happens to be a lot different, as a consequence of the "migratory jam" and the imminent and omnipresent danger of Islamic terrorism, France, Austria, Germany, Denmark, Sweden and Norway have simultaneously notified their willingness to reintroduce internal border controls to the commission and so they did.⁴⁵³

Over the years the European Union has developed several mechanisms to counteract the terrorist threat, starting with the adoption in 2002 of the Council Framework Decision 475 on combating terrorism, which gave the first shared understanding of this crime, stating its objective elements (murder, bodily injuries, hostage taking, extortion, committing attacks, threat to commit any of the above) and subjective elements (acts committed with the objective of seriously intimidating a population, destabilising or destroying structures of a country or international organisation or making a government abstain from performing actions).⁴⁵⁴ Following this approach, the UE adopted also in 2005 a counter-terrorism strategy based on four main pillars of prevention: the fight against radicalization and recruitment of terrorists, the protection of possible targets of terrorist attacks, the prosecution of terrorists also by cutting their financial sources and the elaboration of measures of response in case of terrorist attacks.⁴⁵⁵

However, European states gradually realized that those measures and policies showed some pretty deep shortcomings and loopholes, especially concerning the exchange of salient information and the Schengen acquis permitting the free movement of people in

⁴⁵¹ Temporary reintroduction of border control, Migration and Home Affairs, European Commission, ec.europa.eu/home-affairs.

⁴⁵² MARONTA F., *Requiem per Schengen*, in *Limes La Strategia della Paura*, Gedi, Vol.11, December 2015, pp.189-195.

⁴⁵³ Supra footnote 451.

⁴⁵⁴ Council Framework Decision on combating terrorism 2002/475/JHA, 13 June 2002, art.1 and 2.

⁴⁵⁵ MANCIULLI A., *Sconfiggere il Terrorismo*, Roma, Camera dei Deputati, 2017, p.80.

the Schengen area and thus also of possible terrorists. This last issue was particularly delicate and controversial, especially considering the fact that the Balkans consist of a logistic hub and main corridor, both for immigrants and for the foreign fighters of the Jihadist terrorism.

Therefore, Europol created in 2016 the European Counter Terrorism Center, with the aim of sharing information of foreign fighters and the source of funding of the several cells. Moreover, in this framework, a relevant instrument happened to be the EU Passenger Name Record (PNR), a system approved by the European Parliament in 2016, that permits the tracing of movements by aircraft of people within and outside the EU. This mechanism should be implemented by all states within the 25th May 2018.⁴⁵⁶

3. Brexit, leaving the European Union

The 23rd June 2016 marked an historical date, a sort of watershed in the European Union history; the British people summoned to the polls for the Brexit referendum, after months of political propaganda that affected not only the UK, nor the boundaries of the European Union, but the entire world, expressed their preference and with 72% of the British population casting the ballot, 48,1% of which voted to remain in the European Union, whilst 51,9% of voters picked the leave option, The UK had formally decided to exit the Union.⁴⁵⁷ The United Kingdom, however, has never completely been an integral part of the European Union. Since its adhesion in 1973, the UK played the part of a wary member in the EU, refusing the new euro currency in 1992, not joining the Schengen free border area in 1997 and by ensuring an exception⁴⁵⁸, excluding it from joining the EU Charter of Fundamental Rights in 2000.⁴⁵⁹

Nonetheless, such results at the ballot box took the entire world by surprise and the British people too. In fact, it could be argued that neither the remain supporters nor the leave ones were actually expecting this result and maybe they were not even truly aspiring to it, as the softer approach on Brexit of Boris Johnson, leader of “leave” movement and exponent of the conservative party, proves. As a consequence, the UK plunged into a chaotic political mess from which Theresa May ended up being the new

⁴⁵⁶ Ibid.

⁴⁵⁷ FABBRINI F., *The Law and the Politics of Brexit*, Oxford University Press, 2017, pp.1-12; GIOVANNINI A., *Il Brexit spacca il Regno Unito*, in Limes, *Brexit e il Patto delle Anglospie*, Vol.6, June 2016, pp.65-76.

⁴⁵⁸ See Protocol n° 30.

⁴⁵⁹ FABBRINI F., *The Law and the Politics of Brexit*, Oxford University Press, 2017, p.2 and p.226.

prime minister, while embarking on the long and complicated process of negotiating Brexit with the European Union. As a matter of fact, the EU law system, provides the opportunity for a member state to withdraw from the Union, although it was never really meant to be possible. Article 50 of the Treaty on the European Union states:

“1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.”⁴⁶⁰

And it is exactly around this article and article 218 of the TFEU, that the negotiations between the United Kingdom and the European Union are taking place. Therefore, on the 29th March 2017, in accordance with article 50 and the constitutional requirements of the United Kingdom, after the *European Union (notification of withdrawal) Bill*, being approved by the chambers, the British Ambassador notified the European Council president Donald Tusk, through a letter from the British prime minister Theresa May, the intention of the United Kingdom to leave the Union, hence starting the negotiations over article 50.⁴⁶¹ Then, on the 29th April 2017, the European Council adopted the guidelines aimed at determining the framework of the negotiations for UK's withdrawal, which will be assisted by the work of a special taskforce of the European Commission on operational, legal and financial matters.

These guidelines, despite representing just the first step of the process, are very explanatory of the political, financial and social meaning and value of the path undertaken by the UK. As the first few lines cite: “The United Kingdom's decision to leave the Union creates significant uncertainties that have the potential to cause disruption, in particular in the United Kingdom but also, to a lesser extent, in other Member States. Citizens who have built their lives on the basis of rights flowing from the British membership of the EU face the prospect of losing those rights. Businesses and other stakeholders will lose the

⁴⁶⁰ Treaty on the European Union, Maastricht, 1 November 1993, consolidated version of 2007, art.50.

⁴⁶¹ Supra footnote 457.

predictability and certainty that come with EU law, [...] National authorities, businesses and other stakeholders should take all necessary steps to prepare for the consequences of the United Kingdom's withdrawal."⁴⁶² Moreover, besides underlining the fact that “a non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member”⁴⁶³, the Council stresses however the EU willingness to remain a close “partner” of the UK, emphasising at the same time the need to recognize and respect the four indivisible freedoms (goods, capital, services and labour) of the Single Market.⁴⁶⁴

The council also mentions the date the withdrawal, the 29th March 2019, as article 50 of the TEU sets out (a two-year timeframe), on which the treaties will cease to apply. The procedure for Brexit is therefore in place, and it consists of a complicated path made of rearrangements, challenges and new agreements, of which the primary aim is the protection of European citizens' rights and the coordination for an economic and financial policy and integration, especially given the high cost of the divorce bill deriving from the UK's choice (esteemed to be approximately around 70 billion euros by the Commission taskforce, reduced to 40 billion after Theresa May reached an agreement on a “soft Brexit”).

For the purpose of this dissertation, it is particularly relevant to examine the phase before the vote, the road to the referendum, to identify the political, ideological or cultural motivations, to note the differences on how Britain voted and to understand the immediate and long-term consequences both for the UK and for the rest of Europe. Since its start, the Brexit campaign was centred on two main vectors: take back the control and immigration. The “take back the control” mantra was interpreted in different ways (on laws, money, borders or sovereignty) and it rested on the value given to cooperation or vice versa to control. The trade-off between the two depended on the subjective opinion of individuals and on the issue at stake. Many seemed to feel this trade-off as a price to pay for European integration, a constraint that was not convenient for the British welfare.⁴⁶⁵

⁴⁶² European Council, Guidelines following the United Kingdom's notifications of withdrawal under article 50 TUE, EUCO XT 20004/17, Brussels, 29 April 2017.

⁴⁶³ Ibid., Core Principles, par.1.

⁴⁶⁴ Ibid.

⁴⁶⁵ FABBRINI F., *The Law and the Politics of Brexit*, Oxford University Press, 2017, pp.25-36.

Speaking of immigration however, another interpretation associated with the “take back the control” mantra, was to take control over national borders and especially the movement of people. Despite not being significantly affected by the recent refugee crisis as other European states were, the United Kingdom was anyhow the target of several Islamic terrorist attacks, and the conservative and the UKIP parties blamed immigration (in particular from other state members) as one of the causes of the reduction of fundamental social rights, such as national security, economic prosperity and justice. Freedom of labour is indeed one of the four indivisible freedoms of the European single market, and despite having an opt out on the Schengen agreement, the UK has to respect it in view of the transformation of European boundaries. Arguably, this gap between order and openness was one of the main factors leading to the rift within the UK voters.⁴⁶⁶

As a matter of fact, many statistics on the Brexit referendum revealed some important splits on multiple levels, some of which were unexpected, whereas others were rather predictable. First of all, the deep divide between the cosmopolitan, liberal and open city of London, which voted to remain and rural England, whose middle class benefited less from the globalization and was damaged by the industrial decline, a considerable part of the population which developed a strong Euroscepticism and looked at the cultural and social change with suspicion. This area represented one of the strongholds of the “leave” movement. The political fractures that permeated through the United Kingdom are further motivations of such results; frustration, bitterness and alienation represent more often the principal vehicles of the “populist” trend.⁴⁶⁷ Another important divide in the Brexit results consisted of the different outcomes in the four “home nations”: England, Wales, Scotland and Northern Ireland.

The statistics revealed that, while in England and Wales the “leave” won with 53%, in Scotland and Northern Ireland the results were overturned. Despite the ballot being more or less predictable for Scotland and Ireland (especially in the view of pressures for independence), what instead turned out to be an anomalous vote, was the Welsh one, of which region benefited most from the European Union structural funds. Again, this choice might be attributed to political divergence and a sort of protest against the British economic establishment, which favoured the “remain”.⁴⁶⁸

⁴⁶⁶ Ibid., pp.38-48.

⁴⁶⁷ GIOVANNINI A., *Il Brexit spacca il Regno Unito*, in Limes, *Brexit e il Patto delle Anglospie*, Roma, Gedi, Vol.6, June 2016, pp.65-76.

⁴⁶⁸ Ibid.

But an even more interesting and emblematic fact is the educational and generational divide in the poll results. Shortly after the call to the polls, a YouGov study showed the following data⁴⁶⁹:

		Remain	Leave
Age	18-24	71	29
	25-49	54	46
	50-64	40	60
	65+	36	64
Education	GCSE or lower	30	70
	A level	50	50
	Higher Below Degree	48	52
	Degree	68	32

It may not seem surprising, but this data reveals important social fractures, concerning the different mindsets of varying generations and also on mindsets of those with varying levels of education. Among the motivations of those supporting “leave”, multiculturalism, social liberalism and immigration were the three most pressing issues; showing a society (on a global level) that is more and more refusing openness towards the “other”.

The consequence of the Referendum outcome raised the fear of a spread of populist trends, proven correct by the victory of Donald Trump on the 8th November 2016 and the dangerous rise of prominence of the National Front Leader Marine Le Pen who managed to progress to the second turn of presidential elections in France. The main risk for Europe was that Brexit could trigger a sort of explosion of Euroscepticism. The revival and increase of nationalist and sometimes xenophobic parties is indeed affecting the whole of Europe, starting from Finland, with the Perussuomalaiset, the “True Finns” party, passing through Hungary, with the Jobbik, a radical and nationalist movement, to Italy with the well-known Lega. Within this framework, migrants’ integration and multiculturalism appear challenged and distant goals for Europe. Since the post-World War II period, the UK has been the object of several migratory flows, first from its former colonies and then from other European states. The Multicultural project in the UK was firstly enacted by the Labour party prime minister Tony Blair in 1997, whose aim was to implement a pluralistic society, recognizing diversity, inviting institutions to be the

⁴⁶⁹ Source : <https://yougov.co.uk/news/2016/06/27/how-britain-voted/>

guarantors of such diversity and building up a kind of “community of communities”.⁴⁷⁰ However, the first backlashes occurred with the new millennium. In fact, in 2001 further urban unrests in the North of England revealed the shortcomings of such a multicultural model; the communities created in respect to cultural diversities were indeed parallel hemispheres that shared the same social space with the dominant one but did not meet nor cross it. After the advent of Islamic terrorism, the situation worsened, especially in 2005 when multiple terrorist attacks, perpetrated by young British citizens following their radicalization hit the London metropolitan area. After those events, the populist and anti-immigrant rhetoric found its political vehicle in the UKIP (United Kingdom Independent Party), a party that has increased its popularity in recent years. Its leader, Nigel Farage, has been one of the fiercest supporters of Brexit, where the campaign was indeed centred on the migration problems.⁴⁷¹ After all, David Cameron’s words at the intergovernmental conference on terrorism and radicalisation in 2011 sounded appropriate and perhaps forward-looking: “We have failed to provide a vision of society to which they feel they want to belong. We have even tolerated these segregated communities behaving in ways that run counter to our values. [...] State Multiculturalism has failed.”⁴⁷²

4. USA, from Melting Pot to Multiculturalism and Trump’s Election

As far as multiculturalism, ethnicity, race, immigration and integration are concerned, the United States of America is probably the country most affected and shaped by these themes and debates. Progressive and conservative at the same time, American history symbolizes an evolution in terms of tolerance and integration models that revealed itself sometimes successful and at other times regressive and narrow-minded. From the historical land of immigration of the WASP (White Anglo-Saxon Protestants, the descendants of the former English colonizers), America became the land of dreams and opportunities for many other nationalities over the centuries, transforming it into an increasingly varied and multi-ethnic society, yet, not without adverse reactions. The exclusion and the refusal of immigrants have different and multiple origins: the fear of

⁴⁷⁰ PAREKH B., *Rethinking multiculturalism : cultural diversity and political theory*, Basingstoke, MacMillan, 2000; ANTONSICH M., *Requiem per il Multiculturalismo all’Inglese*, in *Limes Chi Siamo?*, Roma, Gedi, Vol.7, July 2016, pp.211-216.

⁴⁷¹ ANTONSICH M., *Requiem per il Multiculturalismo all’Inglese*, in *Limes Chi Siamo?*, Roma, Gedi, Vol.7, July 2016, pp.211-216.

⁴⁷² Ibid.; WRIGHT O., TAYLOR J., *Cameron: My war on multiculturalism*, The Independent, 5 February 2011.

otherness, diverse religious beliefs, the concern over the blending of race, precisely the mixing between white Anglo-Saxons and inferior races, classified by a social Darwinism. The nativist movement in the USA has indeed deep social roots; American multiculturalism disguised a very complex reality made of two relevant factors: colonialism and immigration. At first, the lands were discovered and subjected to the domination of the European colonizers, then African slaves were shipped to work in the plantations, afterwards, during the XIX and XX centuries, wave after wave of new European immigrants landed and settled in the territory, adopting the single Anglo-Saxon-based culture and finally the most relevant wave occurred, that of Mexican and Latino workers.⁴⁷³ Therefore, everything started from immigration, which was influenced by different trends over the centuries.

The first hints of nativism emerged in the 1800s, when immigration grew year by year, reaching an average of 350.000 between 1848 and 1854. The American nativists soon exhibited their intolerance, especially towards the poor Catholic peasants from Ireland in Maryland and against Germans in Pennsylvania, considered savages.⁴⁷⁴ Furthermore, during the 1920s large-scale immigration increased, especially from Eastern and Southern European countries and Asia, causing violent discriminatory reactions of renewed nativism, which led to the adoption of anti-immigrants laws and quotas and the rise of nativist organizations (including a revived Ku Klux Klan) defending the white supremacy.⁴⁷⁵ This anti-immigrant hysteria, led to the promulgation of acts such as the Immigration act of 1924, establishing discriminatory annual quotas varying from country to country (for example, for Italian immigrants the quota was about 6.000, compared to the 66.000 quota for Great Britain).⁴⁷⁶ Those drastic restrictions were seen as a victory for the Nordic race, that was able to preserve them until the mid-1960s. However, an assimilation process based on the Americanisation of the new immigrants had already been put in place and it was deeply supported by American capitalists.

After all, European immigrants were more easily assimilable than other cultures. One of the most blatant examples of this Americanisation process happened in the Henry Ford's industries, where southern and eastern Europeans employed by the motor company

⁴⁷³ REX J., *Multiculturalism in Europe and America*, in *Nation and Nationalism (Journal)*, ASEN, Vol.1, Issue 2, July 1995, pp.243-259.

⁴⁷⁴ LACORNE D., *La crisi dell'Identità Americana*, Roma, Editori Riuniti, January 1999, pp.69-73.

⁴⁷⁵ PEREA F. J., *Immigrants Out! New nativism and Anti-immigrant impulse in the United States*, New York, New York University Press, 1997, pp.19-24.

⁴⁷⁶ Ibid.

were forced to attend compulsory courses of English and certain Anglo-Protestant values. The *Ford English school melting pot* organized also emblematic graduation ceremonies, where the employees, dressed like they were when they first arrived, walked through a big pot labelled “Melting Pot” and emerged from it dressed like American business men holding the US flag.⁴⁷⁷ It is precisely during those years that the Melting Pot model emerged, representing an idea of multi-ethnic fusion and homogenization in order to create something new and better, the American culture. Nonetheless, this method of integration through which people of diverse origins blended together forming one nation, was proven unsuccessful and in particular because it was addressed just to some specific minorities, while it did not involve at all Afro-Americans communities which were emancipated after the end of slavery in 1865.⁴⁷⁸

The real propelling force in the progress of integration policies was enacted starting from the late 1960s, when the immigration quotas based on national-origin were removed with the Immigration Act of 1965, the black American population claimed the recognition of their civil rights, fighting for a colour-blind state polity and with the advent of Liberalism, through aspiring to an equal society regardless of race, ethnicity, colours and gender. The next step was the promotion and implementation of the so-called “affirmative action” or positive discrimination, political, legislative and administrative measures meant at correcting and stopping any discrimination. The founding act of this “affirmative action” was the Civil Rights Act of 1964, a valuable weapon and useful tool to combat racism in a society self-proclaimed democratic and egalitarian, but which over the years failed to integrate one of the biggest pieces of its *demos* with the continuing maltreatment of former slaves as members of a sort of inferior class.⁴⁷⁹ The Civil Rights act consisted of the very first symbol of equal opportunities, granting the full inclusion and guarantees of voting rights, the effective de-segregation of public education, public facilities and the labour market, asserting principles such as: “All persons shall be entitled to the full and equal participation of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation [...] without discrimination or segregation on the ground of race, color, religion, or national origin”⁴⁸⁰ and specifying that

⁴⁷⁷ Ibid., p.26; LACORNE D., *La crisi dell'Identità Americana*, Rome, Editori Riuniti, January 1999, p.167.

⁴⁷⁸ REX J., *Multiculturalism in Europe and America*, in *Nation and Nationalism (Journal)*, ASEN, Vol.1, Issue 2, July 1995, pp.243-259.

⁴⁷⁹ LACORNE D., *La crisi dell'Identità Americana*, Rome, Editori Riuniti, January 1999, p.208.

⁴⁸⁰ Civil Rights Act, 1964, Title II, Sec. 201, par. a).

““Desegregation” means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin”.⁴⁸¹

Despite the emergence of criticisms over affirmative action, stating that it actually consisted of reverse discrimination favouring the components of certain groups on a racial basis, thus contrary to the equal opportunities concept, the mechanism of affirmative action further developed, being applied to the university admissions system.⁴⁸² Nevertheless, with the end of the racist quotas, not surprisingly immigration grew; between the 1970s and the 1990s Asian and Latino populations increased at 385% and 141%, causing, as one may expect, a renewed nativist, anti-immigrant reaction, viewing immigrants as a problem, but without considering that it was an effect of US governments and corporations foreign politics and economics. ⁴⁸³

In California the anti-immigrant groups managed to achieve substantial political success for their campaign. Indeed, in 1994 a referendum to stop illegal immigration and to reduce public expenses was held in California and the results of this vote, renamed “SOS Save Our State”, led to the adoption of the California proposition 187 (Illegal Aliens ineligible for public benefits), with 59% of votes in favour; the scope of such a proposition was to strongly restrict the access to public services like schools and hospitals for undocumented immigrants.⁴⁸⁴ However, in those same years further developments of the multicultural theory were enhanced.

The demographic and cultural changes in the population composition, an increase in respect for cultural diversity, the implementation of human rights, including cultural rights, new feminist wave and ethnic sensitivity fostered the reconceptualization of the notion of multiculturalism, leading to discredit the melting pot model, which resulted inappropriate in meeting the claims of minorities. As a matter of fact, as Will Kymlicka remarked, to be efficient the paradigm of multiculturalism has to be fluid “in its conception of groups and group boundaries (that is, it must accept that new groups may emerge, older groups may coalesce or disappear); voluntary in its conception of group affiliation[...]; and non-exclusive in its conception of group identity (that is, it must accept that being a member of one group does not preclude identification with another group,

⁴⁸¹ Ibid. Title IV, Sec. 401, par. b).

⁴⁸² Supra footnote 484., pp.213-216.

⁴⁸³ RUBIN D., VERHEUL J., *American Multiculturalism after 9/11*, Amsterdam University Press, 2009, p.26; PEREA F. J., *Immigrants Out! New nativism and Anti-immigrant impulse in the United States*, New York, New York University Press, 1997, p.28.

⁴⁸⁴ Supra footnote 479, pp.124-129.

or with the larger American nation)”⁴⁸⁵. Therefore, according to Kymlicka’s reasoning, an American open and fluid society could only fit with a voluntary, comprehensive and fluid pattern of multiculturalism. This alternative model was found in the salad bowl model, a mirror image of American society, re-evaluating and enhancing ethnic diversity and cultural pluralism as distinct traits to preserve, abandoning the conception of forced assimilation to create a homogenous society.

However, although the boost gave after WWII by international humanitarian law and international organizations, which gradually developed a social, political and legislative framework of respect and tolerance of ethnic pluralism, American multiculturalism was once again profoundly undermined, this time by the insurgence on the world stage of Islamic terrorism, whose onset hit directly the core of The United States on the 11th September 2001. The terrorist attack was perceived as an attack on the whole nation, its values, its principles and identity, inducing an immediate sense of unity, patriotism and defensive and suspicious stance towards other cultures and religions. Those attacks that so deeply affected and shocked the American population, contribute to the implementation and realisation of more strict security measures and border controls and once again reopen the debate over illegal immigration and citizenship.⁴⁸⁶ Today US Citizenship for immigrants is achievable following three principles: both the *ius soli* and the *ius sanguinis*, and the naturalization process if one meets the requirements of continuous residence.⁴⁸⁷ But to get the entire picture of American plural society and to understand the geopolitical relevance of the modern age, one needs to take another step forward and clash with the unavoidable reality of the Trump phenomenon.

The 2016 presidential elections in the USA represented a flashing warning light under more perspective. On the 8th November 2016, the republican candidate Donald Trump was elected 45th president of the United States, winning 290 elector votes against the 232 votes for Clinton, but still only with 46.7% of the popular vote compared to 48.5% of Hilary Clinton. Indeed, the US electoral system is a complex mechanism based on the electoral college, composed of a set number of 538 electors, proportional with the size of each state. Therefore, American people casting the polls on the 8th November did not

⁴⁸⁵ KYMLICKA W., *American Multiculturalism and the ‘Nations Within’*, in (edited by) IVISON D., PATTON P., SANDERS W., *Political Theory and the Rights of Indigenous People*, Cambridge University Press, 2000, pp.216-237.

⁴⁸⁶ RUBIN D., VERHEUL J., *American Multiculturalism after 9/11*, Amsterdam University Press, 2009, pp.105-119.

⁴⁸⁷ Source : www.uscis.gov/us-citizenship

directly choose one of the candidates but expressed their preference for their electors and their votes were finally translated into the electoral college votes, in a winner-takes-all perspective (it is sufficient to slightly get the majority in order to win all the electoral votes of a state). Although being a rare event, these elections represented one of the five times in American history, where the popular vote did not correspond with the result of the electoral college.⁴⁸⁸ To better understand Trump's victory, it is necessary to analyse the geopolitical framework of contemporary America. Data showed that Trump gained the majority in the central and southern states, like Texas, Alabama and Georgia historically conservative and hothouses of nationalist, racist and the never uneliminated white supremacist ideologies. This stunning upset does not concern just Donald Trump, his ambiguous statements, his questionable pledges on the campaign trail, but mostly the current state of American society and more precisely the sentiments of the middle class. Trump's victory is said to be a populism victory, a nativism and protectionism triumph, the effect of a "deglobalization", the uprising against Hispanic immigrants, minorities and the exploitation of the welfare system, and the intolerance of delegitimized institutions which contributed to a globalization that favoured just the upper class, while impoverishing the populous middle class, the same class that the New York tycoon, with his popular motto "Make America Great Again", with simple words and emphatic speeches, was able to capture.⁴⁸⁹

In the United States, according to recent research over the last 30 years, the growth in the income of the bottom 50% has been zero, whereas income of the top 1% has grown by 300%.⁴⁹⁰ Wealth and economic inequalities are enormous in the USA and the middle class blamed the dark side of globalization for that. This class factor is further compounded by the racial factor. Some Americans are far from being openminded to the challenges and opportunities of a cosmopolitan society. The self-proclaimed melting pot state is still harbouring the heritage of the former nativists, used to the privileges of their status and look with suspicion on increased flows of immigrants (especially Latinos) that by 2050 will constitute 25% of the total population⁴⁹¹; Donald Trump represents only the end of the wedge of this phenomenon and the fact that Trump managed to successfully attain at

⁴⁸⁸ US Presidential Election Process: <https://www.usa.gov/election>; Statistics and facts on the 2016 Election: <https://www.statista.com/topics/2722/2016-election/>

⁴⁸⁹ FABBRI D., *Trump e i Dolori di una Giovane Superpotenza*, in Limes, *L'agenda di Trump*, Roma, Gedi, Vol.11, November 2016, pp.35-43.

⁴⁹⁰ Oxfam Report, *An Economy for the 99%*, January 2017. www.oxfam.org

⁴⁹¹ Supra footnote 489.

the White House, demonstrates it. The promise of building a wall at the Mexican border, of limiting free trade and favouring the domestic economy by renegotiating the terms of the TPP (Trans-Pacific Partnership), the TTIP (Transatlantic Trade and Investment Partnership) and of the NAFTA (North America Free Trade Area), of repatriating the illegal immigrants, have certainly broken through the souls of the lower middle class and working class.⁴⁹² Moreover, statistics of the Elections disclosed also a generational divide, with 53% of the population aged between 19 and 44 voting for Hilary, while 52% of those aged between 45 and older voting for Trump.⁴⁹³

With the words of Noam Chomsky “the neoliberal programs have led to stagnation or decline for much of the population, undermining of functioning democracy, reduction of benefits and social welfare [...] the social struggles and achievements [...] have been largely supplanted by fear, despair, and isolation, opening the way to the Trump phenomenon, which should be cause for deep concern.”⁴⁹⁴

⁴⁹² Ibid.

⁴⁹³ Source: Statista, The Statistics Portal, www.statista.com/topics/2722/2016-election/

⁴⁹⁴ CHOMSKY N., *Why is Donald Trump having so much success during this election cycle?*, www.quora.com.

CONCLUSIONS

The scope of this dissertation was to explore with an unbiased view the subject of multiculturalism, by means of investigating and examining the several European and global multicultural environments and analysing the existing political and juridical instruments created to deal with the multicultural challenge, in order to provide the reader with a careful overview on such a topical debate.

From the very first chapter it appeared clear how difficult it is to handle these concepts, given the complex definition of the notion of culture itself. However, we have ascertained that when speaking of cultural rights, cultural diversity and multiculturalism, several legal instruments posited and endorsed by the international community have provided useful tools and definitions to overcome such complexity and misunderstanding of interpretation and to create efficient instruments and fully-fledge measures of implementation, to foster integration, promote fundamental freedoms and the respect of cultural diversity against discrimination and intolerance.

In Europe significant examples of regulatory instruments and policies to manage minorities have been examined. The French case, perhaps the most interesting one, demonstrated how the assimilationist model revealed itself to be unsuccessful for the integration of new immigrants within the French society. In fact, with the intention of creating new French citizens, the French Republic demands the abandonment of the immigrants' own identity and culture, favouring ghettoization instead of integration. Despite having taken Switzerland as a means of comparison with French multiculturalism, it seems clear that the success of integration policies in a multicultural state, also depends highly on the very nature and composition of such a society. Indeed, French multiethnicity is the result of several immigration flows, while Switzerland consists of a multinational federation, where different populations voluntarily decide to gather and form a multicultural society. Therefore, we have asserted that the success or unsuccess of the different multicultural policies and models of integration might also be ascribable to the diverse features representing the composition of society, deeply influencing the relationship between the dominant group and minorities.

On the global level instead, two diverse but relevant cases of cultural pluralism have been analysed. On the one hand, we have ascertained the success of a liberal and progressive state as in the case of Canada, first supporter and promoter of multicultural policies,

which, despite having several and varied cultural diversities within its society, it was able to valorise, respect and recognize them, without denying their cultural and personal identities. On the other hand, one of the most complex cultural, religious and ethnic struggles has been examined, the Israeli-Palestinian case. Such clash concerns the dispute over a land claimed by two populations and granted to the Jewish population. It can be affirmed that the particular nature of the state of Israel, defined as an *ethnocracy*, makes reciprocal acceptance and peaceful integration of the two populations even more difficult, as it does not conceive nor admit cultural pluralism. Moreover, notwithstanding the several international efforts to reach a peace agreement, the endorsement of the “two-states solution” envisaged and promoted by the international community and in particular by the United Nations, seems to be far from being realized and implemented. The analysis of this case has showed how the multicultural challenge in deeply divided society might become even tougher to face and sometimes, due to the profoundly anchored rivalries of diverse cultures, it might be a reality not even accepted or endorsed, but instead ignored.

The fourth part instead, brought to the reader’s attention a relevant challenge and drawback arising from the clash of diverse cultures: culturally motivated crimes. Significant deductions have been drawn from this analysis. In fact, we tend to consider some values and principles, such as gender equality, non-discrimination, respect for universal human rights and equal opportunities, as concepts universally endorsed, ascertained and taken for granted. Nonetheless, this specific subject matter demonstrated how actually, even these alleged universal principles and values are not considered as such by all cultures. Female genital mutilation represents a useful example of the diverse views and status experienced by women in different parts of the world. Yet, the main assumption derived from the analysis of such practices of cultural offence, is the assertion of the main and most important limit to cultural rights: the respect for other human rights, which under no circumstances and for the compliance of no other principle, can be infringed. Moreover, this topic has led to a further reflection concerning the feminist ideology: Are feminism and multiculturalism allied or enemies? There is not a univocal response. Sure enough, multiculturalism represents a contradiction for the feminist theory, since it claims for the recognition of minorities rights regardless of race, ethnicity, sexual orientation, and gender, yet without considering the fact that diverse cultures share different and sometimes opposite vision of the status of women, thus actually undermining women.

Finally, the last conclusion drawn from this dissertation concerns the most topical and probably the most uncertain and problematic perspective of cultural pluralism, since it concerns an unfinished phase of history: the challenges to multiculturalism in contemporary societies. Events and phenomenon like the current refugee crisis, the evolution of Islamic terrorism in the Western world, the outcome of the Brexit referendum, and Trump's election in the United States have been clear and obvious alarm bells concerning a more and more globalized and multicultural society. Populism, nationalism, racist and xenophobic movements, previously thought quashed, are instead gaining support in the contemporary debates, undermining the stability of peaceful and secure environments, by means of disrupting democratic principles, social and cultural rights and fundamental freedoms for the fear of the "others".

However, such reactions tell us something more, as they do not involve just the cultural facets of a society, but also the political and economic implications of recent globalization. In fact, a further consideration can be drawn. Historically, in the philosophical theory of world-systems, the middle class was retained as a key structural element for the functioning of the world-system, playing as mediator or catalyser between the core (rich, western countries) and the periphery (poor, third world countries). Such middle class (or semi-periphery, referring to the entire world system) fill the otherwise enormous gap in the welfare and wealth distribution, avoiding the polarization of core and periphery, the wealthiest and the poorest. The fact that, over recent decades, the middle class has gradually become impoverished and has seen a sharp reduction in its wellbeing, while the core has managed to become even wealthier, might explain the political and social violent reaction, as it were.

The middle class is frustrated, angry and afraid of the growth of issues related to her wellbeing and political classes increasingly suggested it to think that the decrease of its wellbeing was to attribute to such factors as mass migration, expansion of multiculturalism, open and common markets, raising the economic competition and undermining the stability of domestic economies. Nation-states have paraphs for a long time blamed external factors, without considering nor looking at their capacity to manage such factors in a sustainable way.

It has been reported that true equality does not correspond to universalism, but to particularism, differentiated regimes according to each group's characteristics, so as to avoid discrimination; but in response to the recognition of diversities we are heading

towards a renewed *revanchism* of nationalist and populist movements, of which recovery is leading to an uncertain political phase, where every single state's choice, whether domestic or foreign, might represent a fatal or decisive geo-political move.

In response to the initial research question posed by this work, we may affirm that multiculturalism is certainly representing a problematic issue to deal with. Diversity and alterity are something we are used to conceive and envision as dangerous and challenging. Nonetheless, the examples of state practice reported, namely those of Canada and Switzerland, have demonstrated that an actual balance and stability within cultural pluralism can be reached whether the appropriate measures and differentiated regimes are applied and equal rights are granted regardless of gender, race and ethnicity. However, we might conclude that it does not exist an indisputable truth when it comes to values and principles, given the fact that each culture and society share different opinions and visions on similar topics. Even the universally deemed fair and right, western perspective can be considered compromised by cultural stereotypes and flaws; Why then should it be right to condemn a foreign practice as brutal, while tolerating and even fostering another similar practice clearly influenced by a western stereotype? Human rights are certainly the most powerful and strongest limit against the risks of multiculturalism, but as recent legal instruments have posited, cultural rights are recognized as human rights too. I believe that the answer to such questions does not rest on asserting which rights should prevail, or which should be denied or limited, but rather on reaching a fair and just balance between these rights, still remembering that culture is not a fixed and static subject, but it evolves and progress as traditions, costumes and values do. The means through which such balance can be achieved are awareness and education; and by asserting this, we do not mean imposing our principles and culture on others, but simply raising mutual awareness on the reciprocal cultural elements jeopardizing our unbiased view on human rights.

To conclude international institutions and bodies will be probably the most responsible characters for the tough task of directing in a fair, cooperative and peaceful manner a renewed concert of nations and cultures, likely to expand more and more, within a contemporary framework of social and political instability.

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Annex 1

Eurostat File: Non-national population resident in EU Member States, by group of citizenship, 2009.

Source : <http://ec.europa.eu/eurostat/statistics-explained>

	Total population	Non-nationals					
		Total		Citizens of other EU Member States		Citizens of non-EU countries	
		in thousands	%	in thousands	%	in thousands	%
EU-27	499 432.2 <i>s</i>	31 779.9 <i>s</i>	6.4	11 937.2 <i>s</i>	2.4	19 842.7 <i>s</i>	4.0
Belgium	10 750.0 <i>p</i>	.	.	.	.	.	.
Bulgaria	7 606.6	23.8	0.3	3.5	0.0	20.3	0.3
Czech Republic	10 467.5	407.5	3.9	145.8	1.4	261.7	2.5
Denmark	5 511.5	320.0	5.8	108.7	2.0	211.4	3.8
Germany	82 002.4	7 185.9	8.8	2 530.7	3.1	4 655.2	5.7
Estonia	1 340.4	214.4	16.0	9.6	0.7	204.8	15.3
Ireland	4 450.0	441.1	9.9	364.8	8.2	76.2	1.7
Greece	11 260.4	929.5	8.3	161.6	1.4	767.9	6.8
Spain	45 828.2	5 651.0	12.3	2 274.2	5.0	3 376.8	7.4
France	64 366.9	3 737.5	5.8	1 302.4	2.0	2 435.2	3.8
Italy	60 045.1	3 891.3	6.5	1 131.8	1.9	2 759.5	4.6
Cyprus	796.9	128.2	16.1	78.2	9.8	50.0	6.3
Latvia	2 261.3	404.0	17.9	9.4	0.4	394.6	17.5
Lithuania	3 349.9	41.5	1.2	2.5	0.1	39.0	1.2
Luxembourg	493.5	214.8	43.5	185.4	37.6	29.5	6.0
Hungary	10 031.0	186.4	1.9	109.8	1.1	76.6	0.8
Malta	413.6	18.1	4.4	8.2	2.0	9.9	2.4
Netherlands	16 485.8	637.1	3.9	290.4	1.8	346.7	2.1
Austria	8 355.3	864.4	10.3	317.0	3.8	547.4	6.6
Poland	37 867.9 <i>p</i>	35.9 <i>p</i>	0.1	10.3 <i>p</i>	0.0	25.6 <i>p</i>	0.1
Portugal	10 627.3	443.1	4.2	84.7	0.8	358.4	3.4
Romania	21 498.6	31.4	0.1	6.0	0.0	25.3	0.1
Slovenia	2 032.4	70.6	3.5	4.2	0.2	66.4	3.3
Slovakia	5 412.3	52.5	1.0	32.7	0.6	19.8	0.4
Finland	5 326.3	142.3	2.7	51.9	1.0	90.4	1.7
Sweden	9 256.3	547.7	5.9	255.6	2.8	292.1	3.2
United Kingdom	61 595.1	4 184.0	6.8	1 793.2	2.9	2 390.8	3.9
Iceland	319.4	24.4	7.6	19.4	6.1	5.0	1.6
Liechtenstein	.	.	.	.	.	.	.
Norway	4 799.3	302.9	6.3	165.4	3.4	137.6	2.9
Switzerland	7 701.9	1 669.7	21.7	1 033.4	13.4	636.3	8.3
Croatia	4 435.1	.	.	.	.	.	.
FYR of Macedonia	2 048.6	.	.	.	.	.	.
Turkey	71 517.1	103.8	0.1	45.3	0.1	58.4	0.1

s = Eurostat estimate; *p* = provisional value

Data source: Eurostat ([migr_pop1ctz](#))