Arab Jurisprudence in the Application of International Human Rights Conventions

(Descriptive Analytical Study)

Algeria, Iraq, Jordan, Lebanon, Morocco, Palestine, and Tunisia

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Abbreviations

ACHR	Arab Charter on Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
GATT	General Agreement on Tariffs and Trade
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child
UNESCO	United Nations Educational, Scientific and Cultural Organization

Preamble

Foreword by the **Raoul Wallenberg Institute** of Human Rights and Humanitarian Law

Within the framework of the **Raoul Wallenberg Institute** of Human Rights and Humanitarian Law project in the Middle East and North Africa (2014-2016), we are pleased to present this book to Arab judges, trainees at partner Arab judicial institutes, lawyers, and university professors at various law schools. The book is an attempt to highlight the status of the judiciary and its role in integrating human rights principles having an international dimension into national judicial application, and to provide the necessary resources to enable professionals in the judicial and human rights fields to easily and efficiently access the rules of international human rights law. This book comprises a summary of the jurisprudence arising from Arab courts, with a focus on the progressive interpretation of international conventions on human rights and the protection of public rights and freedoms by the Arab judiciary. This jurisprudence is developed in the courts through the use of international human rights law to achieve justice in broad terms, and to explore the universal principles confirmed at the national level through accession or ratification of several conventions, treaties, and human rights charters by partner Arab countries. This book shall become – as was originally intended – a purely national and regional Arab product.

At the **Raoul Wallenberg Institute**, as we offer this study on the application of international human rights conventions in Arab jurisprudence, we are pleased to be part of constructive and continuing cooperation with Arab judicial institutes in a number of countries in the Middle East and North Africa, namely: Lebanon, Tunisia, Jordan, Algeria, Morocco, Iraq, and Palestine. This study is a significant achievement and contributes to the accomplishments of Jurisprudence in the Application of Human Rights Standards in Arab Courts, issued in 2012. A third book on Arab jurisprudence concerning international conventions on women's rights authored by Professor Samia Bourouba is being published concurrently.

The study thus builds on past achievements with the aim of enhancing communication and continuity in the promotion and diffusion of judicial knowledge.

At the **Raoul Wallenberg Institute**, as we offer this book to professionals in this field, we cannot but express our hope that we have succeeded in making an effective contribution to our partners in judicial institutes. We are thankful for their close collaboration with us in all programs under the Memorandum of Understanding which identifies strengthening the role of the judiciary and jurists in the protection of human rights as the most prominent objective of programs implemented by the Raoul Wallenberg Institute's regional office in Amman.

In this context, it should be noted that this project and the issuance of this book would not have been possible were it not for the financial support of the Swedish International Development Cooperation Agency (SIDA) and the cooperation of the International Legal Assistance Consortium. A debt of gratitude is owed to both.

Finally, we thank His Excellency **Judge Ahmad Al Ashqar**, doctoral researcher in public law, for writing this book; our thanks go also to **the partner judicial institutes** for their cooperation and provision of their expertise. We would also like to thank **Ms. Eman Siyam**, responsible for the Middle East and North Africa program, for her efforts and supervision in bringing this book to fruition. We hope that we shall continue to cooperate in order to achieve its desired goals.

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1. Introduction

The idea of human rights originates as far back as ancient times and in the various religions and sects of the Middle Ages, which saw the crystallization of humanitarianism. Human rights sources are rooted in the historical and intellectual changes since the Renaissance, culminating in the 18th century and subsequently codified in the Universal Declaration of Human Rights. Human rights in the modern era owe their existence as much to international treaty law as to customary international law, both sources of human rights norms. Together they form the pillars of international human rights law.

The rules and principles of human rights were developed to ensure widespread regulation on the basis of two main sources. The first comprises customary and treaty-based norms in force in a given state in accordance with constitutional procedures; the second exists at the national level and is represented by the constitutional charters containing public rights and freedoms. This latter source constitutes the legislative and judicial framework of national legal systems.

Consequently, international human rights law is now derived, similar to public international law, from a set of clear and precise rules located in various sources developed under the free will of states. Subsequently international human rights standards have become widespread and contain legal rules based on treaty or customary sources of international human rights law.

The majority of states in the Arab region have acceded to and ratified international charters and human rights treaties. These charters and treaties have become important sources that guide Arab judges in judicial application. The provisions of these instruments are the focus of national constitutional documents, and therefore are considered fundamental to justice in Arab jurisprudence. After all, justice is rendered meaningless in the absence of effective judicial protection.

Arab jurisprudence confirms that the human rights principles found in international human rights instruments are legally binding on national systems, not only because they are enshrined in constitutional documents, but also because of the commitment to enforce them in national courts. However, the success of this approach presupposes that curricula for judicial education build the capacity of Arab judges to enforce international human rights instruments which is not always the case.

To address this, eight Arab judicial institutes and schools in the Middle East and North Africa, in collaboration with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, have united to exchange judicial experience under a Memorandum of Understanding. This cooperation aims to develop the human rights education programs of judicial training schools and institutes, and to increase the contribution of graduates of such institutes toward the protection of human rights.

The implementation plan for 2014-2016 includes a number of activities aiming to shed light on important Arab jurisprudence in the field of human rights protection. The plan also highlights the position and role of the judiciary in integrating international human rights principles into national judicial systems. It further provides a necessary resource for accessing international human rights norms, by compiling and analyzing these sources, including the most recent findings in Arab jurisprudence in the protection of human rights and application of international human rights instruments.[1]This book is one of the endeavours arising from the Memorandum of Understanding. It provides theoretical material concerning the mechanisms available to national courts in implementing international human rights norms and outlines a comprehensive body of Arab jurisprudence that has already applied these norms. The book is available to Arab judges and trainees at judicial institutes, who can use it to compare experiences among Arab legal systems that are similar in structure and composition. It may also enlighten judicial thought when creative solutions to inconsistencies and incompatibilities between domestic and international law are sought.

1 In fulfilling the project's objectives, the Raoul Wallenberg Institute published in 2012 a regional book on human rights jurisprudence in Arab courts, prepared by Samia Bourouba, Associate Professor of the Higher School of Magistracy in Algeria. The book was a collaboration among Arab institutions and judicial schools in Algeria, Iraq, Jordan, Morocco, and Palestine. In the second phase of the project, two new books will include both previous and more recent jurisprudence.

The book analyses Arab jurisprudence in the field of human rights protections in general. Jurisprudence is defined here as meaning all judgments and decisions issued by courts and Arab judicial bodies at various levels. This book presents original, applied, and classified material on mechanisms for the use of human rights norms in judicial application, as issued by various Arab courts. Arab judicial institutes and schools, through the members of national teams and their coordinators taking part in the project, have thankfully provided a number of judgements that together encompass the study.

This study makes the fundamental assumption that, among the multiple legislative sources upon which a judge may rely in issuing a ruling, human rights sources are among the most important. Nonetheless, this notion is only true if Arab constitutional and judicial systems refer to existing mechanisms for integrating international conventions into national systems. Accordingly, the value of a particular human rights source may vary based on its prevalence within national laws.

Although this study assumes that judicial oversight plays a role in the protection of human rights, it does not aim to assess the situation of human rights in Arab states or the performance of Arab judicial authorities. It seeks only to construct a body of jurisprudence in the field of human rights protections via international instruments.

1.1 Methodology

This study is mainly a descriptive analysis that aims to deepen the understanding of mechanisms for the protection of human rights and application of international human rights instruments in Arab jurisprudence. The first step in research was to locate the intersection of national texts with the provisions of international conventions. Then, the provisions were examined in order to elucidate the role of national judges and whether their judgments reflect any of the following approaches: respecting primacy of international conventions over national laws; direct application of international instruments to fill legal gaps and legislative insufficiency in national laws; implicit application; or, use of these conventions to interpret the rationale of national lawmakers.

The findings of this research are presented in six chapters.

Chapter 1 offers a brief introduction, presenting the methodology of this descriptive analytical study.

Chapter 2 introduces a theoretical framework for the role of the judiciary in the application of international human rights instruments. It examines judicial application in order to develop a preliminary awareness of the relationship between international human rights conventions and national legislation, and the extent of commitment of national judges in applying them in their jurisprudence.

Chapter 3 discusses constitutional supervision exercised by courts and constitutional councils and the application of international human rights instruments in these bodies. A theoretical framework is developed to show both the nature of these courts and councils, and their role in the protection of human rights, as well as the judicial mechanisms and tools used to apply international human rights conventions. This framework will consider the context in which judges perform and therefore acknowledges that the tools available to a constitutional judge, in light of jurisdiction, are different from those of an administrative or a regular judge.

Constitutional supervision in Lebanon, Tunisia, Iraq, Jordan, Algeria, Palestine and Morocco is examined, beginning with a description of the judicial system in each country followed by an analysis of specific cases. The cases concern a wide range of substantive rights including: equality and non-discrimination; guarantee of a fair trial; freedom of opinion and expression; the right to political participation; and others. This study discusses, for example, how constitutional judges are able to protect the right to personal freedom using their authority to cancel or interpret a law falling under their jurisdictions.

This examination reveals the connection between judicial mechanisms and each specific protected right, thus allowing understanding of such mechanisms and the application of international human rights instruments.

Chapter 4 presents the legitimacy supervision exercised by administrative

courts in the application of international human rights instruments. As in the previous chapter, a theoretical framework shows both the nature of these courts and their role in the protection of human rights, types of oversight, as well as the judicial mechanisms and tools available specifically to these judges.

Legitimacy supervision in administrative courts in Tunisia, Lebanon, Algeria, Palestine, Jordan, Morocco, and Iraq is examined. There is a brief description of the judicial system in each country, followed by discussion of specific cases concerning substantive rights such as: freedom of opinion and expression; freedom of association and the right to organize; property rights; access to information; disabled persons' rights; and many others. This discussion shows, for example, how administrative judges are able to protect international human rights norms through methods of reversal and compensation for violations.

As in the previous chapter, the examination of each case reveals a connection between judicial mechanisms and each protected right, thus furthering understanding of such mechanisms and the application of international human rights instruments.

Chapter 5 concerns the supervision of ordinary courts conducted by ordinary, regular, or judicial courts such as criminal, civil, or commercial courts, depending on designation in each country. This chapter also begins with the presentation of a theoretical framework that shows both the nature of these courts and their role in protecting human rights. Judicial mechanisms and the unique tools available to judges in the ordinary courts are then introduced.

The supervision of ordinary courts in Lebanon, Tunisia, Iraq, Morocco, Palestine, Algeria, and Jordan are examined. Similar to the prior chapters, there is a brief description of the judicial system in each country, followed by discussion of specific cases. These cases concern substantive human rights such as: freedom of opinion and expression; guarantees of a free trial; child rights; refugee rights, specifically in Lebanon and Algeria; and many others. This study discusses how, for example, an ordinary magistrate is able to use various judicial powers, either in the criminal,

civil, or commercial courts, or in summary courts and other jurisdictions to protect human rights.

As in the previous chapters, the examination of each case reveals a connection between judicial mechanisms and each protected right, thus furthering understanding of such mechanisms and the application of international human rights instruments.

Chapter 6 contains the study's references which include books, articles, and websites.

This study's structure will allow the reader to easily access the most relevant aspect of judicial application depending on specialization or interest in a specific state or substantive right without the need to read the entire book. The study will not address military justice, forensic or religious judicial authorities. It will limit itself to the three judicial patterns mentioned, these being the main authorities having general jurisdiction to examine and arbitrate disputes.

Finally, the main limitation of this study lies in the lack of centralized data on Arab judicial decisions. It was possible to overcome this issue by referring to some studies and court websites as well as other means of including distinctive Arab jurisprudence in the field of international human rights law.

2. General Theoretical Framework for the Role of the Judiciary in the Application of International Human Rights Instruments

To determine the nature of Arab jurisprudence and its role in the application of international human rights conventions, it is important first to understand the role of the judiciary in the protection of human rights and the nature of judicial oversight in different courts. These courts include constitutional courts and councils, administrative courts, and ordinary courts, such as criminal, civil, and commercial courts.

This chapter first addresses the concept of judicial oversight and its role in the protection of human rights; it then examines human rights conventions and their relationship with constitutions and national judicial systems.

2.1 The Concept of Judicial Oversight and its Role in the Protection of Human Rights from the Perspective of International Standards

2.1.1 The Concept of Judicial Oversight

The protection of rights and public freedoms is manifested through judicial oversight of both national legislation as well as the activities of public authorities. If the principle of the rule of law requires that "all, including State agencies, are to abide by the laws issued by competent authorities as a basis for the legitimacy of the work of this authority",[2] protection of rights and freedoms cannot be achieved without the existence of regulatory, legitimate, and binding tools in constitutional systems, most notably the oversight exercised by the judiciary. The rule of law assumes that the judiciary has a supervisory role in assessing the compatibility of legislation with a constitution. The judiciary is also tasked with supervising the degree of compatibility between the actions of public authorities and legislation or a constitution. Comprising courts of different types and levels, the judiciary arbitrates disputes between individuals, or between

2. M. M. Mosbah, The Right of a Person to a Fair Trial: A Comparative Study (Dar Annahda Al-Arabia, Beirut, 1996) p. 16.

individuals and public authorities, thereby enforcing the rule of law. This is what is meant by 'judicial oversight'.

Judicial oversight, despite its many definitions, enables a judicial authority to review certain actions and legislation in accordance both with the rules and principles determining the court's jurisdiction and with the law applicable to the presented dispute.[3]

Judicial oversight also supposes the absence of decisions or actions outside the scope of judicial review with legislators having regulated the mechanism for judicial oversight. Judicial oversight takes place within a precise structure, governed by legislative rules falling within the realm of public order, and is inviolable. Legislators impose patterns for judicial oversight in order to ensure minimal overlap and contradiction. The legislature has vested some courts with competencies that cannot be assumed by other courts and interference by the latter will be deemed void and any resulting judgments issued will lack enforceability. Constitutions have defined general rules for these competencies, leaving specific provisions to be dealt with in legislation. Based on these specific provisions the structure of judicial oversight becomes better defined. Whether constitutional, administrative, criminal or civil, judicial oversight is exercised by regular courts or any authority empowered to settle disputes between litigants.

2.1.2 Guaranteeing the Effectiveness of Judicial Oversight in the Protection of Human Rights from an International Standards Perspective

The establishment of effective judicial oversight must be based on the following: the right to seek judicial redress and judicial remedy; judicial independence; and fair trial guarantees.

3 The definition of judicial oversight may conflict with a number of legal concepts and terms, hindering the possibility of reviewing administrative actions and legislation, whether primary or secondary, and whether applied in normal or exceptional circumstances. Judicial oversight is a permanent and comprehensive process that requires explanation of several other ambiguous concepts including that of acts of sovereignty given that a constitution neither addresses acts of sovereignty nor stipulates their removal from the scope of judicial oversight. It is equally important to define the concepts of urgent circumstances, extraordinary circumstances, and states of emergency and necessity.

The right to seek judicial remedy is considered one of the most fundamental guarantees connected to judicial oversight. Without the right to seek judicial remedy and access a court, judicial oversight cannot take place.

International treaties and conventions set a high value on the right to seek judicial remedy. Article 10 of the Universal Declaration of Human Rights (UDHR) states that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". Article 8 of the UDHR says that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". The International Covenant on Civil and Political Rights (ICCPR) also emphasizes this right, while mentioning a number of associated guarantees in Article 14(1)-(7).[4] The jurisprudence of courts and constitutional councils in comparative judicial systems agree on the inadmissibility of any legislation blocking the right to seek judicial remedy.[5]

The right to seek judicial remedy is associated with an important principle: judicial independence. This means that "the State Treasury – and not the litigants – shall assume the salaries of Judges and staff and cover their needs; litigants shall assume payment of a variety of fees to the State Treasury".[6]

If the right to seek judicial remedy is one of the most important guarantees, it can be said that it presupposes the existence of an independent judiciary. This is confirmed in Article 14(1) of the ICCPR which specifies

4 See United Nations High Commissioner for Human Rights in the Palestinian Territories, International Rules and Standards Particular to Sovereignty of the Law and Human Rights (United Nations Publications, Palestine, 2013) p. 45.

5 In this, the Egyptian Supreme Constitutional Court found in its ruling no. 92 for year 4 Judicial Constitutional in 1983 "that Article II(b) of the Agrarian Reform Law contradicted the text of Article 68 of the Egyptian Constitution, which stipulates the right to litigation and the right of every citizen to have recourse to an ordinary court". See A.F. Al Lamsawy, Litigation in National Legislation and the Stance of International Covenants and Global Constitutional Principles 1st ed. (National Center for Legal Publications, Egypt, 2009) p. 149.

6 A. Al Fazairy, Guarantees of Litigation: A Comparative Analysis (Dar Al-Maaref Publishing, Alexandria, 1990) p. 52.

that disputed matters should be dealt with by a competent, independent, and impartial tribunal.[7]

Judicial independence has become one of the established principles guaranteeing the effectiveness of judicial oversight in international law as confirmed by the Basic Principles on the Independence of the Judiciary adopted by the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, Italy in 1985. This convention included a set of principles on judicial independence, judges, conditions of service, discipline, immunity, detention, and isolation, among other matters.[8]

Judicial independence is also among the most important fundamental guarantees of effective judicial oversight found in national judicial systems. It ensures proper functioning of the judicial process in order to protect rights and fundamental freedoms. Independence has a major impact on the integrity and impartiality of the judge when issuing decisions, particularly human rights provisions.[9] Accordingly, most Arab constitutions provide for judicial independence, and forbid interference in court proceedings. National jurisprudence of various countries has referred to the crucial role that judicial independence plays in enabling the effective protection of

7 The idea of judicial independence evolved throughout several eras in order to reduce the dominance of rulers by seeking mechanisms to stop them from interfering in the work of judges in pursuit of personal goals and interests, or to strengthen their dominance and violation of human rights without monitoring. Thinkers and philosophers made efforts to develop the idea of the independence of the judiciary, and Montesquieu is considered to be the first to propose this theory, which seeks an organic separation in which each branch specializes in one of the three functions of the State: legislative, executive, or judicial. The theory developed by trial and error since it lacked conclusive separation among all three, and resulted in establishing mutual cooperation and participation. However, some believe that in all modern democratic constitutions the complete independence of the judiciary is immutable. See H. Ibrahim and A-K. Al-Jubouri, Guarantees of the Judge in Islamic Sharia Law: A Comparative Study, 1st ed. (Al-Halabi Legal Publications, Beirut, 2009) p. 60.

8 See United Nations High Commissioner for Human Rights in the Palestinian Territories, supra note 4, p. 119.

9 It cannot be imagined that judicial oversight is effective and impartial if the judiciary is subordinated to the dictates, pressure, and hegemony of the administrative authority over judicial affairs. Some people have interpreted this to include the necessity of providing financial and administrative independence to the judiciary. Accordingly, most constitutions provide for judicial independence, and forbid interference in the affairs of the courts.

rights and public freedoms[10] as well as ensuring the independence of judges[11] and precluding outside influence on judges.[12]

An open court is also considered among the most important judicial guarantees for the protection of human rights. International conventions enshrine the principle of public trials, for example, in Article 10 of the UDHR which says that trials should be conducted in public. Article 13(2) of the Arab Charter on Human Rights (ACHR) declares that "[t]rials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights".[13] Similarly, Article 14(1) of the ICCPR sets a general rule requiring hearings to be held in public before a competent court. However, the press and the public may be prevented from attending all or part of a trial for reasons of public morals, public order, national security, protection of the privacy of parties, or to the extent deemed necessary by the court in exceptional circumstances where publicity would prejudice the interests of justice. In

10 Among the important legal precedents that demonstrate the importance of judicial independence, the judgment of the Inter-American Court of Human Rights in the matter known as the case of the Constitutional Court, is conspicuous. "It is related to the criminal prosecution and the final isolation by legislative decisions dated 28 May 1997 issued against three judges of the Constitutional Court due to their issuance of a ruling for the Constitutional Court on the non-applicability of the decision of the President of Peru (Fujimori) that dissolved the Congress and the Court of Constitutional Guarantees; the isolation of the three judges was a result of the application of the penalty that was imposed by the legislative authority within the framework of a political trial, [and] the Inter-American Court of Human Rights concluded that articles 8 and 25 of the American Convention on Human Rights have been violated." See Office of the United Nations High Commissioner for Human Rights, Human Rights in the Administration of Justice: Manual on Human Rights for Judges, Prosecutors and Lawyers (United Nations High Commissioner for Human Rights, Geneva, 2003) p. 120.

11 Despite the importance of judicial independence as an institution, the independence of judges as individuals in the issuance of their provisions and self-immunity constitutes the cornerstone in ensuring judicial independence as a whole, since judges must enjoy independence coming from the "spirit of indispensability". Judge Abdullah Ghazlan, a member of the Palestinian Supreme Court, considers that "it is dangerous for the Judiciary to be independent as an authority but not the individual judges. It is as if the judge is violating his own independence or his independence is violated by other judges. I claim that the independence of the judge is the main pillar and the cornerstone in the independence of the judiciary as an authority". See A. Ghazlan. 'The Concept of the Independence of the Judge, Ethical and Professional Value', 16 Justice and Law Magazine of the Palestinian Center for the Independence of the Judiciary and the Legal Profession (2011) p. 250.

12 Nowhere is this more evident than in the functioning of the professional institutes for judges and political work in Italy. Intervention of political considerations in the appointment of judicial officeholders resulted in the judiciary becoming pro-political and subject to the influence of the executive power. For more information on what made it lose its impartiality and independence, see H. R. Abdul Karim, Judicial Protection of the Freedom to Form Political Parties (Legal Books House, Al Mahalla al Koubra, Egypt, 2008) p. 787.

13 See League of Arab States, Arab Charter on Human Rights, 15 September 1994, < www.refworld.org/docid/3ae6b38540.html >, visited on 13 May 2016.

any event, Article 14(1) also indicates that the judgment should be made available to the public and therefore is in accordance with the provisions of most Arab constitutions, as well as Article 13(2) of the ACHR.

Most constitutional documents, including those of Arab countries, enshrine the principle of public trials. National constitutions and international conventions ensure the implementation of such principles in order to achieve a number of human rights related objectives, including effective judicial oversight and prevention of human rights violations in the context of confidential proceedings. Imposing community control over proceedings both reinforces the principle of public hearings and establishes a legal safeguard. Public hearings enjoy political and popular support because their "main aim is to involve the public in issues of concern to public opinion in the community, thus ensuring effectiveness of judicial oversight in the protection of Rights and Public Freedoms, considering that the right of the public to attend hearings is a manifestation that the public's sense of justice is fulfilled".[14]

Fair trial guarantees are a vital means to ensure the protection of human rights. These guarantees both flow from and intersect with the inherent rights of human beings. The concept of a fair trial is comprehensive and can accommodate all guarantees related to the judicial process as a whole, including the rights of an accused person to be informed of the charges against him/her, as well as the right to a lawyer, to silence and to make statements.

Article 14 of the ICCPR covers several important foundations in guaranteeing a fair trial and thus has influenced most national constitutions. The guarantee of presumption of innocence, designed to protect a person from being subjected to unfair trial without legal basis or clear evidence suitable for incrimination, conviction, and sentencing is one of the most important foundations. Without this protection, the individual would become subject to domination, abuse, and encroachment by public authorities. The Egyptian Supreme Constitutional Court stated in a ruling on this matter that "the presumption of innocence is considered the basic

14 See A. Majed, 'The Media and the Limits and Controls of the Principle of Public Hearing', Al Ahram, <www.ahram.org.eg/archive/Issues-Views/News/96467.aspx>, visited on 22 May 2016.

rule adopted by all laws not because it ensures protection of the guilty, but to ward off punishment from the individual if the charge against him was not proven beyond reasonable doubt".[15]

Presumption of innocence constitutes an effective guarantee of judicial oversight because it compels the competent judge to declare the innocence of any defendant in the absence of sufficient evidence warranting conviction. Article 14(2) of the ICCPR establishes that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". The rule of 'presumption of innocence' is linked to the right of defence, i.e., the right of the accused to prepare a defence which benefits from provisions in the code of criminal procedure. These provisions were developed to enable judicial oversight, establish and maintain equality of arms between prosecution and defence, and allow a defendant adequate opportunity to present a defence in return for the right of the community to try the case.

Article 14(3) of the ICCPR details several safeguards such as the right of the accused to be informed of the nature of the charge(s) against him/her, as well as the rights to have adequate time to prepare a defence, to have a lawyer and to the expeditious conduct of proceedings.

Fair trial guarantees also require the appearance of the accused before a judge and a competent and impartial tribunal. This right is enshrined in Article 14(1) of the ICCPR and Article 10 of the UDHR. Moreover, Article 15 of the ICCPR affirms the principle of non-retroactivity of criminal laws by stating that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed". This article adheres to the principle of in dubio pro reo (ambiguity shall be resolved in the accused's favour) as it further stipulates that "[n]or shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby" (emphasis added).

15 See Judgment no. 12-13, Judicial Constitutional, issued on 2 February 1992, in H. Bakkar, Protection of the Right of the Accused to a Fair Protection (Dar Al-Maaref Publishing, Alexandria, 2008) p. 9.

The principle of judicial hierarchy is also considered one of the major guarantees that strengthen judicial oversight. Article 14(5) of the ICCPR affirms that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". Indeed, having a higher court monitoring a lower level court is a procedural mechanism that allows the review of a lower court judgment before it becomes final. Judicial oversight therefore exists across several levels and national jurisprudence from various countries has confirmed that "the principle of judicial hierarchy has the general goal of strengthening and ensuring the proper administration of justice".[16]

2.2 International Human Rights Conventions and their Relationship with National Constitutional Systems

This section will outline the sources of international human rights law and their relationship to national constitutions and judicial systems. First, the development or evolution of human rights sources will be discussed. Then, the interaction between these sources and national constitutional systems including the judiciary will be examined.

2.2.1 The Development of Human Rights Sources

At the international level, human rights have developed from philosophical principles deriving from a ranwge of intellectual sources. However, two types of sources dominate. The first are international sources having a customary and treaty-based dimension[17]. The second are national sources of rights and public freedoms contained in constitutional documents. Although international human rights sources may guide judges in their decisions, the development of these sources has also led to a significant evolution in the concepts of human rights norms in national constitutional and judicial systems.

16 Al-Fazairy, supra note 6, p. 132.

17 "The concept of Human Rights was the product of a philosophical labor which led, along with the events and historical revolutions in America and Europe in the early 18th century, to the crystallization of human rights in charters and then in institutional treaties sponsored by international organizations". See M. Sabila and A.S. Al-Ali, Human Rights: Philosophical Essentials and Foundations, 2nd ed. (Dar Toubkal Publishing House, Casablanca, 2004) p. 5.

It is possible to define human rights as "natural machinery required by the spiritual, mental, instinctive, material and physical human nature of a person".[18] Human rights have originated from an innate desire to preserve respect, equality, and the values of tolerance among peoples.[19] This human desire is reflected in national constitutions while additionally countries conclude international agreements to further the promotion and protection of human rights.

The international community has made considerable efforts to find ways to protect human rights. These efforts culminated in the adoption of the Charter of the United Nations in San Francisco on 26 June 1945. Under Article 1(3), the United Nations has stated as its most important purpose the achievement of "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[20]

The international community has endeavoured to universalize concepts of human rights particularly in certain historical contexts. Indeed, through the provisions of international human rights law, these principles have derived their strength from restraining the sovereignty of states in their behaviour toward individuals. "[S]tates' grip on their sovereignty [became] an obstacle to respecting their international legal obligations originating primarily from the Charter of the United Nations and the human rights conventions, the latter carrying within them certain rights that have become peremptory rules",[21] whether those states were party to the treaty or not. Accordingly, modern international law gave the individual a status

18 See A.M. Al Dabbas and.A.U. Abu Zein, Human Rights and Freedoms and the Role of the Legitimacy of Police Procedures in Reinforcement (Dar Al Thaqafa, Amman, 2005) p. 26.

19 Human rights were considered the product of the idea of natural law, once stripped from its religious roots and characterized by its time due to the jurist Jrosios. The expansion of the liberal doctrine in Europe in the 17th century and the adoption of the thinkers on the standards of natural law contributed to considering human rights as inherent by nature and therefore fundamental and not a formality. See S. S. al Hajj, The Legal Concepts of Human Rights across Time and Space, 3rd ed. (Dar Al Kitab, Al-Jadida Al-Motahida, Beirut, 2004) p. 41.

20 See Office of the United Nations High Commission for Human Rights, supra note 10, p. 3.

21 See N. M. Hassawi, Rights of Palestinian Refugees between International Legitimacy and the Palestinian - Israeli Negotiations (Al-Zeitouna Center for Studies and Consultancies, Beirut, 2007) p. 43.

in international conventions and treaties, especially when it came to public rights and freedoms.[22]

If domestic laws focused on human rights in order to provide effective means of protection, the international legal system did the same once belief among countries matured as a result of extensive human suffering in the 20th century, in particular the atrocities of the First and Second World Wars. International law developed its interest in the individual in various ways, including the philosophical concepts enshrined in constitutions and bills of rights, as well as from the creation of mechanisms for the protection of individuals. Indeed "the first clear vision towards the international protection of human rights emerged after the First World War, though this fact was already determined prior to this date due to the status of the individual in international law".[23]

The focus of the international community was demonstrated in these human rights rules and in placing the individual at the centre of the UDHR at the United Nations General Assembly on 10 December 1948.[24]
The UDHR mandates respect for human rights, by referring to the obligation of national legal systems to protect them. Protection derives from the UDHR preamble which states that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". Protection is further strengthened by Article 8 which reaffirms that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him

22 If the "nation-state since the signing of the Peace Treaty of Westphalia in 1648 is the direct player on the level of international relations considering it is the only person of international law, and what it entails for these countries to enjoy the rights and incurring obligations imposed by the international legal system; and if the intense debate at the time leading to the denial of any direct role for the individual in the international legal system, despite being recognized as representing the humanitarian unity upon which any national legal system is based, then European countries have had to conclude treaties requiring the protection of a certain category of its own nationals, in the eighteenth and nineteenth centuries". See M. L. Radi and H. Abdul Hadi, Introduction to Human Rights Study (publisher unknown) p. 101.

23 Ibid.

24 Some criticized the western character in this declaration as they considered "the formulation of the human rights rules in the Universal Declaration and in other treaties have been drafted based on the consideration that they are fundamental in the European culture and reflect its own specificities, and that they differ, to some extent, from the cultural specificity of other nations". See M.A. Al-Jabri, Democracy and Human Rights (UNESCO Publications, Morocco, 2000) p. 13.

by the constitution or by law".[25] This article may be considered the main foundation for the commitment of states to enshrine human rights principles in national legal systems, and to provide guarantees of judicial oversight in relation to potential human rights violations.

It is no secret that the UDHR includes general rules of human rights that have affected, to a large extent, modern national constitutions,[26] so much so that the UDHR has become a binding source of customary international law. Whilst some might contest the legal value of the UDHR, the International Court of Justice made clear in its Namibia Advisory Opinion (1971) that the UDHR's "binding strength emanates nonetheless from the acceptance by the States of the Declaration as a custom through habitual practice".[27] Sources of contractual obligation agreed upon by states are added, in the form of ratified international treaties and covenants such as the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[28]

With such interactive development over time, human rights derive their existence, in the modern era, from a contractual international source in addition to customary international sources to form the pillars for such protections.[29]

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25 Article 10 of the UDHR states: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

26 For example, Article 11 of the UDHR states: "(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed". The content of this article is similar to the provisions in several national constitutions.

27 See K. I. Al Hadithy, 'The Legal Position of Palestinian Refugees and the Position of the United Nations Thereof', Arab Affairs Magazine (2005) p. 205.

28 The International Covenant on Economic, Social and Cultural Rights entered into force on 3 January 1976 in accordance with Article (27/1), which stipulated that it went into force three months after the date of deposit with the Secretary-General of the thirty-fifth instrument of ratification or instrument of accession. The ICCPR entered into force on 23 March 1976 in accordance with Article (49/1) of the covenant, which stipulated that it went into force three months after the date of deposit with the Secretary-General of the thirty-fifth instrument of ratification or instrument of accession. The Optional Protocol to the ICCPR went into force 23 March 1976 in accordance with Article (9/1), which stipulated that it entered into force three months after the date of deposit with the Secretary-General of the tenth instrument of ratification or instrument of accession. See Office of the United Nations High Commissioner for Human Rights, Human Rights: A Compilation of International Instruments (United Nations, New York and Geneva, 2002) pp. 3, 6, and 8.

29 See M. Sullivan, Human Rights: From Socrates to Marx, 2nd ed., (M. Al Hilali, Trans.) (Imperial Publications, Rabat, Morocco, 1999) p. 6.

At the regional level, sixteen Arab states adopted the Arab Charter on Human Rights (ACHR) at the Arab Summit in Tunis on 23 May 2004. This agreement rendered the protection of human rights fundamental, whether originating from an international source in the form of international, universal, or regional treaties, or from national internal constitutional, legislative, or administrative sources.[30]

It is recognized that the principles enshrined in international human rights law are not without impact on national and judicial constitutions and application, but in addition, are of a binding character in national constitutional systems. They are not only being enacted in constitutional documents, but are recognized in judicial systems through their application in the judgments issued by national courts.[31]

As a reflection of the texts of international conventions, it has been shown that "human rights have become the most important subject in constitutional documents, and the topic most related to the concept of justice, since justice is meaningless in a society that ignores and neglects human rights".[32] Sources of human rights have evolved on two levels, internationally and locally, to become a tool to guide judges when necessary in order to safeguard human rights, and to enshrine those rules and principles of international human rights law enacted in national constitutional documents.

2.2.2 The Relationship between International Human Rights Conventions and National Constitutional Systems

The direct impact of international human rights conventions on national constitutional systems is determined by the integration of international human rights norms within the national constitutions and legislative mechanisms. The mechanisms for integrating international conventions and treaties, including those related to human rights, into national constitutions and legislation differ among states. Some states grant the

30 See K. A. Al-Kabbash, Study of the Origins of the Legal Protection of Human Rights (Al Fateh Printing and Publishing, Alexandria, 2006) p. 11.

31 See I. Shaaban, International Human Rights Law (Al-Quds University, Palestine, 2008) p. 42.

32 See M. Korban, Human Rights Subject to Divergence (publisher unknown, 1990) p. 337.

executive the authority to conclude agreements and treaties, provided that the parliament approves them prior to enactment, while others require parliament's approval for particular types of agreements such as those containing financial or political commitments. Ratification by states entails the obligation to implement the provisions of these agreements, in accordance Article 26 of the 1969 Vienna Convention on the Law of Treaties.[33]

While some constitutions define – for the most part – mechanisms to integrate international conventions into their legal systems,[34] others go further and point out explicitly in their texts the value of international treaties to their legal system.[35]

It can be said that international treaties, in particular those associated with public rights and freedoms, supersede national laws. However they must not contradict constitutions because these treaties can possess binding force in the national legal system only if a constitution has been amended. Nevertheless, states may not break away from their contractual obligations under the pretext of incompatibility with internal laws. This is established by Article 46 of the Vienna Convention on the Law of Treaties which stipulates that "[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law". Similarly, a state may not refuse to be bound by an obligation declared constitutionally non-ratified. This was confirmed in the judgment of the Permanent Court of International Justice in the 1923 Wimbledon case and in the 1998 judgment of the International Court of Justice in the dispute between the United Nations and the United States of America

33 See S. Bourouba, Jurisprudence in the Application of Human Rights Standards in Arab Courts, Algeria, Iraq, Jordan, Morocco, and Palestine (Raoul Wallenberg Institute, Amman, 2012) pp. 25-40.

34 "The value and strength of international treaties vary in respect to the domestic legislation in accordance with the constitutional system of each state. Some jurisprudence adopts the dualist doctrine that international and domestic laws constitute equal systems independent from each other, while monist theorists argue that the rules of general international law and the rules of domestic law integrate into a single legal system". See A. Kayed, Parliamentary Control of the Treaties Concluded by the Executive Branch (The Independent Commission for Citizens' Rights, Ramallah, March 2012) pp. 16-34.

35 For example, Article 56 of the French constitution has raised the status of international conventions to the point where the constitution had to be amended since it was contrary to the provisions of the treaty ratified in accordance with the conditions prescribed, while Article 6 of the United States Constitution confirmed that treaties are the supreme law of the country. Article 65 of the Turkish Constitution grants treaties the same power enjoyed by ordinary laws, while some constitutions, such as the constitutions of Greece, Bulgaria, Tunisia, and Italy, simply state the ratification method which suggests these constitutions grant treaties the same status as domestic laws. Ibid., pp. 33-37.

regarding the 1947 United Nations Headquarters Agreement.[36]

In general, the status of international conventions with respect to national laws is provided for in the constitutions of specific countries.[37] Whatever the ratification or publishing method to determine the extent of its entry into force and whatever the goals of the states to protect sovereignty and not increase their financial burden, these constitutional procedures do not exempt states from fulfilling their contractual obligations in the first place. Accordingly, international human rights conventions clearly have impact on national judicial systems through the commitment of national courts to implement international treaties in judicial applications following the common logic upon which the human rights treaties were founded. Moreover, states are not exempt from their obligations under the provisions of human rights customary international law. The principles of the hierarchy rule contained in the International Bill of Human Rights prevail over the provisions of national legislation since judges can apply "the applicable international norms accepted as law, indicated by the frequency of use, establishing in this manner an international customary commitment upon states".[38]

The issue of the relationship between international and domestic law is a long-standing principle of modern international law. International jurisprudence has dealt with it and enshrined it in two theories: dualism and monism. The theory of dualism or bilateral theory is considered an extension of the concept of volition in the interpretation of the foundations for the binding power of international law. It is based on the distinction of international and domestic law sources, and the difference in the nature and structure of both legal systems, in addition to the various subjects addressed by the rule of law in each of the two systems. Adopting this theory entails total independence between the two systems, and for the internal judiciary to abstain from applying international legal norms, unless they have become internal legal rules through what is called 'reception'.[39]

36 Ibid., pp. 38-39.

37 Bourouba, supra note 33, pp. 12-46.

38 Office of the United Nations High Commissioner for Human Rights, supra note 10, p. 8.

39 Bourouba, supra note 33, p. 25.

The monist theory is an extension of the school of modern positivism, based on the belief that international and domestic laws are one legal system. Supporters of this theory are divided into two categories when the question of conflict between international and domestic law arises. The first represents the majority view that international law is superior. The second represents a minority that calls for the superiority of domestic law. Despite the academic importance of these two theories, they have become in practice redundant given that states are finding solutions through their own constitutions. A constitution may use the unity trend and at the same time draw on some aspects of the duplication theory, while the International Court of Justice has addressed on many occasions, in both its judicial and arbitral divisions, the relationship between international and domestic law. International conventions devote prominent importance to this theory. Reference may be made in this regard to the Vienna Convention on the Law of Treaties in which Article 27 denotes the superiority of international treaties over domestic law stating that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46".[40]

As a result, it is noted that national constitutions follow two main patterns in integrating international human rights norms. The first pattern is based on the development of texts that prevent, totally forbid, or restrict within the limits of the law due to the gravity of these acts and the serious prejudice caused to public rights and freedoms, such measures as preventing torture and the non-retroactivity of laws. The second pattern bans carrying out offensive acts such as the removal of citizenship but authorizes this action under exceptional circumstances.[41]

While it is clear that international agreements have an impact on national constitutions and legislation, these agreements leave the detail to be developed by the national law-making authorities. This position derives from the realist point of view present in international conventions addressing human rights norms. Some justifications were formed when drafting national laws, including the idea of "public order and safety, the protection

40 Ibid.

41 See M. A. Al-Rukn, The Constitutional Regulation of Public Rights and Freedoms (publisher unknown) pp. 393- 400.

of national security and respect for state structures and resources".[42] However, the constitutional or ordinary legislator is not given a free hand. The legislator must be "committed to the constitutional limitations of the human rights norms in their thematic boundaries, and [agree] that the organization of these rights shall not reach the extent of wasting them or totally confiscating them, or that he may impose restrictions on freedoms and rights in a manner that renders them difficult to exercise".[43]

"While international human rights sources in general impose customary or contractual obligations on states to respect the principles of human rights, they also assume that these rules are applied in good faith in practice,"[44] allowing the national judicial system to "exercise an interpretive, logical, and holistic approach while searching for the interpretation that respects the rights and interests of the individual".[45]

For these purposes, the national judge can resort to diverse international conventions regardless of their title or their scope of inclusion, be it a covenant, convention, charter or protocol. They are all legally binding on the states that approve them and states should comply with their

42 See Article 21(3) of the UDHR: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures". This shifts the procedure to guarantee this right to the national legislator. See also Article 22: "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality".

43 Al-Rukn, supra note 41, p. 401.

44 Office of the United Nations High Commissioner for Human Rights, supra note 10, p. 7.

45 On the level of the impact of international human rights sources on national judicial systems, it is clear that the Egyptian judiciary has abstained from applying any legislative text that contradicts international human rights norms. Consider the verdict issued by the Cairo Emergency Supreme State Security Court in the case of the Office of the Public Prosecutor no. 4190 for the year 86 Al-Azbakiya (121 Al-Kully North) specific to strike action by train conductors. It represents a clear picture whereby the court ruled for the cancellation of Article 124 of the Penal Code that prohibits strike action on the grounds of its incompatibility with the International Covenant on Economic, Social and Cultural Rights. The Court considered that when the Convention was published in the Official Gazette on 8 April 1982 after being approved by Parliament, it became a law of the state, as long as it fell under the jurisdiction of the Penal Law. Article 124 should be seen as implicitly cancelled in Article 8(d) of the Convention referred to in accordance with Article 2 of the Civil Law (See Hussam Mubarak Law Centre, <hmlc-egy.org/node/162>) European jurisprudence from national systems has referred to the provisions of international human rights law on many occasions including the extradition of Augusto Pinochet Ugarte which was examined by the UK House of Lords on 24 March 1999. The obligations arising from the United Nations Convention against Torture have been integrated into this ruling. This case is considered one of the most important judgments on the integration of international human rights law into the national courts. A further case is that of an American musician who came before a German court which based its decision on Article 9 of the European Convention on Human Rights as well as on Articles 18 and 26 of the ICCPR. See Office of the United Nations High Commissioner for Human Rights, supra note 10, pp. 20-22.

provisions, if they have been ratified.[46] States could commit to these treaties in two stages, beginning with signing the treaty and ending with ratification. Alternatively, they can commit in one step whereby they sign the convention and declare an intention to ratify it in the future. Once ratified, the state may not commit any act that is incompatible with the object and purpose of the treaty. The State accedes to the treaty, and becomes a party. States parties undertake to abide by the treaty, and to fulfil the obligations contained therein.

Treaties can be divided into bilateral or collective treaties; they can also be divided in accordance with their capacities to establish rules of international law. There are two types of the latter: contractual treaties (private) and law-making treaties (general). The object of contractual treaties is the exchange of individual interests of a personal nature, not characterized by public need. On the other hand, law-making treaties are open to all states for accession and thus constitute a source of international law. As such, human rights treaties fall into the general category and either deal with human rights in general, such as the international covenants or with the rights of a certain category of person, such as the United Nations Convention on the Rights of the Child (UNCRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and others.

As for protocols, they are usually a smaller treaty attached at a later stage to a major treaty. Protocols generally add more provisions to the original treaty, and broaden its scope of application or they may establish a mechanism to advance complaints concerning the violation of its provisions. Protocols become legally binding on the state when ratified or acceded to.

The national judge, for the purposes of interpretation of the provisions contained in international treaties and additional protocols can be guided by the comments, decisions, and results issued by relevant bodies entrusted to monitor the implementation of treaties or by human rights courts. These are bodies established under either the treaties or by the

46 Some treaties such as the ICESCR and the ICCPR are open to all countries throughout the world for ratification while others are limited to countries that belong to a particular region.

United Nations or regional organizations to monitor the implementation of treaties and investigate complaints. The national judge can also be guided by the comments of other non-governmental bodies, such as the United Nations Working Group on Arbitrary Detention and the United Nations Special Rapporteurs of the Commission on Human Rights.[47]

Generally, Arab jurisprudence can strengthen the link between national legislation and international human rights law by having judges prioritize the international text when it contradicts with domestic legislation, so as to reinforce the superiority of international treaties over domestic laws, while remaining in line with national constitutional requirements. It may also be achieved through the use of international legal norms by national judges to overcome legislative shortcomings or a legal gap in domestic legislation or where such legislation is insufficient or silent on human rights issues. National judges may clarify, explain, and interpret the rules of international human rights law so as to enhance the value of human rights norms in national legislation in a manner consistent with the spirit of such treaties. All of these approaches will be examined in detail in the following chapters.

47 For example, the United Nations General Assembly adopted the International Covenant on Economic, Social and Cultural Rights, which was opened for signature, ratification and accession by United Nations General Assembly resolution 2200 A (XXI-D) of 16 December 1966. As well, the United Nations General Assembly adopted the ICCPR in 1966; it entered into force in 1976. The number of state parties reached 140 by October 1998. It codified the civil and political rights in the form of a binding treaty to states that ratify or accede to it and widened the scope of the civil and political rights recognized in the UDHR. It protects fundamental rights, including those principles that guide the organization Amnesty International, and established a body of 18 experts known as the Commission on Human Rights. The general comments of this committee provide a reference guide for the interpretation of the covenant's articles, and the Committee may look into complaints submitted by any state parties, provided that both countries concerned formally recognize the competence of the Committee in this regard, as declared under article 41 of the ICCPR.

3. Controlling the Constitutionality of Laws in the Application of International Human Rights Conventions

The vast majority of comparative constitutional and judicial systems adopt an approach based on enabling one entity to control the constitutionality of laws in reference to the principles and provisions of constitutional documents, including those principles relating to human rights and public freedoms. Constitutional control has a crucial role in the application of international human rights conventions and is addressed in this chapter first through the concept of judicial oversight and its role in the protection of human rights, and second through the mechanisms for constitutional control in relation to international human rights standards.

3.1 The Concept of Oversight of the Constitutionality of Laws, its Form, and its Role in the Protection of Human Rights

The study of constitutional oversight and the effective application of international human rights standards requires, preliminarily, addressing the concept of oversight, the forms it takes, and its role in the protection of human rights. This section addresses first the concept of oversight over the constitutionality of laws; then, forms of oversight of the constitutionality of laws and its role in the protection of human rights are examined.

3.1.1. The Concept of Oversight of the Constitutionality of Laws

The concept of oversight of the constitutionality of laws has historical roots in the idealist doctrines and theories that prevailed prior to the modern era. If "these idealist theories make out of heavenly religions a primary source of each law, and consider laws an extension of the humanitarian principles of justice embodied in the natural law, which must be preserved from derogation and restriction",[48] and with the evolutions in various constitutional systems, oversight developed disparately until

48 M. Al Majzoub, Constitutional Law and the Political System in Lebanon, 4th ed. (Al-Halabi Legal Publications, Beirut, 2002) p. 83.

jurisprudence defined it as "the process by which the provisions of the law are made consistent with the Constitution. It is designed to safeguard the Constitution, protect and ensure respect for the rules, including those related to public rights and freedoms".[49]

Thus the concept of oversight of the constitutionality of laws is determined on the grounds of constitutional rules, including human rights rules, which restrict parliament and public authorities as these rules are supreme and incapable of being revoked or opposed by legislation or practice.[50]

The first written constitutions were developed with the idea that they would act as tools to protect freedom. By ensuring that the rights of the citizen remain untouched by the legislator,[51] constitutions established specific mechanisms to guarantee these rights. Thus, authorities established under a constitution, including constitutional oversight mechanisms, are the means to achieving this ideal and guaranteeing the rights of citizens, as well as being a means for the state to achieve the mission envisaged in its constitution.[52] Therefore, since human rights, public freedoms, and guarantees of judicial oversight are equally integral parts of many constitutions, the aim of constitutional oversight is to protect and guarantee these important rules as well as to ensure they are free from interference

49 M.S. Al Amawi, Control over the Constitutionality of Laws in Egypt, Lebanon and Jordan (Master's thesis) (Arab Research and Studies Institute, Cairo, 2000) p. 8.

50 Some jurisprudence considers that the developments leading to the emergence of oversight of the constitutionality of laws have been confined to countries that adopt rigid constitutions. "[E]xamining oversight over the constitutionality of laws could not be seen under flexible constitutions because the legislator is able to amend the constitutional provisions following the same rules and procedures for the development and amendment of ordinary laws. Therefore, the laws developed by the legislator are considered as amended, where it violates the Constitution". See F. Abdul Nabi Al Wahidi, Constitutional Developments in Palestine 1917-1995, 2nd ed. (Al Azhar University Publications, Faculty of Law, Palestine, 1996) p. 108.

51 The first constitutions are those written by the English colonies of North America starting in 1776 (The Constitution of the State of Virginia). See R. Al Musadak, Constitutional Law and Constitutional Institutions – Methodology Guidelines, 1st ed. (Dar Toubkal Publishing House, Casablanca, 1987) p. 47.

52 The indications of oversight of the constitutionality of laws first appeared when the constitution of the United States of America was declared as emanating from "we the people". This is a clear consecration of the idea of oversight performed by the people rather than parliament. It is a clear indication that the U.S. Congress is not as free-handed as its English counterpart. American justice started wielding the sword of constitutional oversight according to this concept. The New Jersey Court ruled in 1780 in the case Holmes v. Walton the invalidity of a law issued to compose a jury of six members. A New Hampshire Court ruled in 1787 the unconstitutionality of legislation passed to deprive some defendants of their right to trial by jury. See also the decision of Judge Marshall in the case Marbury v. Madison in 1803 in which he stated that "the Constitution in its reality is an expression of the popular will, and its rules supersede all acts by government authorities, including Congress". This case, for the legal community, forms the first of the principles applied in the consecration of constitutional oversight. See Al Majzoub, supra note 48, p. 83.

or manipulation, allowing them to remain enforceable and respected.[53]

Norms of human rights and freedoms therefore gain supremacy over ordinary legislation in light of their constitutional status in two ways: first, the distinct form of the constitution and second, that constitution's distinct objective. "The primacy of the form of the Constitution can be achieved when its amendment requires special forms and procedures different from the procedures to be followed to amend ordinary laws. The distinction of the objective is achieved for all types of constitutions, written or unwritten, rigid and non-rigid. Distinction of the form cannot be achieved except for rigid constitutions".[54] It seems that the oversight of the constitutionality of laws plays a major role in the protection of human rights and the application of international human rights standards through its authority to review the extent of accordance of laws with a constitution in line with international human rights conventions.

3.1.2 Forms of Constitutional Oversight and its Role in the Protection of Human Rights

Many countries enable a particular authority to oversee the constitutionality of laws by explicitly stipulating such in their constitutions. This task may be assigned to a political or judicial entity. The nature of constitutional oversight differs from one country to another in terms of the entity vested with oversight authority and in the timing of oversight, whether prior or pursuant to the enactment of laws. Constitutions also differ in the means of appeal. Comparative constitutional regimes have settled on two main methods of oversight of the constitutionality of laws: political and judicial oversight.

53 In ancient times, Lord Thomas Coke tried in his book Systems to define the relationship between the law and the state when he pointed out that "the greatest Testament has included a number of basic principles and rules which are directly linked to both ideas of right and justice, as well as public law included in turn further expression of these supreme principles, and the greatest Testament and the rules of the common law are considered as the supreme law in the country and therefore a restriction on the authority of the King and Parliament". It may be that Cook succeeded in understanding this problem from his own perspective, as he found that, "[t]he relationship between the State and the law is based on the superiority of the law over the State as it is a restriction on its powers. This restriction, assumes that there should be someone to monitor the encroachment of power, whether by Parliament or King, on the supreme law or constitution". Cook's understanding and his reference to restrictions on the authority of parliament and the king are considered one of the most important principles for determining the general framework of the concept of constitutional oversight. See E. Al Danasoury and A. H. Al Shawarby, Constitutional Proceedings (Dar Al-Maaref Publishing, Alexandria, 2002) p. 18.

54 Y. Al Jamal, 'Constitutional Control Systems', Law Faculties Forum, <droit.3oloum.org/t1-topic>, visited on 22 May 2016.

In the case of political oversight, the constitutional oversight function is assigned by a constitutional text to a non-judicial entity, often called a constitutional council. This entity reviews legislation before final enactment to determine the extent of its compatibility with the constitution; hence the term 'preventive oversight' is often used to refer to this process.[55] This method of constitutional oversight emerged in France after the French Revolution, and under circumstances in which it was believed that acts of parliament should not be compromised.[56]

Political oversight has been subject to criticism, with opponents submitting that a proposed law's compatibility with its constitution cannot be known other than through judicial application in individual cases. Thus, such oversight is useless unless it is made subject to judicial application. Opponents of political oversight also criticize its assignment to a political body, because the appointment of members could be politicized, threatening the independence and impartiality of decisions.

However, supporters consider this type of constitutional oversight a good way to prevent the enactment of unconstitutional legislation before it is made into law. They see it as a useful technique to avoid the negative effects resulting from judicial application that concludes a legal text is unconstitutional with retroactivity. They also allege that the trend in jurisprudence confers a judicial character on political oversight. This is due, in their opinion, to realistic rather than theoretical or legal reasoning.[57]

Political oversight guarantees, in principle, the non-enactment of any legislation that violates human rights. This means there will not be individual

55 Many Arab judicial regimes such as Lebanon have used political oversight. The Constitution of the Lebanese Republic (1990) was influenced by the French style in the control of the constitutionality of laws through the establishment of a Constitutional Council under Article 19; but this Council did not begin to function until 1994. The French system of political oversight was adopted in other countries as well such as the Kingdom of Morocco, Mauritania, and Algeria.

56 n his book, The Spirit of the Laws, Montesquieu makes what could be considered a reference to limiting the right to preserve the laws to political powers exclusively. He wrote, "It is not enough to have median positions alone in the monarchy, but there should exist a repository of laws also, and this repository should only be entrusted to non-political entities that announce laws when enacted and evoke them when forgotten". See C. De Secondat, Baron de Montesquieu, The Spirit of the Laws, Part 1 (A. Zuaiter, Trans.) G. Al Kfoury and E. Rabat, International Committee for the Translation of Masterpieces in Beirut (Eds.) (Dal Al-Maaref Publishing, Alexandria, 1953) p. 33.

57 Y.M. Al Assar, 'Balancing Between Prior and Subsequent Oversight over Constitutionality', 1:1 Constitutional Oversight Journal (The Union of Arab Constitutional Courts and Councils, 2007) p. 293.

or collective cases that have suffered or are suffering from violations of their rights who are then required to resort to a judicial entity in order to rule on the unconstitutionality of the law.

In the case of judicial oversight, the function of constitutional oversight is assigned to a judicial body. It may be part of the normal judicial system, such as a supreme court, or an independent judicial body, often called a constitutional court.[58] Respected French jurist Maurice Duverger defines judicial oversight as a form of control which "should be performed by a system with the status of a court".[59]

Judicial oversight has incurred some criticism, among which is that such a system would lead to a government of judges as a result of conveying decisions to the judiciary, and taking them away from parliament and the executive. Some opponents also argue that judicial oversight often leads to conservative orientation in sentencing because the majority of judges tend naturally in this direction, depending on their legal culture, mentality, and social background. Furthermore, they contend that judicial oversight violates the principle of separation of powers because the function of a judge should be limited to the application of the law and not extend to an examination of its constitutionality.

Supporters of judicial oversight refute these criticisms by arguing that, in reality, judges are committed to applying the provisions of the constitution. Some proponents of judicial oversight also believe constitutional judges adjudicate disputes within their areas of expertise, and to say otherwise

58 Some constitutions assign the task of overseeing the constitutionality of the law to the supreme court, being at the top of the judicial pyramid of the state, such as: the Swiss Constitution which entrusts this task to the Federal Court; the Senegal Constitution of 1960; and the United Arab Emirates Constitution of 1971. But in countries that adopt judicial oversight over the constitutionality of laws, most have constitutions that provide the establishment of a special court to do this job. Among the European constitutions that took such an approach are: "[the] Constitution of Austria for the year 1945, the Spanish Constitution in 1931, the Italian Constitution in 1947, the Constitution of the Federal Republic of Germany of 1949. And among the constitutions of Arab countries that took this approach also: the Constitution of Iraq for the year 1925, the Syrian Constitution of 1950, Kuwait Constitution of 1962, the Egyptian Constitution of 1971, as well as the Palestinian Basic Law amended in 2003". See A.G.B. Abdullah, The Mediator in the Political Systems and Constitutional Law (publisher unknown, 2004) p. 552.

59 M. Duverger, Political Institutions and Constitutional Law (G. Saad, Trans.) (University Corporation for Studies, Publishing and Distribution, Beirut, 2014) p. 160.

may be considered an affront to the principle of separation of powers.[60]

In the judicial system, two main types of oversight of the constitutionality of laws are established: abstention and cancellation. Abstention oversight operates on the legal provisions in force during the consideration of a dispute before the relevant court whereas cancellation oversight applies to legislation prior or subsequent to its enactment.[61]

The judiciary proceeds with its oversight in several ways including via the original suit, sub-constitutional oversight, and by a combination of the original case and accessory pleas. The United States is unique insofar as it also conducts oversight through restraining orders and declaratory judgments.[62]

The most important and most common method of judicial oversight of the constitutionality of laws is the use of the original case. The appellant files a lawsuit before a competent judicial authority to appeal the constitutionality of a law. It is also common to use accessory pleas. Many differences separate these two approaches to judicial oversight. The court may decide to cancel or nullify a law if it is proven to be incompatible with the constitution. However, a court will refrain from applying the law if it is proven to be unconstitutional in case of oversight that makes use of accessory appeals. Only one court is vested with the authority in the instance of oversight of an original case. Conversely, all courts may examine accessory appeals. In an original case, a judgment to abolish a law is authoritative above all others, while this authority is lacking in judgments on accessory pleas because in such cases authority is limited to the dispute in question. [63]

Oversight via the original case requires the presence of a constitutional text which establishes a central entity to handle constitutional oversight,

60 A. Nassar, 'Supervision of Control over the Constitutionality of Laws and their Practical Applications', presented at the 2nd Scientific Forum, Khartoum, Sudan, 16 December 2003, 1:1 Journal of the Union of Arab Constitutional Courts and Councils (2007) p. 157.

61 Al Danasoury and Al Shawarby, supra note 53, p. 24.

62 A.R. Abu Hujaila, Control over the Constitutionality of Laws in Jordan, 1st ed. (publisher unknown, 2004) p. 32.

63 J.J. Nassar, Mediator in Constitutional Law (Cairo University Publications, Cairo, 1996) pp. 154-155.

whereas with accessory pleas, it is possible for courts to have oversight authority across different types and levels of courts without a constitutional text. Consequently, it is common to divide judicial oversight into centralized oversight and decentralized oversight, as well as to combine prior and subsequent central oversight. An example is the decision of the Egyptian constitutional legislator in the current amendment in 2005, to have prior centralized judicial oversight of the constitutionality of the regulatory law of presidential elections in Egypt before its enactment. This was done to certify its conformity with the provisions of the constitution. Furthermore, the Egyptian Supreme Constitutional Court ruled in 2006 that the fact the court engages in prior constitutional oversight and issues its opinion about a draft law does not prevent it from assuming subsequent oversight over the provisions of the law.[64]

Some scholars consider that judicial oversight is more effective and efficient in protecting public rights and freedoms than political oversight. The former enjoys guarantees in terms of neutrality, independence, and publicity as well as other fair trial guarantees. It is supposedly removed from political whims and personal interests. Ideally, members of the court vested with constitutional oversight should be judges with substantial experience in judicial work or with an academic background. Therefore, they are capable of determining the extent of conformity of a law with the constitution, and highly competent to understand the contents of constitutional rules related to public rights and freedoms and their judicial application.[65]

3.2. Mechanisms of and Jurisprudence on Constitutional Oversight and the Application of International Human Rights Conventions

After reviewing the concept of constitutional oversight, its forms and its role in the protection of human rights, it is necessary to examine – in a detailed and practical manner – the mechanisms and applications of constitutional oversight in implementing international human rights conventions.

64 N. Talba, 'Control over the Constitutionality of Laws', 27:1 Journal of Economic and Legal Sciences (Damascus University, 2011) p. 502.

65 Nassar, supra note 63, p. 156.

Jurisprudence from constitutional courts and councils has a crucial role in the application of international human rights instruments. Understanding this role is achieved through a review of judicial mechanisms and by extrapolating applications issued by constitutional courts and councils in Arab and comparative judicial systems.

First, judicial mechanisms for the application of international standards of human rights are explored. Then the jurisprudence relating to constitutional oversight in the application of international human rights conventions is discussed. Finally the role of constitutional oversight in the application of international human rights standards is charted.

3.2.1. Judicial Mechanisms for the Application of International Human Rights Conventions

Oversight of the constitutionality of laws acquires great importance in the protection of human rights and freedoms whilst granting them constitutional protection, thus resulting in the application of international standards of human rights. Because judges cannot look at those rights from an individual perspective, they start by analysing the constitutional texts through three standards: the person, society, and the requirements of public order. Any jurisprudence of a constitutional judge that does not take into consideration the interests of this triad will be riddled with imperfections.[66]

The constitutional judge or member of the constitutional council is supposed to conduct a balancing exercise based on the complementarity of a constitutional text with a comprehensive vision based on a coherent approach between the constitution and international human rights law. This means that "the texts of the Constitution complement one another and that each text has an independent content that cannot be separated from the rest of the texts, so that these texts cannot be understood separately from one another, but rather any indication of the meaning of one of the text results from the comprehensive meanings of the others".[67] Therefore,

66 A.A. Saliba, The Role of the Constitutional Judiciary in Establishing the Rule of Law: A Comparative Study (Modern Book Foundation, Tripoli, 2002) p. 326.

67 Constitutional Court of Kuwait, 'Request for Interpretation no. 3 of 2004', 1 Constitutional Oversight Magazine (The Union of Arab Constitutional Courts and Councils, 2007) p. 101.

there is significant overlap and inextricability of public rights and freedoms. We can delve deeper into understanding the inclusion of human rights in constitutional texts by analysing the interconnected historical sequence between the text in the national constitution and its contents in the international human rights conventions, and the recommendations of committees monitoring these conventions.

Within these standards, comparative constitutional oversight plays a crucial role in asserting guarantees for human rights and freedoms, as when constitutional courts exceed the limits of the constitutional text itself in order to protect human rights. Nothing is more indicative of this than the decision of the Constitutional Court of South Africa in 1995, in which it rejected the death penalty on the grounds that it did not comply with section 9 of the South African Constitution which recognizes individual human rights, notably the right to life.[68]

Hence, the constitutional oversight authority vested with a constitutional court or council, whether practising prior or subsequent oversight, is positioned at the top of a hierarchy supporting the implementation of international human rights standards. These courts and councils are specialized in adjudicating disputes between constitutions and legislation or draft legislation, including those problems that may arise in the field of human rights and the application of international conventions. Accordingly, judicial mechanisms in the application of international standards through constitutional oversight are of great importance because the constitutional judge or member of the constitutional council can refer to various sources to develop the law. Thus, judges may prioritize the text contained in the international convention based either on the principle of supremacy or by considering it as an internationally binding norm. The judges also have the right to annul legislation in violation of an international convention, based on constitutional conditions. They have the ability to interpret an international convention so as to confirm the content of constitutions in relation to rights and freedoms. Thus, the judge or member may integrate provisions of the convention into the body of the constitution by adopting a holistic interpretation that sets the foundations and establishes the relationship between the constitutional text and international human rights

68 Saliba, supra note 66, p. 313.

conventions. Consequently, legislation unfavourable to a convention is rendered ineffective, even if this is not stated explicitly in the constitution.

3.2.2. Jurisprudence Relating to Constitutional Oversight in the Application of International Human Rights Conventions

There are practical applications of the jurisprudence issued by Arab courts and constitutional councils that demonstrate the forms of judicial oversight in the application of international human rights conventions. These applications may be classified into specific rights depending on their content, essence, and the right protected, such as the right to freedom of opinion and expression, the right to political participation, the right to freedom of belief, the right to equality before the law, etc. On the other hand, these rights will not be classified easily as civil, political, economic, social or cultural rights because these rights – in their essence –cannot be separated from one other. Moreover, this partition, derived from international law, does not reflect the importance of restriction, withdrawal, or interpretation. It does not have a legal effect as much as it is associated with the development of these concepts and their acceptance in the international community as well as contributing to the emergence of separate international documents. Therefore, the classification based on the content of the right and its substantive essence was found to be more effective in order to understand the nature of these applications and their interdependence with other relevant rights.

3.2.2.1. Jurisprudence of the Lebanese Constitutional Council

Article 19 of the Lebanese Constitution refers to the establishment of a constitutional council, and on 15 July 1993 parliament enacted law no. 250/93 establishing the Lebanese Constitutional Council pursuant to this article. This Constitutional Council is specialized, as per Article 1 of its constituting law, to oversee the constitutionality of laws and other texts which have legal status, and resolve appeals and disputes arising from presidential and parliamentary elections. Article 18 of law no. 250/93 explicitly stipulates that the Constitutional Council shall be vested with an oversight authority. Unless otherwise stated, no other judicial authority may carry out this function either directly by means of appeals or indirectly

by pleas. The other texts with legal status referred to in the constituting law include all legislative acts issued by the executive branch, such as laws enacted by decree as per Article 58 of the Lebanese Constitution, the budget law implemented by decree under Article 86 of the Lebanese Constitution, and legislative decrees issued by the government as per the authority vested in it by parliament.[69]

The protection of human rights in Lebanese constitutional jurisprudence has grown with the increasing number of appeals before the council. In spite of such appeals, the Lebanese Constitutional Council has addressed the protection of human rights and the application of international conventions in this regard in much of its jurisprudence. The Lebanese constitutional judges follow an approach based on implicit application of international human rights conventions as shown when analysing the right to political participation, the right to privacy, and the freedom of belief.

The Right to Political Participation: The right to political participation emerges from the right to equality and the principle of non-discrimination enshrined in international conventions, such as Article 26 of the ICCPR. This right overlaps with other rights, in particular the right to hold public office and the right to vote.

The Lebanese Constitutional Council has emphasized the protection of this right evidenced by decision no. 296/4 issued on 7 August 1996 related to the annulment of some articles of Election Law no. 530 on 12 July 1996 by way of Article 12 of the Lebanese Constitution. The decision stated that "to stand for election is a civil and constitutional right, and any limitation on the exercise of this right by the legislator can only be narrowly interpreted".

The Council decided to revoke the text of Article 30 of the electoral law on the grounds that it violated articles 7 and 12 of the Lebanese Constitution.

69 It should be noted that the primary goal of establishing the council, as stipulated in the national reconciliation document approved by the Parliament meeting held in Ta'if, Saudi Arabia on 22 October 1989, is to interpret the Constitution as well as oversee the constitutionality of laws, and resolve appeals and disputes arising from presidential and parliamentary elections. However, law no. 250/93 did not provide a prerogative to interpret the Constitution. After extensive debate in Parliament, the prerogative to interpret the Constitution was removed. See Lebanese Army Command, <www.lebarmy.gov.lb/ar/news/?18866#.VaKogCKsVyc>, visited on 22 May 2016.

The Lebanese Constitutional Council held that if the legislator were to set controls and restrictions on the right to stand for election, this prohibition would have to be in conformity with the conceived goal of the legislator.[70]

It is noteworthy that in its decision, the Lebanese Constitutional Council implicitly applied Article 26 of the ICCPR, saying that:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

The Right to Privacy and the Sanctity of Private Life: International covenants and charters on human rights have unanimously agreed on the right to privacy and protecting the sanctity of private life. This is established in Article 12 of the UDHR which states that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

The Lebanese Constitutional Council has confirmed in its jurisprudence the right of Lebanese citizens to privacy within standards guaranteeing the sanctity of private life. Decision no. 2/99 on the protection of correspondence and the sanctity of private life is an example. The decision examined articles 15 and 16 of law no. 140/99 dated 27 October 1999 related to the right to confidentiality of communications. It revoked Article 15 as being unconstitutional, since the provision was absolute and did not distinguish monitoring communications pursuant to an administrative decision from monitoring based on judicial decision. The Lebanese Constitutional Council considered it detrimental to individual liberty as protected by the Constitution and furthermore said from it stems the freedom of movement, freedom to express an opinion, freedom of correspondence, sanctity of the home, and respect for private life. These freedoms are safeguarded by the Constitution and protected by law.[71]

70 Saliba, supra note 66, p. 445.

71 Ibid., pp. 446-447.

In this way, the Lebanese Constitutional Council expanded the interpretation of the right to privacy. It resorted to implicitly interpreting those texts protecting human rights, in accordance with international standards, particularly Article 12 of the UDHR

The Right to Freedom of Belief: The freedom of belief occupies an important position especially in countries where multiple communities exist. This freedom is closely related to other constitutional rights such as the right to expression, the right to practice religion, and freedom of thought. International human rights conventions have enshrined freedom of belief in such provisions as Article 18, paragraph 1 of the ICCPR which confirms that "[e]veryone shall have the right to freedom of thought, conscience and religion". This includes freedom to adhere to a religion, freedom to profess any religion or belief of one's choice, and the freedom to manifest one's religion or belief in worship, observance, practice and teaching, alone or in a community, in public or in private.

An important responsibility of a constitutional judge in Lebanon is understanding the idiosyncrasies of the social structure that play a prominent role in providing unity and stability among and within communities.[72] The Lebanese Constitutional Council has worked hard to safeguard the independence of communities managing their religious affairs in order to protect the right to believe and worship. This was expressed in decision no. 1/99 dated 24 November 1999 related to the establishment of the Board of Trustees of the Druze community endowments. The decision revoked some language used in articles 11 and 12 of the law that violated the constitution.[73]

It is clear upon reviewing the jurisprudence of the Lebanese Constitutional Council that it works toward applying the international conventions of human rights. It has adopted an extensive interpretation of constitutional texts in such a manner that the applications are implicitly consistent with international human rights standards. This emphasizes its important role in constitutional oversight in applying international human rights conventions.

72 Ibid., p. 448.

73 Ibid., p. 448-449.

3.2.2.2. Jurisprudence of the Tunisian Constitutional Council

With the ratification of the new Tunisian Constitution in 2014, a constitutional court was established under Article 117. The Constitutional Court is tasked with monitoring the constitutionality of draft laws, at the request of the President of the Republic or the Prime Minister or thirty members of the Assembly of the Representatives of the People *(Majlis Nawwab esh-Sha'b)*. It also examines the constitutionality of draft laws submitted by the President of the Assembly, as determined in Chapter 142. Furthermore, it may monitor procedures for amendment of the Constitution, as well as treaties presented by the President of the Republic before enacting or ratifying a draft law. The Constitutional Court has the power to scrutinize laws submitted by courts or parties to a dispute based on pleas of unconstitutionality in accordance with the procedures imposed by law.[74]

The Constitutional Court has replaced the former Constitutional Council. To date, the Constitutional Court has issued no judgment indicating its effectiveness in the application of international human rights standards. Accordingly, decisions of the Constitutional Council are considered to reflect the role of constitutional oversight in Tunisia through the application of international human rights conventions.

In reviewing its jurisprudence, it is evident that the Tunisian Constitutional Council was active in setting the foundations for serious constitutional application to enshrine the rules of international human rights law. Among these efforts is Opinion 02-2006 on a draft law to complement the provisions of the Personal Status Code. Chapter 66 bis of the draft law, which provides for the right of grandparents to visit their grandchildren, invokes in its reasoning the United Nations Convention on the Rights of the Child (UNCRC). This convention was ratified by the Republic of Tunisia and requires taking into consideration the child's best interests including the right to maintain family ties. The applicable chapter of the draft law specifies, in addition to parents', the rights and duties of members of the extended family, if necessary. Furthermore, it mentions that "granting the right of visitation to grandparents after the death of a parent, and taking

74 On 3 March 2011, the election of the constitutive committee was announced to lay down a new constitution for the Republic of Tunisia. And on 26 January 2014 three years after the breakdown of the former regime the new Tunisian Constitution was ratified.

into consideration the child's best interests, strengthens ties between family members and therefore, represents an aspect of family protection in the framework required by the Constitution and the principles agreed upon by the Republic of Tunisia, as enshrined particularly in the UNCRC". The Constitutional Council concluded when issuing its opinion that the draft law conformed to the Constitution.[75]

In considering the child's best interests as foundational in its Opinion, the Tunisian Constitutional Council demonstrated a deep understanding of the relationship between national laws and international agreements. The Council relied on the interpretation of provisions of national law from the perspective of international standards on children's rights. This is appropriate as part of the harmonization of national and international law. Another example is Opinion no. 32-2007 on a draft law proposing to ratify the protocol of the African Charter on Human and Peoples' Rights establishing an international court. In its reasoning, the Constitutional Council pointed out that "the above-mentioned Chapter 32 states that treaties ratified by the President and approved by Parliament surpass in supremacy the laws". It also mentioned that "[t]he pledge of the State to international commitments does not constitute a renunciation of its sovereignty but is rather a manifestation of applying its sovereignty". In deciding, the Constitutional Council took into account:

> *"[t]he characteristics of the African Court on Human and Peoples' Rights, based on the preamble of the Constitution that states the people's resolution to adhere to human values common among the nations championing human dignity. Moreover, Chapter 5 of the Constitution stipulates that the Republic of Tunisia guarantees the fundamental freedoms and human rights in their universality, comprehensiveness, complementarity and interdependence. The Protocol to be ratified is in accordance with all of the above in the context of achieving those goals without compromising the sovereignty of the State".*

When issuing the Opinion, the Constitutional Council concluded that the draft law was in conformity with the Constitution.[76]

75 See United Nations Human Rights Committee, 'Replies of the Tunisian Government to the list of issues (CCPR/C/TUN/Q/5) to be taken up in connection with the consideration of the fifth periodic report of Tunisia (CCPR/C/TUN/5)' (United Nations Human Rights Committee, 25 February 2008), <tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fTUN%2fQ%2f5%2fAdd.1&Lang=en>.

76 Ibid.

It is worth noting here that the Tunisian Constitutional Council referred to the protocol of the African Charter on Human and Peoples' Rights to decide on the constitutionality of the ratification of this protocol. The Constitutional Council succeeded in reconciling the provisions of the Tunisian Constitution in force at the time with the obligations of ratification of the protocol. The Council's discussion of Chapter 5 and of state sovereignty positively expands the interpretation of the provisions of the Constitution. This is therefore a prime example of constitutional oversight in implementing international human rights conventions.

Opinion 56-2005 on a draft law to regulate underwater diving examined matters of non-conformity of the draft law with the Constitution, namely Article 17 of the draft law regarding financial penalty and deprivation of liberty for committing offenses. The Tunisian Constitutional Council decided that this article and the circumstances mentioned violated Article 73 of the 1982 United Nations Convention on the Law of the Sea ratified by Tunisia. Article 73 states that "[c]oastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment … or any other form of corporal punishment". The Constitutional Council recalled that "under Chapter 32 of the Constitution, treaties that are ratified and approved supersede the law" and "consequently Article 17, in its current draft, does not comply with Chapter 32 of the Constitution". The Constitutional Council concluded by stating that the draft law, particularly Article 17, was incompatible with the Constitution.[77]

Hence, the Tunisian Constitutional Council has adopted the approach of ensuring the primacy of international conventions over national legislation, confirming that ratified international treaties, including international human rights conventions, are more influential than national laws, as per the provisions of Chapter 32 of the Tunisian Constitution in effect at the time.

Thus, by examining the applications of the Tunisian Constitutional Council, it is evident that it followed three discretionary methods in applying international human rights conventions while exercising constitutional oversight. The first method is based on the harmonization of national

77 Ibid.

legislation and international conventions. The second is based on the positive and expansive interpretation of constitutional provisions. The final method is based on giving precedence to international conventions over national legislation.

3.2.2.3. Jurisprudence of the Iraqi Federal Supreme Court

The Federal Supreme Court of Iraq monitors the constitutionality of laws and regulations in force and the interpretation of constitutional texts. It also addresses other issues such as those established in Article 93 of the 2005 Constitution of the Republic of Iraq, as well as exercising jurisdiction over questions of membership of the Council of Representatives under Article 52 bis. This Court also has jurisdiction to review appeals issued by the Administrative Court in accordance with the provisions of Article 4 ter of law no. 30 of 2005, in addition to other competencies granted under the Nationality Law no. 26 of 2006 and the Law of Governorates not Incorporated into a Region.[78]

Some argue that the Federal Supreme Court has played a significant role in public life during the transitional period in which it has carried out its functions under the Iraqi State Administrative Law. It safeguards citizens' rights and freedoms, particularly since the expansion of the Court's role through Article 93 of the Constitution which had significant impact on the court's function in curbing infractions of both legislative and executive powers in order to protect human rights and public freedoms. The protection of such rights and freedoms is considered an ultimate goal of constitutional oversight.[79]

In reviewing the jurisprudence of the Federal Supreme Court of Iraq, it is clear that the Court interprets the Iraqi Constitution in a way that renders it compatible with international human rights conventions. Whilst this approach is not explicit, its jurisprudence includes the protection of civil,

78 See D. A. Abdullah and B. A. J. Tawfiq, 'The Role of the Federal Court in the Protection of Human Rights in Iraq', 13:49 Rafidain Juridic Magazine (year 16) p. 368.

79 I. H. Abdullah, 'The Role of the Federal Supreme Court in Iraq in the Protection of Rights and Freedoms', Journal of the Legislation and the Judiciary, <www.iasj.net/iasj?func=fulltext&aId=50951>, visited on 22 May 2016.

political, social, economic, and cultural rights.[80] Examination of the right to nationality, the right to own property, fair trial guarantees, and the right to equality and non-discrimination illustrate the mechanisms of this implicit approach.

The Right to Nationality: The right to citizenship is considered one of the most important rights as affirmed in Article 15 of the UDHR which states that "[e]veryone has the right to a nationality". The importance of the right to a nationality arises particularly in relation to women and the ability of their children to gain nationality. Therefore, this right is intertwined with women's rights and with a child's right to acquire nationality which originally branches from the right to equality and non-discrimination.

The Iraqi Federal Supreme Court has worked diligently to advocate for the right to citizenship. For example, the Iraqi Ministry of the Interior refrained from granting Iraqi nationality to those born of an Iraqi mother and non-Iraqi father. As a consequence, an Iraqi woman whose children were fathered by a man having other Arab nationality initiated an appeal against the Interior Minister's decision before the Administrative Court. Her appeal was rejected. However, the woman petitioned the Federal Supreme Court, which in turn ordered the Administrative Court to implement the Constitution and the nationality law, and to rule in favour of granting Iraqi nationality to those born of an Iraqi mother.[81]

In this case, the Federal Supreme Court in Iraq applied Article 18(2) of the Iraqi Constitution which specifies that "Iraqis are those born of an Iraqi father or an Iraqi mother as it is regulated by the law" as well as Article 3(a) of the Iraqi Nationality Law no. 26 of 2006 stating that "the Iraqi is … born of an Iraqi father or an Iraqi mother".[82]

80 For more information on the role of the Federal Supreme Court in Iraq, see S. R. Al Mossawy, 'Iraqi Judiciary Prevents the Executive Branch from Detaining Persons', The Federal Supreme Court in Iraq, <www.ahewar.org/debat/show.art.asp?aid=249005>, visited on 16 May 2016.

81 See Abdullah, ***supra*** note 79.

82 It is noted in this judgment that the Federal Supreme Court did not practice its oversight authority concerning the constitutionality of the Nationality Law in a direct lawsuit. Instead, it proceeded through an indirect lawsuit to appeal the decision of the Administrative Court, thus fulfilling its role in the protection of human rights. The Administrative Court abided by the decision of the Federal Supreme Court as it is binding. Finally, the Ministry of Interior committed itself to the decision, but only after the Federal Supreme Court delivered a large number of similar decisions, such as: decision4/Federal/discrimination/2007 on 26 April 2007; decision31/Federal/discrimination/2007 on 30 July 2007; and decision 78/Federal/discrimination/2007 on 16 November 2007. Ibid.

Furthermore, its judgment implicitly applied both Article 9(2) of the CEDAW,[83] which affirms that "[s]tates parties shall grant women equal rights with men with respect to the nationality of their children"[84] as well as Article 15 of the UDHR.

The Right to Own Property: The right to own property is enshrined in Article 17 of the UDHR which specifies that "[e]veryone has the right to own property alone as well as in association with others" and that "[n]o one shall be arbitrarily deprived of his property". This right is intertwined with many other legal rights including the right to dispose of a property and the right to legal personality.

Following the same methodology, the Iraqi Federal Supreme Court adopted implicit application of international human rights treaties in its decisions relating to the right to own property. This is clear in decision no. 11/Federal/2006 issued on 24 August 2006. The case concerned an appeal against clause 3, decision no. 221 issued on 4 October 2001 by the dissolved Revolutionary Command Council. This decision stated: "(N.J.Sh.), son of the aforementioned ... of the present decision, is excluded from becoming heir to her [estate] after her death as punishment for his ingratitude. His shares shall be distributed among the other heirs proportionally to their legitimate entitlement". The Federal Supreme Court found that this decision was issued under the provisional constitution, which adopted Sharia law. Sharia law has been applied in cases in which an heir is deprived of inheritance, but since no rule specifies ingratitude towards parents as a reason for disinheritance, the court ruled the decision was in violation of the Constitution. The Federal Supreme Court decided to annul the clause under dispute on the basis of unconstitutionality.[85]

This judgment implicitly applies Article 17 of the UDHR, consistent with Article 23(1) of the Iraqi Constitution which states that "[p]rivate property is protected and the owner has the right to use the property, exploit it

83 ***See*** Bourouba, supra note 33, pp. 46-47.

84 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted by the UN General Assembly and submitted for signature, ratification, and accession by its resolution 34/180 of 18 December 1979, date of validation: 3 September 1981.

85 ***See*** Abdullah, supra note 79.

and dispose of it within the law". Article 23(2) notes that "[e]xpropriation is not permissible unless for the purpose of public benefit, against fair compensation regulated by law".

Decision no. 60/Federal/2009 of 12 July 2010 exhibits the Federal Supreme Court's efforts to safeguard the right to own property and to make clear the inviolability of this right. In this case, an appeal against the decision of the former President of the Republic, published in volume 67 on 31 July 2001 was brought before the court. The decision in question ordered the division of land number 525(1) into lots without the consent of the appellant who co-owned that parcel of land. The decision in question had also ordered that the lot be registered to the defendant (A.R.S.) contrary to the provisions of articles 1070-1073 of Iraqi civil law. Since such a division of land is a form of confiscating the right to dispose of a property, it violated both the temporary constitution as well as the 2005 Constitution of the Republic of Iraq. The Federal Supreme Court ruled the decision unconstitutional and ordered restitution by returning the piece of land to its status prior to its division. This is considered another implicit application of the provisions of Article 17 of the UDHR.[86]

Fair Trial Guarantees: Article 14 of the ICCPR establishes solid foundations to guarantee a fair trial. So too do the UDHR and the Arab Charter on Human Rights in many of their provisions. In accordance with international standards, the Iraqi Federal Supreme Court has sought to provide guarantees for a fair trial, including making provisions for the right to personal liberty and the prevention of interference with personal liberty unless by judicial decision.

This effort manifests in a case that began with the Ministry of Human Rights requesting an opinion from the Supreme Judicial Council regarding a decision of the General Director of Customs to arrest 37 people under the Customs Law, in his capacity as a member of the executive. The Supreme Judicial Council referred the request to the Federal Supreme Court, deeming it a judicial dispute between the Ministry of Human Rights and the General Customs Directorate. In accordance with Article 5 of the Rules of Procedure of the Court no. 1 for 2005, the Court notified the

86 ***See*** Bourouba, supra note 33, p. 71.

Ministry of Human Rights to initiate a direct lawsuit about the conflict in order to decide on the constitutionality of Article 237(2) of the Customs Law.[87] The direct lawsuit proceeded.

After hearing the case, the Federal Supreme Court ruled that the provisions of Article 237(2)(1) of the Customs Law violated Article 37(1)(b) of the Constitution which states that "[n]o person may be kept in custody or investigated except according to a judicial decision". The Court noted that the authority of arrest is vested in the judiciary which operates independently from other authorities pursuant to the principle of separation of powers under Article 47 of the Constitution. The ICCPR and UDHR also declare the inadmissibility of arrest except by judicial order.

The Federal Supreme Court also affirmed the right of citizens' access to justice and to a fair trial in the appeal case no. 4/Federal/2007 dated 29 May 2007concerning the disciplinary law for civil servants and the public sector. In this case, an employee who received a warning from the Minister of Agriculture appealed based on the unconstitutionality of Article 11(4) of the 1991 disciplinary law. This article provided immunity to ministerial decisions but contradicted Article 100 of the Constitution which prohibits immunity from appeal of any administrative decision. The Federal Supreme Court ruled in favour of the unconstitutionality of Article 11(4), stating that it violated both Article 19(3) of the Constitution which acknowledges that "[l]itigation is a guaranteed right and warranted for all" and Article 19(4) which says that "[t]he right of defence is sacred and guaranteed". Based on this ruling, the Iraqi Parliament amended the disciplinary law through no. 5 of 2008 and submitted two disciplinary acts (notification and warning) to legal methods of appeal.[88]

Furthermore, this ruling implicitly applies Article 8 of the UDHR which states: "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

The Right to Equality and Non-Discrimination: The right to equality and

87 See Bourouba, supra note 33, p. 128.

88 See Abdullah, supra note 79.

non-discrimination is inseparable from other rights, including the right to hold public office and the right to political participation. This right prevents discrimination based on race, colour, sex, or religion, from which diverse constitutional rights may transpire. Therefore, many judicial applications whether related to civil, political, social, or economic rights are linked to the right to non-discrimination.[89]

The Federal Supreme Court in Iraq has enshrined the right to equality and non-discrimination and has implicitly applied international human rights law in this regard. This was achieved by linking the interpretation of this right under the Constitution to international human rights law. In decision no. 13/Federal/2007 dated 31 July 2007 the right of citizens to representation on provincial councils was examined. The Court noted in its decision that, "the rules adopted in the interpretation of any article in a certain law require that all the articles of said law be examined in order to determine the philosophy and purpose of this law as sought by the legislature and the Constitution". The Court was of the opinion that Article 49(4) of the Constitution aims to establish the representation of women on the Council of Representatives at no less than one quarter of the total number of members. The Federal Supreme Court further found that this same level of representation should be applied to provincial councils due to their similar purpose and competencies in the legislative field, considering also the overlap with the principles of equality and non-discrimination instituted in Article 14 of the Constitution.[90]

This ruling came as a result of a request from the Iraqi Parliament to interpret some constitutional provisions, including Article 14. The Parliament asked whether it was possible to impose a specific level of female representation in provincial councils in accordance with the Constitution and other sources safeguarding equal opportunities. Although the Constitution guarantees a specific level of female representation in Parliament the law does not address the situation of women's representation in the governorates that are not affiliated with any province.

89 Article 26, ICCPR, stipulates: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

90 Iraqi Republic, Iraqi Constitution, <http://iraqinationality.gov.iq/attach/iraqi_constitution.pdf>, visited on 16 May 2016.

The text of the Federal Supreme Court's ruling indicates that it proceeded with an implicit application of Article 2 of the UDHR which declares that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". It also emphasized the need for positive discrimination in favour of women as an element of community empowerment. This is consistent with all international conventions in this regard and Article 14 of the Iraqi Constitution which affirms: "Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status".[91]

In this decision, the Federal Supreme Court used the same approach of implicit application of international standards of equality and non-discrimination to protect not only women but also minorities through proportional representation. This appeal concerned amendments made to the Election Law no. 126 of 2005, by law no. 26 of 2009. Article (1)(3) of this law specified the requirement to: "grant a quota to the constituency in question, that is calculated from within seats in their provinces, but in a way not to impact their ratio in case of their participation in national [voters'] lists". Article (1)(5) of this law also provides: "the quota of seats allocated for Christians shall be limited to one electoral district".

This article omitted other ethnic and religious minority groups such as the Mandaeans who live across all provinces of Iraq, and the Yazidis residing in Nineveh, Dohuk, and elsewhere. The Mandaeans appealed the constitutionality of clause 5 and demanded equal footing with Christians and the right to be allocated seats within one electoral district. The Federal Supreme Court ruled in both case nos. 6/Federal/2010 and 7/Federal/2010 issued on 3 March 2010 that Article 1(5) of law no. 26 of 2009 was unconstitutional because of its incompatibility with Article 14 as well as Article 20, concerning political rights, of the Constitution. It also notified the legislature to consider enacting legislation that conforms to these constitutional provisions.

The Yazidi members appealed on the exact same grounds and in decision

91 Ibid.

11/Federal/2010 dated 14 June 2010, the Federal Supreme Court ruled that the law in question was unconstitutional insofar as it applied to Yazidis. The same decree was issued.[92]

Through the rulings and verdicts of the Iraqi Federal Supreme Court, evidence of an approach based on the implicit rather than explicit application of international human rights standards can be seen. The interpretation of constitutional provisions from a perspective that conforms with and complements international standards with the aim of strengthening constitutional oversight in the application of international human rights conventions is effective.[93]

3.2.2.4. Jurisprudence of the Jordanian Constitutional Court

Before the issuance of the Jordanian Constitutional Court's Law no. 15 of 2012, there was no centralized constitutional oversight in the Jordanian judicial system. The Jordanian courts resorted to 'restraint oversight'. This is a defence method used by persons affected by a certain law whereby during court proceedings they request that this law be excluded for violating the constitution. This method can be used with any lawsuit before the judiciary regardless of its topic. The defence could be submitted before a criminal or administrative court when one of the parties claims the unconstitutionality of the legal text upon which the dispute will be examined. This party requests that the text not be applied. If the reasoning is accepted by the judge and the request is approved, the judge will refrain from applying the legal text without a wholesale cancellation or nullification in accordance with the principle ***res judicata.***

Restraint oversight arises in judicial systems in which the constitution is silent on the matter of oversight. It does not require a constitutional text because it is related to the nature of a judge's work when the defendant pleads the unconstitutionality of a certain law. It is then the duty of the judge to examine the validity of this plea. If it is demonstrated that the law is in accordance with the constitution, the judge shall continue to apply it in an ongoing dispute. However, if it is demonstrated that the text violates

92 Bourouba, ***supra note*** 33, pp. 60-62.

93 Bourouba, ***supra note*** 33, pp. 52-58.

constitutional law, the judge shall favour the constitution as the supreme legal text in the hierarchy of law. This was the approach adopted by various Jordanian courts before the establishment of the Constitutional Court.[94]

The Jordanian Constitution was amended in 2011 to, inter alia, establish a Constitutional Court.[95] The constitutional amendments issued on 1 October 2011 approved a special chapter for the establishment of such a court in Articles 58-61. Article 58 of the Jordanian Constitution, as amended, stipulates that "[a] constitutional court shall be established by law and based in Amman and shall be deemed an independent and separate judicial body. It shall consist of at least nine members, including the president, all of whom shall be appointed by the King". Pursuant to this text, the Constitutional Court issued law no. 15 of 2012 on 6 October 2012. Under Article 4 of this law, the Constitutional Court became competent to monitor the constitutionality of laws and regulations in force, as well as to interpret constitutional provisions. Articles 9-12 regulate the procedures for constitutional appeals before the Court.[96]

Consequently, constitutional oversight in Jordan can be divided into two main stages: restraint oversight applied before the issuance of Constitutional Court law no. 15 of 2012; and central constitutional oversight after this law was enacted. Due to the impact of restraint oversight, it is worthwhile to highlight some rulings and judgments by Jordanian courts

94 Since the ruling is limited only to restrict the application of a certain law due to its incompatibility with the constitution, and because the authority of its judgment would be restricted to the case in hand, the impact of such decisions is limited to the parties to the dispute only (principle res judicata). The law remains valid and continues to exist, and it can be applied by other courts unless it is appealed for unconstitutionality before the court, or if the court decides on its unconstitutionality. Therefore, it is likely that the judgments issued by the various courts will conflict. It is, however, worth noting that a ruling by a higher court to refrain from applying a certain law due to its unconstitutionality restricts other courts of different levels, and will impede the application of that law. See H.A. Al Tahrawi, 'The Essence of Restraining Control in Jordanian Law', <www.lawjo.net/vb/showthread.php?30001%D8%A7%D9%84%D9%82%D8%A7%D9%86%D9%88%D9%86%D8%A7%D9%84%D8%A7%D8%AF%D8%A7%D8%B1%D9%8A%D8%A7%D9%84%D9%85%D8%AD%D8%A7%D9%85%D9%8A%D9%87%D8%A7%D9%86%D9%8A%D8%B9%D9%84%D9%8A%D8%A7%D9%84%D8%B7%D9%87%D8%B1%D8%A7%D9%88%D9%8A>, visited on 22 May 2016.

95 These amendments were very extensive as they covered more than one third of the provisions of the Constitution and contained important amendments related to the provisions of the management of authority and its modus operandi, as well as a section related to fundamental human rights and the system of human rights in its international concept which was approved by the Parliament and became effective and enforceable. Among the most important amendments were issues related to the three authorities, and guarantees of non-interference and measures to prevent encroachment on one another. The relations and functioning of these authorities were organized, and constitutional institutions for monitoring the exercise of authority were established. See Jordanian Constitutional Court, >, visited on 22 May 2016.

96 Ibid.

that saw the use of this defence before analysing the role of the Jordanian Constitutional Court.

In respect to restraint oversight, Jordanian courts of all types and at all levels greatly contributed to enshrining human rights in their jurisprudence by refraining from applying laws that violated human rights, thereby emphasizing the constitutional protection of these rights. For example, the judgment of the First Instance Court of Amman in its session of 30 October 2002 is important. The Court opposed legislative and punitive restrictions on the freedom of publication by refraining from applying Article 78 of the Penal Code no. 16 of 1960. The First Instance Court considered in judgment no. 876/2002 that basing the responsibility of the editor in chief on legal presumptions that he had checked all published information in his newspaper constitutes a violation of the Constitution by failing to assume the principle of good faith and innocence. It also decided that Article 41(b) of the Press and Publications Law violated Article 103 of the Constitution. The Court ruled that it should refrain from applying legal text that is incompatible with the Constitution and that it should consider the supremacy of the Constitution over all laws.[97]

Moreover, the Jordanian Court of Justice set an important precedent in case no. 226/97 of 26 January1998 regarding the unconstitutionality of the Press and Publications Temporary Law no. 27 of 1997. The Court concluded that the "necessary measures" provided for in Article 94 of the 1952 Jordanian Constitution were not fulfilled in cases where this legislation was applied. Therefore, the law was deemed incompatible with the Constitution and it was decided that it should not be applied.[98]

It is noteworthy here that these two courts attempted to protect the right to freedom of expression by refraining from applying contradictory legislation or legislation that had been imposed through a violation of the constitution. This protection is in conformity with the international safeguards for freedom of expression. Both judgments are in line with Article 19 of the ICCPR which states that "[e]veryone shall have the right to hold opinions

97 It should be noted that the source did not mention the name of the court that issued decision no. 876/2002. See Jordanian Legislation, <www.lob.gov.jo>, visited on 22 May 2016.

98 Abu Hujaila, supra note 62, p. 163.

without interference," and that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

After the approval of constitutional amendments in 2011 and pursuant to the Jordanian Constitutional Court Law, constitutional oversight in Jordan became more regularized and resulted in improved protection of human rights. Despite its infancy, the Jordanian Constitutional Court has been able to issue a number of judicial applications and interpretations of the constitution's provisions that comply with international human rights standards concerning, for example, the right to unionize, the right to equality before the law and the judiciary, and the right to litigation.

The Right to Union Organization: The Jordanian Constitutional Court enshrined the right to organize unions in Opinion no. 6 of 2013 issued on 24 July 2013. The mandate of the Constitutional Court for interpretation of laws is based on the Senate's decision of 14 April 2013 which included a request to interpret Article 23(2) and Article 120 of the Jordanian Constitution. The opinion was to indicate whether these two articles permitted the staff of any ministry, department, body, or governmental institution to establish their own union, considering they are members of the civil service, and there is no identical model for their jobs in the private sector.[99]

In its decision, the Court stated that Article 128(1) of the Jordanian Constitution pursuant to the 2011 amendments set the rights and freedoms of the Jordanian citizen within a strong boundary of protection. This article confers protection on the right to organize unions by instilling a solid connection between constitutional texts and the provisions of international human rights conventions. The Court highlighted the mandatory provisions of Article 23(4) of the UDHR ratified by Jordan on 10 December 1948 which asserts that "[e]veryone has the right to form and to join trade unions for the protection of his interests".

99 For more information about judgments, see Jordanian Constitutional Court, <www.cco.gov.jo>, visited on 22 May 2016.

In an unprecedented turn, the Court explicitly linked Article 128(1) of the Jordanian Constitution with Article 22(1) of the ICCPR as ratified by Jordan on 3 January 1976 which affirms: "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests". The Court also linked the Constitution with Article 8 of the ICESCR 1966, ratified by Jordan on 3 January 1976 which states:

> *"The States Parties to the present Covenant undertake to ensure: the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; the right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations".*

The Jordanian Constitutional Court was not content to refer simply to these international covenants. It went further by conferring protection to the right to organize by emphasizing the compulsory character of the Constitution of the International Labour Organization (ILO) in accordance with Article 1 and other provisions in the ILO document. The Court also referred to ILO Convention no. 87 on the Freedom of Association and Protection of the Right to Organize, as well as Convention no. 98 on the Right to Organize and Collective Bargaining. The court considered that these conventions granted the right to organize to all public staff members, adopting a comprehensive meaning of the word 'public' to encompass all persons employed by public authorities. This ruling resulted in the formation of the 'Organization of Public Employees' with the objective of determining and defending the interests of this group. The Court entitled all public officials in any ministry, department, government body, or institution to establish their own trade unions even if they are affiliated with the civil service, and even if there is no identical model of their jobs in the private sector.

This decision is a precedent insofar as it demonstrates the capabilities of constitutional oversight and legislative interpretation from the perspective of international human rights conventions by noting the mandatory

character of these standards as they apply to the national legislator. This fits in the context of the judicial approach that relies on treaties superseding national laws in conformity with the constitution.

The Right to Equality Before the Law and the Judiciary: The Jordanian Constitutional Court has sought to confer protection on the right to equality before the law and the judiciary in many of its decisions. One example is that of decision no. 2 of 2013 issued on 3 April 2013. It concerned the constitutionality of Article 51 of the Arbitration Law no. 31 of 2001 that had been submitted to the Appeals Court in Amman, case no. 15/2012 and subsequently referred to the Court of Cassation, which referred it to the Constitutional Court. This appeal included a claim that Article 51 of the Arbitration Law violated the spirit and principles of the Constitution, insofar as it failed to achieve equality among the involved parties before the law and judiciary. The law granted one of the parties an additional level of litigation while withholding it from the other party or parties. This constituted a denial of justice and equality between adversaries, and was a violation of Article 6(1) of the Jordanian Constitution.[100]

The Court found that Article 51 contradicted Article 128(1) of the Jordanian Constitution that protects and prevents interference with various types of public rights and freedoms. The Court highlighted the legislature's mandate to regulate these rights provided it not undermine, compromise, or otherwise waste or confiscate them in violation of the provisions of the Constitution.

The Court explicitly ruled that the right to litigation is a constitutional principle that may not be denied. Citizens should have equal access to this right, especially given that Article 6(1) of the Constitution declares that all Jordanians are equal before the law without discrimination on the grounds of race, language or religion. The Court concluded that Article 51 of the Arbitration Law violated the principle of equality before the law as stated in Article 6(1) of the Constitution and therefore decided that the law was unconstitutional for violating both Articles 6(1) and 128(1).

In the same context, the Jordanian Constitutional Court decided to confer

100 Ibid.

constitutional protection on the right to equality before the law and the judiciary in its ruling in judgment no. 4 of 2014 dated 3 September 2014. This case was an appeal concerning the constitutionality of Article 14(b) of the Jordan News Agency staff regulations no. 7 of 2010 in regard to the contractual rights of staff. The appellant argued that this article violated the principle of equality among Jordanians as asserted in Article 6(1) of the Constitution. The Court concluded that the article under dispute breached the right to equality among Jordanians and therefore rendered it unconstitutional.[101]

The right to equality before the law was also confirmed in ruling no. 7 of 2013 related to Article 11(c) of the Business Names Regulations no. 9 of 2006. The Court considered this article unconstitutional since it deprived the applicant of a financial write-off of the costs associated with appealing an administrative decision, although a write-off was granted to the other party. In its decision, the Court held that the article under dispute amounted to a breach of the principle of equality as defined in Article 6(1) of the Jordanian constitution.[102]

It is evident that the Jordanian Constitutional Court has adopted an approach in line with the provisions of Article 10 of the UDHR which says that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". The approach also considers Article 8 of the UDHR which states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". Furthermore, its approach upholds Article 14(7) and (11) of the ICCPR concerning the guarantees associated with the right to litigation. This analysis underscores the profound role of the Constitutional Court in the implicit application of international human rights conventions through the interpretation of constitutional provisions.

The Right to Litigation: In addition to the role of the Jordanian Constitutional Court in conferring constitutional protection of the right to organize

101 Ibid.

102 Ibid.

unions and the right to equality before the law and the judiciary, it has provided constitutional protection of the right to litigation. This is evident in decision no. 4 of 2013 dated 3 July 2013. The appeal concerned the constitutionality of the Landlords and Tenants Law, submitted before the Al Ramtha Magistrate Court in case no. 167/2012 related to estimating standard rent, which was referred to the Constitutional Court by the Court of Cassation in its decision no. 4422/2012 dated 27 December 2012.[103]

The court examined whether the finality of judgment on standard rent affected the essence of the appellant's constitutional rights. The court decided that failure to allow an appeal against standard rent represented a substantial violation of citizens' access to higher level courts, and that such a decision squandered the protection imposed by the Constitution. The court concluded that this failure violated Article 128(1) of the Jordanian Constitution as this article sets up a boundary around public rights and freedoms to prevent their circumvention. The mandate granted to the legislator to regulate the use of these rights must not result in undermining or compromising their essence, nor should it extend to squandering or seizing these rights; to do so would diverge from constitutional provisions. Consequently, the court ruled that the finality of judgments regarding standard rent under the Landlords and Tenants Law was unconstitutional. It is evident that the Jordanian Constitutional Court has implicitly applied international standards protecting the right to litigation in accordance with the provisions of articles 8 and 10 of the UDHR as well as Article 14(1)-(7) of the ICCPR which guarantees the right to litigation and other legal privileges associated with it.

3.2.2.5. Jurisprudence of the Algerian Constitutional Council

The ratification of the 1989 Algerian Constitution represented a quantum leap in Algerian constitutional organization by laying the foundations for the rule of law, adopting the principle of separation of powers, and enshrining the constitutional protection of human rights through the creation of a Constitutional Council tasked with assuming constitutional oversight in accordance with Article 155 (later Article 165 of the 1996 Constitution). This Article identifies the Council's competencies by stating that "the

103 Ibid.

Constitutional Council, in addition to the competencies explicitly delegated by other provisions of the Constitution, adjudicates in the constitutionality of the treaties and laws, and the regulations, either through an opinion before it becomes enforceable, or by a decision in an opposite situation". In examining this article, two major observations can be made.

> *"[First,] that the Algerian Constitution has given the Constitutional Council the power to monitor three types of legal rules: the Treaties, the Laws, and the Conventions. It is the only Arab constitution that provides for constitutional oversight over treaties. The second observation is that the Algerian Constitutional Council has adopted the prior and subsequent constitutional oversight system, which is also not accounted for by other Arab constitutions".*[104]

Followers of the Algerian Constitutional Council's jurisprudence find that from its inception it has assumed an active and fundamental role in the application of international human rights conventions. It both examined the provisions brought before it, and expanded these by applying the principle of alignment of laws. The Council has been keen to affirm that legislators, representing a public authority, respect individual rights and freedoms enshrined in the Constitution through the legislative process. The Council not only nullified the provisions that infringe upon rights, it also reminded the legislature of its role in enshrining and enforcing such rights. For example, in opinion no. 01 issued on 6 March 1997 which examined the constitutionality of the order containing the Organic Law on the Electoral System, it was stated that "the work of the legislator, especially in the field of rights and freedoms, individual as well as collective, should guarantee the actual exercise of the right or freedom recognized in the Constitution".[105]

An examination of the Algerian Constitutional Council's rulings on the right to equality and non-discrimination, and the right to political participation and to form parties reveals the active and fundamental role it has played in the application of international human rights instruments.

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104 Bourouba, ***supranote*** 33, p. 28.

105 S. Bourouba, ***Algerian Constitutional Council and the Protection of Human Rights***: Primary Assessment of the Practices (Faculty of Law, University of Algiers, Algiers, 2012) p. 25.

The Right to Equality and Non-Discrimination: The Algerian Constitutional Council confirmed the right to equality among Algerian citizens, and prohibited discrimination of any kind in its decision of 20 August 1989 concerning electoral law. What is remarkable in this decision is that the Council emphasized the principle of supremacy of international conventions over national legislation. It stated that:

> *"[a]ny convention, after being ratified and published, shall be included in national laws, and shall acquire, under Article 123 of the Algerian Constitution, supremacy over national laws. Every Algerian citizen is entitled to invoke it before the judicial authorities. This is confirmed, in particular, by the Charter of the United Nations of 1966 approved by law no. 08.89 dated 19 Ramadan 1409 corresponding to 25 April 1989, and to which Algeria acceded by presidential decree no. 67.89 of 11 Shawwal 1409, corresponding to 16 May 1989. It is also reflected in the African Charter on Human and Peoples' Rights, approved by decree no. 37.87 of 4 Jumada Al-Thani 1407, corresponding to 3 February 1987. These legal tools strictly and explicitly prohibit discrimination of any kind".*[106]

Some consider that the Algerian Constitutional Council has positively expanded the application of international human rights conventions in its jurisprudence, as clearly expressed in this decision. As noted by scholar Samia Bourouba, "one of the results of this expansion is that the reference base is no longer limited to the constitution but also includes international treaties. This prompted the Council to annul the law due to inconsistency with the human rights treaties ratified by Algeria, namely the ICCPR, and the African Charter on Human and Peoples' Rights of 1981, both of which enshrine the principle of non-discrimination".[107]

The Algerian Constitutional Council was eager to enshrine the right to equality and non-discrimination in other rulings, some of which have been mentioned in an opinion issued in 1998. The Council asks the legislature "to consider that the principle of equality of citizens before the law as set out in Article 29 of the Constitution requires the legislator to subject the

106 Bourouba, ***supra note*** 33, p. 28.

107 Bourouba, ***supra note***105.

citizens who are in similar positions to similar rules, and subjecting those who are in different positions to different rules".[108] It is clear that the Algerian Constitutional Council has opted to allow international conventions to prevail over national law, contributing to the growing role of constitutional oversight in the application of international human rights conventions.

The Right to Political Participation and to Form Parties: The right to political participation emerges from the right to equality and non-discrimination enshrined in Article 26 of the ICCPR. This right overlaps with other rights, especially the right to conduct public affairs, the right to vote and be elected, and the right to form political parties.

The Algerian Constitutional Council has sought to assert the right to political participation and to form parties, which is clear in its judgment on the notification of political parties issued in 1997. Three of the impugned judgments concerned a requirement that parties refrain from using for political purposes the basic components of national identity, namely: Islam, Arabism, and Amazighism. Article 13 of this notification stipulated that the founding members [of the party] have Algerian origins or have held citizenship for at least 10 years and that they normally reside within the country. The Algerian Constitutional Council found this unconstitutional because it sets conditions that would result in narrowing the right to form political parties. This right is recognized and guaranteed by the Constitution in Article 42(1) which states that "[t]he right to establish political parties is recognized and guaranteed". The Algerian Constitutional Council indicated in its reasoning that the "role of law is to apply the constitutional principle providing for the procedures and modalities of its application and not to diminish its content or remove [it] by imposing restrictions or by adding new conditions".[109]

Thus the importance of the mechanism of jurisprudence is illustrated in

108 It seems from this decision as well that the Constitutional Council incorporated treaties in the sources of its judgments, unlike the French Constitutional Council in a famous case concerning the prevention of voluntary abortion in which it issued a decision in 1975, refusing to return to the human rights treaties to estimate the extent of conformity of the law to its provisions. This decision raises the question of whether the Algerian Constitutional Council had intended by this to interfere in the competencies of the judiciary authority, which holds oversight of the compatibility of laws with international conventions. See Bourouba, supra note 105.

109 Ibid.

the Council's interpretation of constitutional provisions from a human rights perspective, contributing to the harmonization of national legislation and international human rights conventions.

In the same context, the Algerian Constitutional Council emphasized the right to political participation in a ruling on the 1989 electoral law which required original Algerian nationality for a candidate's spouse. The Council determined that this provision was also unconstitutional.[110] Finally, the Constitutional Council issued opinion no. 1 of 06 March 1997, in which it considered Article 13 of the Organic Law on Political Parties requiring founding members of a political party to have original Algerian citizenship or to have held citizenship for at least 10 years. The Council found this unconstitutional and nullified it for contradicting Article 29 of the Algerian Constitution.[111]

3.2.2.6. Jurisprudence of the Palestinian Supreme Court in its Constitutional Function

A review of the constitutional history in Palestine prior to the Amended Basic Law of 2003 shows that constitutional documents did not include oversight provisions. At the time of the British Mandate, the Constitutional Decree of Palestine of 1922 and its amendments did not refer to constitutional oversight. Oversight was also missing from Basic Law no. 255 of 1955, and from both the constitutional order of 1962 in the Gaza Strip, and from the Jordanian Constitution of 1952 in the West Bank.

During this phase, control over the constitutionality of laws did not derive its legitimacy from any constitutional document, and neither was it a central function assigned to a specific authority. Instead, courts of various categories and levels monitored the constitutionality of laws in their form and subject by refraining from applying provisions that were inconsistent with the constitution, based on a legislative hierarchy in which the constitution occupies the apex.[112]

110 Some believe that the Council's decision was not remarkable as it added the condition of publication which is not contained in Article 132 of the Constitution which stipulates that: "Treaties ratified by the President of the Republic, according to the conditions set forth in the Constitution, are superior to the law". Ibid.

111 Ibid.

112 For more discussion concerning 'restraint oversight', see section 3.2.2.4. 'Jurisprudence of the Jordanian Constitutional Court' of this book.

Courts practiced oversight by omission as can be inferred from decision no. 50/53 of higher appeal, which stated: "As it is in the Constitution of Palestine which is the basic law in force in the area under order no. 6, the court is not absolved from addressing the constitutionality of the laws, the basic principle being that the courts shall handle the interpretation of the laws arising from a dispute. It has and must verify the integrity of the law applied either in terms of form or subject". This approach is also seen in decisions including request 69/76 higher court, 13/42, 7/42, 8/42, and others.[113]

The issuance of the 2003 Amended Basic Law as the constitutional document in force represented a move toward constitutional oversight in Palestine. Article 103 established the Supreme Constitutional Court while leaving its mode of establishment and procedures to be dealt with in ordinary legislation. Article 104 temporarily referred the jurisdiction of the Supreme Constitutional Court to the Supreme Court, until the Supreme Constitutional Court was formed. Article 103 of the Amended Basic Law demonstrates that the purpose of the constitutional court is to provide centralized judicial oversight of the constitutionality of laws.

The Supreme Constitutional Court derives its jurisdiction from Article 103 of the Amended Basic Law. Article 103(1) establishes that the competencies of the Supreme Constitutional Court are limited to monitoring the constitutionality of laws, regulations, rules, and others, as well as the interpretation of the provisions of the Basic Law and legislation, settling jurisdictional conflict between the judicial and administrative authorities. Article 27 of the Supreme Constitutional Court Law no. 3 of 2006 states four specific ways to initiate constitutional appeals and pleas: (i) the original direct way in which a plaintiff files a lawsuit; (ii) plea through the referral from competent courts and bodies; (iii) accessory pleas by any litigant in a pending case; and (iv) plea by interference of the Constitutional Court.

113 M. Abou Moulouh, 'Judicial Control as a Guarantee to the Rule of Law', 3 Quarterly Policies (2007) pp. 37-38.

Despite Constitutional Court Law no. 3, the Supreme Constitutional Court has not yet been established and the jurisdiction to consider constitutional disputes remains temporarily with the Supreme Court.[114]

As to the issue of jurisprudence, the rulings of the Palestinian Supreme Court, in its constitutional capacity, are relatively few due to the small number of appeals submitted to it. To date, there have been no rulings on the constitutionality of any laws by the Supreme Court with the exception of appeal 4/2005 dated 14 November 2005, submitted by the Palestinian Centre for Human Rights to abolish the Judiciary Act no. 15 of 2005. In this case, the Palestinian Centre for Human Rights appealed the constitutionality of the Judiciary Act, which had been approved by the President of the Palestinian National Authority on 10 November 2005, and published in the Palestinian Chronicles, issue no. 60. The impugned act fell within the laws mentioned in Article 100 of the Amended Basic Law which says that "[a] highest Judicial Council shall be established and the law should provide for its composition, competencies and rules of procedure. It shall be consulted on draft laws regulating any matter of judicial affairs, including the public prosecutor". The appellant argued that it was necessary for the Palestinian President to consult with the Supreme Judicial Council on the matter of the amended Judiciary Act before it was submitted to the Legislative Council and approved by the president pursuant to Article 100. As reported by the advisor to the head of the Supreme Judicial Council, this consultation did not happen, which amounted to a clear violation of the Palestinian Basic Law.[115]

114 Some believe that the temporary delegation of jurisdiction to the Supreme Court over constitutional appeals was inspired by the provisions of Article 192 of the 1971 Egyptian Constitution. Among those, some criticized the Palestinian constitutional legislator for copying the Egyptian experience because the Palestinian constitutional legislator overlooked the fact that there exists no separate law applied to the Palestinian Supreme Court, along the lines of the 1969 law regulating the Supreme Court in Egypt. Therefore, the Palestinian Supreme Court had to establish much jurisprudence in determining how to hold sessions of constitutional appeals, since guidance is lacking in the law that establishes civil courts (no. 5 of 2001). This situation persisted even after the issuance of the Supreme Constitutional Court Law no. 3 of 2006.

115 The Centre for Human Rights mentioned in the appeal that the impugned law contained many legal and constitutional irregularities. Specifically, it pointed out the constitutional infringement represented by Article 65 which stated that: "[t]he appointment of the Prosecutor [is] a decision by the President of the Palestinian National Authority based on a placement by the Minister of Justice and the approval of the Legislative Council, the law establishes the competencies of the attorney general and his duties". This article contradicts Article 107(1) of the Amended Basic Law that identifies how to set the appointment and selection of the Attorney General: "The attorney general is appointed by a decision of the President of the Palestinian National Authority pursuant to a placement by the Higher Judiciary Council", and demonstrates inconsistencies in the texts of the impugned law, especially articles 36 and 103 which represent a constitutional violation of Article 100 of the Amended Basic Law.

At a session held in Gaza on 27 November 2005, the Supreme Court ruled, in its constitutional capacity, that the Judiciary Act no. 15 was unconstitutional, and concluded that it should be taken to have never existed. The Court explained that "failing to take the opinion of the Higher Judicial Council on the Judiciary Act as provided for in Article 100 of the Palestinian Basic Law is a violation of the Constitution and requires the abolition of the entire law". In addition, the ruling relates to the principle of judicial independence which is a constitutional principle.[116]

The action of the Supreme Court in this appeal was in line with the Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan in 1985,[117] in particular Article 1 which states that "[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary". The Supreme Court's decision in this matter may be considered an implicit application of international standards regarding the independence of the judiciary underlining the role of these standards in the protection of human rights.

3.2.2.7. Jurisprudence of the Moroccan Constitutional Council

Constitutional oversight in Morocco commenced in 1962 with the establishment of the Constitutional Chamber of the Supreme Council which was replaced by the Constitutional Council in the 1992 Constitution. Under the more recent 2011 Moroccan Constitution, Part VIII (chapters 129-134) establishes a Constitutional Court tasked with dealing with: the validity of parliamentary elections and referenda; the compatibility of regulatory laws; internal regulations of the Parliament and House of Councillors; and concurrence of national laws and international commitments with the Constitution.

The rulings of the Moroccan Constitutional Council which concern

116 See Palestinian Centre for Human Rights <www.pchrgaza.org>, visited 22 May 2016.

117 Adopted and made public by United Nations General Assembly resolutions 40/32 dated 29 November 1985 and 40/146 dated 13 December 1985.

freedom of opinion and expression, guarantees of a free trial, and the right to political participation illustrate the role of constitutional oversight in the application of international human rights conventions.

Freedom of Opinion and Expression: Decision no. 94-36 issued by the Moroccan Constitutional Council is considered one of the most important rulings enshrining freedom of opinion and expression as contained in the Moroccan Constitution and international human rights law. This decision was the result of a case concerning taxes imposed on antennas capable of receiving satellite channels. The Constitutional Council ruled, based on the transmittal letter submitted by members of Parliament, the unconstitutionality of the law based on procedure, namely the government's lack of respect for its failure to present this law before parliament.[118]

This decision safeguards freedom of opinion and expression by deeming unconstitutional any law that fails to follow the procedural requirements for its issuance. This is consistent with international rules that protect the right to freedom of opinion and expression. The decision is also consistent with Article 19 of the ICCPR which states "[e]veryone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". Thus, in its decision, the Council executed an implicit application of international human rights standards.

Guarantees of a Fair Trial: Article 14 of the ICCPR lays important foundations for fair trial guarantees similar to the provisions of the UDHR and the Arab Charter on Human Rights. This guarantee also includes the rules put into effect in criminal procedures by constitutional and ordinary legislators. They are guarantees derived from and interacting with the inherent rights of human beings. The concept of a fair trial is considered an inclusive concept that engages all the guarantees associated with the judicial process. The right of defence is deemed to be among the most important of these guarantees

118 *See* The Moroccan Association for Human Rights, <www.amdh.org.ma>, visited 22 May 2016.

In this context, the Moroccan Constitutional Council bestowed protection upon the right to a defence, designating it a main component of the fair trial guarantee as contained in the Moroccan Constitution and international human rights law. This right formed the centre of controversy during the Constitutional Council's consideration of Law no. 129.01 ordering a change to Article 139 of the Code of Criminal Procedure. Article 139 grants the investigating judge the authority, or based on a request by the public prosecutor, to withhold copies of transcripts or other documentation in whole or in part, provided such withholding is in the best interests of an investigation of any offense contained in Article 108 of the code, specifically crimes of bribery, abuse of power, embezzlement, squandering, treachery or money laundering.[119]

The Moroccan Constitutional Council ruled that Article 139 was unconstitutional on the grounds that the right to a defence is guaranteed under Chapter 120 of the Constitution. The Council stressed that this is a fundamental right, and that all rights related to a fair trial are practiced through it. Moreover, this right arises at the time of reading the charges to the defendant, and carries through pending issuance of a final judgment. In its reasoning, the Council referred to the principle of equality of arms between the prosecution and the defence, indicating that the lawyers of both the defendant as well as the civil party in all crimes should benefit from the same conditions and deadlines to prepare submissions as the prosecution. The Moroccan Constitutional Council confirmed in this decision the need to subject the right of defence and other guarantees of a fair trial to as much protection as possible, especially with regard to the duration of the handover of the file to the defendant's lawyer or the civil party. These are guarantees which would achieve a balance between the proper conduct of an investigation in the crimes mentioned and defence rights.[120]

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119 A. Achibah, 'Moroccan Constitutional Judicial Protection of Civil and Political Rights', Journal of Legal Science <www.marocdroit.com/%D8%AD%D9%85%D8%A7%D9%8A%D8%A9-%D8%A7%D9%84%D9%82%D8%B6%D8%A7%D8%A1-%D8%A7%D9%84%D8%AF%D8%B3%D8%AA%D9%88%D8%B1%D9%8A-%D8%A7%D9%84%D9%85%D8%BA%D8%B1%D8%A8%D9%8A-%D9%84%D9%84%D8%AD%D9%82%D9%88%D9%82-%D8%A7%D9%84%D9%85%D8%AF%D9%86%D9%8A%D8%A9-%D9%88%D8%A7%D9%84%D8%B3%D9%8A%D8%A7%D8%B3%D9%8A%D8%A9-%D9%82%D8%B1%D8%A7%D8%A1%D8%A9-%D9%81%D9%8A_a4807.html>, visited on 22 May 2016.

120 Ibid.

With this case, the Moroccan Constitutional Council demonstrated the implicit application of the international human rights standards which deal with the protection of fair trial guarantees, particularly the right to a defence and its associated rights.

The Right to Political Participation: As discussed in section 3.2.2.5. on Algeria, the right to political participation emerges from the right to equality and non-discrimination contained in Article 26 of the ICCPR. This right overlaps with several other rights, particularly the rights to work in public positions, to vote and be elected, and to form political parties.

The Moroccan Constitutional Council has made considerable progress in the protection of the right to political participation, possibly due to the numerous issues presented before it related to electoral appeals. The right to stand for election is regarded as one of the most important aspects of the constitutional right to political participation.

The Moroccan Constitutional Council sought to protect this right in its decision no. 17/2002 questioning the constitutionality of regulatory law 97-31 related to Parliament. The Constitutional Council considered the following text: "Each member of Parliament wishing to stand for election as member of the House of Councillors should resign prior to that from any board he/she might be sitting on". It found this was incompatible with the right to stand for election. The Council added in the decision that the requirement of political affiliation to stand for election contradicts the provisions guaranteeing citizens the freedom to engage with any trade union organization or political group of their choice. The text was also ruled incompatible with the right of all citizens to occupy public positions. The Constitutional Council referred to Chapter 37 of the Moroccan Constitution in this decision.

Subsequently, the Moroccan Constitutional Council, in reference to Part I, chapters 9-14 of the Constitution (ended the controversy regarding the compulsory nature of these chapters and the obligations they place on the ordinary legislator. Some considered these chapters part of a mere declaration of principles, devoid of any legal value. However, having the Constitutional Council refer to these sections stresses that they form a

core part of the rights and freedoms enshrined in the Constitution and comprise more than just a declaration of principles.[121]

The Moroccan Constitutional Council not only provided protection to the right to stand for election in the abstract, but it deliberately linked this right to other rights, such as the right to equality before the law. In a Council decision issued 23 January 2007 the requirement to obtain a 3 per cent acceptance of nominations under Article 20 of the Parliament Organization Law was examined to determine its constitutionality. The requirement aimed at restricting the right of parties and their candidates to stand for elections. The Council determined that this condition and other related conditions violated the right to equality before the law among candidates, and thus was inconsistent with Chapter 5 of the Constitution. The requirement was also found to be inconsistent with the right to stand for election, and thus constituted a violation of chapters 3 and 4 of the Constitution. Furthermore, it affected the rights of political parties, whether in electoral participation and representation of citizens, or through the right to free competition among parties. Finally it hindered the spread of the spirit of pluralism based on equality.

The Constitutional Council concluded that this requirement contradicts the constitutional framework concerning the organization of political parties and the principle of equality between parties. It is a violation of what the Council called the 'party system' which is founded on principles of constitutional value, such as the multi-party system and freedom of competition among parties as well as the independence of parties in the conduct of their internal affairs.[122]

The right to political participation was also confirmed by the Moroccan Constitutional Council's resolution of 13 October 2011 on the Organic Law of the House of Representatives. In its analysis, the Council determined that "political participation and pluralism are one of the foundations of the modern state that the Constitution seeks to consolidate and strengthen

121 Ibid.

122 Ibid.

[in] its institutions alongside the basic principles of the Constitution in the field of male and female citizens exercising their political rights".[123]

The Moroccan Constitutional Council implicitly applied international human rights conventions in respect to the right to political participation as well as the right to equality and non-discrimination as enshrined in international conventions such as Article 26 of the ICCPR.

The jurisprudence of the Moroccan Constitutional Council shows that the Council adopted two methods in its jurisprudence. The first method draws principles from international human rights law and implicitly integrates these into jurisprudence in a unique way. The second method is based on the extensive interpretation of these international principles in line with the Moroccan Constitution to achieve a balance between constitutional rules and requirements and those principles found in international human rights law.

123 Ibid.

4. The Role of Administrative Courts in the Application of International Human Rights Conventions

As a result of their competencies, administrative courts are considered among the most important sites of judicial oversight aimed at protecting human rights. The vast majority of comparative judicial systems adopt an approach based on enabling a particular authority to extend its control over the legality of actions by public authorities that affect the rights of individuals. Thus, control over legitimacy vested in the administrative judge plays a key role in the application of international human rights standards.

The first section of this chapter studies the nature and type of oversight conducted by administrative courts in the protection of human rights. The second section addresses the methods and jurisprudence of such courts in implementing international human rights conventions.

4.1. Nature and Types of Oversight by Administrative Courts and the Courts' Role in the Protection of Human Rights

In order to deepen understanding of the role of administrative courts in implementing international human rights conventions, it is necessary to review the nature and types of oversight conducted by administrative courts and the courts' role in the protection of human rights. Indeed, the nature and types of oversight exercised by administrative courts play a key role in understanding the characteristics of this type of judicial oversight. First, the nature of the oversight conducted by administrative courts and its role in the protection of human rights will be discussed. Then, the types of administrative court oversight and its role in protecting human rights will be reviewed.

4.1.1. The Nature of Administrative Court Oversight and its Role in the Protection of Human Rights

Administrative court oversight possesses a special character that distinguishes it from other mechanisms of judicial oversight. This is due to the fact that administrative courts specialize in controlling the legality of activities of public authorities. The principle of legality means that the rulers, primarily those involved in public administration, and those ruled, primarily citizens, abide by the law. Should the public administration stray beyond the limits of the law, administrative court oversight would require this authority to rectify its position to ensure it remains in conformity with the law.

The role of administrative court oversight is central to safeguarding public rights and freedoms, and protecting these rights from abuse. Nonetheless, some theories postulate that when these types of actions are subject to judicial oversight, the public authority may be deprived of its discretionary power in certain circumstances thereby constraining its movements and obstructing its performance.

It is a fact that a public authority must be subject to judicial oversight since it is vested with broad powers to carry out activities which may infringe individual rights. In specific cases in which there are inadequate legislative restrictions and controls, the nature of administrative court oversight requires that the administrative judge acts, with his founding and creative authority, to fill gaps and protect individual rights.[124]

In fact, it is clear that the nature of oversight practised by the administrative courts is characterized by the inclusion of an 'administrative oversight authority', which is one of the most powerful manifestations of the public

124 With the development of comparative judicial systems, and the settling of the idea of judicial oversight over the activities of public authorities, modern administrative jurisprudence came to believe that the work of the authority involves a clear infringement on the principle of legality, and demolishes the concept of the rule of law. Hence, this could result in the executive branch having free rein to do what it wants without supervision or control, therefore violating public rights and freedoms. Ibid., p. 85-98.

authority, and the most restrictive on individual freedoms.[125] Many jurisdictions moved toward distinguishing between what is considered a true freedom which the legislator protects and guarantees, and what is considered an authorization allowed to individuals and tolerated by authorities.[126] Comparative jurisprudence considers that an administration's use of its authority in administrative oversight, either by means of prevention or absolute prohibition of individual activity, is inadmissible. This method would mean, a priori, the abolition of the freedom itself, whereas an administrative oversight authority is competent to organize freedoms and not confiscate them.[127]

Accordingly, administrative courts play an integral role in protecting public rights and freedoms, as well as in implementing international human rights conventions in a manner consistent with national constitutions and laws.

4.1.2. Types of Administrative Court Oversight and their Role in the Protection of Human Rights

Comparative judicial systems know two main forms of administrative courts. The first is based on the unity of the judiciary in the face of disputes of any kind, given that there is one court specialized in all disputes brought before it no matter its nature. The second form is based on the concept of judicial dualism. An independent judiciary might exist and specialize in exclusively examining administrative disputes, including oversight of the work of public authorities, far from the jurisdiction of ordinary courts.[128]

The monist justice system is based on non-discrimination between

125 The Conseil d'État (French Council of State) was the first to address administrative authority over individuals by limiting its power. Administrative oversight is defined as a collection of commands, procedures, and decisions taken by a competent authority to maintain public order in its three competencies: security, health, and peace. It also manifests the work of the administration by regulating the freedoms of individuals in the protection of public order. Administrative oversight differs from other similar concepts such as judicial oversight or legislative oversight. Ibid., p. 25.

126 "This distinction was clarified on the occasion of religious processions that take place on public roads [in France]. If the religious procession was a tradition settled a long time ago, the Council of State considers it to be a manifestation of the enjoyment of a public freedom, namely the freedom of religious practice". See A.R. Al Kiyoumi, Summary of Administrative Law (Arab Beirut University, Alexandria, 2008) p. 20.

127 The French Conseil d'État decided that objection on the basis of minor risk to public order does not justify limiting public freedoms with dangerous restrictions. Ibid., p. 21.

128 S. Jamaledine, Administrative Justice: Control over the Work of the Administration (Dar Al-Maaref Publishing, Alexandria, 2003) p. 306.

individuals and the administration. It subjects them both to a single judicial system: the ordinary courts. Disputes might fall under the jurisdiction of one of the various ordinary courts or of a central judicial authority such as the supreme court or the federal court. In contrast, the system of judicial dualism differentiates between disputes among individuals that are within the competency of ordinary courts and administrative disputes that are within the competency of a specialized court, namely the administrative court. Dualism can manifest in the establishment of multiple administrative courts at different levels, or a centralized authority such as a council of state.[129]

With regard to the types of administrative court oversight and their role in the protection of human rights, some consider the monist system more in line with the principle of legality since it subjects individuals and the administration to one law. It does not permit the administration any privileges that are not equally available to individuals. Moreover, the monist system allows for easier litigation as compared to litigating under the distinct jurisdictions of ordinary and administrative courts as is the case with the system of judicial dualism. Nonetheless, the monist system has been criticized since it eliminates the independence the administration should have by submitting it to orders that hinder it from carrying out its functions. This could force the administration to issue legislation that prevents appeals of its decisions, potentially infringing upon human rights and public freedoms.[130]

Some consider that the system of judicial dualism turns administrative courts into creative courts able to make public laws which differ from ordinary regulations, through which the public interest can be served while individual rights are protected.[131]

On the other hand, it is possible to divide administrative courts into those having cancellation jurisdiction or powers and those with comprehensive powers. Those having cancellation powers judicature examine

129 See 'Organization of Administrative Courts under Judicial Dualism', Star Times, <www.startimes.com/?t=29456344>, visited 22 May 2016.

130 Ibid.

131 Ibid.

administrative proceedings. The judge's authority in these cases is limited to verifying the validity and legitimacy of the administrative decision, and the extent of its compliance with the law. The judgment does not go beyond that level, and it is not up to the judge to amend the impugned decision or establish new law. In comparison, courts having comprehensive powers assume full authority to resolve a dispute. In these cases, the role of the administrative judge is not restricted to cancelling an illegal decision, but may consider consequences of that decision. Since the decision would be related to the personal rights of a plaintiff, the judge may decide to not only cancel the decision but to also order compensation for damage caused to the plaintiff, including reimbursement of costs resulting from harmful administrative actions.

Although cancellation powers are important, they are not enough to fully protect the rights and freedoms of individuals. Some scholars believe that cancellation powers, while ensuring the termination of erroneous administrative decisions, do not cover the consequences of having been subjected to an erroneous decision for a prolonged period. There exists in some countries a practice of enforcing administrative decisions despite their being subject to cancellation litigation.[132]

4.2. The Mechanisms and Applications of Administrative Court Oversight in the Implementation of International Human Rights Conventions

An examination of the mechanisms and applications of administrative court oversight in the implementation of international human rights conventions is important in order to identify the means and tools available to administrative judges exercising their role in the protection of human rights and public freedoms. This topic is addressed first by describing the mechanisms available to the administrative courts in the implementation of international human rights conventions and then, in reviewing the applications of administrative courts in the implementation of international human rights conventions. Jurisprudence of administrative

132 S. M. Al Tamawy, Administrative Justice, Second Book: Compensation Judicature and Means of Appeal in Provisions: A Comparative Study (Dar Al Fikr El Arabi, Cairo, 2003) p. 11.

courts in Tunisia, Lebanon, Algeria, Palestine, Jordan, Morocco and Iraq are examined.

4.2.1. The Mechanisms Available to Administrative Courts in the Implementation of International Human Rights Conventions

Administrative courts have several mechanisms that enable the judge to protect public rights and freedoms and to implement international human rights conventions. One example is found in the issue of the burden or standard of proof. The jurisprudence of administrative courts indicates agreement to accept evidence collected by all means of proof or significance. It also indicates a refusal to accept, as evidence of a deviation defect, only a read of the decision and its reasoning or the manner by which it was issued and implemented, and the circumstances surrounding it.[133]

This gives a complainant the right to dispute the facts established in an administrative decision. Litigants may argue against reasoning that restricts their freedoms and rights and affects their legal positions, especially since administrations use various justifications, such as public order and security concerns, to justify denying citizens their rights. Jurisprudence establishes that citizens have a wide berth to establish, using any manner of proof, that the disputed decision was not based on real facts.[134]

The administrative judge also has the ability to adapt the facts that led to the administrative decision under dispute. This applies in cases in which the administration may have made its decision disregarding certain facts in order to justify violating public rights and freedoms. The administrative

133 The French Conseil d'Etat has confirmed this through its jurisprudence in relation to the ways of establishing proof in administrative proceedings. See Al Kiyoumi, supra note 126, p. 67.

134 The French Conseil d´Etat , in its protection of public freedoms, went to the extent of developing a judicial equivalent in favour of individuals against the administration. It decided, for example, that traditional religious processions and funerals should not disturb public tranquillity. Consequently, individuals do not carry the burden of proof, since this burden instead falls directly on the administration. This shift is considered an important facilitation for individuals in the field of cancellation litigation, as it preserves their rights and freedoms. See A. Boudiaf, Lectures on Administrative Law: A Gateway to the Study of Administrative Law (Arab Open Academy in Denmark, Copenhagen, 2010) p.20.

judge addresses this by adapting the facts, exposing the contents of the administrative decision, and issuing a judgment based on those facts.[135]

Many administrative systems provide the administrative judge with the authority to order compensation for material and moral damage.[136] This authority enhances the capacity of the judge to protect rights and public freedoms by compelling the administration to respect human dignity and fundamental rights and freedoms that are considered inseparable from humanity. Compromising these rights leads to psychological and moral harm that the administration should be required to compensate, rising to another way to protect human rights.

There are various tools available to administrative judges in the implementation of international human rights conventions. These are evident in four types of cases.

- In the first type of case, if a dispute is related to an administrative decision that was issued subsequent to an international treaty, and it conflicts with that treaty, the administrative judge has the power to cancel the decision provided the appeal is based on an examination of legality.

- In the second type of case, a decision is issued prior to an international treaty and is inconsistent with the new treaty. This treaty may or may not result in an implicit cancellation of this decision. If the decision is regulatory, the judge can suspend it as long as the international rule is still effective. The judge is obliged to declare the cancellation, and

135 One of the most important provisions of the French Conseil d´Etat in the control of the legal qualification of the facts is "its ruling in the case of Gomel in 1914: since it cancelled the decision made by the director of one of the regions who refused to grant Mr. Gomel a license to build in an archaeological area on the grounds that this construction will distort the beauty of the archaeological view, and when the Council looked into the legal qualification of the facts this decision relied upon it was deemed incorrect, and cancelled the decision of the Director". See M.L. Radi, Summary of Administrative Law (publisher unknown) p. 81.

136 The French Conseil d´Etat expanded the scope of its competencies so that it was no longer limited to compensating material damage only, opening the door to compensation for moral damage resulting from the action of the administration. This is clear in the decision in the case of Delpech. The Council compelled a municipal council to disburse material and moral compensation to a teacher to whom the Council refused to hand over the keys to his house without justification. The teacher was forced to live in an unhealthy and indecent location, resulting in severe damage to most of his home furniture, and the deterioration of his children's health. See Al Tamawy, supra note 132, p. 361.

revoke all executive decrees issued subsequent to the treaty which conflict with it.

- In the third type of case which is related to a law infringing upon a treaty, the authority of the judge seems constricted. If the law was enacted prior to the treaty, the judge only has the power to cancel starting from the date of integration of the international treaty with the national system. It is then the duty of the judge to declare the invalidity of all executive decrees based on the cancelled laws.

- In the fourth type of case, if judges state in an extraordinary way the supremacy of an international rule over legislation in force, they can then only assert their inability to implement the legislation.[137]

4.2.2. The Jurisprudence of the Administrative Courts in the Implementation of International Human Rights Conventions

In its jurisprudence, administrative courts in Arab countries endeavour to protect human rights. Some of this jurisprudence has explicitly given priority to international conventions protecting human rights that are also guaranteed by national constitutions and ordinary legislation. Other judicial rulings have sought to directly apply international human rights treaties. Implicit application of international human rights conventions, as discussed in the previous chapter, may also be found in administrative court jurisprudence. Implicit application requires expansive interpretation of the national constitution or laws, or the application of international conventions to close legal gaps in certain laws.

This next section describes the jurisprudence of various administrative courts in Tunisia, Lebanon, Algeria, Palestine, Jordan, Morocco and Iraq. It begins with a brief look at the judicial organization of the administrative courts in each of these countries.

4.2.2.1. Jurisprudence of the Administrative Judiciary in Tunisia

The ratification of the new Tunisian Constitution in 2014 signified a leap

137 See 'Judicial Oversight over the Agreement of Legislative and Regulatory Norms' (Web log post), Comprehensive Law web log, <droit7.blogspot.com/2015/06/blog-post_81.html>, visited on 22 May 2016.

toward the reorganization of the administrative system in Tunisia. Under Chapter 116 of the Constitution, the Tunisian administrative judiciary is comprised of an Administrative Supreme Court, administrative appeals courts and administrative first instance courts. The Constitution assigned the organization of these courts to ordinary law. The Tunisian administrative judiciary is tasked with scrutinizing violations of the administration's authority, presiding over administrative disputes, and exercising an advisory function.

The Tunisian administrative judiciary performs a significant role in the implementation of international human rights conventions in its jurisprudence. Decisions concerning the freedom of opinion and expression, the freedom of association, and the freedom to marry and found a family are reviewed.

Freedom of Opinion and Expression: The Tunisian administrative judiciary has sought to protect the right to freedom of opinion and expression found in international human rights conventions by annulling decisions violating this right. An administrative court of first instance issued a verdict in case no. 2193, dated 1 June 1994, that was based on both Article 19 of the UDHR and Chapter 8 of the Tunisian Constitution. The Court held that the administration cannot lawfully add a note to an employee's file based on his political views, or philosophical or religious beliefs and that it may not prosecute an employee based on his ideas provided he was not acting in a way that was incompatible with the performance of his job. The administrative court reaffirmed this position in another first instance verdict issued in case no. 18600, dated 14 April 2001, using the same reasoning.[138]

It is clear that the administrative court explicitly invoked international human rights conventions, in particular Article 19 of the UDHR, and linked them with Chapter 8 of the Tunisian Constitution, demonstrating the role that the administrative courts can play in the implementation of international human rights conventions.

Freedom of Association: The administrative court has emphasized the

138 See United Nations Human Rights Committee, supra note 75.

importance of the right to freedom of association in a decision made in a first instance verdict in case no. 3643, dated 21 May 1996. The court explicitly based its verdict on Article 22 of the ICCPR, and revoked the decision of the Minister of the Interior concerning the classification of the Tunisian Human Rights League as a civil society organization on the basis that the classification was an abuse of power. The Court considered that "[i]nternational treaties ratified in accordance with Chapter 32 of the Constitution, are more powerful than the laws, thus the minister's decision, according to law no. 25 of 2 April 1992 supplementing law no. 154 of 7 November 1959 related to associations, is tainted by the abuse of power".

The Administrative Court reiterated the same position in the first instance verdict in case no. 13918 of 13 May 2003, relying on the same rationale.[139]

From this judgment, it is clear that the administrative court has developed its jurisprudence based on the supremacy of international conventions over national law in certain instances. The Court notes that international treaties ratified in accordance with Chapter 32 of the Constitution, are considered superior to national laws. This jurisprudence applies to administrative decisions taken under these laws and is evidence of a. developing trend toward solidifying the role of the administrative judiciary in the implementation of international human rights conventions.

Freedom to Marry and Found a Family: In the first instance verdict in case no. 16919, dated 18 December 1999, the administrative court in Tunisia issued a decision to protect the freedom to marry and found a family. The court based this explicitly on Article 23 of the ICCPR which states that men and women of marriageable age have the right to marry and found a family without restriction. The administrative court decided to cancel a decision to expel an employee of the Internal Security Forces who had married a foreign woman without prior permission from the government, contrary to Chapter 8 of the Public Order that governs members of the Internal Security Forces. The Court noted that there was no rationale for the decision given that the administration was not able to justify the need for prior authorization. Among its reasons was the possibility of destabilizing state security, which the court rejected.[140]

139 Ibid.

140 Ibid.

Notably, the administrative court decided this case on the basis of prioritizing international conventions over national legislation, explicitly referring to Article 23 of the ICCPR. This is another example of the current trend in establishing the role of administrative courts in implementing international human rights conventions.

4.2.2.2. Jurisprudence of the Administrative Judiciary in Lebanon

The Lebanese judicial system applies the system of judicial dualism. It is organized as follows:

- The State Council is divided into seven bodies including the Council of Cases and six chambers one of which is administrative and the others judicial. The chambers in the State Council are maintained by the State Commissioner and his assistants. As for the Council of Cases, it consists of the President of the State Council, the chambers' presidents, and three counsellors.
- Several administrative bodies have judicial capacity to address certain administrative cases. Their decisions can be challenged by appeal or cassation before the State Council. The most important of these committees are the Committees of Objection on Taxes and Fees, the bodies' or employees' disciplinary councils, and the special committees for registration to the electoral lists.
- The Court of Litigation Settlement handles conflicts of jurisdiction between administrative and judicial tribunals.
- The Audit Court (Financial Judiciary) is considered an administrative court that handles the financial judiciary whose task is to take care of the public finances and funds deposited in the treasury. Administratively, the Audit Office is related to the Prime Minister's Office.

In terms of judicial jurisprudence, the Lebanese administrative judiciary plays an important role in the protection of human rights by implementing international human rights conventions. An overview of cases concerning the right to access information and the right to a fair trial follows.

Right to Access Information: On 4 March 2014, the Lebanese State Council issued a decision confirming the right to access information.

The Committee of the Families of the Kidnapped and the Disappeared in Lebanon and the organization Support of Lebanese in Detention and Exile (SOLIDE) petitioned the State Council on 24 December 2009 to appeal the Prime Minister's implicit decision not to disclose certain documents of the Commission of Inquiry concerning investigations into kidnapped and missing persons. The State Council decided to revoke this implicit decision, enshrining the right of the families of the disappeared to access information. It was held that the right to know the fates of their family members was a natural right and thus the State Council declared that the right to access information in this case did not permit any restriction, derogation, or exception unless under an explicit legal text. No such legal text was available.[141]

This was a landmark decision protecting the right to access information and is characterized by a deep understanding of human rights norms set out in international conventions, such as the right to life and a decent burial, the right to respect for family foundations and reunification, and the right of the child to family care, love, and stable life. The Lebanese State Council explicitly and in a detailed fashion, based its decision on international standards which indicates the importance of the role it is playing in the implementation of international human rights conventions in Lebanon.

Fair Trial Guarantees: In Article 14, the ICCPR defines the right to a fair trial which includes the right to a defence and derivative rights that enable the defendant or his lawyer to attend investigation sessions and present a defence. The Lebanese State Council issued a related decision on 1 April 2014 to accept a case presented by a defence lawyer against the General Directorate of General Security, Ministry of Interior and Municipalities. The applicant asked for the revocation of a decision that prevented him from attending his client's investigation sessions in the General Directorate, and asked the State for compensation for the damage incurred after his client (a charitable humanitarian organization) cancelled its contract due to this prohibition. The decision was based on the determining counsellor's report in which reference to international and internal instruments devoted

141 Many consider that this decision has significant political and social importance. See 'The Most Prominent Judicial Decisions in 2014: The Right to Knowledge against the Heroes Memories', Legal Agenda, <www.legal-agenda.com/article.php?id=1006&lang=a>, visited 22 May 2016.

to rights and freedoms was made, including Article 20 of the Lebanese Constitution which enshrines judicial guarantees, including the litigant's right to a proper defence. The decision was also based on paragraph (b) of the Constitution's preamble which states Lebanon's commitment to the UDHR, the Charter of the United Nations, and the ICCPR.[142]

The State Council implicitly applied international human rights conventions in reaching this result, indicating again the importance of the role played by the administrative judiciary in the implementation of international human rights conventions.

4.2.2.3. Jurisprudence of the Administrative Judiciary in Algeria

Algeria also applies the system of judicial dualism. The administrative judiciary in Algeria is comprised of the following authorities:

- The State Council is the highest administrative judicial body of the administrative jurisdiction and consolidates administrative jurisprudence across Algeria. It consists of judges and public prosecutors and functions to allocate appeals to the administrative courts and issues final decisions. In addition to its judicial powers, the Council enjoys an advisory function providing its opinion on national laws before they are presented before the legislative authority.
- The administrative courts are considered the first instance courts of the administrative judiciary. They exist in the jurisdiction of each judicial council department. The court is composed of at least three judges, and decides on all disputes to which the state or one of its bodies or public institutions is a party. Its verdicts are subject to appeal before the State Council.

The Algerian administrative court confirmed its role in the application of international human rights conventions in the Algerian State Council decision to follow the Algerian French Judicial Protocol signed on 28 August 1962 in a dispute between the Banking Committee and a bank.

142 This case started when a non-governmental organization that appointed a lawyer to defend foreign domestic workers decided to replace that lawyer because he had carried out certain actions considered by the General Security Directorate to be provocative and harmful to the progress of investigations. The NGO terminated the contract. Ibid.

This was an explicit reference to the right to work as confirmed by various international conventions.

The dispute began when the Banking Committee opened an investigation against a bank (Y.B.). The bank appointed J. M., a lawyer registered at the Bar in Paris, France, to defend its interests. However, under resolution no. 99/3 dated 23 March 1999, the Banking Committee rejected this appointment because it did not comply with the requirements of Article 6 of law no. 91/04. The rejection was appealed on the grounds of provisions in the Algerian French Judicial Protocol.[143]

In ruling against the Banking Committee, the State Council determined that:

> *"it should be said in these circumstances that she has respected the legal obligation imposed by the international protocol mentioned above, and that when the Banking Committee required the submission of the special license from the President of the Bar stipulated in Article 6 of the Law dated 8 January 1991, it ignored the requirements of the Judicial Protocol dated 28 August 1962 signed between Algeria and France".*

The Council found that the Banking Committee decision was contrary to international law.[144]

This case may also be considered an implicit application of international human rights law, in particular Article 6(1) of the ICESCR which affirms the right to work: "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right". This right is enshrined in multilateral and bilateral agreements such as the Algerian French Judicial Protocol.[145]

143 This case raised the question of the right to practice law in Algeria when the lawyer is a foreigner. The parties rejecting the registration applications have, every time, referred to internal laws which set conditions on foreigners wishing to practice law. However bilateral protocols governing the modality of lawyers from one state to another are being concluded with concessionary terms. Since national laws govern the legal profession including registration and enrollment conditions, as well as its practice, the Algerian law no. 91-04 dated 8 January 1991 governed the conditions for practicing the legal profession, as well as the rights and duties of the lawyer. See Bourouba, supra note 33, p 73.

144 Ibid., p. 75.

145 Ibid., p. 72.

4.2.2.4. Jurisprudence of the Administrative Judiciary in Palestine

The enactment of the Establishment of the Regular Courts Law no. 5 of 2001 symbolized a development in the organization of the administrative judiciary in Palestine, which saw the establishment of the Palestinian Court of Justice which, as one component of the Palestinian Supreme Court, considers administrative appeals. The Court of Justice is comprised of one judicial level, and its decisions are final.

The Palestinian Court of Justice is competent under Article 33 of the Establishment of the Regular Courts Law no. 5 of 2001 to look into special election appeals, applications presented by concerned parties to abolish lists, as well as regulations or final administrative decisions that offend persons or the property of public law persons, such as professional associations, higher education institutions, associations duly registered, and associations of public interest.[146] It may also hear applications requesting the release of persons arbitrarily detained and disputes relating to public functions such as appointments, promotion, bonuses, salaries, transportation, and issues surrounding discipline, retirement, or dismissal.

The court may consider: the refusal of the administrative authority; the authority's failure to take any decision according to the provisions of the laws or applicable regulations; and other administrative disputes and issues not arising in trial proceedings such as petitions or summons that fall outside the jurisdiction of any court requiring necessary adjudication. The Palestinian Court of Justice has a prominent role in the protection of human rights as is seen in its jurisprudence applying international human rights conventions. Jurisprudence concerning the right to personal liberty, the right to litigation, the freedom to form associations, and the right of equal access to public services, is analysed.

The Right to Personal Liberty: The right to personal liberty contains many associated rights including the right to a fair trial, the prohibition of arbitrary

146 The text of this article was amended by presidential decree no. 15 of 2014 regarding the amendment of law no. 5 of 2001 on establishing regular courts.

detention and the right to security of the person. Article 9 of the ICCPR has comprehensively expressed this right and the rights associated with it.[147]

The Palestinian Court of Justice has assumed a prominent role in the protection of this right by imposing strict controls on detention procedures. Several judgments have been issued in this regard, perhaps most notably in case no. 119/2005, dated 30 October 2005, in which the Court explicitly referred to the need to implement international human rights conventions in judicial decisions.

The plaintiff appealed the governor's decision dated 6 July 2005 to continue to detain the plaintiff. The appellant said that the decision was at fault by virtue of an abuse of power and constituted a flagrant violation of the court's decisions.

The Court ruled to annul the decision and issued an order to the prison to immediately release the plaintiff. It based its reasoning on the Amended Basic Law of Palestine, specifically Article 11(1) which states that "[p]ersonal freedom is a natural right, shall be guaranteed and may not be violated" and Article 11(2) which says "[i]t is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of any person, except by judicial order in accordance with the provisions of the law". The Court also made reference to Article 98 of the same law which states that "[j]udges shall be independent and shall not be subject to any authority other than the authority of the law while exercising their duties. No other authority may interfere in the judiciary or in judicial affairs".The Court indicated that Judiciary Law no. (1) of 2002, as the basic law for the judiciary, has created peremptory rules preventing interference in judicial

147 Article 9 of the ICCPR states:
"1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

affairs in order to protect the judiciary from the executive. The Court stated in regard to Article 1 of the 2002 law that "the judiciary is independent, and any interference in the judiciary or in the affairs of justice is prohibited".

Remarkably, the court founded its ruling on international and regional human rights conventions. Indeed, it explicitly stated that "the Criminal Procedure Law no. 3 of 2001 established rules and regulations to prevent the violation of basic human rights set out in international and regional covenants protecting human rights". This is an explicit allusion to the supremacy of international human rights conventions over national legislative sources that may prevent their application, as well as acknowledgement that human rights norms as derived from the international conventions provide a comprehensive and coherent explanation of the relationship between national legislation and international conventions.

In a similar case, the Palestinian Court of Justice ruled that "no person shall be arrested and detained except by a command of the competent authorities, and whereas the arrest of the plaintiffs and their continued detention was contrary to the Penal Code and in accordance with void procedures, thus their continuous detention is considered illegal and thereby [the authority] should immediately release them".[148]

In yet another judgment, the Court referred to the violation of the Palestinian Basic Law provisions on arbitrary detention in finding that "the arrest of the plaintiff, despite the absence of a charge against him and without being interrogated and submitted to a competent court after more than ten months, contrary to the provisions of the Basic Law and Article 120 of the Criminal Procedures Law no. 3 of 2001, and his arrest, is illegal, which requires its cancellation and his immediate release unless he is convicted or detained for another reason".[149]

In addition to dealing with unlawful arrest and detention, the Palestinian Court of Justice explicitly confirmed the prohibition of political arrests. The court ruled in a verdict that "the arrest procedures of the plaintiff was

148 Judgment of the Supreme Court of Justice, held in Ramallah in administrative lawsuit no. 25 of 1961, Database of the Technical Office of the Palestinian Supreme Court, Ramallah, Reviewed on 20 July 2012.

149 Judgment of the Supreme Court of Justice, held in Ramallah in administrative lawsuit no. 8 of 2002, Ibid.

not done by the public prosecutor and the plaintiff was not presented to a judge to extend his detention which indicates that his arrest was political, and whereas the political arrests are prohibited, thus it requires the immediate release of the plaintiff".[150]

The Palestinian Court of Justice has also stressed the need for the authority to implement judicial verdicts issued to release those arrested unlawfully. It believed that the Palestinian Interior Minister's failure to implement these decisions constituted a violation of the Constitution, infringing upon the independence of the judiciary and the principle of separation of powers. It found that the Minister of the Interior's decision to re-arrest the released plaintiff was an abuse of the authority of the judiciary which should result in the annulment of the minister's decision.[151]

In reading these verdicts, it is clear that the Palestinian Court of Justice implicitly applied certain provisions of international human rights law, particularly Article 9 of the ICCPR that asserts the right to a fair trial, the prohibition of arbitrary detention, and the right to personal security.

The Right to Litigation: The jurisprudence of the Palestinian Court of Justice enshrined the right to litigation by emphasizing the inadmissibility of an immunity claim concerning administrative decisions. This was decided in verdict no. 531/2010 which reads:

> *"The sovereignty work is inherently administrative work, and to argue that some administrative decisions are of a sovereign nature aims to immunize these decisions from judicial control despite being tainted by illegality. For scholars, this results in problems of legitimacy as well as defying the Palestinian legislature which has agreed to this doctrine and the text of Article 30 of the Basic Law which states that 'any provision in the laws protecting any decision or administrative action from judicial control is forbidden'".*

150 Judgment of the Supreme Court of Justice, held in Gaza in administrative lawsuit no. 170 of 2001, Ibid.

151 The text of the decision included: "as it is not permissible for the executive authority to impose its control over the procedures of the courts and their decisions, and since jurists agreed that restricting the executive authority from intervening in the lawsuits filed before the Courts is one of the most important factors to establish the principle of judicial independence and impose its respect on everyone. The executive authority should remain restrained even if there is an error in the application of the law committed by the judge during the proceedings, because the right way to rectify such a mistake and fix it is through appealing those verdicts by means prescribed by the law, and not by the executive authorities' interference in the proceedings and the decisions of the courts". See lawsuit no.112/2005 judiciary, judgment no. 169, Supreme Court of Justice, Ibid.

In this ruling, the Palestinian Court of Justice rendered "all acts of sovereignty a blemish on legitimacy", thus affirming that the right of the Palestinian citizen to litigation is a constitutional right. This right is provided for in Article 8 of the UDHR which states that, "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". The ICCPR also affirms this right, and Article 14(1)-(7) indicates a number guarantees associated with the right to litigate.

In this ruling, the Palestinian Court of Justice implicitly applied international human rights conventions, aligning them with national constitutional rules.

The Right to Form Associations: Article 22 of the ICCPR refers to the right to freedom of association, and emphasizes that restrictions on this right are prohibited except to the extent provided by law and under measures necessary in a democratic society, for the preservation of national security, public safety, public order, protection of public health or morals or the protection of individual rights and freedoms.[152]

The Palestinian Court of Justice has clearly affirmed the right to freedom of association in many of its provisions, and prohibited the public authority from imposing controls that inhibit associations from legally operating as civil society institutions. This applied in particular to the Monetary Authority which had frozen several associations' funds without legal justification, and so the Palestinian Court of Justice held in its decision in case no. 163 of 2003 that:

> *"whereas it was not proven that the plaintiff associations violated the Societies Law, the license conditions under which they were created, or that they got their money illegally. It was not proven to be attributed*

152 Article 22 of the ICCPR states:
"1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention".

to any corruption, abuse in distribution, violation of the Societies Act, prejudice to the interests of the citizens or the detriment of the national interest. Whereas the Societies Act brought to these associations special protection so that they can perform their duties to the fullest and this was not applied by the defendant to the Monetary Authority, the decision issued in freezing the funds of the plaintiff associations was contrary to the law, and includes arbitrary use of power, which has to be cancelled and the plaintiff associations' request to have their money should be granted".[153]

The Palestinian Court of Justice also denied, in its ruling in administrative case no. 125 of 2001, the justifications of the competent authority which had refused to register several new civil society associations on the grounds that there were already registered associations operating in the same fields. This refusal, as described by the court, was "missing the legal justification for the fact that it aims to restrict the right of the citizens to form associations".[154]

In addition, the Court of Justice affirmed the right to form associations when considering a decision of the Ministry of the Interior, which, after failing to meet a legislated deadline, refused to license an association despite a law stating otherwise. In its ruling, the court stated that:

"the charities and NGOs Law no. 1 of 2000 organized the Societies Registration procedures, and that is either by a decision issued by the Minister of Interior, or by law in the case of expiration of a period of more than two months without such a decision being issued based on Article 4(2) of the mentioned Law, and whereas more than two months from the date of the registration application of the plaintiff associations passed without a decision from the Minister of Interior regarding the fulfilment of the registration request to the requirements or not, thus the plaintiff association is registered by law and the Ministry of Interior should grant it a document to that effect".[155]

In these decisions, the Palestinian Supreme Court of Justice implicitly

153 The judgment of the Supreme Court of Justice was held in Gaza in administrative lawsuit no. 163 of 2003. See Database of the Technical Office, supra note 148.

154 The Supreme Court of Justice held in Gaza in administrative case no. 125 of 2001that "[t]he Charities and NGOs Act no. 1 of 2000 does not include any text prohibiting the granting of a license to more than one association working to achieve the same goal; the decision of the Ministry of Interior to reject the application to register an association is misplaced for not having any legal support. The decision must thus be nullified and the defendant, the Ministry of Interior, compelled to duly register the association with the ministry". Ibid.

155 The Supreme Court of Justice held in Gaza in administrative case no. 75 of 2004. Ibid.

applied international human rights conventions, specifically Article 22 of the ICCPR which affirms the right to form associations, without restriction except to the extent provided by the law and specific measures necessary in a democratic society.

The Right to Equal Access to Public Service: Article 25 of the ICCPR refers to the right to equality in accessing public services. This right is linked to the right of equality before the law and the judiciary and the right to non-discrimination on the grounds of race, colour, sex, or religion.[156]

The Palestinian Court of Justice provided its interpretation of the right to equality when stating that "what is meant by the principle of equality is the equality before the law, [so] there can be no demand of equality in cases of lawlessness and prohibition orders".[157] The Court applied this understanding in its judicial applications,[158] particularly in public service disputes, noting in a ruling that "whereas the Palestinian National Authority ordered the return of the employees who were dismissed during the occupation to their former duties, the plaintiff must be treated similarly to them according to the principle of equality between citizens and employees".[159] This was similarly recognized in another ruling in which the court stated that "the justification of the local organizing committee to approving a detailed regulation draft of the contested to avoid paying the compensation to the owner of the land, where the street passes, does not allow it to breach the principle of equal deduction of the opposing plots of land".[160]

The Palestinian Court of Justice also protected the right to employment

156 Article 25 of the ICCPR states:
"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country".

157 The judgment of the Supreme Court of Justice held in Ramallah in administrative case no. 44 of 2005. See Database of the Technical Office, supra note 148.

158 The Supreme Court of Justice found in another ruling that "what is meant by the principle of equality is the legal equality, and shall be excluded the cases that stray from the guidelines and restrictions of the law, since a violation of a law may not be considered a precedent that can be invoked". See the judgment of the Supreme Court of Justice held in Ramallah in administrative case no. 42 of 2003. Ibid.

159 Judgment of the Supreme Court of Justice held in Gaza in administrative case no. 23 of 1995. Ibid.

160 Judgment of the Supreme Court of Justice held in Ramallah in administrative case no. 22 of 2006. Ibid.

in many of its provisions, including in its decision cancelling the decree issued by the President containing the retirement referral of the plaintiff. The court found that:

> *"As the plaintiff is an employee at the diplomatic corps at the Foreign Ministry in Ramallah and has pensions rights according to the general retirement law after reaching the age of sixty pursuant to articles 20 and 22 of the law, based on what has been indicated, we find that the President of the State of Palestine violated the law by issuing a presidential decree referring the plaintiff to retirement. This requires the cancellation of the appealed decision and the return of the plaintiff to work in Ramallah".*[161]

This ruling not only overturned the decision, but it also required the concerned employee to return to her work, which provides a clear obligation to the authority in a precedent that will not be repeated in the provisions of the Supreme Court of Justice, which often only rescinds decisions.

The Supreme Court of Justice decided in a judgment that an employee must not be dismissed unless pursuant to liability, a committed negligence, or for incompetence. If dismissed, the decision should be issued by a legally qualified person, with any personal opinion clearly stated. The decision of the defendant to reject the appointment of the plaintiff on the basis of the views of an unknown relevant authority, renders the decision illegal and flawed with abuse of power and therefore should be void.[162] Despite these many cases, the court diverted from this jurisprudence in another ruling exhibiting similar facts.[163] This contradiction resulted in the

161 Supreme Court case no. 100/2009. Ibid.

162 The court ruled that "the probation period of the plaintiff shall be for one year starting from the date of commencement of the work as stated in the decision of appointment and Article 30 of the Civil Service Law. Failure to offer the employee permanent employment due to his status as unfit during the probationary period is not valid due to the lack of a fitness condition for the work ascribed to him. This provision depends on a specific period (probation) and does not go beyond it". See Supreme Court of Justice no. 311/2009. Ibid.

163 In Supreme Court of Justice no. 375/2008, the verdict stated: "the Court found that it is not competent to look into this lawsuit", and the text read that the Court would "dismiss the claim for lack of jurisdiction", citing that the letter sent to the plaintiff stated that "it was decided to hire you to work at the Ministry of Education and Higher Education from the date you fulfill the requirements of employment… etc. [which] is a decision relying on several conditions and is one of the adverse preparatory decisions". Its texts did not rise to the level of an administrative decision appealable before the Supreme Court of Justice. The second impugned decision concerned cancelling placement and/or appointment based on a letter from the Chief of Staff for "lack of competency of the authorities approving the placement and/or the appointment is not considered an administrative decision because it is a subsequent action and /or follows the first decision". Ibid.

matter being referred to the Supreme Court which issued an important ruling that enhanced the role of the Palestinian administrative judiciary in the protection of public rights and freedoms, in what is known as "the issue of the teachers dismissed on security grounds". The court found that considering recommendations of the security services as a requirement to hold employment and public positions destroys the foundations of the rule of law. This action also diminishes citizens' rights to equality and equal opportunities in the public service.[164]

This ruling is of great importance since it created a legally binding principle for all the judicial bodies. It affected hundreds of individuals who had been deprived of the right to hold public service employment.

The right to equality is closely linked to the right to political participation. The Palestinian Court of Justice responded by protecting this right when it issued an important ruling on the issue of the postponement of local elections.[165] The court overturned a Cabinet decision that postponed upcoming local council elections. This judgment included an important principle stipulating that general elections for local councils have constitutional and legal merit and must be initiated within a scheduled time as set by law. The executive power cannot choose to initiate or stop them as they wish.

These decisions make it clear that the Palestinian Supreme Court of Justice is intent on the implicit application of international human rights conventions, specifically Article 25 of the ICCPR which affirms the right to equal access to public service. This principle is linked to the right of equality before the law and the judiciary, and the right to non-discrimination on grounds of race, colour, sex, or religion.

4.2.2.5. Jurisprudence of the Administrative Court in Jordan

Amendments to the Jordanian Constitution in 2011 brought a remarkable development toward organizing the Jordanian administrative court. These

164 See Lawsuit of the Supreme Justice no. 209/2009. It is worth noting that the sentence was issued by a decision dated 4 September 2012 with a majority of one vote only.

165 Lawsuit of the Supreme Court of Justice no. 531/2010. See Database of the Technical Office, supra note 148. Reviewed on 20 July 2012. Additional comments on this sentence can be read in: 16 Justice Magazine, pp. 197-219.

included an amendment to Article 100 which now states that "types, degrees, departments, responsibilities and management of the courts are assigned by a special law that provides the establishment of an administrative judiciary upon two degrees". Based on this amendment, the Administrative Judiciary Law of 2014 was issued, approved by the National Assembly, and ratified by His Majesty the King in July 2014. This law permits two degrees of litigation in accordance with the Article 100 amendment.

Whereas Article 3 of the law stipulated the establishment of two administrative judiciary tribunals (the Administrative Court and the Supreme Administrative Court), Article 25 also stated that "the Supreme Administrative Court shall have jurisdiction to review appeals filed before it in all final judgments of the Administrative Court, and shall review appeals from both objective and legal perspectives". Prior to this amendment the Jordanian Court of Justice was the court of first and last resort.[166]

The Jordanian Administrative Court has sought to protect public rights and freedoms such as the right to equality and non-discrimination, the freedom of opinion and expression, fair trial guarantees and freedom of association in many of its decisions.

The Right to Equality and Non-Discrimination: The Jordanian Court of Justice affirmed the right to equality as a constitutional right, while the Jordanian High Court of Justice disclosed in a ruling a recognition of the principle of equality. It stated that "there is no reach to demand equality in case of lawlessness orders and prohibitions in other similar cases" and this emphasizes the right to equality and non-discrimination. The Jordanian Court of Justice stated that legal equality is the non-discrimination between citizens if their circumstances and legal positions are the same.[167]

The Jordanian Court of Justice affirmed, in another ruling, the protection of citizens' rights to equality and equality to hold public office, and the protection of employees of the public sector from arbitrary rule. The court

166 See H. Alkabilat, 'Litigation with Two Levels of Judicial Procedures in Jordan's New Administrative Justice Law', <www.legal-agenda.com/article.php?id=796&lang=ar>, visited on 22 May 2016.

167 A.K. Shatnawi, Encyclopedia of Administrative Justice: Part 1 (Dar Al Thaqafa, Amman, 2011) p. 809.

has taken this position in a number of cases including in a verdict in which it cancelled the administration's decision to require a member of staff to retire, "since this administrative decision was tainted by the demerit of the abuse of power, and that it has been issued out of revenge and not for the common interest".[168]

It is therefore evident that Jordanian courts have strengthened the right to equality and non-discrimination by implicit application of international human rights conventions, linking them also to constitutional texts in the interpretation of this right in accordance with Article 26 of the ICCPR, which states:

> *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".*

Freedom of Opinion and Expression: The Jordanian Supreme Court of Justice has protected the right to freedom of opinion and expression as well as the right of publication and free press. Among its rulings is case no. 57/1954 whose main facts can be summarized as follows. An application was made on behalf of the petitioners to the Minister of Interior to issue a magazine licence to ***Al Fajr Al Jadid*** (New Dawn). However, the Minister rejected the application under the pretext that the petitioners did not have a good reputation as they belonged to a particular political and intellectual party. The High Court of Justice ruled to cancel the Minister's decision, and stated that "[m]erely to embrace a particular political principle, if this embrace is not combined to punishable action by law, does not in itself imply bad manners, otherwise not adopting this concept, leads to unreasonable results which are not in conformity with the essence of the law and its objectives".[169]

The jurisprudence of the Jordanian Court of Justice in this verdict is consistent with international conventions on the freedom of opinion and

168 O. M. Al-Shobaki, Administrative Justice: A Comparative Study, 1st ed., version III (Dar Al Thaqafa, Amman, 2007) p. 363.

169 See Y. Shukair (Web log post), <yahiashukkeir.wordpress.com>, visited on 22 May 2016.

expression, such as Article 19 of the ICCPR which holds that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice", and therefore may be considered an implicit application of international human rights standards.

Fair Trial Guarantees: The Jordanian Court of Justice has expressed deep understanding of the guarantees for a fair trial by adopting international standards, particularly Article 14 of the ICCPR with emphasis on the presumption of innocence, considered to be a cornerstone of a fair trial. The Jordanian Court of Justice confirmed in resolution no.103 of 1980 the right to the presumption of innocence. In this case, the Jordan Bar Association refused to register the petitioner as a trainee lawyer in light of a felony charge laid against him. The charge was investigated by the competent authorities but in trial dismissed for lack of proof. The court justified its conclusion referring to Article 8(1) of the Bar Association Law no. 11 of 1972 which states that the application for registration of trainee lawyers may not be rejected simply because of the accusation of a felony or moral crime being committed by the student; the request cannot be denied unless the student has been convicted of a felony. Registration may not be refused on the mere basis of a charge, even if it has been investigated by competent authorities.[170]

The Jordanian Court of Justice in this judgment has implicitly applied international human rights conventions, specifically Article 14 of the ICCPR.

In the context of conferring fair trial guarantees, the Jordanian High Court of Justice emphasized the importance of the right to a defence through its settlement in verdict no. 13/2000 (pentagonal board) dated 31 January 2001. The facts of the case can be summarized as follows. The military disciplinary board made a decision to dismiss the petitioner from his job based on an oral, unwritten investigation. The Supreme Court of Justice stated that as the trial of the petitioner was not written, it was absolutely

170 See Jordanian Court of Justice Decisions, <www.lawjo.net/vb/archive/index.php/f-38.html>, visited on 22 May 2016.

invalid. The Bureau of Investigation did not charge the petitioner and so he was not able to defend himself. Witnesses who reported to the investigation did not swear oath. This procedure therefore violated the rights of the accused. The court stressed the need for essential guarantees as a minimum in each disciplinary trial. This limitation is imposed by abstract justice and considerations of fairness in order to give the accused a chance to defend himself.[171]

The approach taken by the Jordanian Court of Justice in these two cases is in keeping with the implicit application of international human rights conventions demonstrated in previous cases discussed. The decisions are consistent with guarantees contained in Article 14 of the ICCPR, including the right to be presumed innocent and the right to a defence.

The Right to Freedom of Association and to Practice Activities: The Supreme Court affirmed the right to freedom of association, ensuring this right is without interference from the authorities except to the extent prescribed by law. This is exhibited in resolution no. 159/2010 (pentagonal board) issued by the Jordanian Supreme Court on 20 July 2010. In this case, the administrative authority in the competent ministry appointed a temporary committee to run an association instead of the usual elected committee. The court stated that the decision to appoint a committee, even temporarily must be based on one of the reasons set out in Article 14 of the Cooperative Associations Regulations no. 13 of 1998 in accordance with clause (b) as a constituent of such decisions. Since several possible reasons were identified in the regulations, the administration had the opportunity to state the reasons which led to the appointment of the temporary committee. Furthermore, the authority should have recorded its reasons in the form of causation, which would have been considered part of the administrative decision and one of the validity conditions. Given that none of this took place, the court ruled to cancel the decision to establish that temporary committee.[172]

The approach taken by the Jordanian Court of Justice in this verdict is consistent with the implicit application of international human rights

171 Ibid.

172 Ibid.

conventions, notably Article 22(1) of the ICCPR as ratified by Jordan on 3 January 1976. This states that "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests". It is conforms to provisions of Article 8 of the ICESCR of 1966, ratified by Jordan on 3 January 1976.

4.2.2.6. Jurisprudence of the Administrative Court in Morocco

The administrative courts in Morocco were established under Al-Dahir no.3 November 1993, and came into effect on 4 May 1994.[173] The Advisory Council for Human Rights was established by royal decree announced on 8 May 1990. This Council exists for the purpose of supporting and strengthening the state of law and rights. Seven administrative courts were established in seven areas: Rabat, Meknes, Fez, Oujda, Marrakech, Agadir, and Casablanca. In order to enhance the structure of the Moroccan administrative judiciary, Al-Dahir no. 1.06.07 was issued on 14 February 2006. This created administrative courts of appeal with seats in Rabat and Marrakech. It came into effect on 18 September 2006.

In terms of judicial application, the Moroccan administrative judiciary is diligent in providing legal protection of human rights and public freedoms, and has in many of its decisions recognized the supremacy of international conventions over national legislation. This was the case in Supreme Council Resolution no. 61 dated 13 February 1992. The administrative chamber considered that an "international convention is among the sources of the law and should be respected, therefore no administrative decisions may be issued in case of breaching the international convention which calls for its abolition for being unconstitutional". This trend has developed in many subsequent judgments of the administrative courts, including in cases dealing with freedom of association and the right to private property.

The Right to Freedom of Association and the Practice of Activities: The Moroccan Administrative Court has protected the right to freedom of association and the practice of activities in accordance with legal requirements. The Administrative Court in Fez, in a ruling issued on 10

173 Al-Dahir al-Sharif means a royal decree issued by the king in regard to state affairs such as appointments and higher decisions.

June 2015, cancelled a decision appealed by the Tahala branch of the Moroccan Association of Human Rights. Without any legal basis, the administrative authority refused to take over the legal file related to the renewal of the local office of the Moroccan Association of Human Rights. The court referred to the role of the local authority in regard to the establishment of associations which is limited to the receipt of registration fees, and the authority does not have the right to refuse to extradite this receipt. The judiciary alone is entitled to decide on the invalidity of assembly in accordance with the requirements of the laws concerning the right to form associations. This decision came after the association held a general meeting to discuss two reports, moral and financial, as well as the election of a new office. The court ruled to cancel the administrative decision in question.[174]

The ruling of the court is an explicit reference to the administrative judiciary's protection of the right to freedom of association. This falls under the implicit application of international human rights conventions, particularly Article 22(1) of the ICCPR which asserts that: "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests".

In other cases, the administrative judiciary exceeded its role in the protection of rights and freedoms and imposed a penalty against the state for issuing an administrative decision which arbitrarily prohibited the activity of associations. This was the case in verdict no. 114 in the file 988-7112-2014 dated 16 January 2015 in the administrative court of Rabat. The court fined the Moroccan state MAD 50,000 (approximately EUR 4,500) for the benefit of the Moroccan Association of Human Rights due to an arbitrary prohibition of an activity planned and organized for September 2014 in the Bouhlal centre of the Ministry of Youth and Sports.

The court stated that the theme of the prohibited activity was human rights. Human rights falls within the state's definition of cultural activities, and is therefore exempted from prior state authorization in accordance with clause 6, Chapter III of the Act on Public Assembly. To say otherwise leads

174 See Moroccan Association of Human Rights, <www.amdh.org.ma/ar/news-ar/verdict-favorable-amdh>, visited 22 May 2016.

to an erosion of the ability to engage in knowledge attainment, education, training, awareness, and sensitization.

The court's decision stated that human rights are part of a culture and require action by all legally available means to consolidate them in the collective conscience and in the everyday behaviour of each member of a community. The education and training institutions as well as civil society organizations bear fundamental responsibility for this. This was confirmed on the 51st anniversary of the UDHR by a royal message addressed to the nation which stated that "the incorporation of human rights culture spreads the light of knowledge; the role of the school remains central to instilling values of human rights among youth until it becomes social convention and a habit". The court concluded by accepting the request of the Moroccan Association of Human Rights and instructing the State, Youth and Sports sector to compensate the plaintiff for moral damages with a payment of MAD 50,000 (approximately EUR 4,500).[175]

The court ruled in a similar case, file number 949/7112/201 dated 21 November 2014,in which the State of Rabat tried to prevent a seminar of the Moroccan Association of Human Rights, scheduled for 27 September 2014, from taking place. The court ruled to cancel the decision issued by the Magistrate of Rabat under no. 542 dated 25 September 2014 which prevented the Moroccan Association of Human Rights from holding its symposium. The court ruled against the state's actions, in the person of the Prime Minister, and in favour of the plaintiff, awarding MAD 100,000 (approximately EUR 9,000) compensation for moral damage.[176]

The Administrative Court in Rabat has implicitly applied international human rights conventions, namely Article 22(1) of the ICCPR, which stipulates: "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests". The court confirmed its understanding of international human rights standards and interpreted them to ensure the effectiveness of its role in protecting rights and freedoms. This understanding is affirmed by the supreme royal message delivered on the 51st anniversary of the UDHR.

175 Ibid.

176 Ibid.

The Right to Private Property: The administrative court in Rabat has sought to protect the right to private property, particularly the right to ownership of movable property. This is demonstrated in its decision in file no. 792/1/2012 issued on 10 October 2012. In this case, a lawyer had been "surprised by an oral notice from Sala Agency, that the municipal tax collector in the tax collection office in Sala, seized her [bank] account presumed to be an account for customers' deposits for being a member of the Lawyer's Authority in Rabat. She did not receive any notice or decision to this effect from the bank, despite the fact that the subjected bank account is a professional account and not a personal account". Considering the damage resulting from the loss of rights and money, the applicant sought a verdict to lift the seizure on her deposit account.[177]

The court ruled in favour of the request, and explained by stating:

> *"based on the apparent bank certificate attached to the file, the detention of property procedures undertaken within the framework of the sample notice for the non-possessor, was focused on the professional bank account related to clients and their arising rights under law no. 08-28 concerning the amendment of the law governing the legal profession and related to others' rights which are the rights of depositors to whom the service is executed. Therefore, the appropriation of property was of properties not owned by the defendant, which makes it legally unjustified, and the request to remove it well-founded, especially that the urgency of case should be in perspective due to the damage to deposits by customers in case of prolonged appropriation".*[178]

The administrative tribunal in Rabat had sought to implicitly apply international conventions to protect the right to private property and its inviolability. This is consistent with international human rights law, namely Article 17 of the UDHR which acknowledges that "[e]veryone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property". This right intertwines with the right to dispose of a property, the right to legal personality, and several other related rights.

177 See Journal of Legal Science, <www.marocdroit.com>, visited 22 May 2016.

178 Ibid.

4.2.2.7. Jurisprudence of the Administrative Tribunal in Iraq

Iraq is among the Arab states which have adopted the dualist justice system. Many legislative amendments were introduced for the purpose of updating and developing this system. The latest of these amendments was in 2013 with the issuance of the 5th amendment to the law of the State Consultative Council no. 65 of 1979, in which the Iraqi Administrative Court was formed by the State Consultative Council which holds authority, and was then linked with the Ministry of Justice and based in Baghdad. The court consists of: one chairman; two vice-presidents, one for legislative affairs, opinion, and fatwa, and the other for administrative affairs; and a number of counsellors (not less than 50) as well as assisting counsellors (not less than 25 and not more than half of the number of counsellors).

The state consists of the following sections: General Authority, Presidency, Specialised Agencies, Supreme Administrative Court, Administrative Courts, and Staff Court. While the Supreme Administrative Court sits in Baghdad, it is under the chairmanship of the President of the Council or authorized counsellors, and the membership of six counsellors, and four assistant counsellors designated by the President of the Council.

The competencies of the Federal Court of Cassation are identified in the Civil Procedure Law no. 83 of 1969. This court hears cases of appeal against decisions of the Administrative Courts and the Staff Court as well as disputes over: the assigning of jurisdiction in the proceedings of cases between the Administrative Court and the Staff Court; and, the enforcement of two final but contradictory rulings issued by the Administrative Court or the Staff Court in a single matter if that matter involves the same parties, or when one ruling was implemented but the other not.[179]

The jurisprudence of the Iraqi Administrative Court reveals that it resorted to the protection of public rights and freedoms such as the right to organize, the right to life, and disabled persons' rights in several applications.

The Right to Organize and Freedom of Association: The State Consultative

179 See Iraqi Parliamentary Observatory, <www.miqpm.com/Document_Details.php?ID=181>, visited 22 May 2016.

Council of Iraq protected the right to organize and the freedom of association by refraining from imposing restrictions on them. This is evident in resolution no. 92/2014 dated 26 August 2014. The case began when the Ministry of Culture in No. (11644) decided on 16 June 2014 to request an opinion of the State Council, based on Article 6(4) of Council Law no. 65 (1979), regarding the possibility of combining employment with the presidency of trade unions. Article 5(1) of the State Employee and Public Sector Discipline no. 14 of 1991 prohibits employees from combining employment and any other job. The legal department of the Ministry of Culture believed that there was no possibility of combining employment in a primary job with holding the presidency of a trade union.

The State Consultative Council decided that combining civil employment with the presidency of a trade union was not prohibited. It attributed its decision to Article 22(3) of the Constitution, which declares that "[t]he state guarantees the right to form trade unions and professional associations or join them, and it is regulated by law". The Council affirmed the existence of trade unions established under special laws such as: the Iraqi Syndicate of Engineers Law no. 51 of 1979, the Doctors' Syndicate Law no. 81 of 1984, and the Teachers Union Law in the Republic of Iraq no. 7 of 1989. The Council believed that these laws would not prevent combining public employment with union membership including the presidency of the union.[180]

In its decision, the State Consultative Council of Iraq relied on the implicit application of international human rights conventions, enshrining the constitutional text protecting the right to organize. This is consistent with Article 22 of the ICCPR which provides for freedom of association including the right to form and join trade unions, with no restrictions other than those necessary for public security, safety, and health.

The Right to Life: The right to life is considered a fundamental right that all human beings are entitled to. This right is among the most controversial rights especially in regard to the application of the death penalty. International treaties have safeguarded the right to life in Article 3 of the

180 See Iraqi Ministry of Justice, Resolutions of the State Consultative Council, <www.moj.gov.iq/view.1232/>, visited 22 May 2016.

UDHR which establishes that "[e]veryone has the right to life, liberty and security of person".

In its jurisprudence, the State Consultative Council of Iraq has protected the right to life rather than imposing the death penalty as shown in resolution no.17/2008 issued on 4 February 2008. This decision was issued after the Iraqi Ministry of Human Rights in its publication no.(S/19109) on 7 September 2006 requested the opinion of the State Consultative Council, based on Article 6(5) of Council Law no. 65 (1979), concerning the resolution of the Revolutionary Command Council (dissolved) no. (95) of 1994, concerning the imposition of the death penalty on each person who smuggles a car, truck, or any kind of machinery or used machinery for the purpose of drilling or rectitude or any similar purpose outside Iraq or to a hostile party. The Ministry of Human Rights asked the Council to rule on whether to keep, cancel, or amend the provisions of this resolution in the light of current stage and the provisions of the Iraqi Constitution.

The case involved the Ministry of Water Resources which demonstrated through the General Inspector Office's publication no. (h/155) on 22 November 2006 that it was in favour of maintaining the resolution in order to stop smugglers of the types of machinery mentioned above. The Ministry of Finance also indicated in its publication no.(B/34394) on 9 October 2007, that it had no reason for cancelling the resolution and activating other laws, as the existing laws were deemed sufficient to address cases of smuggling.

Despite the support, the State Consultative Council decided to cancel the resolution imposing the death penalty in the case of smuggling, justifying its decision by stating that the death penalty should apply to serious crimes and citing Customs Law no. 23 of 1984. This is a specialized law to address smuggling offenses. Punishable felonies are mentioned in the first chapter of this law, and the punishment for these felonies never reaches death penalty.[181]

It is evident that the State Consultative Council's decision is a direct application of Article 6 of the ICCPR which states:

181 Ibid.

"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court".

The Rights of Persons with Disabilities: In a unique decision, especially in light of the jurisdiction granted to the State Consultative Council of Iraq, the Council had a prominent role in the application of international conventions on human rights in regard to the rights of persons with disabilities. Decision no. 125/2008 dated 6 October 2008, concerned a request by the General Secretariat of the Council of Ministers, publication no. (s/2/4/10/6030) on 17 March 2008, for legal advice from the State Consultative Council based on the Article 6(2) of Council Law no. 65 of 1979, as regards the ratification of the United Nations Convention of the Rights of Persons with Disabilities adopted by the UN General Assembly in 2006. The General Secretariat of the Council of Ministers indicated that the aims of the convention were to promote, protect, and ensure that all persons with disabilities fully and equally benefit from all human rights and other fundamental freedoms, and to uphold respect for their dignity. The Ministry of Human Rights indicated in its publication no. 2866 of 3 March 2008 the importance of the UN Convention on the Rights of Persons with Disabilities and the need to sign and ratify it.

The Ministry of Foreign Affairs indicated in its publications no. (MW/3/411) on 04 May 2008, and (7/4/14/54804) on 15 May 2008, that there is nothing to prevent the country from signing the convention. The instrument came into force on 30 April 2008 after being ratified by 20 states according to the provisions of Article 45 of the convention.[182]

The State Consultative Council decided, after scrutinizing the convention that it did not contradict the Constitution and relevant legislation, and ruled that there were no restrictions against signing the UN Convention on the Rights of Persons with Disabilities.

182 Ibid.

This decision of the State Consultative Council enhanced the application of international human rights conventions in a significant way, while remaining consistent with the Iraqi Constitution.

In a similar context, the Council issued a resolution no.128/2008 dated 8 October 2008, which found a lack of restrictions that would prevent the Republic of Iraq from acceding to the convention on the Protection and Promotion of the Diversity of Cultural Expressions, supported by the United Nations Educational, Scientific and Cultural Organization (UNESCO), in Paris in 2005, and enforced on 18 March 2007.[183]

183 Ibid.

5. The Role of Ordinary Courts in the Application of International Human Rights Conventions

Ordinary courts have a direct role in the protection of public rights and freedoms and the application of international human rights conventions. The nature of this protection differs from that provided by constitutional and administrative courts in terms of the inclusion of constitutional rules in criminal and civil lawsuits which are enforced in a way that guarantees public rights and freedoms. This is done without it being obvious that these procedures uphold the constitutional rules that comply with international conventions on human rights. The significance of the ordinary judiciary in the protection of human rights and the application of international conventions resides in the direct contact of ordinary judges with daily conflicts and the number of issues brought before them as compared to the constitutional or the administrative judiciary. In Arab countries, there are several divisions of the ordinary judiciary including civil, criminal, commercial, labour, urgency and other courts and patterns of specialization depending on the judicial system of each state.

The ordinary judiciary is mostly subject to the principle of progressive litigation in which cases advance through the trial court in degrees beginning from the lowest level and ending at the highest. The court sitting at the top of the judicial pyramid may be responsible for many tasks, including monitoring the range of law enforcement. It also strives to implement legal principles to achieve stability in jurisprudence.

Due to the importance of the ordinary judiciary in the protection of public rights and freedoms and the application of international conventions on human rights, its role will be examined through two enquiries: the first focuses on the nature of jurisdiction of the ordinary judiciary and its role in the protection of public rights and freedoms. The second reviews the jurisprudence of the ordinary judiciary in the application of international conventions.

5.1. The Nature of the Jurisdiction of the Ordinary Judiciary and its Role in the Protection of Human Rights and Public Freedoms

The competence of the ordinary judiciary varies and diversifies depending on its trials. Criminal court cases reflect one type of competence while civil, commercial and urgent courts reflect another.

5.1.1. Criminal Courts

Criminal courts carry out a vital role in establishing public order and implementing punitive legislation. They are also supposed to monitor the integrity of the public authority's proceedings and prevent breaches of human rights except to the extent provided for by the laws in force. This role is in line with the contents of constitutions and international conventions which guarantee basic human rights during trial proceedings.

Since the principles of criminal courts prohibit punishment of citizens for a felony when a lawsuit has not been instigated, even if proven by the evidence[184], it is not admissible to assign punishment to any citizen or initiate investigative proceedings against him, unless these arise from the competent authority in accordance with the provisions of the constitution and criminal procedure, which comply with international conventions of human rights.

Punishment, as a general rule, is determined for the benefit of society and the protection of public interest, as well as to restrain social behaviour and ensure a peaceful society.[185] Punishment requires the compromise of one human right in order to protect other rights. The connection between punishment and the right affected is based on a philosophical dialectic that postulates that individual freedom must be constrained in order to avoid compromising others' rights and freedoms, which leads to the understanding that punishment was originally enacted not only to protect individual rights but also to protect the right of society from any assault against it. This gives public authorities the right to impose punishment

184 See A. Ghazlan, 'Preamble' in Collection of Judicial Judgments and Legal Principles issued by the Palestinian Court of Cassation (Palestinian Judges Association, Palestine, 2009) p. 114.

185 M.A. Al-Halabi, General Provisions in the Penal Code (Dar Al Thaqafa, Amman, 1996) p. 451.

within the jurisdiction of the criminal courts, and through court supervision of the conduct of the public authority in controlling crimes against persons, property, and society as a whole.

Arab penal and criminal laws contain a series of sanctions which include sanctions imposed on perpetrators of crimes against the rights of individuals. Accordingly, the penal legislator criminalizes assaults on the right to life, and stipulates punishment of murderers. It criminalizes the assault on physical integrity, and imposes multiple penalties for crimes of malfeasance and attacks on honour such as rape, indecent assault, adultery, and others. Acts against personal freedom such as deprivation of liberty, unlawful arrest as well as acts affecting private property, such as theft, abuse of trust, robbery, embezzlement, and so on are also criminalized, and sanctions put into force.

The legislator set these incriminating rules to maintain the rights of individuals on the one hand, and to maintain the rights of the community on the other, through deterrence from any attempt to compromise those rights guaranteed by constitutions and international conventions. Therefore, it is evident that criminal legislation represents a reflection of constitutional rules protecting the rights of individuals and the community, and is an obvious application of international conventions of human rights. Every rule in the criminal law is connected to legal rules enshrined in other laws..[186]

Since the origins of the principles of criminal procedures and norms include the creation of penal codes from theory to practice, it has been said that "[t]he morality of people, their culture and advancement can be measured by their basic laws; since these include their concepts of right and justice, human dignity, and respect for personal and public freedoms, and since the code of criminal procedure is considered a mirror that reflects the civilization, culture, and the democracy of the people".[187]

Perhaps one of the most important constitutional principles is the presumption of innocence as well as the right to a defence. Public authorities often resort to procedures that affect personal rights in order to

186 K. Al Saeed, Explanation of General Provisions in the Penal Code (Dar Al Thaqafa, Amman, 2009) p. 18.

187 M.S. Nigim, Code of Criminal Procedure (Dar Al Thaqafa, Amman, 2000) p. 4.

move forward a criminal case. This stage, in the pre-trial period, includes evidence gathering and preliminary investigation procedures. Perhaps one of the most serious procedures in this pre-trial period which may affect human rights is arrest and detention. For this reason we find that most Arab laws assert that: no person may be arrested or imprisoned unless by an order of the legally competent authority; each person shall be treated in order to preserve his dignity; and it is not permissible to harm the detainee physically or mentally. This is established by the constitutional norms and international conventions on human rights which allow for judicial control over public authorities to ensure the procedures of arrest and detention are legally implemented.

In general, Arab penal laws have imposed strict judicial control over the procedures of public authorities, taking into account human rights guarantees adapted to the provisions of international law.

5.1.2. Civil and Commercial Courts and Urgent Justice

The civil and commercial courts are each specialized to deal with particular types of disputes aimed to restore rights in civil transactions, according to obligations as established by law. A harmful act known as a 'tort' or 'unlawful act' is one of the most important examples of a dispute which incurs commitments to restore damage caused by a wrongdoer.

But how can the civil and commercial courts practice judicial supervision aimed at protecting public rights and freedoms?

Undoubtedly, civil and commercial courts are unique in settling disputes between parties themselves, or between individuals and public authorities when the authority is acting as a public entity. The idea of the civil and commercial judiciary is based on penalties of civil liability, dominated by "compensation, while the penalty of criminal responsibility is dominated by the idea of punishment".[188]

From within the matrix of the penalty on civil liability, real estate courts have jurisdiction over matters relating to property rights. This jurisdiction

188 J. A. Al-Adawi, Sources of Obligations (Dar Al-Maaref Publishing, Alexandria, 1997) p. 315.

involves the indirect protection of human rights. For example, the claims of property and its subdivisions target in essence the protection of the citizen's right to private property, while compensation lawsuits target in all forms protection from assault. The affected party resorts to the civil court to redress damage in a case based on his rights derived primarily from the provisions of the constitution, reflected in the procedural provisions and objectivity in legislation. In addition, supervision of the civil and commercial judiciary emerges to protect human rights in the emergency judiciary (urgent courts) which requires the wrongdoer to cease the offending act while the competent trial courts undertake the task of resolving the case by either restoring the disputed situation to its earlier stage, denying the case, or ruling in favour of compensation for the effects of this offence on individuals and groups.

Civil penalty takes several forms including direct concrete penalty, executed by way of compensation, as well as recourse to the previous condition before the conflict began, and permits the submission of urgent requests to discontinue the infringement of rights. Such provisions may be found in most Arab legal codes.

Undoubtedly, the jurisdiction of civil courts in compensation encompasses constitutional protection of public rights and freedoms. Some jurisprudence considers compensation to be a penalty for a violation of rights, serving as a "penalty for deviation and infringement of others' rights. This deviation occurs if the person intentionally causes damage to others. This is what is called civil crime".[189] Civil courts practice their judicial competencies by governing compensation for those affected by third-party damage, and create a deterrent for each person attempting to cause intentional damage to others' rights, either personal or moral. This entails the civil courts to impose compensation for such damage, which is in addition to the possibility of the offending party being punished in the criminal courts if the act constitutes a crime. Therefore, some legal systems have given civil and commercial courts the jurisdiction to deal with compensation lawsuits arising from penal offenses. The criminal courts might also specialize in

189 A.A. Al-Sanhoury, The Mediator in Explaining the New Civil Code, Volume 3, 3rd ed. (Al-Halabi Legal Publications, Beirut, 2009) p. 882.

dealing with civil compensation claims according to criminal proceedings if the complainant represents the civil plaintiff.

The civil courts, to achieve their mission, play a role in the protection of public rights and freedoms by extending control over disputes between individuals to assign rights. Real estate lawsuits represent such control, as do lawsuits regarding the right to safe drinking water and sanitation, and the right to use property. These courts, for example, may impose control to align the right to housing with the right to private property in lawsuits related to evacuation of rented properties, attempting to achieve balance between these two rights and to identify in whose favour the balance should be resolved.

Perhaps the jurisdiction of civil courts to deal with claims arising from contracts constitutes an indirect protection of personal freedom. The civil judiciary aims to protect the freedom of contract, one expression of personal freedom, in accordance with the law. It is this court's mandate to protect the right to enter into a legal agreement that binds the contracting parties. Thus, it goes beyond the protection of the freedom of contract and extends to the protection of individuals' positions and their financial, economic, and social rights, among others.

It is also clear that the civil courts are specialized in dealing with labour disputes. In some countries, there might be a specialized labour judiciary which practices supervision over rulings, and oversees the application of labour law that regulates constitutional employment rights.

It is evident from the foregoing that civil and commercial courts, as well as the urgent judiciary practice indirect monitoring of human rights. Their mission lies in repairing damage caused by unlawful acts in order to protect the personal rights of the citizen and order cessation for infringement. These personal rights relate directly and inseparably to public rights and freedoms sponsored by constitutions and national legislation as well as international conventions.

5.2. Mechanisms and Jurisprudence of the Ordinary Courts in the Implementation of International Human Rights Conventions

This section will examine the mechanisms and jurisprudence of the ordinary judiciary in the implementation of international human rights conventions in two parts. The first deals with the mechanism of jurisprudence of the ordinary judge in regard to the implementation of international conventions on human rights. The second reviews extensively the jurisprudence of the ordinary judiciary in Arab courts in applying international conventions on human rights.

5.2.1. Mechanisms of the Jurisprudence of the Ordinary Judge in the Implementation of International Conventions on Human Rights

The judges, who have jurisdiction in any of the ordinary courts, whether criminal, civil, commercial or other, are the first defenders of human rights. They are most capable of applying the substantive provisions of the verdicts in disputes submitted from various legislative and legal sources including international conventions. Such judges are obliged to apply the laws based on the principle of hierarchy of legislation, and according to its gradation in the legal system, to apply international conventions of human rights in their rulings. Even if disciplined by the hierarchy of legislation, international conventions of human rights are one of the most important tools that serve to achieve justice and protect the rights of individuals.

The ordinary judge has both a wide set of competencies which enable him to recognize the jurisprudence that documents the relationship between national legislation and international human rights law, as well as much creative power in the use of specific tools in the judgment. This leads ordinary judges to play a major role in highlighting human rights rules derived from international sources, especially if these sources are directly related to achieving the requirements of justice. Thus, ordinary judges are distinguished from constitutional judges and administrative judges by having the authority to adapt the facts in order to achieve justice. The task of the constitutional judge is limited to the cancellation of laws that are incompatible with the constitution, while the task of the administrative judge is limited to cancelling decisions violating the law. Conversely,

ordinary judges have several tools which enable them to effectively use international conventions in their verdicts.

One of the main tools at the disposal of the ordinary judge is the right to direct application of international conventions on human rights in cases where the national law lacks provisions to deal with the matter before the court. Thus the ordinary judge could be making up for legislative shortcomings or filling a legal vacuum in legislation and internal laws in case of insufficiency or silence addressing an issue related to human rights. Ordinary judges also have the right, in accordance with constitutional requirements, to prioritize international provisions over internal legislation in case of discrepancy. Moreover, they have the right to use international customary law of human rights as a binding source in the absence of a convention ratified by their states.

Ordinary judges can interpret provisions in the national law from the perspective of international conventions, and have the right to elaborate in expressing their understanding, convictions and conscience in the judicial framing of the relationship between national texts and international rules, if these would achieve their obligation to protect the rights of litigants. These judges can also resort to the opinions of international committees emanating from international treaties in support of rulings and jurisprudence.

5.2.2. Jurisprudence of the Ordinary Judiciary in the Application of International Conventions of Human Rights

The ordinary judiciary in the Arab region plays, in its multiple divisions, an important role in the application of international conventions of human rights. The applications vary among the courts in the mechanisms of jurisprudence. While some judicial bodies deliberately undertake the direct application of international agreements in their jurisprudence in order to supplement legislative shortcomings and fill the vacuum in national laws, other judicial bodies prioritize international conventions over national legislative sources, according to the principle of supremacy.

Other courts and judicial bodies interpret the national law from the

perspective of international conventions, in harmony with national laws and constitutions. To show these different approaches, applications of ordinary courts in Lebanon, Tunisia, Iraq, Morocco, Palestine, Algeria and Jordan are reviewed.

5.2.2.1. Jurisprudence of the Ordinary Judiciary in Lebanon

The Lebanese ordinary judiciary deals with civil and criminal matters, and is divided as follows:

- Civil Justice consists of courts of first instance which are the primary chamber, the single judge, and the courts of appeal. This latter court is specialized in considering appeals on verdicts issued, first and foremost, by the primary chamber and the single judge if the value of the claim exceeds LBP 3 million (approximately EUR 1,700) or if it is not assigned a value. It also considers some cases without constituting an appeal degree, and cases from the Court of Cassation which is the nation's Supreme Court. Some specific matters fall exclusively within its specialization. It can veto judgments issued by the courts of appeal, and, in some special cases, certain transfer requests of lawsuits also fall under its jurisdiction. The General Authority of the Court of Cassation has specific competencies, including, for example, any case against the state regarding acts of judges, and any case which concerns a decision issued by an Islamic or sectarian court which is disputed for lack of jurisdiction or for violating a fundamental formula of public order, and invoking veto on provisions for the benefit of the law, and many others. The terms of reference of the civil courts vary among commercial, financial, real estate, implementation, and urgency.

- The criminal judiciary consists of an investigative judiciary represented by public prosecutions, as well as judicial investigation. The criminal judiciary is composed also of the sentencing judiciary represented by a single criminal judge; misdemeanours Court of Appeals, Criminal Court, the Lebanese criminal judiciary and includes as well the exceptional criminal judiciary which is comprised of the Juvenile Court, the Military Court, and the Court of Publications. There is also a Judicial Council

which considers lawsuits forwarded to it based on a decree issued by the Council of Ministers. The council primarily considers crimes against the state's security. Perhaps the most important characteristic of the decisions issued by the Judicial Council is the inconvertibility of appeal in any means or review methods whether regular or irregular.[190]

In examining jurisprudence issued by ordinary courts in Lebanon, it is evident that these courts exercised, in a major way, direct application of international human rights conventions especially in the case of the urgent justice courts. The courts either bridged deficiencies in national legislation or prioritized the international convention over national legislation. There is also evidence of the implicit application of these agreements in many verdicts, which we will show by reviewing the right to mobility, fair trial guarantees, privacy rights, freedom to access information, freedom of belief, and the rights of refugees.

The Right to Mobility: The interim relief judge in Beirut was able to employ international human rights conventions in his verdict no. 300/2014 issued on 23 June 2014. The plaintiff, a domestic worker of Ethiopian nationality, came before the urgent matters judge in Beirut seeking to compel her Lebanese employer to give her back her passport. In his ruling, the judge compelled the employer to return the passport, stating that the retention of a passport constitutes an assault on fundamental rights, specifically the right to mobility. This freedom can be restricted only exceptionally, under the law and without discrimination. The judge stressed the freedom of workers to leave their employment and the inadmissibility of pursuing a discriminatory practice in dealings between foreign and national workers. Such a discriminatory practice would amount to racism if applied only to certain nationalities.[191]

The urgent matters judge in Beirut founded his verdict on the application of international conventions, recognizing the binding nature of these conventions as well as their legal value in the Lebanese Constitution, citing the Lebanese Constitutional Council Decree no. 2 of 1999.

190 See L. Jamhoury, Regional Analytical Study to Protect the Human Rights of Women: Bright Signs in the Provisions of the Arab Judiciary, September 2013 (Arab Women Organization, Cairo, 2013) p. 35.

191 See Legal Agenda, supra note 141.

The interim relief judge in Beirut undertook direct application of these international human rights conventions:

- Article 13 of the UDHR which stipulates that "[e]veryone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to leave any country, including his own, and to return to his country".
- Article 12 of the ICCPR which affirms that "[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence".
- Article 26 of the ICCPR which states that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The judge pointed out that Lebanon ratified this convention on 1 September 1972.
- Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination which declares that "States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination…"
- Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination which says that "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law… among those the right to freedom of movement and residence within the border of the State, the right to leave any country, including one's own, and to return to one's country".

Fair Trial Guarantees: The Lebanese ordinary judiciary has protected fair trial guarantees in many ways as evidenced in several resolutions. The

interim relief judge in Beirut in his decision issued on 2 February 2011 decided to apply international human rights conventions to protect the right to litigation and promote fair trial guarantees such as the right to a defence. In this case, the Lebanese Ski Federation prohibited the defendant from skiing and participating in any local and international activity on behalf of the Lebanese Republic for three years. On 23 September 2010, the defendant filed a request to revoke this decision.[192]

The interim relief judge in Beirut ruled to suspend the Lebanese Ski Federation's decision based on the merits of the case, specifically direct application of international human rights conventions related to fair trial guarantees, the right to defence, and the right to litigate. In his decision, the judge referred to the statements in the Constitution's preamble about the value of treaties and quoted the decision of the Lebanese Constitutional Council no. 2 of 1999 in which the judge explicitly applied the following provisions of international human rights conventions:

- Article 10 of the UDHR which states that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".
- Article 14 of the ICCPR which affirms that "[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

This decision remarkably also referred to the European Convention on Human Rights; the provisions of Article 14 of the ICCPR are enshrined in the European convention. It was noted in the ruling that while Lebanon is not a signatory to the European convention, it is committed to Article 14 of the ICCPR. Furthermore, the right to a defence has constitutional value in accordance with decisions of the Lebanese Constitutional Council, and is a fundamental right, according to the jurisprudence established by the Lebanese Court of Cassation.

The interim relief judge in Beirut found, as a result, that the decision of the Lebanese Ski Federation against the defendant was incompatible

192 See Palestinian Supreme Judicial Council, <www.courts.gov.ps/userfiles/file/333.pdf>, visited on 22 May 2016.

with international conventions which guarantee the right to a fair trial, and called for its suspension.

Thus, the interim relief judge in Beirut in his ruling went beyond direct application of international conventions and deliberately expanded the interpretation of these agreements, linking them to the Lebanese Constitution, as well as verdicts of the Constitutional Council and the Court of Cassation, with reference to the European Convention on Human Rights and the American Constitution.[193]

The Right to Privacy and the Sanctity of Private Life: An ordinary judge in Lebanon bestowed judicial protection on the right to privacy and the sanctity of private life. The lawsuit required achieving a balance between the right to freedom of opinion and expression, in this case granted to the media, and the right to privacy and the sanctity of private life of citizens. The interim relief judge in Beirut extended his judicial supervision to weigh these two rights in his decision issued on 18 January 2014.

In this case, the defendant sought to prevent broadcast of an episode of a television program as well as any mention of her name in that broadcast given that it would cause her financial and moral damage. She had already refused to be interviewed by the media.

The interim relief judge in Beirut considered two main rights: the right to privacy and freedom of opinion and expression. In order to reach his decision, the trial judge based his reasoning on international conventions and the provisions of the Lebanese Constitution, and decided that the protection of the right to privacy and the sanctity of private life outweighed the right to freedom of opinion and expression. The judge showed cause in reaching this conclusion referring to the fact the plaintiff was not a public figure, and that the matter to be dealt with was neither a public issue nor in the public interest, which could have expanded the boundaries of freedom of opinion and expression. In addition, the judge pointed out the repeated refusal of the plaintiff to appear on the air when contacted by the media.[194]

193 Ibid.

194 Ibid.

Perhaps one of the more striking merits of the decision is the recourse of the interim relief judge in Beirut to international conventions showing a deep and balanced understanding of the importance of these provisions in the protection of human rights while remaining in accord with the Lebanese Constitution. The judge based the decision on the direct application of the following international conventions:

- Article 19(2) of the ICCPR which establishes that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".
- Article 17 of the ICCPR which states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks". Lebanon ratified this convention on 1 September 1972.
- Article 12 of the UDHR which affirms that "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

The interim relief judge in Beirut applied international human rights conventions with a profound understanding of the responsibility to balance the conflicting rights within these conventions, while asserting the binding nature of these agreements on Lebanese national judges due to its legal value in the Lebanese Constitution, particularly the preamble.

The interim relief judge in Beirut did not rule to prevent the broadcast but decided instead to positively intervene in the episode to preserve the balance between rights. He committed the accused to broadcast the episode only after masking the voice of the plaintiff, and disguising the workplace, company's name and other identifying details. In this way, the ordinary judiciary played an active role in protecting human rights.

The Right to Freedom of Publication and Access to Information: In a related ruling, an ordinary judge in Lebanon sought to protect the right to freedom

of publication and access to information, in the context of balancing the right to freedom of opinion and expression granted to the media, and the right to privacy and the sanctity of a private life. The interim relief judge in Beirut expanded his judicial control to balance these two rights in a decision issued on 16 July 2013.

In this case, the interim relief judge in Beirut was asked to order the removal of ten articles from a website, based on the plaintiff's claim that these articles undermined his dignity and the dignity of the party he belonged to, resulting in invective and insult against him.[195]

The judge concluded in favour of retaining the articles on the website in order to protect freedom of opinion and expression, the right to publication for the press, and the right to access information, especially when related to a public figure and a matter of public interest. This decision was based on international human rights conventions, in particular Article 19 of the ICCPR which protects the freedom of expression. However, in rejecting the demand, the judge imposed on the publisher a requirement to amend the title of the articles, in order to achieve balance between the right to access information and the right to privacy. This is considered a positive intervention which reflects the effective role played by the ordinary judiciary in enshrining and protecting human rights.

In a similar context, the interim relief judge in Beirut emphasized in another verdict issued on 8 December 2014 the same concerns. In this case, a university asked the court to prevent a newspaper from publishing the private correspondence of those in charge of this university and its employees. The judge decided to follow a precedent consistent with the principles of freedom of expression in exposing corruption, and thus ruled to prevent the dissemination of the private correspondence of the American University when unnecessary and not significant to public interest, while allowing, conversely, the publication of correspondence that is necessary and relevant to the public interest. To reach this conclusion, the judgment affirmed the supremacy of the public interest and the right of the public to information and knowledge over individual interests which justifies sacrificing the privacy of a person in order to protect the public interest.[196]

195 Ibid.

196 See Legal Agenda, supra note 141.

Freedom of Belief: The Lebanese ordinary judiciary has safeguarded in much of its jurisprudence the freedom of belief, as in a resolution issued on 24 March 2014 by a single criminal judge in Jwaya. This case involved a request from a plaintiff to change her name. Her existing name indicated her affiliation with a certain religious sect to which she no longer wished to belong. She cited private reasons, adding that she no longer wanted to be linked with any sect. She based her case on the freedom of belief and enforcement of the Lebanese Constitution. The court approved her request and gave her permission to change her name. The judge justified his decision stating that the privacy of one's religious affiliation is a right guaranteed by the Lebanese Constitution, derived from the freedom of worship as enshrined in Article 9 of the Constitution.[197]

In a similar case, this same court issued a verdict on 11 February 2014 to correct a family name from Abed Ali to Abed-El-Ali. The plaintiff wished to make the change on the grounds that his existing name was contrary to his beliefs and the legitimate and doctrinal principles he embraced as it portrayed him as a slave of a man and not a slave to God.

In considering both this and the previous case, it is clear that the court endeavours to protect the freedom of individuals to shape their identities, and declare them in accordance with their beliefs, without favouring one belief over another.[198]

Refugee Rights: Since Lebanon's accession to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a large number of verdicts that prohibit deportation of refugees were issued based on Article 3 which prohibits the state to deport a person to a country where his or her life or freedom is at risk. In addition, several resolutions were released in 2009-2010, after accession, condemning the abusive and arbitrary practices of the general security forces in arresting refugees for periods as long as four years without legal warrant.[199]

197 Ibid.

198 Ibid.

199 Ibid.

Perhaps the most notable verdict in this regard is the decision issued by the interim relief judge in Beirut in lawsuit no. 493/2014. The plaintiff was held in the custody of the general security forces despite having refugee status from the United Nations High Commissioner for Refugees (UNHCR). In spite of a previous decision of the Court of Appeal to not arbitrarily detain refugees, the general security forces kept him in custody, until his lawyer filed a request before the interim relief judge seeking the release of the man. The judge issued an order to release the plaintiff immediately under penalty of a fine of LBP 200 thousand (approximately EUR 115) for each day of delay.[200]

This decision is distinct in the tailoring of its jurisprudence to balance administrative law that allows detention, with the principle of personal freedom and the right to seek asylum. The judge used a principle of proportionality in weighing the two provisions. The decision was based clearly on the direct application of the following international human rights conventions:

- Article 9 of the UDHR which stipulates that "[n]o one shall be subjected to arbitrary arrest, detention or exile".
- Article 9 of the ICCPR which states:

> *"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.... Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".*

This decision is of major importance due to the judge's positive interpretation of international conventions ratified by Lebanon to protect refugees' rights. Although Lebanon did not accede to the UN Convention Relating to the Status of Refugees of 1951 as noted in the judge's decision, he broadened his jurisprudence and sought support from the international conventions that have been ratified by Lebanon, especially in referring to Article 8 of the Lebanese Constitution which protects individual liberty and prohibits arbitrary detention.

200 See Palestinian Supreme Judicial Council, supra note 192.

The ruling demonstrates that in the event of a shortcoming or a legislative vacuum in national law, the judge may use international and constitutional conventions as guidance. The judge in this case confirmed the existence of shortcomings in the 1962 Law Regulating the Entry of Foreigners into Lebanon, Their Stay and Their Exit from Lebanon, which led the judge to use the international conventions in reaching his conclusion.[201]

In another decision of equal importance, a single criminal judge in Damour ruled on 9 November 2010 to protect the rights of refugees. A request was filed by the General Prosecutor's Office of Appeal asking the single criminal judge to consider the case of a refugee who entered Lebanon without a visa. The court found this person had refugee status under the provisions of international law. Therefore the judge decided to sentence the refugee to one month imprisonment for illegal entry into Lebanese territory in accordance with Article 32 of the Foreigners Law. However, the time he'd already served in detention was to be deducted from his sentence. The court furthermore decided not to expel this refugee from Lebanon until a permanent solution for his case was found.

In this case, the judge undertook the direct application of the following international human rights conventions:

- Article 14 of the UDHR which declares that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution".
- Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment acceded to by Lebanon under law no. 185 dated 24 May 2000 which states:

> *"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law....Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".*

This judgment is particularly important due to an indirect reference to Article 33 of the Convention Relating to the Status of Refugees of 1951 which was

201 bid.

not acceded to by Lebanon. In being guided by international human rights conventions, including those not ratified by the state, the judge broadened the content of jurisprudence resulting in strengthening the protection of human rights. The judge also affirmed the supremacy of these treaties over other laws, thus giving priority to the international conventions when faced with contradiction.[202] The interpretation undertaken by the single criminal judge in Damour in this case reinforces the role of the ordinary judiciary in the application of international standards of human rights.

5.2.2.2. Jurisprudence of the Ordinary Judiciary in Tunisia

- The ordinary judiciary in Tunisia is comprised of the township justice courts, the courts of first instance, real estate courts and the Court of Cassation based in Tunis. They are organized as follows:
- The township justice courts in Tunisia are considered the lowest level in the hierarchy of courts. There are 85 township justice courts located all over Tunisia. Judges of the township justice courts handle alone all the cases brought to them according to their competencies. The procedures followed in the township justice courts are flexible and include the possibility for litigants to file their cases without a general deputy or a lawyer. The law of 23 May 1994 supported the flexibility of this judiciary by increasing the limits of its competence to cases valued up to TND 7,000 (approximately EUR 3,000). This law also introduced a conciliation stage, and in the penal field, the township justice court considers violations which are not of great seriousness. The decisions taken by this court generally are considered final; however, there is possibility to appeal minor misdemeanours to the court of first instance.
- The courts of first instance are considered the primary judicial body of public rights par excellence. Each one consists of a President of the Court and two judges, and they issue judgments determined by a majority of votes. In these courts, the presence of a lawyer remains optional in penal cases. Each court of first instance has a number of chambers including civil, criminal, and commercial, among others. The courts of first instance in the courts of appeal are only criminal courts, and consist of a president, two justices and two judges. The courts

202 See Palestinian Supreme Judicial Council, supra note 192.

of first instance have general authority since they handle primarily all civil and commercial lawsuits which are not within the jurisdiction of another court by special provision. In criminal matters, the courts of first instance handle misdemeanours and felonies, except those that fall under the jurisdiction of the township justice courts. As a second-degree judiciary, the courts of first instance handle appeals against verdicts issued by the township justice court.

- The real estate court considers applications of real estate registration. Since the passage of a law on 23 April 1995, it has been possible to have this court's verdicts reconsidered in certain circumstances.
- The courts of appeal consider appeals on verdicts issued by the courts of first instance. Each court of appeal includes a number of departments: criminal, civil, commercial, and accusation departments. In general, there is a chief of department who, along with two or four counsellors, makes decisions collectively. The court of appeals will also handle misdemeanour cases in which there has been a conviction in a court of first instance, as well as in criminal cases sentenced by those courts of first instance equivalent to the courts of appeal.
- The Court of Cassation is the highest judicial body of the Tunisian judicial system. However, it does not represent a third degree of litigation. The Court of Cassation consists of a number of departments: civil, criminal, administrative, and real estate. It only hears cases appealed over questions of the law and not over questions of fact. In accordance with the provisions of the Code of Criminal Procedure, the court of cassation hears cases that are appealed on the grounds of lack of jurisdiction, abuse of power, breach of law, or incorrect application of the law. It will also hear appeals of decisions that had been deemed by a lower court to be final.[203]

In terms of judicial application, it is evident that many of the ordinary courts in Tunisia have adopted an approach based on the direct application of international human rights conventions. These are reviewed through judicial applications in: the right to form a family, freedom of belief, the rights of the child, and the right to equality before the law.

The Right to Form a Family: The Tunisian ordinary judiciary emphasizes

203 See Jamhoury, supra note 190, p. 24.

the protection of the right to form a family in accordance with Tunisian laws on public order. The court of first instance considered this in case no. 34179 of 27 June 2000 which concerned a request for the issuance of a patent to execute an Egyptian rule of 'divorce'. This case was refused as follows:

> *"This divorce represents a traditional and religious form of dissolving marriage based on the desire of one side which is the husband, without any consideration of the family's interest. Therefore the mentioned divorce is incompatible with the Tunisian public order as evidenced in chapter 6 of the constitution and articles 1,2, and 7, and clauses 1 and 2 of Article 16 of the UDHR of 1948, as well as articles 1,2, and 16 (c) of the CEDAW of 1979".*[204]

In this ruling, the court undertook the explicit application of Article 16 of the UDHR, as well as articles 1, 2, and 16 (c) of the CEDAW. This demonstrates the extent of the ordinary judiciary's capabilities in applying international human rights conventions.

Freedom of Belief: The Tunisian ordinary judiciary sought to protect the freedom of belief in many of its rulings. This is evident in particular in its judgment in case no. 7602, dated 18 May 2000, issued by the court of first instance in Tunis. This court considered a lawsuit in which a request was made to abolish a sales contract concluded by a non-Muslim widow. The contract concerned a real estate property she inherited from her deceased Muslim husband. The court dismissed the case and refuted the argument that a non-Muslim is not entitled to be listed on inheritance documents as the owner of the property of the deceased.

The court emphasized that "the exclusion of the widow from the list of heirs on the basis of her religious beliefs, contradicts the provisions of Chapter 88 of the Personal Status Code which identifies premeditated murder as the exclusive reason to inhibit inheritance…" and that:

> *"non-discrimination based on religion represents one of the underlying principles of the Tunisian judicial system and constitutes one of the characteristics of the freedom of belief, according to the guarantees included in chapter 5 of the constitution and required by articles 2, 16*

204 See United Nations Human Rights Committee, supra note 75.

and 18 of the UDHR of 1948; and clause 2 of Article 2 of the ICESCR; and clause 1 of Article 2 of the ICCPR; and these two deeds were both ratified by Tunisia".[205]

This case illustrates the ordinary court's commitment to application of international human rights instruments in alignment with national laws and the Tunisian constitution in protecting the freedom of belief.

The Rights of the Child: The Tunisian ordinary judiciary deliberately undertook the direct application of the UNCRC to protect rights in many of its provisions, particularly in cases concerning issues of the child's best interests. In verdict no. 7286 of 2 March 2001 issued by the Court of Cassation, the court considered a case filed by a Tunisian father against a verdict issued by the court of appeal confirming a judgment of the court of first instance to grant patent to execute a verdict that had been issued by a court in Brussels, which granted divorce and custody of a child to a mother who holds Belgian nationality. The Court of Cassation rejected the lawsuit and the rationale contained therein. This verdict is inconsistent with Tunisian public law as it prevents the father from exercising guardianship over his son, and deprives the child of being raised in the cultural and religious environment of the father. Thus, the judges of the court of first instance may have violated Tunisian law by granting the execution of the Brussels court's decision.

However, in explaining the rejected appeal, the Court of Cassation confirmed that "the Tunisian legislator, in compliance with the provisions of the UNCRC, dated the 20th of November 1989, ratified by Tunisia, took into account the child's best interests." While the court believed "there will be no negative effect on the Tunisian public order caused by a foreign decision granting custody of a child to a foreign mother ... in respect to this case ... the only criterion that should prevail is the child's best interests".[206] In the verdict in case no. 53/16189 of 2 December 2003, the first instance court in Manouba considered a lawsuit submitted by the public prosecutor seeking permission to prove paternity by DNA testing or genetic fingerprinting. The court stated the following in its analysis:

205 Ibid.

206 Ibid.

"[F]iliation is one of the children's rights that cannot be restricted by the shape of relationships chosen by his father, and then filiation must be understood, as contained in chapter 68 of the Code of Personal Status, in its broad sense according to clause 2 of Article 2 of the UNCRC ratified under the act dated 29 November 1991, which protects from all forms of discrimination or penalty required by the legal status of his parents. Depriving a child of his right to filiation on the grounds of his parents being not linked in a marital association, represents a punishment bestowed on the child and attaining one of his fundamental rights, without any consideration of the discrimination resulting among children by adopting an artificial distinction between legitimate filiations and biological filiation".[207]

The Right to Equality before the Law: The Tunisian ordinary judiciary has protected the right to equality before the law in many of its verdicts. In case no. 120, dated 6 January 2004, the court of appeal in Tunis considered a case filed by the heirs of a Tunisian woman who had been married in Switzerland to a Belgian citizen against a ruling by the court of first instance which affirmed the right of a case filed by the Belgian man who sought to cancel his wife's death certificate claiming that his name was not included as one of the heirs. The court however dismissed the case and affirmed the ruling issued by the court of first instance.

The plaintiffs claimed that the marriage in Switzerland was invalid due to a Tunisian prohibition on the marriage of a Muslim woman to a non-Muslim. As a result, the Belgian man could not be included in the list of the eligible heirs.

The court asserted, in the merits of the decision to reject the appeal, a number of points:

"[P]rosecuting invalidity of marriage and thus the disinheritance based on the difference of beliefs constitutes a violation of Chapter 6 of the Constitution which considers all citizens equal in rights and duties, and they are equal before the law. To ensure preferential treatment among men who benefit from the freedom to marry a non-Muslim while women are deprived of it, as well as the preferential treatment in the field of inheritance is incompatible with the freedom of conscience and religion, guaranteed also by the Constitution and international conventions ratified by Tunisia".[208]

207 Ibid.

208 Ibid.

5.2.2.3. Jurisprudence of the Ordinary Judiciary in Iraq

The Iraqi ordinary judiciary is highly versatile, comprised of a civil and penal authority. The civil court consists of several types of courts.

- Courts of first instance may be found in the centre of each province or governorate, and may also be formed in suburban areas. These courts consist of a single judge and operate in accordance with the terms of reference contained in the Code of Civil Procedure.[209]
- Labour courts are mandated under labour laws for each province. The court is presided over by a single judge. In cases where a labour court has not been formed, its role is to be entrusted to the courts of first instance. Its decisions are final and appealable through the court of cassation. Labour courts have jurisdiction to consider lawsuits related to labour law, pension law and social security for workers.
- Courts of Appeal exist in each of Iraq's 14 appellate regions. The Court of Appeal is the supreme judicial body in its region. It consists of a president, a number of deputies, and judges whose numbers vary from one region to another. Other courts within the geographical area in which they are located are subordinate to it. This court is specialized in handling appeals against verdicts issued by the court of first instance in cases worth more than IQD 1,000 (EUR 0.80) and in verdicts of bankruptcy and liquidation of companies. It is considered a second degree court.
- The Court of Cassation is the supreme judicial body which practices control over all courts. Its jurisdiction lies in handling the appeals against judgments and decisions issued by the courts of appeal and the courts of first instance which are beyond the jurisdiction of the Court of Appeal.

The penal judiciary consists of a variety of courts:

- Inquisition courts are established wherever a court of first instance

209 The courts of first instance are civil courts in issues related to personal status such as marriage or divorce for non-Muslims and foreigners in Iraq. They apply the civil law rather than Sharia law originally contained in the Personal Status Law (no.188 of 1959).They issue judgments of a final degree which are appealable only before the Court of Cassation. Personal Status Courts on the other hand consist of a single judge, and consider personal status issues, such as marriage, divorce, judicial separation, and inheritance for Muslims. These courts also apply the Personal Status Law and their decisions are also final and appealable only before the Court of Cassation.

exists. There may be one or more such courts for each court of first instance. The judge of the court of first instance shall be the investigating judge unless another is appointed. These courts are presided over by a single judge.

- Criminal courts are formed in each province, and there are four criminal courts in Baghdad. These courts have jurisdiction to handle criminal offenses referred to them by the courts of inquisition or by misdemeanour courts, in addition to having other competencies.
- Misdemeanour courts sit wherever a court of first instance exists. These courts have only a single judge, and are competent to handle misdemeanours and infractions.
- Juvenile courts are divided into two types: juvenile inquisition courts, which have jurisdiction over the investigation of crimes charged against juveniles, and the authority to press charges; and juvenile courts which both try and dispose of cases.
- Custom courts have jurisdiction over cases related to customs issues. Their rulings are final and appealable only before the appeals chamber under the Custom Act (Customs).
- The Iraqi High Criminal Court specializes in charges against the former regime, and also considers genocide, war crimes, and crimes against humanity as well as the crimes contained in the Iraqi penal laws in force between 17 July 1968 and 1 May 2008.
- The Iraqi Central Criminal Court was established by a resolution from the Coalition Provisional Authority. It handles serious crimes. As of the date of publication of this book, this court is attached to criminal courts based in Baghdad, despite the fact that the law permits holding hearings in other places.[210]

The Iraqi Judicial Organization Law no. 160 of 1979 and its amendments identify the jurisdiction of these courts in detail.[211]

The ordinary judiciary in Iraq is characterized by diversity and the pursuit of specialization in a unique structure. It is motivated towards the development of a litigation system that would ensure fair trial guarantees.

210 Jamhoury, supra note 190, p.31.

211 For more information about the Iraqi judicial organization and the recent amendments to Judicial Organization Law no. (160) of 1979, please review the website of the Iraqi Supreme Judicial Council found in the Iraqi Legal Database.

When examining its jurisprudence, it is evident that the Iraqi ordinary judiciary has implicitly applied international conventions of human rights. This can be seen through an analysis of cases dealing with fair trial guarantees, the right to private property, and the right to freedom of opinion and expression.

Fair Trial Guarantees: The Iraqi ordinary judiciary has demonstrated its desire to protect fair trial guarantees in several rulings. On 28 January 2009, the Federal Court of Cassation issued a verdict on public order no. 154 (2008). In it, the court set a legal principle which states that "if the claims of secret informants were the only evidence in the case and were not consolidated by considerable evidence or presumption, this [would call] for abolition of the charge against the accused and his release for lack of evidence". The Iraqi judiciary reinforced the provision of the presumption of innocence as well in this case. The verdict complies with international standards, and is considered to be implicit application of Article 14 of the ICCPR, in particular the presumption of innocence, one of the most important guarantees of a fair trial.

The Right to Private Property: Many Iraqi judges have strived to protect the right to private property as a constitutional right with roots in international conventions. Among these verdicts is the ruling of the court of appeal of Qadisiyah, considered a Court of Cassation in this case, which was published as no. 179/T-H/2010 on 29 November 2010. It ruled to veto a decision of the court of first instance of Diwaniyah. When the case was scrutinized and deliberated over, and it was found that the appeal was filed within the legal period and was accepted in its form, and upon consideration of the contents of the appeal it was found that it was valid and in conformity with the law. The plaintiff had earned by inheritance properties and real estate as well as material rights included in an inheritance under Article 1106 of the Civil [212]Law. However, there were two relevant provisions in the national law. Article 189 of the Land Registration Law specifies that an heir should earn the right to property ownership and other items from the date of death of the testator, whereas the same law

212 For more information about the commentary of His Excellency Judge Salem Radwan Al-Mussawy in regard to the verdict of the Court of Appeal in Qadisiyah as a Court of Cassation, see Journal of the Legislation and the Judiciary, <www.tqmag.net/body.asp?field=news_arabic&id=1268&page_namper=p5>, visited on 22 May 2016.

states that an heir cannot dispose of any inheritance until after registration in the Land Registry. As mentioned above, the decision was based on the law, so the judge dismissed the appeal, charging the appellant costs based on the provisions of Article 210(2) of the Code of Civil Procedure and the agreement on 24/Dhu al-Hijjah/1432 corresponding to 29 November 2010.

This jurisprudence shows implicit application of international human rights conventions, especially Article 17 of the UDHR, which stipulates that "[e]veryone has the right to own property alone as well as in association with others". This is intertwined with several other rights such as the right to dispose of a property, the right to legal personality and other issues discussed in this resolution.

The Right to Freedom of Opinion and Expression: The Iraqi ordinary judiciary has protected the right to freedom of opinion and expression as is clear in verdict no. (110/publication/civil/2014) issued on 3 October 2015 by the court of publication and media issues. A claim was filed in court by the prosecutor and his agent to demand IQD 750 million (approximately EUR 600 thousand) as compensation for moral damage caused to a client by the defendant. The damage was the result of verbal abuse which, as described by the prosecutor, "no law, custom, humanity, or morality would allow to be expressed in front of Iraqi society" perpetrated through Facebook pages and ultimately defaming the client's reputation and person. The defendant called the client a conspirator, prohibiting citizens from practicing the right to freedom of opinion and expression, and other insulting terms.

The court appointed specialized experts in publishing and media, and found that while the actions of the accused did not reach the level of defamation, libel, slander, abuse, or distortion nonetheless the insults should not have been made. The court ruled a mistrial.

The governing body in this verdict implicitly applied international human rights conventions. This verdict is consistent with Article 19 of the ICCPR which protects freedom of opinion and expression.

5.2.2.4. Jurisprudence of the Ordinary Judiciary in Morocco

The *Dahir Al-Sharif*[213] of 15 July 1974 amended the structure of the Moroccan judiciary. This *Dahir* abolished earlier courts and replaced them with community and district courts including courts of first instance, courts of appeal, and the Supreme Council which was restructured. Thus the Moroccan ordinary judiciary is formed by the Court of First Instance, and these are the courts with jurisdiction of a public mandate. The creation of 30 Courts of First Instance instead of 45 charge courts, and 16 regional courts, with the creation of nine Courts of Appeal, and the organization of the single judge was approved, who shall administer in cases at the level of the Courts of First Instance. The Dahir created eight commercial courts and three commercial courts of appeal responsible for settling commercial disputes included within its jurisdiction as well as the creation of seven administrative courts, and two administrative courts of appeal specialized in cases where one of the parties is the state, thus monitoring the work of the administration.

In 2011, under *Dahir* no. 1.11.148, community and district courts were abolished and replaced by the proximity judiciary and individual judiciary in the courts of first instance with some exceptions. This *Dahir* also established appeal chambers in the courts of first instance to consider cases that do not exceed MAD 20 thousand (approximately EUR 1,800) with the possibility of classifying the courts of first instance, depending on the cases, as civil courts of first instance, social courts of first instance, or restraining courts of first instance. This classification does not yet include the administrative courts in Casablanca due to the large number of cases under its specialization. Four departments of financial crimes were created in the courts of appeal in Rabat, Marrakech, Fez, and Casablanca while the Supreme Council was renamed the Court of Cassation.

The organization of the Moroccan judiciary is characterized by diversity and adaptation on an ongoing basis, especially in terms of the structure of the ordinary judiciary. To show the role of the ordinary judiciary in the application of international human rights conventions, decisions issued by

213 Al-Dahir al-Sharif means a royal decree issued by the king in regard to state affairs such as appointments and higher decisions.

the ordinary courts in cases related to the right to personal liberty, the right to freedom of contract, and children's rights will be reviewed.

The Right to Personal Liberty and the Absence of Physical Coercion: The Moroccan ordinary judiciary has sought to protect the right to personal liberty and absence of physical coercion specifically in cases in which the inability to fulfil a contractual obligation is at issue. Several court rulings on this issue show direct application of the ICCPR. Perhaps the most notable and the most pronounced in the application of international human rights conventions is the verdict issued by the former Supreme Council in commercial file no. 1716/99 dated 22 March 2003. The Council prohibited physical coercion as a punishment for the inability to fulfil a contract, despite stipulations in the Dahir of 8 February 1961 which authorized physical coercion in civil cases. The council applied Article 11 of the ICCPR ratified by Morocco on 18 November 1979, which acknowledges that "[n]o one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation".

A review of this verdict indicates that the Supreme Council (now the Court of Cassation) recognized the priority of international human rights conventions particularly the ICCPR, believing that they have binding force that transcends national legislation.[214]

In another case, the Supreme Council explicitly recognized Article 11 of the ICCPR, when it stated that "there is no indication in the file that the student claimed and proved his inability to fulfil his contractual obligation in regard to the required, hence, according to the concept of violation of the aforementioned agreement it is possible to specify the duration of coercion against the civic party who is able to fulfil".[215]

The Right to Freedom of Contract: The Moroccan ordinary judiciary has protected the right to freedom of contract through the application

214 In another case filed by one of the plaintiffs against a bank operating in Rabat, the Supreme Council implicitly acknowledged the ICCPR, when it pointed out that: "Chapter 11 of the Charter of the United Nations dated 16 December 1966 on civil and political rights and ratified by Morocco on 27 March1979, on prohibiting the imprisonment of a person due to his inability to fulfill a contractual obligation, the impugned decision which endorsed the preliminary judgment that determined physical coercion against the student in case of failing to perform, but failed to determine it in the case of the student being unable or incapable to perform". See A. Al-Wardi, 'Public Law and Political Science' (Doctoral thesis) Fez, Legal Sciences <www.marocdroit.com>.

215 Ibid.

of international conventions on trade disputes, such as the General Agreement on Tarriffs and Trade (GATT), in much of its jurisprudence, particularly in the fields of maritime, commercial, and air contracting. The Supreme Council stressed in more than one verdict the principle of supremacy of international treaties over national law, including in decision no. 754 dated 19 May 1999 in commercial file no. 4356/1990.[216] The decision gave priority to the Hamburg Rules over the national law of commerce in terms of a sea carrier's liability. As stated in that verdict, "the United Nations International Convention on the Carriage of Goods by Sea approved in Hamburg on 31 March 1978 joined by Morocco on 17 July 1978 is considered effective as of 11 January 1992 and a binding law on a national scale starting [from] that date". Similar jurisprudence reoccurred in the verdict issued by the Supreme Council on 2 March 1999, which favoured the application of the Warsaw Convention of 1929 concerning international air transport over Moroccan domestic law.[217]

The Supreme Council in Morocco in issuing such verdicts demonstrates the direct application of international human rights conventions as well as the principle of supremacy of international conventions over national law. This confirms the effectiveness of the ordinary judiciary in this regard.

The Rights of the Child: The ordinary judiciary in Morocco has protected the rights of the child through the application of international conventions on human rights in its rulings. Among these is the verdict of the court of first instance in Tangier dated 26 November 2009 in file no. 2495/08. The court pointed out in its verdict that "according to clause 1 of Article 3 of the United Nations Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989, ratified by

216 The legitimate chamber of the Court of Appeal in Casablanca, reported in its reasoning for decision no. 1413 dated 23 May 2007, as follows: "As the international convention is a special law which supersedes national laws in its application, which is represented here by the Personal Status Code and the Family Code which is a general law, and that's in accordance with the principle of supremacy of these treaties over the national law confirmed by the Supreme Council in its resolution no.754 dated 19 May 1999 in commercial file no. 4356/1990 and published in the Supreme Council Magazine number 56" which demonstrates the application of the principle of supremacy of international conventions over national law, including the Family Code. Ibid.

217 Contradiction appears in chapters 231 and 262 of the Maritime Commercial Law which stipulates that the period of the shipping carrier's responsibility goes from the date of accepting the goods to the date of its actual situation under a signal from the receiver, while the Hamburg agreement indicates that the carrier's responsibility ends by delivering the goods to the office of exploitation of ports; whereas from this date the responsibility of the latter towards the receiver starts. Ibid.

Morocco on 21 June 1993, the judiciary must primarily consider the best interests of the child when considering disputes related to children".[218]

The court of first instance in Tangier protected the rights of children and prioritized their best interests in accordance with international standards on child rights. This protection comes through the application of Article 3(1) of the UNCRC of 1989, which confirms that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

In file no. 616/1607/2009, the court of first instance in Tangier also noted that "the court in the case of custody takes into consideration all the circumstances as well as realistic and legal facts which all lead in the direction of considering the best interests of the child in question as his interest is at the core of the verdicts related to his custody as an implementation of the Convention on the Rights of Child".[219]

The court of first instance in Al Hoceima in its verdict dated 22 February 2007 in file no. 14/2007 confirmed the child's right to education, care, and family foster care as well as the right to direct contact with both parents in light of the UNCRC. The court stated that:

> *"…the right of children to pursue education is one of the most important rights imposed upon the father and the mother and provided for by the constitution and all international conventions, whereas clause 2 of Article 10 of the mentioned convention stipulates that a child [whose] parents live in two separate countries has the right to maintain regular personal relations and direct contacts with both parents. To this end and in accordance with the commitments of the States Parties under clause 2 of Article 9, the states should respect the right of the child and his parents to leave any country, including their own, and accessing their country, and this right is not subject to any restrictions but the ones prescribed by law".*[220]

It is clear from these verdicts that the ordinary judiciary directly applied international human rights conventions, particularly the provisions of

218 Ibid.

219 Ibid.

220 Ibid.

the UNCRC and upheld the principle of the precedence of international conventions over national law. This included deep consideration of the meaning of the child's best interests and a declaration that they must be taken into account in all proceedings related to children. In this way, the ordinary judiciary protects the rights of the child through the application of international instruments.

5.2.2.5. Jurisprudence of the Ordinary Judiciary in Palestine

The ordinary judiciary in Palestine is based on the principle of judicial hierarchy, and constitutes two degrees. The magistrate court is divided into criminal and civil branches, the courts of first instance are comprised of tripartite and individual bodies, and there is also a court of appeal and a court of cassation. The differences among these are explained in the following section.

Magistrate courts are courts of first instance presided over by a single judge, specialized in handling specific cases within the court's competence. They are divided, according to the competence determined by the Supreme Judicial Council, into the following:

- The Authority of the Criminal Magistrate's Court has jurisdiction to consider offenses and misdemeanours that do not exceed a term of imprisonment of three years. It also has jurisdiction to handle applications to extend detention if submitted by the public prosecutor in investigative cases of all types of crimes, misdemeanours, and felonies when the required period of arrest is less than 45 days, and accordingly it is competent to consider the requests of release submitted by defendants or their lawyers. The Supreme Judicial Council allocates criminal magistrate judges to consider juvenile cases and journalists' cases, as well as allocating judges of state property.
- The Authority of the Civil Magistrate's Court has jurisdiction in civil, commercial, and real estate disputes within its competence, as contained in Article 39 of the Palestinian Civil and Commercial

Procedure law no. 2 of 2001.[221] It is also competent to handle urgent applications. The Supreme Judicial Council allocates magistrates in civil courts to consider labour matters and settlement issues.

- Courts of first instance have general jurisdiction. A court of first instance exists in each Palestinian province in one of two forms:

- The tripartite body is composed of three judges and has jurisdiction in all cases that are not within the jurisdiction of the magistrate courts, whether in criminal, civil, or commercial matters. As such, it is considered a first degree court; its verdicts can be appealed before the Court of Appeal. This court may act as a court of appeal of rulings issued by the magistrate courts, and as such it is considered a second degree court. Its rulings can be appealed before the Court of Cassation as a court of law which has jurisdiction to handle felonies in penal matters, and inclusion of jurisdiction of the tripartite bodies assigned to handle civil and commercial disputes.
- The individual bodies of the courts of first instance are composed of a single judge and divided into civil and criminal sections. The individual criminal body specializes in handling crimes within its jurisdiction, while the individual civil and commercial bodies have jurisdiction over specific kinds of civil and commercial cases. These bodies are considered courts of first degree and their verdicts can be appealed before the Court of Appeal as a court of second degree.

Judges of implementation departments who are specialized in executing civil and legal verdicts are also attached to the court of first instance.

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221 Article 39 of the Code of Civil and Commercial Procedure Law no. (2) of 2001 stipulates thatthe Magistrate's Court is specialized in considering the following:

1. Lawsuits not exceeding JOD 10,000 (approximately EUR 12,000) or the equivalent in legally circulated currency; its verdict shall be final in cases related to cash amounts of money or transferred money if the value claimed does not exceed JOD 1,000 (approximately EUR 1,200), or its legally exchanged equivalent.
2. Lawsuits of undefined value.
   a) The division of joint movable and immovable property.
   b) Evacuation of tenants.
   c) Jus utendi (right of use)
   d) Disputes relating to usufruct of real estate.
   e) Disputes relating to the use of property.
   f) Delimitation and correction.
   g) Recovery of loans.
   h) Usufruct and maintenance of common parts in multistory buildings.
   I) Lawsuits and requests that fall within the magistrate's jurisdiction, as stipulated in other laws.
   j) Lawsuits for correction in the records and registers of the civil status.

The Court of Appeal is comprised of two main courts: the Court of Appeal of Jerusalem which is being held temporarily in Ramallah, and the Court of Appeal of Gaza. The Court of Appeal, considered a second degree court, has jurisdiction to handle appeals from the court of first instance in criminal, civil, and commercial matters, as well as from the courts of implementation. The Supreme Judicial Council allocates boards of this court. The verdicts of this court can be appealed before the Court of Cassation.

Finally, the Court of Cassation is a court of law held by the President and four judges from the Supreme Court. It can hear final verdicts issued by courts when there is a question of the invalidity of the verdict, or in the proceedings, or in the case of a contradiction between the appealed judgment and a previous judgment, or where the Court of Cassation has been allocated the case ***res judicata*** between adversaries themselves and the conflict itself.[222]

The Court of Cassation is one of two parts of the Supreme Court which also includes the Supreme Court of Justice, specialized in handling administrative appeals. If it is found by any chamber of the Court of Cassation that the potential exists to violate a judicial precedent that would be irrevocable then the court will convene a plenary session, and the verdict issued shall be a precedent applying to other courts in all cases. As the Court of Cassation is part of the Supreme Court it can convene with the presence of a majority of two-thirds of its members – at least – at the request of its President or one of its departments to examine a legal principle previously approved by the court. It can rule on the contradictions between previous principles, as well as on cases that revolve around an updated point of law, have a high level of complexity, or have special significance.

222 Article 30 of the Constitution of Regular Courts Law no. 5 of 2001, stipulates that: "The Court of Cassation is specialized to consider:
1. Appeals filed from the Court of Appeal in criminal and civil cases, and matters of personal status for non-Muslims.
2. Appeals submitted to it from the courts of first instance as a Court of Appeal.
3. Issues related to change the reference of the case.
4. Any applications submitted to it under any other law".

Many of the verdicts issued by ordinary courts illustrate direct or implicit application of international conventions of human rights. Jurisprudence concerning the rights of the child, fair trail guarantees, freedom of opinion and expression, property rights, and freedom of self-determination are examined.

The Rights of the Child: The courts of the Palestinian ordinary judiciary have enshrined children's rights in many of their verdicts, guided by the application of international conventions, particularly the UNCRC. Among those verdicts is the ruling of the Court of Cassation no. 56/2014 dated 4 June 2014.

In this case, a final judgment to convict a child in conflict with the law (juvenile) was issued. The Palestinian juvenile law in force prohibited this child from appealing before the Court of Cassation. However the Court of Cassation did not dismiss his appeal but decided to proceed with hearing the case on a suspicion of the unconstitutionality of Article 16(1) of the juvenile reform law no. 16 of 1954 which prohibits juveniles from appealing before the Court of Cassation. The Court of Cassation decided to refer the case to the Supreme Constitutional Court as the entity competent to adjudicate this constitutional issue. The Court of Cassation perceived that the inadmissibility of rebuttal against verdicts issued by the Court of Appeal in delinquent children's cases could be a violation of the provisions of the Palestinian Basic Law amended in 2003, which is the constitutional document in force.

For the Court of Cassation to refer a case to the Supreme Constitutional Court because of constitutional exception is unique in itself. The verdict indicates profound judicial thought based on the application of international human rights conventions, specifically the UNCRC ratified by Palestine on 2 April 2014. The court also relied on Article 10 of the Basic Law which stipulates that fundamental human rights and liberties are binding and must be respected, and that the Palestinian National Authority would work without delay to join regional and international declarations and covenants

that protect human rights.[223]

Although this judgment did not contain a clear vision of the relationship between national legislation and international conventions, and despite the use of the Court of Cassation's appeal by way of referral in accordance with Article 27 of the Palestinian Constitutional Court Act as the means to implement the international convention[224], a number of indications suggest – explicitly and implicitly – the supremacy of international convention over national law, which can be summed up in the following points:

- Explicit reference to the contents of the preamble of the UNCRC which states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection".
- Reference to Article 1 of the UNCRC, which says that "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".
- Reference to Article 40(3) of the UNCRC, which affirms that "[s]tates Parties shall seek to promote the establishment of laws, procedures,

223 It should be noted that the Palestinian Basic Law has been devoid of determining the rank of international conventions in respect to national legislation in terms of supremacy, and has also been silent in determining integration procedures or harmonization of the international conventions' provisions into national legislation, including even the ratification mechanisms on the conventions and relevant constitutional requirements. This has become a legal dilemma for many researchers and legal professionals because of the accession of Palestine to dozens of international conventions recently. Accordingly, the judgment of the Court of Cassation referred to in these circumstances came to fill the constitutional vacuum and set provisions in the context of the consecration and strengthening of the judiciary's role in terms of legislation's harmonization with international conventions, and determine the extent of these conventions' mandatory character for the national legislator and judge, particularly those conventions on human rights such as the UNCRC.

224 Article 27 of the Constitutional Court Act no. 3 of 2006 states that: "the court handles judicial oversight over the constitutionality as follows:

1. Through the direct original lawsuit issued by the damaged person before the court, based on article (24) of this law.
2. In case one of the competent courts or boards with judicial jurisdiction while considering a lawsuit finds out the unconstitutionality of a law text or ordinance or regulation or order required to settle the dispute, should halt the proceedings and refer the documents with no charges to the Supreme Constitutional Court to decide on the constitutional issue.
3. In case the adversaries decided to appeal while pursuing a lawsuit before one the courts or bodies that has judicial jurisdiction, for unconstitutionality of a law text or ordinance or regulation or order or decision; and in case the court acquitted the seriousness of the appeal, then shall postpone consideration of the case and set a time for those who raised the appeal not to exceed ninety days to file a case before the Supreme Constitutional Court, and in case the lawsuit was not filed in the identified date the appeal shall be deemed as if it didn't exist.
4. If the court was discussing a dispute before it and during the proceedings of this dispute the court discerned an unconstitutional text related to the dispute, the court should on its own address the decision in its unconstitutionality provided that this text is actually connected to the dispute in question duly".

authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law".

- Emphasis on the need to respect international standards for the rights of the child contained in international conventions. The court stated that:

> *"immunizing the provisions of the Court of Appeal issued against the children's right from appealing by rebuttal is unfounded thus destroys the right of the child to patronage and special care granted by the Basic Law as well as the regional and international covenants. It is also unreasonable, logically and legally, that the verdicts issued by the Court of Appeal against adults are appealable by rebuttal while depriving the child from this right. While the child's right to rebuttal is as essential for the child as for the adult, by depriving him of this right is a violation of the provisions of the Basic Law. Thus, the provisions of the mentioned law become idle, like a collection of moralizing, instructions and tips that can be put aside and replaced by texts of lower degree".*[225]

This judgment confirms the ability of an ordinary judge in Palestine to apply international conventions of human rights and use them as a guide in judicial applications.

In the same context, and in another verdict, the Palestinian ordinary judiciary applied the UNCRC directly, as is seen in resolution no. 2863/2014 issued by the Magistrate Criminal Court of Jenin on 22 September 2014. In this case, a child in conflict with the law (juvenile) was detained on charges of theft and pickpocketing thus violating the provisions of Article 407 of the Penal Code no. 16 of 1960. His lawyer sought his release claiming that he should be free given that he was a school student and his arrest for trial purposes would cause him great damage.

The court decided to release the child justifying its decision by saying that:

> *"the arrest of the delinquent child must kept to a minimum, taking into account the child's best interests as stipulated in the Palestinian Child Law no. 7 of 2014 and as dictated by the provisions of the UNCRC of 1989 which imposed limitations on sanctions and prohibitive measures*

225 See 'The Role of Judiciary in the Harmonization of Legislation with International Conventions (Examining the Verdict of the Palestinian Court of Cassation no. 56/2014)', Legal Agenda, <legal-agenda.com/article.php?id=1050&folder=articles&lang=ar>, visited on 22 May 2016.

of freedom as exceptions only. This convention also urged to take into account the child's best interests as a primary consideration in judicial proceedings, and also urged to avoid separating the child from family".

The court reinforced in its decision personal freedom, stating that it is a constitutional base in force under the 2003 Amended Basic Law pointing explicitly to the ICCPR.

The court exercised direct application of the UNCRC in matters related to the arrest of children and giving priority to the child's best interests in judicial proceedings. It also avoided separating the child from his family surroundings, reinforcing that decision with reference to the Palestinian Child Law and the Palestinian Basic Law, and implicitly guided by the ICCPR.

Guarantees of a Fair Trial: The courts of the Palestinian ordinary judiciary have protected the right to a fair trial in a remarkable way in several verdicts in which they imposed control over both the public prosecution and judicial police to ensure investigation procedures do not restrict the freedoms of citizens. Among those is the verdict of the Court of Cassation in Ramallah, penal no. 472/2010 which stated:

"the legal basis requires that the accused is innocent until proven guilty and remand is a temporary measure required by the interests of investigation and trial. However, it is an eccentric and dangerous procedure authorized by law for specific considerations that might be investigation procedures or maintaining both public security and order or the interests and life of the accused himself or so, therefore the court finds that in case of remise of the justifications for remand, the release should be performed".[226]

It is evident that the Court of Cassation imposed its control over the arrest of the accused even though the order was issued by a lower court, and pointed to the right of presumption of innocence. In its ruling, the judge pointed out that preventive imprisonment is a dangerous procedure, and is subject to supervision; it must be backed up by genuine rather than flimsy reasons.

226 Court of Cassation, penal no. 472/2010, the database of the technical office of the Palestinian Supreme Court, Ramallah, reviewed on 20 July 2012.

The Palestinian criminal courts also devoted dozens of their verdicts to protecting the right to a defence. The Court of Appeal considered it in its judgment penal no. 96/2010 that the right to a defence is "a sacred right that may not be neglected under nullity", noting in this particular case that "the law imposed on the accused through an arrest warrant [makes an] exception for the accused in case of illness". The court reasoned in its ruling by saying that: "the security issues and the situation in the light of an occupation of Palestinian territory that does not respect the law and considerations of any kind of human rights would not permit the defendant to come to court which is similar to not attending for reasons of illness".[227]

It can be said that the statements included in these verdicts are implicit applications of Article 14 of the ICCPR which is consistent with the Palestinian Basic Law and Palestinian procedural laws.

Freedom of Opinion and Expression and the Right to Peaceful Assembly:
The courts of the Palestinian ordinary judiciary devoted many of their verdicts to the protection of the freedom of opinion and expression, and peaceful assembly. Among them is a judgment issued by the magistrate court of Jenin in criminal case no. 1065/2013 dated 20 October 2014.

The public prosecution charged a group of persons with continuous crowding contrary to the provisions of Article 168 of the Penal Code no. 16 of 1960. The facts of the indictment included that fact that "the accused, belonging to a certain political party and after prior agreement among them, organized a crowding to protest the Arab initiative which led to a breach of security and public tranquillity".

The court declared the innocence of the defendants in this case, justifying its judgment by saying that:

> *"it wasn't proven to this court the existence of any violation of the rules related to the constitutional right to freedom of opinion and expression and peaceful demonstration guaranteed by Article 19 of the Palestinian Basic Law, as well as Article 19 of the ICCPR ratified by Palestine. In addition the charge assigned to the defendants did not include clear*

227 Database of the technical office of the Palestinian Supreme Court, Ramallah, reviewed on 20 July 2012.

restrictions on the right to demonstrate as a constitutional right, due to the fact that estimation of the illegality of crowding is realized when proven that this crowding is a way to break the law, and crowding itself cannot be considered a crime; because it affects the essence of the constitutional protection of human rights and public freedoms guaranteed constitutionally".

In a similar case, the same court protected the freedom of opinion and expression in a judgment issued 12 October 2014 in criminal case no. 3442/2012. The public prosecutor referred a person to the court with a charge of inciting sectarian strife violating Article 150 of amended Penal Code law no. 16 of 1960. The case against the accused included indictments such as: "the defendant distributed data which belongs to a particular political movement attacking the authority and the political leadership, the accused also took part in a sit-in organized by this political movement in one of the Palestinian universities under the slogan Stop Political Arrests intending to cause sedition". The court declared the innocence of the accused, justifying its verdict by saying that "the fact that the accused distributed data of a political movement and participated in the sit-in organized by the party against political detention does not constitute in itself a punishable offense, since the freedom of opinion and expression is guaranteed and protected under the provisions of the Palestinian Basic Law as amended in 2003, where Article 19 declares that there can be "no prejudice to the freedom of opinion, everyone has the right to express and propagate his opinion verbally, in writing or any other means of expression or art, taking into account the provisions of the law'". This ruling is consistent with the provisions of Article 19 of the ICCPR and the court decided to acquit him.

In these two verdicts, the court protected the right to freedom of opinion and expression by invoking the provisions of the Palestinian Basic Law, and through direct application of Article 19 of the UDHR which establishes that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

The case also shows efforts to protect the right to peaceful assembly through the implicit application of Article 21 of the ICCPR which states:

> *"The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others".*

The Right to Property: The right to private property is one of the most protected rights in civil applications in the courts of the ordinary judiciary in Palestine. The civil courts have protected this right in its various forms, including in the judgment of the Court of Appeal in Ramallah in civil resumption verdict no. 22/2009 where it was noted that:

> *"the law ensures the right to property unconditionally and in all the ways prescribed by the law without any conditions or restrictions. It is illegal to restrain the right to individual property except by the ways determined by the law, and any restriction on private property as long as this property is based on the true rules of the law, shall be dismissed for violating the law and public order".*

This judgment is considered a direct application of Article 17 of the UDHR which asserts that "[e]veryone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property". This right is intertwined with the right to dispose of a property, the right to legal personality, and other property rights.

The Right to Self-Determination: The right to self-determination is one of the fundamental principles enshrined in Article 1 of the ICCPR. Among the applications of this right is the verdict issued by the magistrate court of Ramallah on 13 July 2014 in criminal case no. 669/2014. The court declared the innocence of the accused who had been charged with manufacturing firearms violating Article 25/5 of the Arms and Ammunition Act no. 2 of 1998. The court justified its judgment in the fact that the defendants did not manufacture weapons intended to disrupt public order and security but did so with the purpose of legitimate resistance as a form of the right to self-determination, based on the Fourth Geneva Convention.

The court noted while explaining its verdict that:

> *"the right to self-determination is one of the most important rights that have been recognized and created by international law. This right was explicitly stipulated in the Charter of the United Nations, and that's in Article 1(2) related to the objectives and principles of the United Nations, as well as in Article 55 of chapter nine related to international economic and social cooperation. Palestine as an observer state in the United Nations Organization is bound by those rules, and in order to practice the peoples' right to self-determination the peoples have to follow the armed resistance (armed struggle) by fighting operations conducted by national members who are not members of the regular armed forces, to defend national interests and nationalism, against foreign powers, whether these members operate within a regulation which is subject to supervision and guidance of a legal or factual authority, or if those members operate based on their own initiative, whether embarked on this activity over the national territory or from bases outside the region".*

The court referred in its judgment to many decisions by the UN General Assembly that recognized what can be considered an international custom on the right of people to armed resistance a means to self-determination.[228] The courts found that the acts carried out by the defendants fit into the context of the Palestinian people's right to self-determination through their legitimate right to armed resistance, and elaborated in describing the applicability of legitimate resistance recognized by international law for acts carried out by these persons. As a result the court decided to declare their innocence since their acts were not considered a crime.

The court invoked international human rights conventions through the implicit application of Article 1 of the ICCPR, which establishes that all peoples have the right to self-determination, and by virtue of that right, they

228 Decisions of the United Nations General Assembly stated in the Judgment:
1. Recommendation no. (2105/1964), which stated that the United Nations General Assembly recognizes the legitimacy of the struggle of peoples under colonialism in order to gain their right to self-determination and independence, and calls all countries to provide financial and moral assistance to national liberation movements in colonial territories. It is noted in the previous recommendation the ambiguity of the text, especially the word struggle: is it peaceful or military?
2. Resolution no. (2778/1971) and resolution no. (2955/1972); in which there was a confirmation of the right of peoples to self-determination, freedom, independence, and legitimacy of their struggle by all available means in accordance with the Charter of the United Nations.
3. Resolution no. (3070/1973) under which the United Nations General Assembly asked all member states to recognize the right of peoples to self-determination, independence, and to provide material and moral support as well as assistance to the peoples fighting for this goal.
4. Recommendations of the General Assembly nos.(2708, 652, 3295) made regarding Portuguese colonies and the situation in Namibia; the General Assembly confirmed explicitly that "armed struggle" is one of the legitimate means by which national liberation movements may resort to achieve their right to self-determination.

freely determine their political status and freely pursue their economic, social, and cultural development. It also directly applied the Fourth Geneva Convention for the purposes of legal qualification of the facts, based on the customary international law of human rights as a binding source. Moreover, the court invoked the Charter of the United Nations, specifically Article 1(2) related to the goals and principles of the United Nations, and Article 55 of Chapter 9 concerning international economic and social cooperation. The court pointed out that Palestine is committed to these rules as an observer state in the United Nations Organization, with reference to the reasoning in the context of the recommendations and resolutions of the United Nations General Assembly regarding the right to self-determination, and the conditions of legitimate armed resistance in international law.

5.2.2.6. Jurisprudence of the Ordinary Judiciary in Algeria

The Algerian Code of Civil and Administrative Procedures no. 09/08 dated 25 February 2008 identifies the formation and functioning of each of the judicial authorities which are part of the ordinary judiciary. The Algerian ordinary judiciary is characterized by diversity and specialization evident in its structure:

- The Supreme Court is at the top of the hierarchy of the ordinary judiciary. It is the constituent body of the acts of the judicial councils and courts. The Algerian Constitution entrusts the Supreme Court with ensuring respect of the law and unification of jurisprudence; therefore it is a Court of Law. It consists of eight chambers subdivided into sections depending on need. These are: the Civil Chamber, the Chamber of Real Estate, the Chamber of Personal Status and Inheritance, the Social Chamber, the Criminal Chamber, the Commercial and Maritime Chamber, the Misdemeanours and Infractions Chamber, and the Petitions Chamber. The Supreme Court issues collective verdicts whether in a chamber or department, headed by the Chairman of the Chamber or section, depending on the situation. The Chairman of the Chamber ensures, with the assistance of the presidents of departments, the consistency of jurisprudence within each chamber, while the First President of the Supreme Court ensures the consistency

of jurisprudence within the Supreme Court. Two or three chambers meet in the framework of a hybrid chamber to decide on a common matter of jurisprudence, and if they cannot reach a unified solution, the First President calls all the chambers combined to settle the legal point under dispute. Then a preliminary decision that will be imposed on everyone is issued. The Supreme Court judges are divided into judges and public prosecutor judges.

- Judicial Councils are the judicial bodies of second degree, concerned with settling appeals raised against the verdicts issued by courts and adjudicating as a last degree of litigation. The Civil and Administrative Procedures Act gives the councils more authority, such as responsibility for the settlement of appeals against decisions issued by the Competition Council. In addition, the councils adjudicate requests related to conflicts of jurisdiction between the judges, as well as requests concerning disqualification of judges. The Judicial Councils are formed of chambers which are distributed depending on the nature of disputes. The chambers are: the Civil Chamber, the Criminal Chamber, the Charge Chamber, the Emergency Chamber, the Family Affairs Chamber, the Juvenile Chamber, the Social Chamber, the Real Estate Chamber, the Maritime Chamber and the Chamber of Commerce. The Judicial Councils adjudicate collectively unless provided otherwise by law, taking into account during selection the need to have an odd number of members in order to configure a majority.

- Individual Courts are judicial bodies ruled by a single judge according to specific procedural rules identified under the legislation in force. Their competences and functioning are defined by civil and criminal procedures. In addition to special laws, they adjudicate in all disputes as a first degree of litigation unless the law provides otherwise. The courts are regulated by size, tasks, and the importance of their activities, and organized into departments. The departments and the distribution of judges among those departments are determined by an order from the President of the Court after seeking the opinion of the state prosecutor. The judge can issue verdicts in more than one department or section as required for the functioning of the court.

- 7 specialized judicial authorities,[229] where the criminal court considers the acts described as criminal, misdemeanours and the violations associated with them, as well as crimes described as terrorist acts or subversive acts which are referred to the court by the charge chamber. The criminal court is committed to consider the charges contained in the referral decision issued by the charge chamber exclusively, and it is not up to the court to decide its competence. Its verdicts are appealable before the Supreme Court.

As for specialized judicial authorities, they adjudicate in disputes and complex issues in terms of assembling material means and human specialized skills, and these specialized judicial authorities are designated exclusively to adjudicate in disputes concerning international trade, bankruptcy, judicial settlement, banks, intellectual property, maritime issues, air transport, and insurance.[230]

In terms of its jurisprudence, the ordinary judiciary in Algeria explicitly applied international conventions of human rights which may be seen through an analysis of cases concerning refugee rights and children's rights.

Refugee Rights: The misdemeanours section of the court in Constantine addressed in verdict no. 11542/13 index no. 12238/13 dated 29 September 2013 the rights of refugees. The case concerns a person who entered Algerian territory illegally and was arrested by members of the judicial police. This refugee was arrested in a place where he was suspected to be working illegally. The state prosecutor decided to charge him with a misdemeanour for working without a permit in accordance with Articles 7 and 88 of Law no. 8-11 and his case was then referred to the court.

In a unique precedent, while declaring the innocence of the accused, the court explained its judgment based on the direct application of

229 Specialized judiciary authorities in Algiers include military courts, which are governed by a special law related to military rules, which are of a special nature in terms of composition, as well as in terms of procedures followed before it. It considers crimes against the military regime; its individuality is represented by the confidentiality of the investigation proceedings, and the arrest and filing orders are in force the issuance of a judgment in the case, its verdicts are issued without a cause except both cases of lack of jurisdiction or adventitious requests, contrary to what is prevalent in the judicial authorities of ordinary or administrative judiciary that must cause their verdicts. See Al-Wardi, supra note 214.

230 Ibid.

international human rights conventions, particularly the 1951 Convention relating to the Status of Refugees ratified by Algeria on 25 July 1963 and published in the official gazette number 105 in 1963. The court directly applied this convention as follows:

- The court found that the accused met with the refugee status requirements under Article 3 of the convention. The court stated that the provisions of the international convention take priority while provisions of domestic law do not apply in his case under Articles 1 and 7 of Law no. 8-11.
- Article 31(1), concerning illegal entry of refugees, which asserts:

> *"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".*

The court based its ruling on articles 131 and 132 of the Algerian Constitution, and it is evident from this verdict that the court prioritized the convention over domestic law, demonstrating the capability of the ordinary judiciary in applying international conventions of human rights.

The Rights of the Child: The civil court of Constantine in its judgment Table no. 13695/14 Index no. 07041/14 of 30 November 2014 attempted to protect the rights of the child. In this case, a child was exposed to electric shock due to unmaintained electrical wiring between houses, which led to his permanent disability including the amputation of his hand. His family filed a lawsuit demanding compensation. The Court of Constantine ordered the defendant to pay DZD 3 million (approximately EUR 24,000) for the damage.

The court explained its decision based on the African Charter on the Rights and Welfare of the Child, ratified by Algeria on 8 July 2003, and published in the official gazette no. 41 of 2003. After reviewing the Algerian Constitution and Algerian laws relevant to the case and adapting the facts based on civil liability and assumed error, the court affirmed that

international conventions must be taken into consideration. It pointed out the necessity of civil magistrates respecting international conventions in their judgments either under penalty or nullity. This was affirmed by Article 358, Clause 7 of the Algerian Code of Civil and Administrative Procedures no. 09/08 which says that a judge's lack of respect for international conventions is one ground for appeal, stressing the need to protect civil rights through direct application of international conventions.

In addition, the court exercised direct application of Article 4 of the African Charter on the Rights and Welfare of the Child which states:

> *"In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law".*

This court conferred protection of the best interests of the child through direct application of articles 4 and 11 of the African Charter on the Rights and Welfare of the Child. The best interests of the child were interpreted by the court which stated: "estimation of compensation is a must to provide full coverage of the child's health and psychological condition and protect his right to study and his right to education mentioned in Article 11 of the same charter to promote the child's personality, talents, and development as well as compensation to guarantee his treatment and care until maturity".

In exercising direct application of international conventions of human rights, the court has shown an example of the ability of civil magistrates to protect human rights through jurisprudence and judicial efforts.

5.2.2.7. Jurisprudence of the Ordinary Judiciary in Jordan

The courts of the ordinary judiciary in Jordan are known as regular courts. These courts have general jurisdiction over all civil and criminal matters,

including claims held by or against the government.[231] The courts of the ordinary judiciary are divided into courts of first instance and second degree courts.

The courts of first instance include magistrate courts and courts of first instance.

Magistrate courts are presided over by a single judge, and established under Article 3(a) of the Formation of Regular Courts Law no. 17 of 2001 which defines its competence. Magistrate courts are governed by the Magistrates Court Act, or any law or applicable system whether in penal matters, human rights, or civil and commercial matters. They also have jurisdiction over labour issues and other matters within their competence.

Courts of first instance are composed of a President and a number of judges as needed. They are located in various provinces and districts of the kingdom, and established by Article 4 of the Formation of Regular Courts Law no. 17. They act as primary courts in all legal and criminal proceedings in which the judicial authority is not delegated to any other court (specifically the courts of general jurisdiction). Moreover, they are second degree courts which function as courts of appeal that handle cases referred from the magistrate courts according to the Magistrates Courts Act. [232]

In addition, each court of first instance has also established an enforcement department headed by a judge, known as the Head of Enforcement, who is at least a fourth degree judge. The Heads of Enforcement are assisted by one or more judges and the most senior among them shall replace the head in his or her absence. In addition, the magistrate judge proceeds

231 See Jordanian Judicial Council, <www.jc.jo/types>, visited on 22 May 2016.

232 The court of first instance considers legal proceedings with a single judge known as the primary judge when dealing with all legal proceedings outside the jurisdiction of the magistrate court no matter what value, and considers cases of counterparties and their divaricates and the same goes for the original case. Criminal proceedings are presided over by a single judge when considering misdemeanor crimes beyond the jurisdiction of the magistrate judge under the Magistrate's Courts Act, but with two judges when considering criminal proceedings beyond the jurisdiction of the criminal court under its own law. Three judges preside when considering criminal cases in which the legal punishment is the death penalty, hard labour for life, life imprisonment, or temporary detention or temporary hard labor for a period not less than fifteen years. Such cases are normally beyond the jurisdiction of the criminal court under its own law. Ibid.

with the jurisdiction of the president when there is no court of first instance.[233]

The second degree courts include Courts of Appeal and the Court of Cassation. The Courts of Appeal have at least three judges who handle appeals in criminal and human rights cases. There are three courts of appeal in the kingdom: Amman, Irbid, and Maan.

The Court of Cassation, based in Amman, is a law court. However, it is not considered among the degrees of litigation, and may not be a subject court (i.e., looking into facts and evidence) except when considering discrimination brought before it under the provisions of the State Security Court, the Court of the Police or the Criminal Court. The Court of Cassation is headed by the President of the Judicial Council, and includes a number of judges as needed. However, at least five judges sit on its regular board which is headed by the most senior judge among them.[234]

There are also a number of special courts including the criminal court; the court of appeal for income tax issues; the court of first customs; the court of land and water settlement; municipal courts; and the court of maintenance of state property.[235]

The ordinary judiciary in Jordan is characterized by a wide range of levels of litigation and qualitative specialization. To understand more about the application of international human rights conventions in the ordinary judiciary, cases concerning the right to legal personality and the freedom to contract, the right to personal liberty, freedom from physical coercion, and freedom of opinion and expression will be reviewed.

The Right to Legal Personality and the Freedom to Contract: In its decisions, the ordinary judiciary in Jordan has protected the right to a legal personality and freedom to contract. Among them is a case which went before the Court of Cassation regarding a dispute over a lawsuit filed by a company to claim compensation and to seek the application of an arbitration clause in the contract of carriage between the shipper, the carrier (ship owner) and the addressee (the plaintiff).

233 See law no. (36) of 2002, Implementation Law (temporary law).

234 For more about the terms of reference of the Court of Cassation, see Ibid.

235 For more about Jordan's regular courts, see Ibid.

The Court of Cassation applied the 1978 United Nations International Convention on the Carriage of Goods by Sea, known as the Hamburg Rules, which allows parties of the contract of carriage to refer any dispute to any agreed upon court. This contradicts the provisions of Article 215 of the Jordanian Maritime Trade law that gives jurisdiction to Jordanian courts to settle such disputes. The court stated:

> *"the jurisprudence and the judiciary agreed that international agreements concluded by the state have a higher rank than the domestic laws of these countries, and these agreements have priority in application, even if its provisions contradict its domestic law... . It shall be on the condition that international treaties and conventions had passed by all constitutional phases in the country that is looking in the matter of dispute. [It] should be demonstrated as well if the United Nations Convention on the Carriage of Goods by Sea - to which Jordan acceded by virtue of a decision by the Cabinet published in the Official Gazette, issue no. 4484 dated 16 April 2001 and which allowed the parties to agree on referring any dispute relating to the carriage of goods to any destination chosen for this purpose – had passed through all due constitutional phases, and if the execution thereof requires approval by the National Assembly as well as ratification".*[236]

The Jordanian Court of Cassation gave priority in this case to the international convention over national law with the provision that the conditions required for the enforcement of this agreement are verified. In this decision, there is evidence of the implicit application of Article 6 of the UDHR, which stipulates that "[e]veryone has the right to recognition everywhere as a person before the law". Other rights including the right to a legal personality and the right to freedom of contract were also applied in this case. The Court of Cassation applied the United Nations Convention on the Carriage of Goods by Sea and gave the convention priority over Jordanian maritime trade law which assigns, in Article 215, jurisdiction in disputes to the Jordanian courts.[237]

The Right to Personal Liberty: The courts of the ordinary judiciary extended in many of its rulings control over the availability of fair trial guarantees, especially the right to personal liberty. Among those rulings is a verdict issued by the Court of Cassation to consider a judgment issued by the

236 Bourouba, supra note 33, p. 33-34.

237 Ibid.

Criminal Court of Amman on 29 January 2003 convicting the accused and sentencing them to hard labour for life.

The Court of Cassation reversed this verdict and justified it by saying "the arrests of the accused took place on 11 August 2001 and they were sent to the Public Prosecutor on 20 August 2001 and that their stay in the security centre for nine days is against the provisions of Article 100 of the Code of Criminal Procedure which asserts that: 'the judicial police officer should immediately hear the statements of the defendant and send him to the competent Public Prosecutor within twenty-four hours.' Because logic requires that defendants shall not be held for so long in a police station and should be sent immediately to the Public Prosecutor". Such a long detention without the benefit of coming before the public prosecutor is considered arbitrary based on the limits of authority.

In another case, the Court of Cassation in its criminal chamber settled on a matter of excluding evidence taken by coercion, whether physical or moral. This jurisprudence has been reinforced after Jordan's 2007 ratification of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment which resulted in the amendment of Article 208 of the Penal Code and in 2011, a new provision in the code which expressly restricts admitting evidence gathered under coercion.[238] This jurisprudence may be considered an implicit application of the international conventions, particularly Article 14 of the ICCPR.

The Right to Personal Liberty and the Absence of Physical Coercion: Through the departments of civil and commercial verdicts, the ordinary judiciary in Jordan has protected the right to personal liberty and the freedom from physical coercion in cases of inability to fulfil a contractual obligation. Many verdicts based on the direct application of the ICCPR in such cases have been issued. Courts have used Article 11 of the ICCPR which declares that "[n]o one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation", thus giving priority to the international convention over Article 22 of the Jordanian Implementation law which states that "a creditor may request imprisonment of his debtor in case the debt was not paid or offer a convenient settlement for his financial capacity".

238 Ibid., p. 128.

Among these was the appeal of a decision issued by the president of the execution department in Aqaba to imprison a debtor. The president justified his judgment referring to Article 22 of the Implementation Act which allows execution of the request of a plaintiff to imprison a convicted debtor in order to pay a debt. However, this article is inconsistent with Article 11 of the ICCPR, and the appeal was based on this incompatibility.[239]

The court of first instance in Aqaba, as the Court of Appeal in this case, decided, to annul this decision. It justified this through Article 11 of the ICCPR which provides that no one shall be imprisoned because of inability to fulfil a contractual obligation, and that two conditions must be met in order to implement this article. The first is that there must be a contractual obligation; and second is that the debtor must be unable to meet his obligations. While the court saw evidence that the first condition was met since the debtor and the creditor had a contractual obligation, there was no evidence of the second condition. There was no reference in this lawsuit to the inability of the debtor to pay, and the debtor did not submit any proof to substantiate this stipulated deficit.[240]

Thus the court of first instance in Aqaba implicitly recognized the applicability of Article 11 of the ICCPR in its decision. This is a remarkable development towards the application of international conventions in judicial decisions.

Freedom of Opinion and Expression: The criminal court in Amman has sought to protect the right to freedom of opinion and expression in a judicial precedent issued in verdict no. 765/2010. The public prosecutor pressed five charges against the accused: one felony charge of disturbing relations with a foreign country, and four misdemeanours including inciting racism, spreading news which would undermine the dignity of the state, encouraging others to act against the existing government and disparaging an official body (in this case, the army).

The indictment included many facts including that, on 14 January 2010 the accused gave an interview to Al-Jazeera television network, and the

239 See Al Shaab News website, <www.shaabnews.com/text-37472.htm>, visited 23 May 2016.

240 See Ammon website, <www.ammonnews.net/article.aspx?articleno=191884>, visited on 23 May 2016.

interview revolved around American-Jordanian relations and the Khost incident which took place on Afghan territory. In this interview, the accused made abusive statements about the state of Jordan and the Jordanian army, and denied that Jordan was exposed to terrorism or any terrorist attacks, adding that Jordan is a country which attacks others. He also insulted the Jordanian army by describing its soldiers as mercenaries, and added that corruption had spread to reach the Jordanian security forces and the intelligence service.

The court's ruling declared responsibility of the accused for some of the charges, while halting prosecution on other charges. The court based its judgment on a deep understanding of the freedom of opinion and expression through using doctrinal interpretations of this freedom, and refuting the base crimes assigned to the defendants. It analysed the statements made by the accused in a detailed way consistent with international standards finally noting that they were not outside the limit of the freedom of opinion and expression protected under the Jordanian Constitution and the Publications Law.

The governing body in this verdict, despite the gravity of the charges assigned to the accused, proceeded to implement these charges while taking into consideration freedom of opinion and expression, which is protected by international conventions of human rights ratified by Jordan. This verdict is consistent with Article 19 of the ICCPR which states that "[e]veryone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

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