THE ROLE OF THE CONSTITUTION AND DOMESTIC LAW IN THE IMPLEMENTATION OF THE MODERN INTERNATIONAL STANDARDS OF HUMAN RIGHTS, A CASE STUDY OF JORDAN.

BY

ABDENNAIM M.A. WANDIEEN

A THESIS SUBMITTED TO THE UNIVERSITY OF LONDON FOR THE DEGREE OF DOCTOR OF PHILOSOPHY IN THE FACULTY OF LAWS

JUNE 1987.

ABSTRACT.

This Thesis deals with the role of the Constitution and the Domestic Law in the implementation of the modern international standards of human rights as defined under the United Nations Covenants on Human Rights of 1966. It seeks to explain some aspects of the obligation of states parties to take legislative measures for purposes of the effective implementation of the Covenants at the domestic level. The study is conducted in the context of a case study of Jordan as a state party.

The Thesis consists of three main parts, divided into seven Chapters and followed by Chapter VIII which is a general conclusion.

Part One, contains two Chapters dealing with the relationship between the modern international standards of human rights and the domestic legal systems. Chapter I is a brief legal and historical background. It seeks to highlight some of the major developments in the legal background of the modern international standards of human rights and the legal system of Jordan. Chapter II discusses the applicability of the international rules of human rights within the domestic legal systems with special reference to Jordan.

Part Two, is devoted to the first part of the role of the constitution and domestic law in the implementation of the modern international standards of human rights; namely, the adoption of equivalent standards at the domestic level. It also contains two Chapters. Whereas Chapter III focuses on the civil and political rights,

Chapter IV deals with the economic, social and cultural rights. A list of four rights has been selected from each catalogue in order to define precisely what are the legislative measures required in the case of each right.

Part Three, deals with the other part of the role of the constitution and domestic law, i.e. the introduction of sufficient domestic legal safeguards. It contains three Chapters. Chapter V discusses the role of the Judiciary as the vindicator of human rights, and the independence of the judiciary as a legal safeguard against human rights violations. Chapter VI deals with the rights to judicial review of administrative actions, as a guarantee against excess or abuse of powers by the administrative authorities, and as an inevitable requirement for the rule of law and respect for human rights in practice. Chapter VII discusses emergency powers and the impact of the state of emergency on human rights; and considers the question of derogation under Article 4 of the Political Covenant. It focuses on the role of the Constitution and the domestic legislature in imposing restrictions on the right of the national authorities to declare a public emergency and on the emergency powers themselves when the state of emergency is declared.

Finally, the concluding Chapter VIII is a general assessment of: The role of the constitution and the domestic laws in the implementation of the modern international standards of human rights, the present system of international scrutiny of the domestic legislative measures, and the performance of Jordan as a state party and the existing legal system of Jordan in general.

CONTENT

page

page

page

page

ACKNOWLEDGEMENTS.

I owe many people much gratitude for their help in completing my thesis, and whatever merit it may have is owed to them. The greatest gratitude is to His Royal Highness, the Crown Prince of Jordan, Prince Hassan Bin Talal, for his concern, continuous support and encouragement and for giving me access to the library of his office. Suitable words of thanks escape me, and I shall always remain in his debt.

I am tremendously grateful to my supervisor, Dr. Peter Slinn for his wise guidance throughout the critical stages of this work. I benefitted a great deal from his suggestions, ideas, and sometimes intellectually provocative comments. I enjoyed my four years under his supervision and found him more than helpful whenever I sought his opinion.

I wish to express my sincere thanks to Professor Rosalin Higgins, for allowing me to attend her valuable seminars, on the International Protection of Human Rights at the London School of Economics and Political Science. I benefitted and learned a great deal from the seminars and from Professor Higgins' experience as a member of the U.N. Human Rights Committee.

My thanks are due to my friends and colleagues in the legal profession in Jordan, especially to Professor R. Al-Sayed, Professor K. Al-Sa'eed Professor M. Al-Ghazawy, in the Faculty of Laws, University of Jordan, for their extensive help, encouragement and their comments on my work. Special thanks go to my colleague Advocate T.K. Al-Nahar, for his limitless help and concern, and for keeping me always informed with the development of Law in Jordan and providing me at his own expense, with the latest text books, publications and cases from Amman.

I am grateful, to Judge F. Kilany for kindly agreeing to give me an interview and for his comments on my ideas and for his valuable gift of text books on the Law of Jordan. I am also indebted to all Jordanian lawyers, officials and private individuals, those mentioned in this work and those who wish to remain anonymous, and to any person who was interviewed by me, or provided me with any kind of information or material during my field-work.

I am very grateful to Miss Jane Connors, from the Law Department at the School of Oriental and African Studies for reading and commenting upon the manuscripts and double-checking the final version. Thanks also to Barrister John Amadou for reading and commenting upon the original manuscripts. I owe special thanks to my friend Miss F. McMillan at S.O.A.S. for her valuable assistance in reading the original manuscript and double checking the second draft. I wish to express my thanks and appreciation to the staff and librarians of the Faculty of Laws in Jordan, the Jordanian Bar Association, and to the librarians at the Institute of Advanced Legal Studies, S.O.A.S., Senate House Library, L.S.E., and the British Library. Finally I would like to thank my family for their patience and support during my twelve years of university education.

A LIST OF ABBREVIATIONS.

ADRDM.	American Declaration of the Rights and Duties of Man.
AFR.	African Charter on Human Rights.
AI.	Amnesty International.
AJIL.	American Journal of International Law.
Boston Coll. Int. & Comp. LR.	Boston College International Law Reports.
Buffalo L. Rev.	Buffalo Law Review.
BYIL.	British Year Book of International Law.
C.D.	Collection of Decisions.
D.R.	Decisions and Reports.
ECOSOC.	The U.N. Economic and Social Council.
ECUM.	European Commission on Human Rights.
EHR.	European Convention on Human Rights.
EHRR.	European Human Rights Reports.
ESC.	European Social Charter.
EUCT.	European Court of Human Rights.
GAOR.	General Assembly Official Records.
GFTU.	The General Federation of Trade Unions.
Harv. I.L.J.	Harvard International Law Journal.
Harv. L.J.	Harvard Law Journal.
HCJ.	High Court of Justice.
HRC.	The U.N. Committee on Human Rights.
HRLJ.	Human Rights Law Journal.
IACM.	Inter-American Commission on Human Rights.
IACHR.	Inter-American Court of Human Rights.
ICLQ.	Internatioinal and Comparative Law Quarterly.

ILM.	International Legal Materials.
ILO.	International Labour Organization.
Islamic DHR.	The Islamic Declaration of Human Rights.
JBR.	The Jordanian Bar Review.
JD.	Jordanian Dinars.
J.J	The Judicial Journal of Trans-Jordan.
JOG.	Jordanian Official Gazzatte.
LIJ.	The Law of the Independence of the Judiciary.
Netherland Y.B.Int.L.	The Netherlands Year Book of International Law.
PLO.	Palestine Liberation Organization.
PLR.	Palestine Law Reports.
Y.B.	The Year Book of the European Convention on Human Rights.

A SPECIAL NOTE.

Except for the Constitution, for which we have accepted the Official translation, the Jordanian Statutes and Cases are translated from Arabic by the present writer. The Statutes are cited by their official titles and numbers, and whenever possible with reference to the number, the date and the page of the issue of the Official Gazette in which they were published. For example, the Law of Print and Publication, would be cited as, 'The Law of Print and Publication, Law No. 33/1973, JOG No. 2429 of 1/7/1973, p. 8.'

The Jordanian Cases are cited in accordance with the ordinary system of citation in Jordan, that is by mentioning the number of the case and if the case is reported, by reference to the yearly volume of the JBR and the page where the case is reported. For example Case No.1 of 1987 would be cited as follows: 'Case No. 1/1987, JBR (1987) p. 100.'

Arabic references are cited in English; references in other European languages are cited in their original. When more than one work of the same author is cited a catch phrase is used to distinguish the various works. The term, 'op.cit', is used to indicate that the work has been cited earlier. If the reader wishes to investigate the full title of the work, the edition, the place and year of publication he may refer to the first citation or to the list of the bibliography.

INTRODUCTION.

Domestic implementation of the international law of human rights is often seen as a political issue and widely discussed in international forums and political conferences. As a legal question it does not appear to have received enough attention from lawyers and legal researchers yet. There are considerable gaps in the contemporary literature of human rights in general and the domestic implementation in particular. Domestic implementation of the international instrument of human rights by means of domestic legislative measures is considered one of the most complicated areas for legal research for it does not only require the study to be conducted in both international law and municipal law simultaneously, but also touches almost every part of the domestic law of any country. Until recently and in many parts of the world, lawyers and governments have turned a blind eye on this issue, partly because they thought it was not very important and partly because it was very problematic and complicated. As we live in what may be described as 'the age of the international protection of human rights', domestic implementation has become an increasingly important subject. Recently, governments have found themselves under legal obligation to secure the effective implementation of a considerable body of international law of human rights within their respective domestic legal systems. The need for action and legal research has thus become more urgent than ever before.

When the United Nations Covenant on Human Rights entered into force in 1976 (The Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly in 1966. Hereinafter referred to as the Covenants), governments and lawyers reacted in a manner which clearly showed the

lack of a clear approach and legal research. However, European lawyers and governments have gained the upper hand in terms of legal research and experience in dealing with the issues of domestic implementation, thanks to the European Convention on Human Rights which has been in force since 1953. Many Third World countries had failed even to report on their domestic legal systems, others had introduced unsatisfactory reports. They did not seem to know what they were required to do, or what to report. The United Nations Committee (HRC) had, therefore, to issue guidelines to help states parties to introduce satisfactory reports. Nonetheless, many reports remained seriously overdue, and in most cases the HRC had to ask for additional information.

In the present work, the intention is to examine the role of the Constitution and domestic laws in the implementation of the modern international standards of human rights. The phrase 'modern international standards of human rights' as used here refers to the minimum standards established under the United Nations Covenants on Human Rights of 1966. The latter have assigned an important role to the national legislator to play in the process of their domestic implementation by requiring it to introduce all the necessary legislative measures through the national Constitution and the relevant laws. The question would thus be: What is this role and how could it be performed? What are these required legislative measures which each state party undertakes to introduce and for what purposes?

It is to these specific questions that we intend to address ourselves in the present work in order to explain the various aspects of the role of the constitution and domestic laws in securing the effective implementation of the modern international standards of human

rights, and the legal implications of the undertaking by states parties to take legislative measures for that purpose. Considering the aims, the text and the provisions of Article 2 of both Covenants, it would appear that the role of the Constitution and the domestic laws consists of two main parts: namely, the adoption of equivalent standards at the domestic level and the introduction of sufficient domestic legal safeguards.

Obviously, theoretical treatment of this subject would not suffice. Alternatively, it calls for a case study and requires a critical legal analysis of the legal dimensions of the substantive rights in order to define the necessary legislative measures required for the implementation of every particular right.

Jordan has thus been chosen as a case study for this purpose. It is not only a good example of a developing country which encounters special political and economic difficulties in securing domestic implementation of the modern international standards of human rights, but also represents the Arab and Muslim states parties who share special religious and cultural traditions which have influenced their domestic legislation and indeed their conception of certain rights and freedoms.

In addition to the fact that this part of the law of Jordan has never been researched before, the Jordanian legal system itself is an interesting mixture of different legal traditions. As well as the Islamic law and traditions inherited form the past and the Ottoman laws, it possesses an element of the English law transmitted directly during the Mandate of Trans-Jordan and Palestine. There is also a distinctive French element which has been conveyed to Jordan through Egypt, Syria and Lebanon.

As a country, Jordan was part of the Ottoman Empire until the end of the First World War. In 1921, the Emirate of Trans-Jordan was established by the late King Abdullah Ibn Al-Hussain, and was placed under the British Mandate until the end of the Second World War. In 1946, the Hashemite Kingdom of Jordan was declared an independent state and subsequently joined the United Nations as such. Following the withdrawal of the British from Palestine in 1948, the Jordanian Armed Forces entered Palestine and managed to save a strip of land on the other side of the river Jordan, known as the West-Bank. The latter joined the East-Bank and became part of the Hashemite Kingdom of Jordan until it was occupied by Israel in 1967.

For the purpose of the domestic implementation of the Covenants, the title 'The Hashemite Kingdom of Jordan' applies to the East-Bank only because the West-Bank has been under military occupation since 1967. Practically speaking Jordan has lost control over that part of its territory and some of it has already been annexed by Israel. From a legal viewpoint, since 1974, Jordan has surrendered its legal rights and obligations over that part to the PLO, when the latter was recognized as the sole legitimate representative of the population of the West-Bank. That is true, although most of them still hold Jordanian Passports for practical and political reasons.

Jordan signed and ratified the Covenants in 1975, and they entered into force in 1976. It is thus important to remember that the commitments of Jordan as a state party to the U.N. Covenants on human rights are limited to the population of the East-Bank and to those who are under its jurisdiction. In assessing the performance of Jordan in this connection only the laws and practices in force in the East-Bank may be taken into consideration.

As for the structural aspects, each of the two parts of the role of the Constitution and domestic laws in the implementation of the modern international standards of human rights will be treated separately in the latter two parts of this work. Before this, however, the relationship between the modern international standards of human rights, and the domestic legal system will be discussed in the first part. Accordingly, the thesis is divided in three parts:

Part One: The Relationship Between the Modern International Standards of Human Rights and the Domestic Legal Systems.

Part Two: Adoption of Equivalent Standards at the Domestic Level.

Part Three: Introduction of Domestic Legal Safeguards.

PART ONE.

THE RELATIONSHIP BETWEEN MODERN INTERNATIONAL STANDARDS OF HUMAN RIGHTS AND DOMESTIC LEGAL SYSTEMS.

In order to understand the legal nature of the modern international standards of human rights which each state party is required to implement within its domestic legal system, a brief consideration of the relationship between the two legal systems seems inevitable. It is thus important to begin by highlighting the most important developments which have led to the creation of two distinctive, but not conflicting systems, and to describe the manner in which modern international standards of human rights were derived from the domestic legal systems. It is equally important to examine the applicability of the modern international standards of human rights, as rules of international law, within the domestic legal system.

Accordingly, this part may be divided into two Chapters:

I. Legal and Historical Background

II. Applicability of the Modern International Standards of Human Rights within the Domestic Legal Systems, with special reference to Jordan.

CHAPTER I.

LEGAL AND HISTORICAL BACKGROUND.

The idea of human rights is as old as mankind itself. That is to say, since the existence of the first human couple on the face of this earth, the idea of having certain rights and the need to protect them from violation has also existed. Methods of protection and implementation of these rights have varied considerably throughout history.(1) However, the idea of regulating and protecting the rights and freedoms of the individual by the law can be traced back to antiquity and to the semitic religions. From among the ancient nations, the Babylonians and their famous code known as "The Code of Hammurabi",(2) which dates back to the 23rd century B.C., is one example.(3) The Code was discovered in north Iraq earlier this century, and has been studied and translated into many languages.(4) It has been described as a codification of the customs and human relations of that time.(5) It recognized the right to private property and protected it against violation.(6) It also protected the right to life, to the extent that, any one who accuses another of a crime punishable by death, he himself would be executed if he could not prove his allegation, and any witness in such a crime, would be executed if his testimony proved to be false .(7)

Although the actual text was not discovered until the 20th century, according to some legal historians, its principles and the Babylonian customs were transferred to more recent traditions, through the medium of successive civilizations.(8)

Roman civilization and Roman law also recognized the notion of rights and freedoms. One of the most famous Roman laws was the law of the Twelve Tables (*Lex duodecim tabularum*), which recognized equality before the law of both the rich and the poor, and the right to private property as well as family rights. The Roman Civil Law (*Jus Civile*), was influenced by the *Jus Gentium* which recognized equal rights for the citizens of the empire in all classes.[9] In the 6th century all Roman laws were codified in six codes known as the *Corpus Juris Civilis* whose influence was reflected greatly in later European laws.[10]

Ancient Greece also played a great role in legal history in general and in the history of human rights in particular.[11] It was there that the idea of natural law and natural rights was born.[12] The rational school called for a rational explanation of nature and the natural surroundings of human beings in order to derive some necessary rules from them. This is what later became known as 'naturalism', which argued that reason is not separated from nature, it is nature itself. To explain this, they said: "God is nature and reason is God", which regulates everything. Therefore, there should be a law consistent with the nature of the universe and derived from it, which can define the nature of all creatures and the relations between them. This was the idea of the unwritten natural law which found its sources in nature and which was supreme to all manmade laws.[13] Therefore, the positive law must be made consistent with the natural laws and all rulers should respect the natural rights of man which are derived from the natural law, not from their positive laws. The individual thusmay not adhere to the positive law if it is incompatible with his natural rights.[14] This was the very beginning of

the idea of the natural law and natural rights, which has had a considerable place in political and philosophical writings, and which has attracted lawyers and revolutionaries throughout the ages.

Holy scriptures and the teachings of the prophets have contributed greatly towards the promotion and the protection of the dignity and freedom of mankind. The oldest of the three semitic religions is Judaism, where most of the religious teachings are contained in the Talmud.(15) It contains a substantial body of rules relating to human relations and human rights.(16)

Christianity enriched the theory of human rights and political philosophy in Europe with fundamental ideas, which had a great influence on the declarations of human rights centuries later.(17) It confirms the dignity of man and the limited powers of the rulers because only God has unlimited power.(18) It preaches the spirit of love and brotherhood amongst mankind. In the Gospels it says: "Glory be to God on high and peace among men on earth".(19) Also "You shall love ... your neighbour as yourself".(20)

Islam developed in the Arab peninsula, when there was no law except for some inhuman traditions and customs. It regulates the whole life of the individualby practical rules concerning his everyday life, dogma and worship. In the Qur'an it says:

> "....you were enemies and he united your hearts in love, so that by his grace you became brothers...and let there be amongst you a body of men who invite to all that is good and enjoy equity and forbid evil..."(21)

According to many Islamic scholars,(22) the theory of human rights in Islam is based on the following principles:

1- Democratic political system, based on *Shura* and political participation by all members of the Muslim society.

2- Equality before the law.

3- Respect for the right to private property, freedom of worship, freedom of thought, opinion and expression.

4- Recognition of the right to work and education, as rights and duties at the same time.[23]

Islamic law has flourished in the Arab and Islamic world for about fourteen centuries and it is still almost the sole law in Saudi Arabia and remains one of the most important sources of legislation in other Arab and Islamic countries. This is probably what is meant by P. Sieghart, when he says: "It is difficult to understand the secular law of Muslim countries without understanding the history of Islam".[24] This remains true, although there have been considerable changes in the laws and practices of many Muslim countries due to the influence of Western legal traditions. Jordan, for instance, still applies Islamic law as the law of personal status,[25] and with some modification as the new Civil Code,[26] whereas in the field of constitutional and administrative law, it seems to have adopted more from the English and French legal systems.[27]

As far as contemporary human rights are concerned, there is strong evidence that Islamic law has recognized and provided for most of them since the very beginning.[28] As an example, we may refer to the first Article of the French Declaration which, as will be explained,[29] could be regarded as the 'legal father' of most of the present human rights, whether those included in national constitutions or those declared by international instruments. This Article reads as follows:

"Men are born and remain free and equal in rights, social distinction may be based only upon general usefulness." This Article seems to re-

semble a literal translation of the rule declared by the second Muslim Caliph, *Umar bin Al-Khatab*, when he said: "when did you enslave the people, though they were born free of their mothers?"

This was in the year 641, when the son of the Muslim Governor of Egypt had whipped an Egyptian Copt, who subsequently went to *Medina* and complained to the Caliph. The latter immediately summoned the Governor and his son to his court. When they appeared before him and the son admitted his deed, the Caliph handed a whip to the Egyptian and asked him to whip the son of the Governor in his presence. When the Egyptian had done what *Umar* said, the Caliph turned to the Governor and pronounced the above doctrine,(30) As a matter of fact, this rule was not invented by *Umar*, but it was based upon earlier precedents and on the practice of the Prophet himself.(31) It was an authoritative interpretation of many Qur'anic verses and sayings of the Prophet, all of which strictly confirmed equality and freedom for all mankind without discrimination on any ground. To quote the Qur'an; "Oh mankind, we have created you from a male and a female." In other words, all human beings are brothers and they are all the descendants of one father and one mother.

"...and we set you up as nations and tribes so that you may be able to recognize each other...Indeed, the noblest among you before God are the most heedful of you".(32) This verse was explained by the Prophet in one of his sayings: "no Arab has any superiority over a non-Arab, nor does a non-Arab have any over an Arab, nor a black man have any superiority over a white man, no white man has any superiority over a black man."(33)

According to Islam, God has given man the right to equality as a birth right, and therefore, no man may face discrimination on the

grounds of the colour of his skin, his place of birth, his race or the nation in which he was born.

These precepts were conveyed to modern documents of human rights through European thought and philosophy. The latter had demonstrated its great interest in Islamic law and history through many academic missions to Islamic universities and by the studies and researches of orientalists, not to mention direct contact with Islamic culture in Spain, or during wars and crusades against Muslims.

If we stay with the same example (Article 1, of the French Declaration), it is evident that it has been circulated through many national constitutions and eventually adopted as Article 1, of the UDHR, in 1948 and again as Article 8, of the Political Covenant in 1966.(34)

During the Middle Ages and the 17th and the 18th centuries the idea of the natural law and natural rights which dates back to antiquity was revitalized and elaborated by many western philosophers.(35) Theories such as those of the social contract,(36) and the writings of Rousseau(37) and Montsquieu in his book '*Esprit des Lois*' published in 1748,(38) helped to prepare the ground for a new era in the effort to promote and protect human rights.(39) In the same period, several important documents relating to human rights were declared in Europe(40) and the United States of America.(41) The most important of these documents was the French Declaration of the Rights of Man and Citizen of 1789.(42) It was so because, it was the first and probably the most important step towards the internationalization of the rights and freedoms of the individual. Contrary to the other declarations of that era which were concerned only with the rights of the citizens of the particular countries, the French Declaration was

designed as an international instrument. Before 1789, rights and freedoms were not recognized as belonging to the individual in his capacity as a human being, but rather as being a member of a given class, society or religion, and therefore, the legal system of the rights and freedoms used to vary considerably according to the tribe, class, society or religion to which the individual belonged. The international character of the declaration is manifested by its title, preamble and the wording of its various articles. It is evident from the title (The Rights of Man and Citizen), that the drafters meant to provide a list of such fundamental rights and freedoms which ought to be recognized as the rights of the individual in his capacity as a human being, regardless of any other consideration, and of those of the citizen in his capacity as a citizen of the state, any state, whereever it be.[43]

The Declaration was largely successful in achieving its objectives. Its principles have been widely accepted and implemented by national constitutions worldwide.[44] The constitutions of the 19th and the 20th centuries in Europe, the United States and Latin America were fast to adopt its principles and style.[45] Between the two world wars, the Declaration found yet a new opportunity to spread throughout the constitutions of the newly independent states in Europe, Africa and Asia, which all followed the model of the French Declaration.[46]

In the Arab world, almost all Arab[47] constitutions echoed the French style with or without direct reference to the Declaration itself.[48] Some of the Arab states in Africa referred directly to the French Declaration, when they drafted their constitutions after independence. The Constitution of Mauritania of 1961, in its preamble says: "Confiding in the all-powerful God, the Mauritanian people

proclaim their attachment to the Muslim religion and to the principles of democracy as defined in the declaration of the rights of man of 1789".

In Morocco, after independence and the return of King Mohammed V. some temporary ordinances concerning human rights were promulgated, until the first Constitution was proclaimed in 1962. The Constitution of 1970, which altered the latter, was also altered by the present Constitution in 1972.(49) It refers to human rights in rather general terms, but nonetheless contains most of the classical rights of man of 1789.(50) A similar approach was taken by Tunisia.(51)

The other Arab countries inherited the doctrines of the French Declaration from the Ottoman laws and constitutions and the Constitution of Turkey of 1928. The Arab world had formed a part of the Ottoman Empire until the First World War.(52) In the 19th century and under the pressure of national movements, the central government published some documents concerning human rights until eventually the ordinance of *'Kolkhaha'* was proclaimed in 1839. The second document on human rights was the ordinance of 1856 (*Al Khat Alhamoioni*) which upheld the same principles of 1789, especially with regard to personal liberty, the right to private property, equality before the law, no punishment without due process of law and the freedom of worship. The first Constitution was proclaimed in 1876, and was abolished after the Turkish revolution and replaced by the Constitution of 1908, which re-established the same rights and freedoms, which remained in force until the downfall of the Empire and the establishment of the Turkish Republic. The Republican Constitution was proclaimed in 1928. It used similar terminology, vividly reminiscent of the Declaration of 1789. "Every Turk is born free and lives free... the limits for everyone's

freedom, which is a natural right, are the limits of the freedom of others".[53]

In 1923, the Monarchical Constitution of Egypt was proclaimed. This showed affinity with the Turkish Constitution and incorporated almost all of the principles of 1789. However, the scope and the range of those rights varied in accordance with the changes in the political system and ideology. The present Constitution was proclaimed in 1971. It provides for the traditional rights and freedoms in a very detailed manner.[54] It seems that the Egyptian legislature has deliberately married the socialist conception of human rights, with the classical principles of 1789 [55] and the principles of Islamic jurisprudence.[56] Article 29, for instance, stipulates that, "Property is subject to the control of the people and protected by the state, there shall be three categories of property; public property, co-operative property and private property." In Article 11, it provides that; "The state shall ensure to women... her equality with men in the political, social, cultural and economic domains, without prejudice to the principles of Islamic law."[57]

As a part of the Ottoman Empire, Jordan had experienced the principles of the French Declaration through the Ottoman constitutions of 1876 and 1908. When the Emirate of Trans-Jordan was established after the first World War, the first Constitution was proclaimed in 1928. In the second chapter it provided for the 'rights of the people', which were almost identical to those in the Egyptian and Turkish constitutions, and which echoed those of the French Declaration of 1789.[58] After independence, the Hashemite Kingdom of Jordan was established, and the Monarchical Constitution was introduced in 1946. It contained a new chapter on the 'rights of the people', but made

only limited modifications to the Constitution of 1928. Following the war of 1948, a part of Palestine (The West-Bank) joined Jordan, and the present Constitution was promulgated in 1952. In the second chapter, it refers to the rights and duties of the Jordanians in general and sometimes in rather vague terms. It has however, re-introduced the same traditional rights from the former constitutions, with some enlargements in the scope of those rights and the role of the state in their enforcement. Nevertheless, as will be explained in the coming chapters, its provisions still need further development and amendments, in order to match the modern standards of human rights.

In spite of the various and frequent amendments to the Constitution, chapter two remained undeveloped, even after the ratification of the Covenants by Jordan in 1975. Whether this means that the Jordanian Constitution is a perfect match to the Covenants or mere carelessness on the part of the Jordanian Legislature, no definite answer can be given at this stage.

At the international level, the impact of the French Declaration on the modern international standards of human rights, is by no means less evident than its impact on the national constitutions and domestic legal systems. Indeed, the former was channelled through the latter. That is to say, by the time the U.N. Commission on Human Rights had started its work on the UDHR,[59] the principles of the French Declaration were already recognized and adopted by almost all major legal systems. In other words, they have become general principles of law, within the meaning of para(3) of Article 38, of the statute of the International Court of Justice. In the words of H. Lauterpacht, "they were general principles of constitutional law of civilized states."[60] This seems to have facilitated the task of the

Commission, who gathered those recognized principles and included them in the UDHR. Comparison between the provisions of the UDHR and the sections on human rights in any of the major western constitutions of the forties, would show that their differences are negligible. Comparison between the French Declaration and the UDHR also shows that their substance is almost identical. It is quite clear that the latter has borrowed the style and most of the contents of the former. Article 1, for example is identical to Article 1 of the French Declaration. It says: "All human beings are born free and equal in dignity and rights...".[61] Article 4, provides for the prohibition of slavery and the banning of all forms of the slave trade, in order to preserve the dignity and freedom of man. Most of the remaining Articles of the UDHR deal with the same traditional doctrines of the French Declaration.

As the UDHR was intended to be an introduction to an internationally binding agreement, the work of the Commission had to proceed towards drafting an international convention on human rights.[62] The latter was meant to be signed and ratified by all member states and to provide for the minimum international standards of human rights, which all parties undertake to implement by every appropriate means, including legislative measures.[63]

However, after frequent meetings and lengthy discussions, the commission decided to draft two covenants on human rights; the Political Covenant and the Economic Covenant.[64] The Covenants seem to embody an enlarged codification of the fundamental rights and freedoms, which had already been declared by the UDHR. That is to say, with further details and expansion, almost all the rights referred to in the UDHR are included in the Covenants.

It is in this very way that the French Declaration and the national constitutions and domestic laws in general have influenced the Covenants or the modern international standards of human rights. Such influence is quite evident in the case of the Political Covenant. The wording of paragraphs (1) and (2) of Article 8, for instance, bears great affinity to Article 1, of the UDHR and Article 1 and 4 of the French Declaration. The remainder of its provisions also deals with the same traditional rights and freedoms. Amongst these, one may mention the right to personal freedom, equality before the law, freedom of thought, opinion and conscience, freedom of expression, freedom of religion and freedom of movement ... etc.

These rights and freedoms have been adopted and developed to constitute minimum international standards of human rights, applicable all over the world and as such they have begun to influence the national constitutions and domestic legal systems of all states parties. Since 1976, the latter have been under legal obligation to take legislative measures and to adjust their national constitutions and domestic laws in conformity with the modern international standards of human rights.(66) In other words, they have pledged themselves to bring their legal systems and practices into line with the provisions of the Covenants.

However, by doing so, states parties are not pledging themselves to implement an entirely alien legal system. That is true, because as mentioned above, those provisions were essentially derived from the various domestic legal systems themselves. They have been processed at the international level and presented as a uniform catalogue of rights in accordance with which all states parties are required to adjust their domestic legal systems.

CHAPTER I. NOTES.

(1) see A.M. Wandieen, Legal Protection of Public Liberties, a Comparative Study, (unpublished dissertation at the Faculty of Law, Ain Shams University), Cairo, 1978, p.8.

(2) *Hammurabi*, was the King of the Kingdom of Babylon, 2285-2242 B.C.

(3) It was discovered by a French expedition earlier this century. It is written on a huge stone, found amongst the remains of the Babylonian Civilization in the city of '*Susa*', north Iraq.

(4) For an English translation and commentary see: Driver and Miles, The Babylonian Law, vol. 1 & 2, Oxford, 1952; For Arabic translation and commentary see: Amir Sulaiman, The Laws of Ancient Iraq, Baghdad, 1977.

(5) Driver and Miles, op.cit., vol.I, p.57.

(6) Arts. 1-5, 6-8.

(7) Driver and Miles, op.cit., vol.I, p.53.

(8) S. Mahmassani, Basic Concepts of Human Rights, Beirut, 1977, p.9; hereinafter referred to as S. Mahmassani.

(9) S. Mahmassani, op.cit., pp.22-24.
Barry Nicholas, An Introduction to Roman Law, Oxford, 1961, p.3.

(10) Barry Nicholas, op.cit., p.2.

(11) On the legal history of ancient Greece see in general:
E.M. Wood AND N. Wood, Class Ideology and Ancient Political Theory, Oxford, 1978, hereinafter referred to as Wood & Wood.
F. Attar, Constitutional Law and Political Systems, Cairo, 1978, p.18.
C.H. McIlwain, The Growth of Political Thought in the West. From the Greeks to the end of the Middle Ages. New York, 1968, pp.1-22

(12) As Lauterpacht put it, "while the ideas of the law of nature date back to antiquity, the notion and the doctrine of natural inalienable rights of man pre-existent to and higher than the positive law of the state seem to be of more recent usage." International Law and Human Rights, London, 1950, pp. 80-81. See also G. Ezejiofor, Protection of Human Rights under the Law, London, 1964, p. 3.

(13) Wood & Wood, op. cit., p.87.
(14) F. Attar. op. cit., p.24.

(15) K. Abraham, " Human relations and Human Rights in Judaism", in The Philosophy of Human Rights, International perspectives ed.

Alan S.Rosenbaum, Connecticut, 1980, pp. 53; See also Lord Acton, Essay on Freedom and Power, Boston, 1948, p.33.

(16) See the Holy Bible, R.S.V. Genesis Chapter 17, Verses 1-10, 19-21 London, 1952.

(17) The effect of those ideas on the declarations of rights was clear, see in particular 'The Bill of Rights'; the Declaration of Independence (U.S.A.) and the French Declaration of 1789. On it's effect on the political thinking in Europe, see: A. A'adial: A Series of Lectures on Human Rights, delivered at the University of Mohammed V., Rabat, 1977, 'unpublished'.

(18) R.J. Henle, "A Catholic View of Human Rights, 'A Thomistic Reflection"', in The Philosophy of Human Rights, ed. by A.S. Rosenbaum, op.cit., pp.85-93.

(19) The Holy Bible, Luke, chapter 2, verse 14.

(20) The Holy Bible, op. cit., chapter 10, verse 27.

(21) The Holy Qur'an, 3/164-5

(22) See for instance:
A. Mawdudi, Human Rights in Islam, 2nd ed., London, 1980, pp.17-34; hereinafter referred to as Mawdudi.
A. Hassan, Public Liberties in Islam, Ain Shams University, Cairo, 1976, pp.130-142.
M. Shaltoot, Islamic Faith and Law, Beirut, undated, p.300.
I. Al-An'ani, Humanitarian International Law, a series of lectures delivered at Ain Shams University, Cairo, 1979, pp.20-39.
S. Parveen, Status of Women in the Muslim World, London, 1975, p.15-18.

(23) Mawdudi, op.cit., pp.21-25

(24) P. Sieghart, The International Law of Human Rights, Oxford, 1983, p.9, hereinafter referred to as: P.Sieghart

(25) For Muslims only.

(26) The Civil Code, Law No. 43 of 1976.

(27) See below Chapters V. and IV.

(28) Although in cases such as equality between man and woman, the Islamic approach is different.

(29) See below p.17.

(30) This case is very famous and well documented in Islamic history. See in particular:
Mawdudi, op. cit., p.33,
A.A. Al-Hakeemi, The Mission of the free Men, Suna'a, 1981, p.77.

(31) It has been reported that a woman, who belonged to a high and noble family, was arrested in connection with a theft. The case was brought before the Prophet, and it was recommended that she be spared punishment. The Prophet replied:"The nations that lived here before you were destroyed by God, because they punished the common man and let their dignitaries go unpunished for their crimes. I swear by God, even if *Fatima* (The daughter of Mohammad), had committed this crime, I would have amputated her hand." Mawdudi; op.cit., p.33

(32) Chapter 49/ 13.

(33) As translated from Arabic by: Mawdudi; op.cit., p.22.

(34) Compare the legal texts.

(35) G. Ezejiofor explained this as follows:"...during the middle ages, there was even greater stress laid by political philosophers, especially St. Thomas Aquinas, on the concept of natural law as a law higher than positive laws and one which all rulers must obey."
On the revitalization of, and the stress laid upon the concept of natural law in the 17th centuries, he added:"After a temporary set-back, resulting from the popularity of of the teaching of *Machiavelli*, and the absolutism of the nascent national state in the 16th century, the idea of natural rights was revitalized by two factors: First, the reformation and the resulting religious struggles brought about a widespread outcry for the natural rights of freedom of conscience and religious belief. The second factor was the doctrine of social contract, which was closely associated with the theory of natural law, since the raw materials used for the formulation of the former, were the common places of the later." op. cit., p. 4. See also: Lauterpacht; op.cit., p.84

(36) Thomas Hobbes, Leviathan, ed. by C.B. Macpherson, London, 1968, part 2, chapters, 15, 17, 21, 22, 25, 26; hereinafter referred to as Hobbes. See also J. Locke, Tow Treaties on Civil Government, Rev. ed. by Peter Laslet, London, 1965.

(37) J. Rousseau, *Du Contract Social aux principes du Droit Politique*. ed. by Vaughan, Manchester, 1918.

(38) Montesquieu, *ESprit de Lois*, (ed.) David Wallace Carrithers, Berkely, Los Angeles, London, 1977.

(39) Hobbes had shocked his generation by his view that man was under no moral obligation in the state of nature. See:
J.W. Gough, John Locke's Political Philosophy, Oxford, 2nd ed., 1973, p.3
J. Swarup, Human Rights and Fundamental Freedom. Bombay, 1975, pp.6-7; hereinafter referred to as J. Swarup.
M. Khalil, Political Systems, and the Constitution of Lebanon. Beirut, 1967, vol. 2, pp.63-65; hereinafter referred to as Khalil.

I.N. Stevens, Constitutional and Administrative Law. Plymouth, 1982, p.7.

(40) When King John (1199-1216), claimed more rights than the law allowed him, and broke the feudal contract, the barons rose in arms against him and compelled him to yield to their demands. On 13th June 1215, the demands were contained in the document known as the 'Magna Carta'. See:
R.P.C. Claude, Comparative Human Rights, Baltimore and London, 1976, p.8;
I.D, Duchacek, Right and Liberties in the World today, Constitutional Promise and Reality. Santa Barbara, Oxford, 1973, p.18;
M. Hassan, Message of Freedom from the Magna Carta to the Lahore Pledge, London, 1963, pp. 15-24;
W.C. Costin and J. Steven Watson 'The Law and Working of the Constitution; Documents (1660-1914. Vol. I (1660-1783), London, 1952.

(41) The Declaration of Independence, See: Constitutions of the Countries of the World. ed. by A.P. Blaustein and G.H. Flanz, New York, 1973, Vol. XVII, pp. 3-4, hereinafter referred to as the Constitutions of the countries of the world. Among the other declarations was; 'Virginia Declaration of Rights, 12th June 1776'.
F.E. Dowrick, Human Rights (Problems, Perspectives and Texts). Durham, 1979, p.155.
Also see: The Declarations of Pensylvania, Maryland, Delaware, New Jersey, North and South Carolina of 1776.
H. Lauterpacht, op.cit., p.88.

(42) The French National Assembly proclaimed this famous Declaration on 27th of August 1789, after the French Revolution of June 1789; hereinafter referred to as the French Declaration.

(43) "... as Dupont de Nemours put it, it was in the minds of its authors 'The fundamental law of the laws of our own and of other nations, which ought to last as long as time itself'." As quoted by Lauterpacht; op.cit., p.91.

(44) See: Paul O'Higgins, Cases and Materials on Civil Liberties. London, 1980, pp.470-471.

(45) P. Sieghart, op.cit., p.9. Lauterpacht; op.cit., p.90.

(46) Sieghart, Ibid; see also:
A.J. Peaslee, The Constitutions of Nations, 4th ed., revised by Dorathe Peaslee, The Hague, 1974 , Vol.I 'Africa'.
On the Constitutions of the communist countries see:
J.F. Triska, The Constitutions of The Communist Party States Stanford, 1968.
Ho Chich-Cheng, The Fourth Constitution of Communist China. (World Anti-Communist League, China); May 1983, pp.26-33.

(47) On the legal systems of the Arab World countries and its developments see in general:

S. Mahmassani; The Legislative System of the Arab States. 3rd ed. Beirut, 1965; hereinafter referred to as Mahmassani, The Legislative Systems.

(48) Except Saudi Arabia, where the Holy Qur'an is implemented as the National Constitution.

(49) A'adial, op.cit., lecture No.9.

(50) See: the Preamble and Arts.(1-18).

(51) The Constitution of Tunisia of 1971.

(52) Except Morocco, which was ruled by the *Alaween* as an independent State.

(53) On the development of the legal systems of the Arab countries see Mahmassani, The Legislative Systems. op.cit.

(54) Arts.7-72.

(55) Arts.23-39.

(56) Arts.2 and 11.

(57) 'The Constitutions of the Countries of the World', op.cit., Vol.IV, Egypt.

(58) The Constitution of 1928, Chapter II, (The Rights of the People), Arts.4-15.

(59) The Commission was established by the ECOSOC in 1946, and instructed to submit recommendations and reports regarding the suggested 'Bill of Rights'. See Resolutions No. 5 (I) of February 1946 and No.9(11) of June 1946.

(60) op.cit., p.89

(61) For the full text of the UDHR, See I. Brownlie, Basic Documents on Human Rights 2nd ed. 1981, pp.21-28; hereinafter referred to as Brownlie, Basic Documents.

(62) See: The General Assembly's Resolution, 543(VI), 1952, U.N. Doc.A/2119 (1952).

(63) Ibid.

(64) See: The General Assembly's Resolution, 2200A (XXI), 1966, U.N. Doc.A/6316 (1966)

(65) Art.2.

APPLICABILITY OF THE MODERN INTERNATIONAL STANDARDS OF HUMAN RIGHTS IN THE DOMESTIC LEGAL SYSTEMS WITH SPECIAL REFERENCE TO JORDAN.

The aim of this chapter is to examine the applicability of the modern international standards of human rights in the domestic legal system and to define their legal status in the law of Jordan. Since the modern international standards of human rights are part of international law, we shall be discussing the relationship between international law and municipal law in general and then we shall attempt to analyze the laws and the practice of Jordan in this regard.

Accordingly, the subject may be divided into two sections as follows:

1- The relationship between international law and municipal law.

2- The applicability of the Human Rights covenants in the law of Jordan.

1- THE RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW.

This is a topic which has always been a fertile field for theoretical controversy dividing the Jurists into two major schools of thought; 'Monism and Dualism'. It is not our intention however, to discuss these theories in depth; a task which is constantly performed by many writers in text books.(1) Alternatively, thus, only the main underlying ideas of these theories will be exposed here, followed by a short assessment of the international practice in this area.

According to the Dualism theory, international law and municipal law are two entirely different legal systems, each being superior in its own sphere; there should, therefore, be no conflict between

them.[2] The dualists emphasize that the two systems are different in more than one sense: they are different as regards their sources, the relations they regulate, and their substance.[3] They support these arguments by pointing out the differences between international law and municipal law; while the former is considered a body of rules based on the common will of the states, functioning solely between them, the latter is the will of the state operating upon individuals within its jurisdiction.[4] Thus, "....when the sovereign by an act of municipal law violates his international obligations, his act is not void, it merely means that he has violated international law...".[5]

The monistic theory, among whose recent exponents are the writers of the 'Vienna School', such as Kelsen, Verdross and George Scelle, regards all laws as a single unity composed of rules which are binding on the states and individuals. As the science of law is a homogeneous field of knowledge, the decisive point then is whether or not international law is a true law. If it is so, the two systems are part of a universal body of legal rules binding all human beings.[6] Nonetheless, the monists are divided amongst themselves over the question of primacy. The conclusion that there is a unity between international law and municipal law raised the question of which one is superior to the other: opinions on this diverge significantly. While some of them have held that the supremacy belongs to the municipal law, the majority argued that such a conclusion would lead to the denial of international law as law, and decided that in the unified legal order, international law must be the superior part.[7]

However, both theories have been criticised by many writers as being inconsistent with international practice. In the words of Prof. O'Connell

> "While the monist incorrectly deduced from the unity of all law the inherent jurisdictional superiority of international law in municipal courts, the dualist, equally incorrectly, deduced from a *priori* dichotomy of international and municipal law the conclusion that the rules of international law, if they form part of municipal law at all, do so on the latter's initiative".(8)

Therefore, in order to side-step the contradiction, between strict monism and dualism, various views have been expressed by international lawyers concerning theories on transformation, adoption and harmonisation.(9)

According to O'Connell,

> "The theory of harmonisation assumes that international law, as a rule of human behaviour, forms part of municipal law and hence is available to municipal judge: but in the rare instance of conflict between the two systems this theory acknowledges that he is obliged by his jurisdictional rules. If there is any merit in speaking of the relationship of the two systems in geometric terms, the correct position must merely be that one system is no more elevated than the other, but that both are on the same plane."(10)

However, it is quite evident that state practice does not correspond exclusively to any of the above theories . Every state draws up its attitude in accordance with its own constitutional system and the relations between its constitutional institutions. In practice a clear distinction has been made between customary rules of international law and treaty law. As far as customary international law is concerned, it is generally recognised as part of the law of the land in almost all countries, without any specific act of incorporation, providing that it is not in conflict with a domestic rule of law.(11) The above principle has either been established by explicit constitutional pro-

visions, or indirectly by judicial application. Among those constitutions are the Constitution of the Federal Republic of Germany.(12) The Federal Constitution of Austria stipulates that, "the generally recognised rules of international law are valid parts of the federal law".(13) Similar provision is provided for in Article 10 of the Italian Constitution "Italy's legal system conforms with the generally recognised principles of international law". In many other countries customary international law is recognised as part of the domestic law by judicial application, as in The Netherlands, Switzerland, France, Syria, Egypt, The United States, Great Britain etc.(14) In British practice, for instance, it has been recognised as part of the law of the land and enforced as such by British municipal courts; providing that such rules are not inconsistent with a British statute, whether the statute be earlier or later in date than the particular customary rule concerned.(15)

Although there is no direct reference to customary international law in the Constitution of Jordan,(153) the Jordanian legislature has always complied with the customary rules of international law, especially with regard to diplomatic and consular immunities, even before the entry into force of the Vienna Conventions for Jordan.(16) Article 11 of the Penal Code of 1960, for instance, exempted diplomatic agents and foreign consuls from the jurisdiction of municipal courts in accordance with the customary rules of international law.(17) Jordanian courts also applied customary international law as part of the law of the land, though sometimes they interpreted it in a rather narrow sense. In a case regarding the French Consulate in Jerusalem, 1958, the Supreme Court stated that: "Foreign consuls enjoy immunity against municipal jurisdiction with

regard to their official actions only, which do not include contractual relations such as the renting of properties". In this case the court interpreted the term 'official actions' in a restricted manner and denied immunity from judicial proceedings, although the matter would usually be regarded as an 'official action'. The dispute resulted from a rent contract signed by the Consul on behalf of his government and approved by the French Foreign Ministry, for a building used to house the offices of the French Consulate in Jerusalem.(18) However, in a more recent case, The Algerian Embassy Case, the same court, this time applying the Vienna Convention, declared the case inadmissible on the grounds of diplomatic immunity.(19)

Practice of States with Regard to Treaties:

The operation of international treaties within the domestic legal system is a highly controversial issue which touches the core of the constitutional system of every state. Therefore, constitutions usually contain special provision(s) concerning treaty-making powers, their relation with the municipal laws and their application by domestic courts. In other words, the practice of states in this field differs from one state to another according to their respective constitutions and the nature of the relationship between constitutional institutions. Nonetheless, a close inspection shows some common elements in this practice, from which the following general principles might be deduced:

1) Conclusion of and accession to treaties (Treaty-making Power) is always an executive province.(20)

Governments initiate the negotiations and draw-up, authenticate and sign treaties. In the American Constitution, for instance, Art-

icle, II. provides that: "He (the President) has power.....to make treaties".

According to Article 26; of the Norwegian Constitution, "The King shall have the right to...conclude and denounce treaties...". The French Constitution also provides for similar provision; "The President of the Republic shall negotiate and ratify treaties".(21) The Constitution of Jordan has also reserved the treaty-making power to the King, the revised Article 33(1) provides that "The king shall... conclude treaties and international agreements".(22)

In countries where there is no written Constitution a similar approach has been adopted by practice for a long time. In the United Kingdom, for example, treaty-making power is an executive province .(23) As Lord Atkin has put it: "Within the British Empire, there is a well-established rule that the making of a treaty is an executive act..."(24)

2) A distinction has been made between two types of international treaties: treaties of special importance which always require the approval of the legislature on the one hand, and those which may become operative upon signature or ratification by the Executive without the interference of the legislature on the other. The French Constitution provides that:

> "peace treaties, commercial treaties, treaties or agreements relative to international organisations....shall go into effect only after having been ratified or approved".(25)

In the Constitution of Kuwait, "...treaties of peace and alliance, treaties concerning the territory of the state... public or private

rights of citizens,... shall come into force only when made by law".(26)

According to the Italian Constitution all treaties of political nature, or which provide for arbitration or imply modification to the nation's territory or financial burdens or laws must be approved by the chambers.(27)

In the United States, the distinction has been made between treaties which need the approval of two-thirds majority of the Senate and so-called "executive agreements", that are made by the President on his own authority.(28)

3) The third element of international practice in this field is that after a treaty is concluded by the competent body (the executive) and upon completion of all required constitutional procedures,(29) it becomes binding on the states, at the international level and in many countries at the domestic level as well. This causes the problem of defining the status of treaties in the domestic legal system; and their position in the domestic legal hierarchy. A review of the relevant provisions of various constitutions shows that; in some instances, constitutions have recognised a superior place to treaty-law on the domestic plane.(30) For some of the constitutional systems treaty-rules cannot, in any circumstances, change or modify the domestic laws, unless they are made law by parliament.(31) According to many other constitutions, treaties that have been duly concluded and assented to by the competent bodies have an equal standing with the domestic laws, in terms of their applicability.(32) Constitutions like those of Jordan and Italy, prescribed the legal requirements for the conclusion of international treaties without defining their status

viz-a-viz the municipal laws, leaving the matter to the courts to decide.[33]

Assessment:

From the above discussion of the juristic theories and the practice of states in regard to the relation between international law and municipal law, it is quite clear that the practice varies considerably and as mentioned earlier does not exclusively correspond to any of those theories. On the contrary, such a theoretical controversy has obscured the facts of this relationship and led to misinterpretation of the attitudes of many constitutions in order to give support to one theory or another.

Practical attitudes of states on this point are always based on their domestic constitutional structure, rather than the jurists' arguments. Therefore, if the establishment of general theories on such an issue is indispensable, they must be deduced from the real practice of the states, and not the other way round. However it seems that the issue of the relationship between international law and municipal law arises only with regard to the customary rules of international law. Since this problem has been resolved in almost all countries by recognising the former as part of the latter as mentioned above,[34] such juristic theories would lose much of their significance. When it comes to international treaties and their relation with the domestic law of any given state, there are only two possibilities. Either the state concerned is not party to the treaty, and there is no connection at all between the treaty and the domestic law of that state (exactly the same as the relationship between the Jordanian law and the European Convention on Human Rights); or the assumption is that the

given state is a party to the treaty, who has duly concluded and ratified it as prescribed by the law. In most cases the treaty becomes part of the law of the state concerned, whether directly or through a special subsequent legislative act. Thus, a conflict between the provisions of the treaty and the municipal laws is a conflict within the domestic law and not between international law and municipal law, because the treaty has become part of the municipal law. If, for any reason, the treaty is not considered part of the domestic law of the state, the treaty remains outside the circle of the domestic law and therefore inapplicable before the domestic courts. In this case the treaty can not compete with the domestic law , because the treaty can not be invoked before the domestic courts in the first place. That is so although in some cases the court may interpret the domestic law in the light of the international commitments of the state, but this is a principle of interpretation and would only apply in cases of ambiguity or un certainty in the domestic law. The mere fact that the treaty is part of international law does not make it enforceable by the domestic courts. Indeed, there are special requirements and conditions in every country and if such conditions and requirements were not fulfilled the treaty would remain inapplicable at the domestic level although the state concerned is a party to the treaty. In Jordan for instance, a treaty that has been signed and duly approved by the National Assembly and assented to by the King, but has not been published in the JOG is not enforceable by the Jordanian courts, although it might be binding on the Jordanian Government at the international level.

Accordingly, as far as international practice is concerned, the theoretical debates concerning the relationship between international law and municipal law are of limited importance. As has already been

observed, in practice every state decides the relationship between its law and international law in accordance with its own constitutional system regardless of what the jurists' theories may suggest in this regard. Furthermore, international practice has shown that it is not accurate to speak of a relationship between international law in general on the one hand and municipal law on the other.[34] States have distinguished between customary rules and treaty rules of international law and made each of them subject to a different system in terms of its relationship with the domestic law as explained above.[35] A state may accept the customary rules of international law as part of its domestic law, applicable by its courts, but it may not always recognize international treaties, as such, to be part of its domestic law or it may make their application by the domestic courts subject to special conditions and requirements.

As far as the human rights Covenants are concerned, none of the above juristic theories can be invoked on its own to determine their status and their applicability within the domestic legal systems of the states parties. However, the Covenants seem to come under the category of international agreements of special importance for which, in many countries approval by the national legislature is required as explained above.[36] Once they have been approved by the national legislature, their applicability and their legal status in the domestic legal system varies from one state to another in accordance with its respective constitutional system.

However, there is no obligation on the states parties as regards the direct incorporation of the Covenants into their domestic legal systems. What is required is a result, i.e. effective implementation of the Covenants. The choice of the appropriate means and techniques

is therefore left to each state party to decide in accordance with its own domestic legal system, as stipulated in Article 2 of both Covenants. If the Covenants are recognized as part of the law of the state party, whether through direct incorporation or otherwise and unless special requirements are specified under the law of the particular state, then application by the domestic courts would normally be subject to the same general principles concerning the application of domestic law.

2. APPLICABILITY OF THE INTERNATIONAL COVENANTS OF HUMAN RIGHTS IN THE LAW OF JORDAN.

Being international agreements, human rights Covenants in the Jordanian system are governed by the rules governing the conclusion and application of international treaties in general. These rules have been in continuous development in accordance with the democratic system and political situation in the country. Article 19 of the Constitution of 1928 (the organic law of Trans-Jordan)(37) provided that, His Highness the Emir concludes treaties, but His Britannic Majesty may if necessary enter on behalf of Trans-Jordan into any commercial treaty or, into any general international agreement when His Majesty is a party on behalf of Great Britain and Northern Ireland.(38)

After the proclamation of independence of the Hashemite Kingdom of Jordan in 1946, the Monarchical Constitution was promulgated, and reserved the power to conclude and ratify treaties to the Executive without the approval of the Parliament. Article 26(b), provides that; "The King declares war and concludes treaties upon the approval of the Council of Ministers."(39) Such an absolute power was criticised and therefore modified by the present Constitution which provides for the approval of the National Assembly to all treaties of special importance. Article (33) of the Constitution of 1952 reads as follows:

> "The King declares war and makes peace and ratifies treaties. However, treaties of peace, alliance, trade, navigation, and any other treaties that imply modification of territory of the state or its sovereign rights or involve financial commitments to the treasury or affect the public or personal rights of Jordanians, shall not be enforceable unless they are approved by the National Assembly. In no circumstances shall any secret conditions contained in any treaty or agreement be contradictory to the openly declared conditions".(40)

The question put forward then was: which types of international agreements are those that must be approved by the National Assembly in order to operate within Jordanian legal system?

Upon the request of the Council of Ministers, The High Council, established under Article 57 of the Constitution,(41) interpreted art.33, and decided that; it is clear that the legislature has divided treaties into two main categories:

First; treaties of peace, alliance, trade and navigation.

Second: treaties that imply modification of the territory of the state or its sovereign rights or contain financial commitments to its treasury, or affect the public or personal rights of Jordanians.

Treaties of the first category are not enforceable unless approved by the National Assembly, no matter what kind of commitments they contain, hence such treaties would by their very nature affect the fundamental sovereign rights of the state over its territory. So far as the second category is concerned, approval of the National Assembly is not required unless they imply some modification of the territory of the state or affect the public or personal rights of Jordanians.

Treaties which do not have such effects are operative upon ratification by the executive without the involvement of the National Assembly.(42)

Until 1958, this resolution was part of the constitutional law of Jordan and was applied by the Jordanian courts as such.(43)

However, in 1958 Article (33) was amended as follows:

> "(i) The King declares war, concludes peace and confirms treaties and agreements.
> (ii) Treaties and agreements which involve financial commitments to the treasury or affect the public or personal rights of Jordanians shall not be enforceable unless they are approved by the National Assembly. In no circumstances shall any secret condition contained

> in any treaty or agreement be contradictory to the openly declared provisions".(44)

In this amendment the phrase 'treaties of peace, alliance, trade, navigation and any other treaties that imply modification of the territory of the State and its sovereign rights' was eliminated. This gave rise to the question of whether these treaties are now within the powers of the King, without the approval of the National Assembly, or still subject to that approval despite such an amendment.

According to the Deputy Prime Minister in his statement in the House of Representatives, the phrase "....treaties which contain modification to the territory of the State or its sovereign rights" was eliminated because these treaties were prohibited under Article 1, of the constitution.(45) Therefore, they would remain unconstitutional even with the approval of the National Assembly.(46) Moreover, treaties of peace, alliance and trade are still subject to the approval of the National Assembly, despite the amendment on the grounds that they are sure to affect the public or personal rights of Jordanians.(47) The revised Article (33) had also added for the first time the term 'agreement' after the term 'treaties': on the difference between the two terms, the High Council stated that:

> "the difference is in practical usage rather than in the legal consequences: the term 'treaty' is usually referred to in more precise meaning, as to the most important political agreements such as those of peace and alliance,...while the term 'agreement' or 'convention' is used in the less important and non-political international agreements".(48)

Many Jordanian writers have criticised this terminology and stated that it would have been much clearer, if the legislature had chosen one of the two terms.(49)

However, it seems that the decisive point is whether or not the matter in question is an international agreement between the Government of Jordan and any other international person(s); if it is so, then it must be sanctioned by the National Assembly within the above criteria, whatever the name or title it bears, treaty, agreement, convention, covenant etc.

Accordingly under Article (33) all important international agreements must be approved by the National Assembly. This is intended to serve as a means of Parliamentary review to the activities of the Executive. A rather interesting constitutional and practical problem was raised as to whether or not the Government (the Council of Ministers) could sanction international agreements by the provisional laws referred to in Article 94 of the Constitution, when the Assembly is not in session.(50) It reads as follows:

> "In cases where the National Assembly is not in session, the Council of Ministers has with assent of the King, the power to issue provisional laws covering matters which require necessary action and which could not be delayed or to approve urgent expenditure which cannot be delayed. Such laws, which should not contravene the provisions of the Constitution, shall have the force of law, providing that they be placed before the National Assembly at the beginning of its next session and the Assembly may sanction such laws or amend them..."

This question has special importance in the present context, since the human rights Covenants were approved by the Council of Ministers in 1975 by a provisional law. According to the majority of Jordanian constitutional lawyers, international agreements cannot be sanctioned by such provisional laws. They justified their views on the ground of the doctrine of separation of powers, as an essential element of the Parliamentary system, which requires the balance between powers through the Parliamentary review of the Executive's activities in

international relations.[51] Alternatively they suggested that the Government must wait until the next session of the National Assembly, and that international agreements should remain unenforceable until a positive resolution is passed by the Assembly.[52]

However, in the administrative practice of the Jordanian Government, the Council of Ministers has constantly issued provisional laws to sanction international agreements whenever the National Assembly is not in session. Therefore, many treaties, including the United Nations Covenants on human rights, have initially been approved by provisional laws, since the entry into force of the present Constitution in 1952.[53] The present writer however holds the view that Article 94, explicitly conferred on the Council of Ministers the power to issue all the necessary provisional laws, with no exception and thus treaties must be included. All that is required for this power to be invoked, is that the National Assembly is not in session. Any suggested limitation in this regard would be unfounded in the light of the explicit provisions of the said Article[54] Thus any international agreement could be approved by the Council of Ministers by a provisional law, provided that it is submitted to the Assembly at the beginning of the next session. The second objection, that the approval is a means of 'check and control' is similarly unfounded, because the right of the Assembly in this respect is always reserved,[55] as the submission of those agreements to the Assembly at the beginning of its next session is a mandatory procedure under the same Article[56]

Thus, the Constitution has distinguished between two kinds of international agreements: those which become operative upon signature and ratification by the Executive on the one hand, and those which

require the approval of the National Assembly on the other.[57] The latter are not enforceable unless they are sanctioned by the Assembly. For their domestic application by the Jordanian courts and administration (as any other legislation) both of them need to be assented to by the King and published in the JOG. Upon the completion of all these Constitutional procedures, both of them become an indivisible part of the Jordanian law, applicable by the courts and binding upon both administration and the individuals.[58]

According to the established view of the Jordanian courts application of international agreements is subject to the same general principles governing the application of domestic legal rules. Principle such as '*Lex posterior derogat priori*' and the hierarchical legal order, *al-tashre'a al-a'ala you-qide al-adna wala ax* (The higher rule abrogates or modifies the lower one and not vice versa); and the rule, *al-khass you-qide al-a'am* or *Lex specialis derogat generali* (special law supersedes the general one) are all applicable.[58a] As treaties usaually regulate particular subjects, they take precedence over the general provisions of a statute or an ordinance in case of conflict. That is to say, when Jordan and other countries conclude an agreement amongst themselves regulating specific matters such as the employment of their citizens within this group, taxation, tourism, transport by land or air, shipment of goods by sea or immigration, the provisions of such an agreement would be regarded as a special legislation regulating the subject concerned, providing of course, that the agreement has received all the required constitutional measures. Should a case involving the subject matter of the agreement, be brought before a Jordanian court, the latter would apply the provisions of the agreement rather than the provision of the general

domestic law governing the issue; this is not because it is an international agreement, but because it is a special law (*Lex specialis*) regulating this specific issue. Let us imagine an immigration agreement between the Arab countries. In a case of an Arab immigrating to Jordan, the domestic courts would apply the provisions of the agreement as a *Lex specialis* instead of the immigration law which is the *Lex generalis* in this case.

In a case before the Supreme Court of Jordan in 1963, involving the Warsaw Convention on Air Transport, an Air Line Company argued that the amount of compensation payable to those killed in a plane-crash was the Islamic *Deah* (blood-money) in accordance with the Islamic Civil Code applicable in Jordan especially since it was a Jordanian Company. The court rejected this argument and decided that the applicable law was the Warsaw Convention (To which Jordan was a party) as a special law regulating the issue of compensation in the case of death or damage resulting from the air-crash, and not the Civil Code which deals with civil compensation in general.(59) In another case in 1966, the same court decided that the provision which should have been applied by the Court of Appeal was the provision of Article 22 of the above mentioned Convention rather than the Labour Code of Jordan for the same reason.(60) Again in 1970, the Supreme Court also ruled that the Brussels Convention on Carriage of Goods by Sea of 1922 was the applicable law in all issues involving shipment of goods by sea and not the Jordanian Civil Code. It was stated that the agreement was duly ratified by the Government of Jordan and therefore that it was applicable in Jordan as a special law regulating special types of legal relations and in this capacity it takes

precedence over the provisions of the Civil Code with regard to the matters regulated by the agreement.(61)

Yet, some Jordanian scholars who are in favour of the theory of monism and the 'supremacy' of international law over the domestic law, have misinterpreted the attitude of the Supreme Court and concluded that, "The Jordanian courts applied the theory of monism and acknowledged supremacy of international treaties over the domestic laws of Jordan".(62) Apparently, what they have failed to notice was that the Supreme Court was applying them as special Jordanian laws, lawfully passed and assented to by His Majesty the King and published in the JOG as required by the Constitution, and not as international agreements.

As a result of this misinterpretation the Jordanian Government reported to the HRC that the Jordanian courts accord international agreements a superior status over the domestic laws. It says (in the report) that:

> "... it should be noted that international agreements which Jordan ratifies or accedes to have the force of law and have precedence over all domestic laws with the exception of the Constitution. This has been repeatedly confirmed by various courts decisions especially the highest court of the land, and in particular judgment No. 310/66 by the Court of Cassation which is the highest court of the land. In other words any individual in Jordan may invoke the covenant or any part thereof in any court of the land."(63)

One may agree with the first sentence of this statement, that duly ratified agreements have the force of law in Jordan; and also with the last sentence, that any individual in Jordan may invoke the Covenant or any part thereof before the Jordanian courts, but one may dispute the statement that Jordanian courts consider international agreements (as such) superior to the domestic laws. In none of the above

mentioned cases, including Case No. 310/66 referred to in the report, has the Supreme Court or indeed any other court made such a statement. Again in all the cases where an international agreement was given precedence over the Jordanian law, it was made clear by the court that this was because the agreement was treated as a special Jordanian law regulating the subject matter and not because it was an international agreement.

Obviously, human rights Covenants, are within the category which requires the approval of the National Assembly. "Treaties and agreements...affect the public or personal rights of Jordanians...."[64] As the Assembly was not in session in 1975 when Jordan signed and ratified the Covenants, they were approved by a provisional law. Like all international agreements in this category, human rights Covenants are of the rank of "Parliamentary Law" or "Statute", which occupies the highest rank after the Constitution in the hierarchy of the Jordanian laws. Concequently, in accordance with the general principles of legality, they cannot be denounced or modified except by a duly passed later piece of legislation of an equivalent level 'Act of Parliament' (statute), or of an even higher rank still 'Constitutional provision'.[65] In the case of conflict with legislation of the same rank (statute) the above mentioned general rules of *'Lex posterior derogat priori'* and *al-khass you-qide al-a'am* or *Lex specials derogat generali* (a special statute supersedes a general one) should apply.

Accordingly, the Covenants are part of the law of Jordan, and directly applicable before the Jordanian courts. Nonetheless, as will be shown from the case law in the coming chapters, the Covenants have never been applied by the Jordanian courts, nor have they been invoked

by advocates before these courts, despite the numerous occasions where they could have been invoked.(66)

The crucial question is how the Jordanian courts are going to interpret and apply the Covenants. It is not quite clear yet whether the Jordanian courts shall regard the Covenants as special laws regulating human rights and therefore giving them precedence over the Jordanian statutes in cases relating to human rights or not.

Some may argue that the Covenants are only general instruments relating to human rights in general and therefore they may not supersede the other laws which deal with specific aspects of human rights. If the provisions of the Political Covenant, for instance, were invoked against the provisions of the Criminal Procedure Code in a criminal case before a court, the latter should regard the Criminal Procedure Code to be the special law which regulates the proceedings in criminal cases and not the Covenant which deals with criminal proceedings among other issues. This argument, if adopted by the Jordanian courts could have a serious impact on the applicability of the Covenants in Jordan; because almost all the rights referred to under the Covenants are regulated by special laws which are currently in force and therefore would supersede the Covenants.

In the light of the present practice of the Jordanian courts, it is not likely that they would give effect to the provision of Article 19 of the Political Covenant for instance, against the provisions of the Law of Print and Publication with regard to the freedom of expression and information; or the provisions relating to equality between the sexes and many other issues, simply because Jordan has special laws regulating these matters, which according to the present practice supersede the Covenant in the case of conflict. Thus, it is

for the Jordanian legislature to take legislative measures to bring these laws into line with the provisions of the Covenants as will be explained in the coming chapters.

CHAPTER II. NOTES.

(1) I. Brownlie, Principles of Public International Law, 3rd. ed. Oxford, 1979, pp.35-59; Schwarzenberger and Brown, A Manual of International Law, 6th ed. (revised second impression), London, 1976 pp.36-39; J.G. Stark, Introduction to International Law, 9th ed. London, 1984, pp. 68-74; D.J. Harris, Cases and Materials on International Law, 3rd ed. London, 1983, pp. 55-78; D.P. O'Connell, International Law, 2nd ed., London, 1970, Vol. I., pp. 38-54; A.K. Pavithran, Substance of Public International Law, Western and Eastern, Bombay, 1963, pp.94-112; M.T. Al-Ghunaimi, General Principles of the Law of Nations, Alexandria, Egypt, 1970, pp.209-224; Ch. Rousseau, Droit International Public, Paris, 1971, Tome I. pp.37-44; D.W. Greig, International Law. 2nd ed., London, 1976, pp.52-55.

(2) See D.P. O'Connell, op. cit., p. 42.

(3) See D.W. Greig, op. cit., p.535; I. Brownlie, op. cit.; p.34.

(4) A. Pavithran, op. cit., p.96.

(5) M.H. Ghanim, Principles of Public International Law, Cairo, 1968, p.136.
Furthermore he recommended this solution to be applied by the Egyptian courts in case of conflict between the laws of Egypt and international law; see also M. Akehurst, A Modern Introduction to International Law. 5th ed., London, 1984, p.44

(6) Greig, op. cit., p.53; Starke, op. cit., p.76.

(7) For further details on the idea of the monists and the relation between the legal norms of 'the technical order' see Hans Kelsen, The General Theory of Law and the State, translated by A. Wedberg; New York, 1973.

(8) See O'Connell, op. cit. p.45 .

(9) See for instance: O'Connell, op. cit., pp.45-46.
C. Rousseau, op. cit., pp.39-40.
M.T. Al-Ghunaimi, op. cit., p.224.

(10) Ibid; In the same direction he also decided that:
if contradictory rules in fact exist, it does not follow that one of them must be void; but neither does it follow that the systems which give rise to them are mutually incompatible. It is one of the principal functions of juristic reasoning to eliminate contradiction by harmonizing the points of collision, not by pretending that they do not exist, nor by crushing the one with the other. p.44.
Identical views are held in 'Arabic International Law Jurisprudence' by Professor Ghaniam, op. cit.; pp.135-136

(11) There are some examples where the customary law even takes precedence over the national legislation. See for example Art.

25; of the German constitution "The general rules of public international law shall be an integral part of the federal law. They shall take precedence over law".

(12) Ibid.

(13) See The Constitution of 1929, Art. 9, as amended in 1981.

(14) See Greig, op. cit., p. 78.

(15) In Mortensen v. Peters, (1906) 8F (FC) 93, a Scottish court acting under an Act of Parliament that restricted fishing in an area beyond the 3-mile limit, convicted a Norwegian with these words: For us an Act of Parliament of duly passed by Lords and Commons and assented to by the King is supreme and we are bound to give effect to its terms."
For further details concerning the Anglo-American practice in this respect see:
Starke, pp. 74-82; Brownlie, op. cit., pp. 45-47;
Pavithran, op. cit., pp. 104-107;
S.A. Romahi, Studies in International Law and Diplomatic Practice, Tokyo, 1980, p.108.

(15a) The only reference in the Constitution is the provision of Art. 103, which refers to international practice with regard to the application of foreign laws, it says: "The regular courts shall exercise their jurisdiction in civil and criminal matters in accordance with the law for the time being in force in the Kingdom provided that, in matters affecting the personal status of foreigners, or in matters of civil and commercial nature in which it is customary by international usage to apply the law of another country, that law shall be applied in a manner to be prescribed by law."

(16) Vienna Conventions entered into force for Jordan in 1971.

(17) Penal Code, Law No.16 of 1960, see the JOG, No. 1484, 1960, p. 324, hereinafter referred to as Penal Code. Similar provision is also included in the Criminal Procedures Code, law No. 9 of 1961, JOG, No. 1539 of 1961, p.311; see also the Income Tax Act of 1964, JOG, No. 1800, 1964, p.1462.

(18) Unreported case.

(19) Case No. 119/73, published in the Jordanian Bar Review, hereinafter referred to as JBR. (1973) p. 330. Jordanian cases are cited by numbers and not by names of the parties. They will be cited here by mentioning the number of the case and the year of registration, followed by the yearly Volume of the JBR in which it is reported and the page number.

(20) Heads of states, Prime Ministers and Foreign Ministers are internationally recognized competent bodies in this field.

(21) Art. 52.

(22) Similar constitutional provision can be found in the constitutions of many countries. See for instance:

The Constitution of:
- Egypt; (1971) Art.151;
- Kuwait; (1962) Art. 70;
- Austria; (1929) Art. 50;
- Switzerland; (1874) Art. 98;
- Germany; (1949) Art. 59;
- Italy; (1947) Art. 80.

(23) See Brownlie, op. cit., p. 35; O'Connell, op. cit., p. 59.

(24) The Privy Council advice in A.G for Canada v. A.G. for Ontario [1937] A.C. 326 at p. 347.

(25) See: Art. 53.

(26) The Constitution of Kuwait of 1962, Art. (70). For identical wording see the Egyptian Constitution of 1971 Art. 151. Similar provisions are also included in almost all Arab constitutions.

(27) Constitution of 1947, Art. 80.

(28) See E.S. Corwin; The Constitution and What It Means Today. Revised by H.W. Chase and C.R. Ducat, 14th ed., Princeton, 1978, p. 173.

(29) This may vary one country to anthr depeding on the respective constitution of each state; in Jordan forinstece, while some treaties are recognised as law merely after ratification by the executive, others need to be approved by the Parliament .In both cases the Royal assent and publication in the JOG are required.

(30) This is the case in the French Constitution of 1958. Art. 55, stipulates that 'treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of law...'

(31) The British System, Lord Denning, referring to the European Convention on Human Rights stated: "But I would dispute altogether that the Convention is a part of our law. Treaties and declarations do not become part of our law until they are made law by Parliament ". R. v. Chief Immigration Officer [1976] W.L.R. 979. Court of Appeal.

(32) The American Constitution stated that the treaties that had been approved by a two thirds majority of the senators become in terms of force equal to the federal law. See Art. 6(2). see also the Constitution of Egypt, Art. 152(2). "...the treaties will have the power of law ..." similar provisions also provided for in Art. 70 of the Constitution of Kuwait.

(33) See Art.s 33 and 80 respectively.

(34) See above pp.27-28

(35) See above pp.27-32

(36) See above p.30

(37) The full text is published in the JOG, No. 188, p.9.

(38) Such a provision resulted from the agreement signed on February 20, 1928, which in Art.(2), stated:
"The power of legislation and of administration entrusted to his Britannic Majesty as mandatory for Palestine shall be exercised in that part of the area under mandate known as Trans-Jordan by His Highness the Emir.
Through such constitutional government as defined and determined in the organic law of Trans-Jordan and any amendments there is made with the approval of His Britannic Majesty."

For further details on Jordan under British mandate, and the British Trans-Jordan relations, see:
Ali Mahfzh, British Jordanian Relation between 1921- 1957, Beirut, 1973.

(39) See: JOG No. 886 1/2/1947.

(40) The Constitution was published in JOG No. 1093, 8/1/1952.

(41) The High Council was entitled to give official interpretation of the Constitution under Art. 122:
"The High Council provided for in Art. 57 shall have the right to interpret the provision of the Constitution either at the request of the Council of Ministers or by a decision taken by any House of the National Assembly, ...such interpretation shall be implemented upon its publication in the Official Gazette."

(42) See: The High Council's Resolution No. 2/28/2/1955 published in JOG No. 1224, 16/3/1955.

(43) See: Case No. 27/55, JBR (1955), p. 118.

(44) See: JOG No. 1396, 1/1/1958.

(45) Art.1 of the Constitution provides that: "The Hashemite Kingdom of Jordan is an independent Arab state. Its sovereignty is indivisible and no part therefrom may be ceded..."

(46) See: Al-Hiyari, Constitutional Law and the Constitutional System of Jordan, 1st ed., Amman 1972 p. 698.

(47) This is the preponderant opinion among the Jordanian writers and lawyers. See for instance: Al-Hiyari, Ibid; S. Keswany; Principles of the Constitutional Law, Amman, 1983, p.243. See also: the 'Resolution of the High Council', above note 42.

(48) See: Resolution No. 1 of 1962.

(49) See: above note 47.

(50) Art. 94.

(51) See S. Keswany, op. cit., p. 247;
Al-Hiyari, op. cit., p. 703.

(52) Ibid.

(53) See A. Al-Hiyari, op. cit., p. 704.

(54) See the text of Art. 94 above p.39

(55) What the Council of Ministers does is a necessary, temporary measure until the Parliament be reconvened. That is why it is called a provisional law.

(56) See Art. 94.

(57) See Art. 33.

(58) Case No. 5/65, JBR (1965) p. 865.

(58a) Ibid, see also notes 59-61.

(59) Case No. 100/62, JBR. (1966) pp. 528-31.

(60) Case No. 310/66, JBR. (1966) p. 1153.
(61) Case No. 12/70, JBR. (1970) p. 222.

(62) See for instance M. Al Wan, "International Treaties in the Legal System of Jordan", JBR. (1976), p. 349.

(63) See U.N. Doc. No. CCPR/C/1/Add.55, p. 2 (1981).

(64) See Art.33, para., 2.

(65) For further details on the principle of legitimacy and its application in Jordan and the legal hierarchy of the legal norms in the law of Jordan, see H. Nddah, The Administrative Courts in Jordan, Amman, 1972, pp. 7-82.

(66) Available records (until January 1987) do not indicate that the Covenants have yet been applied by any Jordanian court. However, during the consideration of the second supplementary reports of Jordan (CCPR/C/1/Add.56) in 1982, the representative of Jordan (Mr. Khouri) cited Case No. 32/82, and claimed that the Supreme Court of Jordan had stated that "International covenants and treaties supersede the local laws." However, inspection of the records and the ruling of the court in this case does not seem to support such a statement. See the summary records of the 361st meeting of the HRC, U.N. Doc. No. CCPR/C/SR.361, p. 7 (1982).

PART TWO

ADOPTION OF EQUIVALENT STANDARDS AT THE DOMESTIC LEVEL.

A major part of the role of the national Constitution and domestic law in the implementation of the modern international standards of human rights, is the introduction of domestic legal provisions which provide for equivalent standards at the national level. The scope and the nature of these domestic legal provisions varies in accordance with the nature of the scope of the obligation of the state parties. The latter vary from one Covenant to the other. Under the Political Covenant, states parties undertake to guarantee the immediate and full implementation of the rights recognized therein, from the moment the Covenant enters into force, whereas under the Economic Covenant states parties undertake to adopt programmes and introduce laws intended for the progressive implementation of the economic, social and cultural rights. Some may argue however that the notion of progressive implementation applies to the economic and social planning with a view of achieving the full realization of these rights, only, and does not include the introduction of the domestic legal provisions. This argument may contain part of the truth, but the crucial difference is, that if the state party does not introduce the required legislative measures for the full implementation of the economic social and cultural rights, it would not be in breach of its obligation, whereas under the Political Covenant it would be in plain violation of its obligation. (compare the provision of Article 2 in both covenants)

Furthermore, the scope of the legal obligation of the states parties and consequently the required domestic legislative measures do

not vary from one Covenant to the other, only, but within the same Covenant from one right to the other. The required legislative measures for the implementation of the right to fair trial for instance differ from those required for the implementation of the right to freedom of religion. Likewise the right to education, requires different legislation from what is required for the right to work for instance.

Accordingly, this part shall be divided into two chapters, each of them dealing with a different set of rights separately.
Chapter III, Civil and Political Rights, Chapter IV, Economic Social and Cultural Rights.

CHAPTER III.

CIVIL AND POLITICAL RIGHTS.

Implementation of civil and political rights presents special problems and difficulties for states parties; partly because of the nature of the issues involved with these rights, and partly because states parties are under legal obligation to guarantee the full and immediate implementation of these rights from the moment the Covenant entered into force. Furthermore, every particular right in this category calls for separate treatment and requires special legislative measures. This means that each state party should carry out a comprehensive review of its existing laws and eliminate those which are inconsistent with the provisions of the Covenant and also introduce the required measures in order to bring its Constitution and domestic laws into line with those provisions.

In this Chapter, we shall enquire into the laws and practices of Jordan in order to examine them viz-a-viz the minimum international standards of the civil and political rights, provided for in the political Covenant. Four rights have been selected for this purpose, namely: the right to life, the right to personal liberty, the right to equality before the law and the right to freedom of expression. These four fundamental rights are chosen because each of them is associated with some problematic issues, which require, careful treatment by the national legislature when assessing the existing laws and introducing the required legislative measures for the domestic implementation of the rights concerned. Issues such as abortion, the death penalty, freedom from arbitrary arrest and double jeopardy, the right to fair trial, freedom of the press and publication, discrimination

and equality between the sexes, are all closely associated with these fundamental rights.

In the case of Jordan, as a Muslim and third world democracy, such issues are of great importance. In third world countries in general, where development of the democratic and constitutional institutions is still under way, the state tends to exercise control over the mass-media and appears to be more suspicious of the manner in which civil and political rights are exercised.

To define the scope of the obligation of the state party and the role that has been assigned to the national Constitution and the domestic law in the implementation of any specific right, one must first start by analysing each right as set up by the relevant Article(s) of the Political Covenant and then turn to the existing laws and practices of Jordan, in order to judge them against the international provisions. Whenever the former falls short of the latter, the required legislative measures to bridge the gap will be suggested.

1- THE RIGHT TO LIFE:

A- LIFE AS A HUMAN RIGHT:

In ancient primitive societies, where there were no laws or official authorities, every man had to protect his own life by all available means.(1)

Although human life was not highly regarded by the laws of some of the ancient civilizations, it was strictly protected by most of them and by religions as well.(2) According to Islam for instance, the killing of a human being is totally prohibited unless in due process of law.(3) Even suicide is forbidden and considered a grave sin, as

the Qur'an says: "Do not kill yourselves"[4] Intentional killing is punishable by the death penalty in all cases.[5] These rules are still applicable in some Muslim countries. In Jordan, the legislature has departed from the traditional Islamic rules and adopted a modern western style of penal policy.

Since all human rights and freedoms can only be accorded to or claimed by a living person, the right to life has thus been regarded as the most important among the recognized rights of man, and has occupied a prominent position in almost all major international instruments of human rights.[6]

As far as the Political Covenant is concerned, Article 6 stipulates that: "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", paragraph (1).

Obviously, the first sentence of this paragraph is a declaratory statement with extremely important implications. The term "inherent" indicates that the right to life is not a right which has been created by the framers of the Covenant, but rather a right which has always existed and been recognized by law from time immemorial. It is a right which has been recognized and protected under general or customary international law, and therefore it is binding on all countries even those which are not parties to the Political Covenant. Some have stressed that the norms protecting the right to life in the contemporary international law possess the status of *jus cogens* rules.[7] The fact that the right to life is the only right in the Covenant to be described as "inherent" indicates the superior value of this right and that it is one without which, protection of the other rights would be meaningless. In a recent resolution the General

Assembly confirmed that, all peoples and all individuals have the inherent right to life and that the safeguarding of this foremost right is an essential condition for the enjoyment of the entire range of social and cultural rights.(8)

The second sentence of this paragraph, requires that this right be protected by law. It is true that the term "law" is broad and includes not only the constitutions and the statutes but also administrative regulations, courts' decisions and even unwritten laws. Therefore, some may argue that protection by administrative regulations may suffice. The term "law" as used here should be interpreted in the light of the required result which is the effective protection of the right to life. Accordingly, the law should be mobilized at the highest level. i.e. the constitution or a statute or both together. Therefore, every state party is required to introduce in its constitution and statutes sufficient legal provisions declaring the right to life as a human right and protecting it from violation. If taken in conjunction with Article 2(1) of the Covenant, the obligation of the state party under this paragraph goes far beyond the mere introduction of legal provisions. It is the obligation to "respect" and to "ensure". The obligation to "respect" requires the authorities of the state party to refrain from taking life in an arbitrary manner. In the course of their official activities official authorities of the state must show a high degree of respect for the life of human beings. A proper consideration must always be given to the possibility that in the course of such official activities - though they might be perfectly legal and justifiable - some innocent people may lose their lives, and therefore the authorities must avoid over reaction and careless actions which may deprive human beings of their lives. In its general

comment on Article 6, the HRC stated that; "...deprivation of life by the authorities of the state is a matter of utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities."(9) The state must also show respect for the right to life by fulfilling the other part of its obligation. That is the duty to "ensure" which requires the state party to take practical measures and to intervene to protect life and to prevent arbitrary deprivation of life from taking place. This undertaking applies not only to deprivation of life by illegal actions but also to any other hazards and threats to life either by human beings or even by natural disaster. Again, commenting on Article 6, the HRC stated that:

> "... the Committee considers that states have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war especially thermo-nuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life...The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6(1) is of paramount importance... states parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their security forces... states parties should take specific and effective measures to prevent the disappearance of individuals, ... states should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life."(10)

For this purpose the HRC stated that the "inherent right to life" guaranteed under this paragraph;

> "cannot properly be understood in a restrictive manner, the protection of this right requires that states adopt positive measures. In this connection, the Committee considers that it would be desirable for states parties to take all possible measures to reduce infant mortality and to increase life expectancy,

> especially in adopting measures to eliminate malnutrition and epidemics."[11]

It should be made clear however, that the obligation to "respect" and to "ensure" the right to life, does not require the state party to provide a personal bodyguard to every individual who may think that his life is threatened. A margin of appreciation must be left to the authorities of the state to assess the need for intervention and protection in the light of the surrounding circumstances.[12] The exercise of such an appreciation by the national authorities is subject to the control of the international bodies of supervision, which may or may not agree with the judgement of the national authorities.

A state party may thus violate this right (the right to life) either "by action or by omission". That is to say, by acting when it should have refrained, and by refraining when it should have acted to prevent arbitrary deprivation of life from taking place when it was likely to occur. In Case No. 84/1981, a person lost his life in some mysterious circumstances while in police custody . As the HRC was unable to arrive at a definite conclusion as to whether the victim had committed suicide, as claimed by the authorities, or was driven to suicide or killed by others while in custody as was claimed by the complainant, the HRC stated that:

> "The inescapable conclusion is that in all the circumstances the state party's authorities either by act or by omission were responsible for not taking adequate measures to protect his life as required by article 6(1) of the Covenant."[13]

The EUCM. has made it clear that the phrase: 'shall be protected by law' used in Article 2 of the EHR. requires the states not only to refrain from taking life, but also to take appropriate steps to

protect life.[13a] In Cyprus v. Turkey, the EUCM. held that the killing of Cypriot civilians by Turkish soldiers commanded by an officer in activities unconnected with any war, contravened Article 2.[14] In the same way, the Inter-American Commission on Human Right - with regard to Article 1, of the American Declaration - stated that, although the government is responsible only for violations committed by its officials or agents, it could not remain passive in the face of attacks on individuals' rights to life in the course of armed struggle between hostile factions.

> "The duty of the state is to guarantee the security of the population, and it could be failing in this duty, both by action and by omission. Accordingly the state cannot remain indifferent to such a fundamental matter, and must do everything in its power effectively to protect these rights".[15]

The third sentence of the same paragraph, 'No one shall be arbitrarily deprived of his life,' clearly indicate that the right to life is not an absolute right, and therefore deprivation of life is a permissible measure so far as it is not 'arbitrary'. What is prohibited under this sentence is arbitrary deprivation of life only.

However, the difficult question that has been raised from the very beginning, which still causes a great deal of controversy among lawyers and writers is this: What is an arbitrary deprivation of life? Is it 'illegal' or merely 'unjustifiable'? Heated debates were recorded during the framing of Article 6, and widely divergent points of view were expressed by the delegates of different countries, especially the UK, USA, USSR, and Lebanon.[16] Further arguments and counter arguments were also occasioned by the discussion of Article 6 in the Third Committee.[17] Some legal commentators have argued that, if the term 'arbitrary' or 'arbitrarily' means only 'illegal', this

would render all the despotic acts of national governments unchallengeable so far as they were in accordance with the domestic law.[18] It has been stated that the drafters, with fresh memories of the atrocities and inhuman practices that the world had experienced during and immediately before the Second World War, intended to reduce the legal discretion of states.[19] The adverb 'arbitrarily' must not be taken as a synonym of 'illegal'. According to P.Hassan, "The reason for the use of the word 'arbitrary' or 'arbitrarily' was to protect individuals from both 'illegal' and 'unjust' acts".[20] Professor R.B.Lillich, questioned this interpretation and stated that: "Even if one accepts this view, however, the question of what constitutes an 'unjust' deprivation of life remains".[21] Nonetheless, he did not attempt to answer the question himself. According to C.K.Boyle:

> "The concept embraced in the clause 'no one shall be arbitrarily deprived of his life' requires that a deprivation be justifiable by reference to pre-existing law in the first instance. But that is not a sufficient requirement; in addition, the law itself, the powers it prescribes from culpability for taking life, must conform to explicit and implicit standards in the covenant on the protection of the right to life."[22]

Prof. Y. Dinstien, admitted that the term is controversial and not easily definable, but did not provide us even with a general criterion to distinguish 'arbitrary' from 'permissible' killing. He stated that:"The term 'arbitrary'... is not easy to define. Its use in Article 6 was indeed criticised at the time of drafting as ambiguous and open to several interpretations".[23] Others have introduced broad definitions using some terminology, which in itself calls for definition.

D. D. Nsereco stated that:

> "Taking into account the meaning assigned to the term 'arbitrarily' by the various delegations, its meaning

> in common parlance, and the totality of the human rights regime which the instruments establish, the present author would posit the following definition. Deprivation of life would be 'arbitrary' if:
> a) it is made without due regard to the rules of natural justice, the due process of law; or
> b) it is made in a manner contrary to the law; or
> c) it is made in pursuance of a law which is despotic, tyrannical and in conflict with international human rights standards or international humanitarian law".[24]

The general comments of the HRC do not provide a clear definition of "arbitrary deprivation of life": in its general comments on Article 6, the Committee stated:

> "The protection against arbitrary deprivation of life which is explicitly required by the third sentence of Article 6(1) is of paramount importance. The Committee considers that state parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also prevent 'arbitrary' killing by their own security forces. The deprivation of life by the authorities of the state is a matter of the utmost gravity".[25]

However, the view expressed by the Committee in The *de Guerrero* Case (communication No.R.11/45) is of great importance.[25a] The communication was brought on behalf of the husband of *Maria Fanny S. de Guerrero*, who was killed during a police raid on a house in the district of Bogota. The raid was ordered in the belief that there was a kidnapped person held prisoner in the said house. Having searched the house without finding the kidnapped person, the police decided to hide in the house to await the arrival of the suspected kidnapper(s). Seven persons, including Mrs. de Guerrero were shot dead by the police as they arrived at the house.

Police inquiries and subsequent trial by the Police Court acquitted the police officers and considered their action justifiable under the domestic law of Colombia, particularly under the legislative Decree No. 0070.[26]

The author of the communication argued that the victims were arbitrarily deprived of their lives by the police and that the action of the police was unjustified because the forensic report, the ballistic report and the result of the paraffin test, showed that none of the victims had fired a shot and that they had all been killed at point-blank range, some of them shot in the back or in the head, and that most of them had been shot while trying to save themselves from the unexpected attack. The forensic report showed that Mrs. de Guerrero was shot several times after she had already died from a heart attack. It was also alleged that the victims were not given the opportunity to surrender, and that subsequent police investigation did not prove that they were kidnappers. Referring to Article 6 of the Political Covenant the Committee stated that:

> "The right enshrined in this article is the supreme right of the human being. It follows that the deprivation of life by the authorities of the state is a matter of the utmost gravity...The requirements that the right shall be protected by law and that no one shall be arbitrarily deprived of his life, means that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state..."(27)

It was also added that:

> "it is the Committee's view that the action of the police resulting in the death of Mrs. de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her life contrary to Article 6(1)... in as much as the police action was made justifiable as a matter of Colombian law by legislative Decree No. 0070 of 20th January 1978, the right to life was not adequately protected by the law of Colombia, as required by Article 6(1)."(28)

The Committee had insisted that the right to life should be interpreted in its widest possible meaning, and criticised the narrow definition given to this right by some states parties, and held the

action of the police to be disproportionate and unjustifiable and therefore amounting to 'arbitrary deprivation' of life. In this case, the Committee has introduced a crucial element in this regard, namely the element of proportionality and justifiability in the light of the circumstances of the case concerned.

Accordingly, arbitrary deprivation of life may be defined as; intentional killing of a human being, which is unjustifiable on both, legal and factual bases. That is to say, in order not to be regarded as an arbitrary deprivation of life, it must not only be justifiable under national and international law, but also justifiable on a factual basis in the surrounding circumstances of the case. In other words, deprivation of life would be considered 'arbitrary' even though it might be permissible under both national and international law, if it is not justifiable on a factual basis; for instance, both national and international law allow the release of hostages by force if necessary, which may involve deprivation of life, nonetheless it would remain arbitrary deprivation of life when it is not justifiable in the exigence of the situation. However, on its own, factual justification is equally insufficient. On the factual side, a brutal murder would provide justification for depriving the murderer of his life, but if the domestic law does not prescribe the death penalty, the execution of the murderer would be regarded as an arbitrary deprivation of life, because it is not justifiable on a legal basis.

Accordingly, it is the duty of the national legislature to establish the right to life as a human right and to punish arbitrary deprivation of life as a capital crime. When such a crime is directed (in whole or in part) against the right to life of a national, ethnic, racial or religious group, it might be regarded as a genocide.[29]

In Jordan, there is no express provision in the Constitution recognizing the right to life as a human right. Nonetheless, it could be argued that it is implied in Article 7 of the Constitution,(30) and protected under the Penal Code. According to the latter, intentional killing of a human being (arbitrary deprivation of life) is an offence, punishable by hard labour for a term of fifteen years.(31) The sentence is to be increased to hard labour for life if the felony has been committed on more than one person or in the case of torturing the victim before murder.(32) The death penalty itself may be imposed in protection of the right to life. Article 328, provides that: "Intentional killing is punishable by the death sentence if committed;

a) with previous planning and determination;

b) to facilitate the way to another felony;

c) against one of the offender's forbears."(33)

If the death resulted from arson, the arsonist is to be punished by death sentence in all cases provided for in Articles 368-369 and by hard labour in those of Articles 370-371.(34)

According to Article 339, any person who encourages or aids another to commit suicide shall be punished by imprisonment from three to fifteen years. "If the suicide was not successful, the punishment shall be imprisonment from three months to two years... and up to three years if it resulted in permanent disability".(35)

Peaceful enjoyment of the right to life has also been guaranteed under various Articles of the criminal law of Jordan.(36) Article 107 of the Penal Code for instance, prescribes a sentence of up to fifteen years hard labour for any two or more persons who establish a felony or conclude an agreement between themselves to commit violence on individuals. The imprisonment should not be less than seven years if

the aim is to commit murder. Moreover, any group of three or more persons which appears on public highways, roads or in the countryside as an armed gang with the aim of ruination , violence or any other such activities, is to be punished by a sentence of hard labour for a term of not less than seven years. This should be extended to life imprisonment if the said group actually carried out such activities.(37)The death sentence may be imposed in case of torture and murder resulting from the said activities.(38)

The Supreme Court of Jordan has held that : " it is enough for the purposes of the above Article to prove that the defendants had participated in the throwing of stones which resulted in death".(39)

In practice, the Jordanian Government seems to have always (even before the entry into force of the U.N. Covenants in 1976) complied with its duty to intervene to preserve order and to protect the life of individuals whether threatened by illegal action or natural disasters.(40) The Government has always performed its duty to protect individuals from terrorist attacks. In September 1970, the Jordanian Government intervened by force to protect the lives of innocent people who were being killed. In order to prevent the crime of genocide and all terrorist activities, waged by Palestinians against Jordanians, all guerillas were evacuated from Amman and consequently from Jordan.(41) Another precedent was the terrrorist attack on the Intercontinental Hotel in Amman on November 17th 1976, when a group of terrorists occupied the hotel and took hostages inside. The Government fulfilled its duty and ensured the release of the threatened hostages.(42)

As for the duty of states parties to refrain from arbitrary deprivation of life, Jordan seems also to have complied with this

obligation so far. That is to say, one cannot see obvious or official 'state activities' which may be regarded as a form of arbitrary deprivation of the right to life by the Government or its agents. This of course does not rule out the possibility that individual cases might occur from time to time, but nonetheless, these would remain very rare and isolated incidents.

B- SOME CORRELATED QUESTIONS: (Abortion and Death Penalty).

Both abortion and the death penalty are closely related to the right to life and they could certainly affect the legal dimensions of this right and the protection being given to it. They are both highly debatable issues and they raise complex questions which need to be treated separately.

1- **Abortion**.

Abortion has become an increasingly important subject over which widely diverging views and attitudes have been expressed by writers, lawyers and legislators, especially concerning its legitimacy.(43)

National legislatures are divided into two camps, those who prohibited abortion on the one hand and those who legalized it on the other. It is interesting to notice that none of the two camps have agreed on unified grounds for prohibiting or legalizing abortion. As regards the former, various justifications for the prohibition of abortion have been put forward. According to some of them, abortion is regarded as an offence against morals and public feelings.(44) In this camp stand the Jordanian and Syrian legislators. Although neither of them has defined the phrase 'moral and public feelings' the Syrian Court of Cassation (Criminal Chamber) has defined it as "those learned

norms of moral excellence and social conduct, recognized by society as such, and of which any violation would hurt the public feelings".(45) Some other penal codes classify it as an offence against persons, that is women, and punish it as such.(46) Finally, there are those which treat abortion as an offence against the family.(47) On the other hand, countries which have legalized abortion have justified it on different bases, such as the right of the pregnant woman to privacy,(48) or her life or health.(49)

However, despite the modern trend among Western legal systems(50) abortion is still, according to many others illegal and against the religious teachings of many religions.(51)

The troublesome question which has frequently arisen is this: When does the life of the foetus start? Article 6 of the Political Covenant, does not provide an explicit answer to this question. As it stands at the present time Article 6(1) declares the "inherent" right to life and requires that it be protected by law, but it does not specify the time when the required protection should commence. During the discussion of this Article in the Third Committee of the General Assembly, an amendment was suggested whereby the phrase "from the moment of conception" would be inserted,(52) but this was rejected on the following grounds:

1) The state is not able to determine the moment of conception and therefore cannot determine the moment from which protection of the life of the foetus should be provided.

2) This is a matter on which internal regulations differ considerably and therefore it is inappropriate to include such a provision in an international instrument.(53)

One may wonder whether any or both of these grounds are sufficient enough reason to reject the amendment and to leave such a crucial question unanswered, causing difficulties in defining the scope of the guaranteed right and the protection required thereto. As regards the first point, the uncertainty about the moment at which life begins, should, if any thing, support the proposal that protection must be provided from the moment of conception. If it is too difficult to define precisely the moment of conception, the moment from which protection should be provided would be the moment when pregnancy becomes known because before that moment the question of abortion is irrelevant. One cannot speak of abortion unless one knows for certain that there is a human being at some stage of its development in the womb and which we seek to destroy. Once pregnancy is confirmed, it is obvious that conception has taken place and thus protection should commence. As for the second reason, (that internal regulations vary considerably on this question) it should be remembered, that abortion is not the only issue on which "internal regulations vary considerably". Several examples may be mentioned here such as; the death penalty, sexual equality, freedom of expression, freedom of trade unions. Variation in domestic laws on these issues did not prevent their inclusion in the Covenant. On the contrary, domestic variations should be a reason to include this issue in order to settle such differences and to provide unified international standards, rather than an obstacle. Another reason to include such a phrase is the provision of paragraph (5) Article 6 which provides that "Sentence of death shall not... be carried out on pregnant women". One may ask why not? Is not the reason to protect the right of the child to life? If so, is there not a right to be born, a right of which the child may

not arbitrarily be deprived. Is it not paradoxical to reject the above amendment and to include this provision in the same Article? Under the present Article 6, if a woman who has been pregnant for three weeks is executed, Article 6 would be violated because the child has been deprived of his right to life. On the other hand if an abortion is performed on a woman who has been pregnant for six months and her moving and kicking child is killed, Article 6 would not be violated. One may ask those who rejected the amendment how they could justify the difference and why they recognized the right to life for the child of a criminal woman and denied the same right to the child of an innocent woman.

Furthermore, Article 4 of The Declaration of the Rights of the Child 1959, stipulates that: "The child... shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care..."

Drafters of the AMR have made it clear that protection of life should start at the moment of conception. Article 4 thereof provides that: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception...".

Divergent views have been expressed by writers and legal commentators on this issue. According to J. Feinberg,

> "unborn children are among the sort of beings of whom possession of rights can meaningfully be predicted, even though they are (temporarily) incapable of having interests, because their future interests can be protected now".(54)

As D. Lasok has insisted:

> "Termination of pregnancy does not consist of the removal of an unwanted piece of jelly (as suggested by

> a high-ranking churchman) but of a deliberate destruction of a human being. Whatever form the operation takes, there can be no mistake that abortion consists of the extraction of the whole or parts of a human being at some stage of development towards a unique person. Putting aside press reports of moving babies being incinerated and the lucrative business of abortion clinics, the ethical and legal question which society has to face squarely, is whether the gains on the side of the protection of the rights of the unborn can be allowed to be neglected by licence to kill".(55)

As for other commentators favouring the right to abortion, Richard Lillich has stated that:

> "The legality of abortion ... is a much debated question, turning as it does upon the determination of when the life to be protected commences;...if there is not already an absolute right to abortion, such a right at least exists during most of a woman's pregnancy and it is not incompatible with the norm governing the right to life...[since it is] a matter of 'legitimate diversity'; it would seem preferable to interpret the right to life norm to permit states, at their option, to sanction limited use".(56)

One may find it difficult to agree with Professor Lillich's argument that the right to abortion "exists during most of a woman's pregnancy". This may be true in the case of some legal systems but not all of them; and thus it is not a general rule. The present writer shares the view that the right to life exists throughout the period of pregnancy and therfore protection shoud be provided from the moment of conception.

The HRC has not had an opportunity to pronounce upon this question yet. Whether the HRC shall accept the view that the right to life starts at the moment of conception and therefore protection by law is required from that moment and consequently declares the laws which permit termination of pregnancy to be inconsistent with Article 6, shall remain to be seen. However, it is not likely that the HRC would agree that protection is required from the moment of conception,

partly because of the legislative history of Article 6(1) and partly because of modern trend towards the liberalization of the laws relating to abortion.

The theoretical debates and the noticeable trend in many legal systems, particularly in the West, towards the liberalization of laws regarding abortion seem to have influenced the views of some lawyers and the attitude of the legislature in Jordan. Until recently, the latter has upheld the prevalent view in Islamic jurisprudence, according to which, abortion (at any time and by whatever means) is a gross violation of the right to life, and therefore forbidden. It is permissible only under the principle of necessity, when it is the only way to save the life of the mother. As far as the Penal Code is concerned, this view is still upheld.

Article 321 of the latter provides that: "Any pregnant woman who miscarries herself or permits anyone else to do so, shall be confined in the penitentiary for a term of six months to three years." According to Article 322 thereof, anyone, who by any means, miscarries a pregnant woman with her consent, shall be punished by imprisonment from one to three years.[57] If the operation or the means used to procure abortion results in the death of the pregnant woman, the person who performs it shall be punished by hard labour for a term of not less than five years.[58] Although abortion in these cases is meant to be produced upon the request of the pregnant woman or by her consent, the legislature provides a greater punishment for the person who performs the operation than for the woman herself.

Obviously, this is intended to prevent such persons from practising their' immoral' and dangerous activities, and to protect the life of the foetus. However, if the abortion is being performed

without the consent of the pregnant woman," the offender shall be punished by hard labour of not more than ten years, and not less than that if it results in the death of the pregnant woman".[59] Here again, the law has increased the punishment in order to protect the right of the embryo and of the pregnant woman to life. The punishment is to be increased by one third in all cases, when the operation is being performed by a physician, pharmacist or a midwife.[60]

It seems that the legislature wants to prevent these people from abusing scientific skills, which would be of great harm to society. It could be stated thus, that the Penal Code of Jordan has prohibited abortion in all cases and at any time of the pregnancy, with or without the consent of the pregnant woman.[61] Nonetheless, it has been permitted, in certain exceptional cases by some recent specific legislative Acts. One of these is *al-Dus-Tour al Teby* (The Medical Constitution) of 1970, which legalised abortion if procured to save the life of the pregnant woman.[62]

Art. 43 thereof provides that when there are no other possible means to save the life of the pregnant woman, pregnancy may be terminated subject to the following conditions:[63]

a) termination of pregnancy is recommended by two physicians as the only possible way to save the life of the pregnant woman. One of the two physicians is to be the performer of the operation, who must mention that in his report;

b) the operation must be agreed to by the pregnant woman or her husband or any other authorised person according to the situation;

c) if the pregnant woman refuses the operation in spite of the doctors' warning, then the latter must adhere to her will;

d) unless urgently needed, a physician who - for reasons of personal conscience - would not recommend the termination of the pregnancy, must pass the case on to one of his colleagues. In the case of Caesarean Section, the doctor must decide - without emotional considerations - whether to save the life of the mother or that of the child, if necessary.(64)

In yet another, more important recent development, the influence of the Western legal systems, especially the British Abortion Act of 1967, on the law of Jordan, became self-evident.

In 1971, the Jordanian legislature departed from the traditional Islamic rule, which forbids abortion unless it is to save the life of the pregnant woman, to the Western point of view, which legalizes abortion if it is considered necessary to preserve her health.

Article 62 of the Law of Public Health of 1971, permits the termination of pregnancy to save the health of the pregnant woman. It provides that:

> "A physician must neither give any prescriptions intended to miscarry a pregnant woman, nor should he perform an abortion. However, abortion may be performed in a hospital or a licensed clinic, if it is necessary to save the life of the pregnant woman or her health, subject to the following conditions:
> 1) Receipt of previous written approval from the pregnant woman. When she is incapable of writing or speaking, the approval is to be signed by her husband or any other authorized person.
> 2) Two registered medical practitioners must certify that the operation is necessary for the preservation of the life or the health of the pregnant woman".(65)

Subject to the above conditions, the same Article exempts any person(s) who procures abortion or participates in it, in any capacity, from any criminal liability under the Penal Code: "... shallnot be guilty of any offence under the Penal Code."(66) As regards this new far-reaching step, some Jordanian commentators have

asked the following question: "To what extent should the health of the pregnant woman be threatened, in order to make the termination of pregnancy permissible?" The prevalent view is that the continuance of pregnancy must cause extraordinary damage to the health of the woman, beyond the ordinary damages and difficulties of the pregnancy, ('an imminent and extraordinary threat').(67)

In conclusion, it must be confirmed that the law of Jordan considers abortion to be a violation of the right to life which commences at the moment of conception. Therefore, it prohibits abortion, at any time during the pregnancy and by whatsoever means. There are only two exceptional cases where abortion is permissible: firstly, if it is the only possible way of saving the life of the pregnant woman; secondly, when it is certain that continuance of the pregnancy would cause serious damage to the mental or physical health of the woman. Thus, no other social or economic reason could in any circumstances justify the termination of pregnancy. Poverty, national policies of birth control, or the possibility of having an abnormal or deformed child, are not valid grounds. Accordingly, and in the light of the above explicit provisions, one cannot accept the argument of Dr. Assa'eed, that poverty may be considered as a threat to the pregnant woman's health, and therefore, that pregnancy may be terminated on such grounds.(68) Finally, the so-called 'right to abortion' has not been recognized by the law of Jordan.(69).

2. The Death Penalty.

The death penalty has been recognized as a lawful sentence for a long time and has been entrenched in many ancient and contemporary legal systems. However, the validity of the sentence has recently become subject to serious theoretical debates and various international conferences which has resulted in a clear movemnet within some legal systems towards the abolition of the sentence.[70] Nonetheless, the death penalty still exists in many domestic legal systems. Therefore, drafters of international instruments on human rights were not expected to introduce provisions expressly providing for its abolition, though many restrictions have been imposed by such instruments to limit the application of the death sentence in practice.

As far as the Political Covenant is concerned, an amendment submitted by Colombia and Uruguay stating that "the death penalty shall not be imposed on any person",[71] was oppposed by the majority of representatives. Article 6, as adopted by the General Assembly, recognizes the death penalty as a lawful sentence.[72] Nonetheless, the text and the drafting history of this Article indicate that the sentence should be exceptional and should be restricted to the narrowest possible range of crimes. Furthermore, it was agreed that a provision should be added stating that nothing in this Article should be invoked to delay or prevent the abolition of capital punishment by any state party.[73] During the framing of Article 6(2) most representatives seemed to agree that adequate safeguards should be introduced in order that the death sentence would not be applied unjustly or capriciously in disregard to the right to life. The difficulty, however, seemed to be the framing of the said safeguards

or restrictions.[74] A glance at Article 6(2), clearly shows that the following restrictions have been accepted:

1. The death sentence must be confined to the " most serious crimes". There is no indication in the text of Article 6 as to how serious a crime must be in order to justify the imposition of the death penalty. The preparatory works also do not provide a precise definition of this phrase .[75] The use of the phrase "most serious crimes" was criticized as lacking precision, hence, the concept of "serious crimes" differed from one country to another.[76] It is true that paragraph (2) may give the impression that the matter is left to the discretion of the individual states parties to decide upon the seriousness of the crimes which may justify the imposition of the death sentence, but the HRC has made it clear that such discretion is not as absolute nor as free as it may appear. The HRC, has stressed that, although states parties are not obliged to abolish the death penalty, they are nonetheless obliged to limit its use to the most serious crimes. It stated:

> "The Committee is of the opinion that the expression "most serious crimes" must be read restrictively to mean that the death penalty should be a quite exceptional measure. It also follows ... that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant. ...the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal.These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence"[77]

Furthermore,the HRC urged the states parties to abolish the death sentence though this was not required by the Covenant and concluded that all measures of abolition should be viewed as

progress in the enjoyment of the rights recognized under the Covenant and should thus be reported to the Committee.[78]

2. No *'ex post facto'* laws should apply; that is to say, the'serious crime' must be so in accordance with a previously enacted piece of legislation.
3. "... not contrary to the provisions of the Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide". This clause means that the death sentence may not be imposed as a result of the exercise of any of the rights guaranteed under the Political Covenant and the guarantees provided thereunder may not be disregarded. The reference to the Genocide Convention suggests that the death penalty may not be imposed in a discriminatory manner. i.e. the law imposing the death sentence for a serious crime must not be directed against a religious, racial or ethnic group.
4. "The death penalty can only be carried out pursuant to a final judgement rendered by a competent court." The Covenant does not require that the court be previously established. Some may thus argue that the setting up of a special court after the commission of the crime, to punish the offender(s), is not contrary to the Covenant. However, it is clear that this requirement refers to the right to fair trial which has been referred to in some other Articles. It is directed against summary executions and therefore the court must observe all procedural requirements whether it has been set up after the commission of the crime or previously established.
5. The convicted person must be given enough time to seek pardon or commutation of the sentence. Although this does not establish a

right to pardon or amnesty, it is meant to emphasize that every effort should be made to avoid the carrying out of the death sentence. It also implies that a convicted person has the right to have his request for pardon or commutation properly considered and examined in good faith.[79]

6. The death penalty must neither be imposed for crimes committed by persons under eighteen years of age, nor be carried out on a pregnant woman.

In Jordan, the law imposes the death penalty for a range of crimes, which from the point of view of the Jordanian legislature, are serious enough to justify the imposition of the sentence. The Penal Code of 1960 provides the death penalty for crimes such as murder, (if it was premeditated, committed to protect other criminals, to facilitate a criminal act or if committed against one of the murderer's forbears)[80], offences against external state security; conspiring with an enemy, in an attempt to paralyse national defence in wartime;[81] offences against internal state security, such as incitement to civil war, and attacks on the life of His Majesty the King or the Crown Prince.[82]

Article 158(3), provides the death sentence for the parties to a criminal conspiracy, if this results in death or torture.[83] Under Articles 138 and 139 the death penalty may be imposed for attempts to prevent the official authorities of the state from performing their constitutional duties, or attempts to change the constitutional system of the country by illegal means.

All these and other provisions providing the death penalty for "serious crimes" under the law of Jordan, were reported to the HRC, in the initial report (CCPR/C/1/Add.24) in 1978 and in the supplementary

report (CCPR/C/1/Add.55) in 1981, and particularly in the second supplementary report (CCPR/C/1/Add.56) where a detailed list of these provisions was included on pages 7-9. The Jordanian representatives explained the situation in Jordan and the manner in which the sentence is being applied and executed in practice. They also confirmed that from the point of view of Jordan these crimes were all serious enough to justify imposition of the death sentence.

Members of the HRC, seemed sympathetic with the position of Jordan in general, but nonetheless they asked many questions as regards the available legal safeguards and procedural guarantees, the yearly average of actual executions and the manner in which the sentence was carried out.[64] It was suggested that Jordan should reduce the number of serious crimes for which the death penalty was imposed, and further information on this matter was also required.The most radical remarks in this regard were the remarks of Mr. Prado Vallejo. A summary, of his views has been reported as follows:

> "... it could be noted from the report of Jordan, that the latter supports the death penalty, although the Covenant tended to encourage states to abolish it. ... he also added that, not only armed rebellion, but also felonous attempts to prevent the established authorities from exercising their functions in accordance with the Constitution were punishable by the death penalty ... . As there were many established authorities, from the Head of State to provincial or municipal authorities, he wondered whether the death penalty could be inflicted on someone who attempted to prevent a municipal authority from exercising its functions ... Article 136 of the Penal Code (page 7 of the report) also referred to an attempt ("any person attempting to change the Constitution of the state by illegal means") that was punishable by the death penalty. Although such criminal acts should be punished, he did not think that persons who had simply intended to commit them should be subject to the death penalty."[65]

In reply to Mr. P. Vallejo, the Jordanian representative quoted Article 138 of the Penal Code in full, and added:

> "The Jordanian Constitution clearly described the powers of the Government. It had to ensure the proper administration of the country and any one who prevented it from fulfilling its functions by committing a serious crime, for example a coup d'etat, was subject to the death penalty. But to date, no one had been condemned for such a crime."(86)

However, it is not clear whether Mr. P. Vallejo, was objecting to the imposition of the death sentence for these crimes because he thought that they were not serious enough to justify the imposition of the sentence, or to the application of the sentence to the mere attempt of these crimes.

As for the second limitation (No *'ex post facto'* law should apply), Article 93, of the Constitution, stipulates that every draft law passed by the Senate and the House of Representatives only becomes operative upon the King's assent, and after the lapse of thirty days from the date of its publication in the Official Gazette, unless specifically provided for in the law or the Royal Decree that it shall come into force on any other specified date. Furthermore, Article 3 of the Penal Code of 1960 forbids any *'ex post facto'* effect of criminal legislation:"No sentence shall be imposed unless it is provided for by the law in force when the crime was committed." In a recent case, the Supreme Court has held that: "...it is a well established principle that the new law must have no *ex post facto* effects..."(87)

In its intial report under Article 40 of the Covenant, Jordan stated that:

> "It should be pointed out that no penalty may be imposed that was not prescribed by the law at the time when the crime was committed, and furthermore that any law modifying the conditions of the incrimination in favour of the accused applies retrospectively to acts committed before its entry into force. In the same way any new law abolishing a penalty or imposing a lighter one is applied to crimes committed before its entry into force; and in cases where, after a sentence has been pronounced, a new law is promulgated to such

> effect that the act for which thesentence was pronounced ceases to be a punishable offence, execution of the sentence is halted and the conviction set aside. On the other hand, a law imposing heavier penalties is not applied to crimes committed before its entry into force."(88)

Members of the HRC were impressed by the law and the practice of Jordan with regard to this and other related issues. During the discussion of the said report it was stated that:

> "Two aspects of the Jordanian legal system mentioned in the report were especially praiseworthy: the fact that new laws which modified punishment to the benefit of the convict were retroactive, and the existence of juvenile jurisdiction distinct from the ordinary penal jurisdictions. It could be said that those two measures went beyond the requirements of the Covenant."(89)

According to the Juveniles Act of 1968,(90) the death penalty is not applicable to persons under eighteen years of age ;"the death penalty or... shall not be imposed on a juvenile".(91)

The law defines a juvenile as a person between seven and eighteen years of age.(92) As for pregnant women the Jordanian law also seems to go much further beyond what is required under Article 6(2). Article 17 of the Penal Code stipulates that the death sentence may not be imposed on a pregnant woman and in this case the sentence should be substituted by life imprisonment.(93)

In order to ensure the rights of the convicted person, to a final judgement served by a competent court, and to seek a pardon or commutation of the sentence, it is mandatory by law for all death penalty cases to be submitted by the Chief of the Public Prosecution to the Supreme Court for re-examination.(94) Following the decision of the Supreme Court, the Chief of the Public Prosecution refers the case to the Minister of Justice with a brief statement on the merits and the evidence, along with a recommendation on the carrying out or

commutation of the sentence.[95] The Minister of Justice, in turn refers the case to the Prime Minister to lay it before the Council of Ministers which recommends the execution or the alteration of the sentence. The recommendation and the reasoning in both cases must be submitted to His Majesty, The King, for his approval.[96]

If the death sentence is approved by the King[97] the convicted person shall be hanged inside the building of the prison, in accordance with Article 358, unless another place is defined by the Royal Decree. However, the hanging must not take place on a holy day according to the religion of the convicted person, or on an official or public holiday.[98] The sentence is to be carried out under the supervision of the Ministry of the Interior, upon a notification from the Chief of the Public Prosecution, showing that all the required procedures have been completed. According to Article 359, the following persons must attend the execution as witnesses:

1) The local public prosecutor, or his deputy;
2) The clerk of the court in which the case was decided;
3) The doctor of the prison;
4) A priest of the religion or sect to which the person belongs;
5) The director of the prison or his deputy;
6) The Chief Constable of the capital or the province in which the execution takes place.

Before the hanging, the Public Prosecutor must ask the person whether he wants to say anything or to make any statement. Anything he may say must be written down in a special report to be signed by the Public Prosecutor, the Clerk and the witnesses of the execution.

The hanged person must be buried at the expense of the Government, if he had no relatives, or if they refused to take the corpse to bury

it. Finally, a report on the proceedings must be written by the Clerk and signed by the witnesses of the execution mentioned in Article 359, for the purposes of the record.

C- ASSESSMENT.

Apart from the death penalty and the controversy over what serious crime may or may not justify the imposition of the sentence, no serious inconsistency between the law and the practice of Jordan, and the provision of Article 6 of the Political Covenant may be found. On the contrary in some aspects of the right to life, the law of Jordan seems to give much wider protection than is actually required under Article 6. The latter makes no indication as to the moment at which the right to life commences, or of that at which protection must be provided. Such an ambiguity has caused great confusion and contradictions among lawyers and legislators, especially over the question of abortion.(99) Article 6 only forbids the carrying out of the death penalty on a pregnant woman, while under the law of Jordan the sentence can not be imposed on her in the first place. Under the law of Jordan protection of the right to life is not restricted to the basic requirements of the physical existence of the human being which ends at the moment of death; the protection begins at the moment of conception and includes the peaceful enjoyment of life, the dignity, pride and reputation of the person,(100) and extends after death to include the "right to a grave" and to be buried with dignity and respect. Furthermore, it includes the protection of the body in the grave.(101)

However, what one should always keep in mind is that what is guaranteed under Article 6, is only the minimum standard that ought to

be guaranteed by all states parties to those subject to their jurisdiction. Conformity with the requirements of Article 6 of the Covenant is not the end, it only means that the state party is not in breach of its obligations. In the case of Jordan, three recommendations may be put forward in this regard; firstly, separate provision may be included in the Constitution, declaring the right to life as a constitutional right, from which nobody may be deprived, except in due process of law. Secondly, the Government must put increasing emphasis on the sanctity of the right to life, especially through administrative instructions to its agents, in particular the Police, the Armed Forces and General Intelligence Services, in order to avoid any misconduct leading to arbitrary deprivation of life by the government agents. Thirdly, although not specifically required under Article 6, the death sentence must be confined to the crime of intentional deprivation of life, and must not be extended to any other offences no matter how serious they may be.

2. - THE RIGHT TO LIBERTY AND SECURITY OF THE PERSON.

The right to personal liberty and security of the person is a central feature of civil and political rights. Alongside the right to life it is rooted deeply in the history of mankind. As has already been mentioned, the notion of personal liberty was known in , religions and ancient civilizations.(102)

The concept of personal liberty was extended by the revolutionary philosophy of the eighteenth century and expressed in their declarations of human rights, especially those of the American and French Revolutions. Modern constitutions especially contain provision(s) providing for the right to personal liberty as a human right to be protected by law.

In the age of international protection of human rights, personal liberty is a common element in all general international human rights instruments. For instance, according to the UDHR, every human being has the right to liberty and security of person, and no one may be subjected to arbitrary arrest and detention.(103) Article 5 of the EHR provides that:

> "Every one has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by the law...".(104)

Similar language has been used in the AMR with more detail and additional safeguards included.(105)

The Political Covenant has laid down in detail the right of everyone to liberty and security of person and additional guarantees and safeguards, such as the rights of the arrested persons and those who have been accused of or convicted on a criminal charge.(106) Before

examining the Jordanian law in relation to those provisions, the main features of these rights as expressed in the Political Covenant will be highlighted, so that the legislative measures required for their implementation may be defined. It seems, therefore, appropriate to discuss the subject under the following four sub-headings:

A. Freedom from arbitrary arrest and detention.

B. The rights of an arrested or detained person.

C. The rights of the accused person.

D. The rights of the convicted or acquitted person.

A. FREEDOM FROM ARBITRARY ARREST AND DETENTION.

Article 9(1) of the Political Covenant provides for this element of the protection of personal liberty. It states that:

> "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 procedures as are established by law."

This paragraph prohibits arbitrary arrest or detention, as a *prima facie* violation of the right to personal liberty. The term 'arbitrary' should be given the same definition as in Article 6, regarding 'arbitrary deprivation of the right to life'.(107) Accordingly, in order not to be 'arbitrary', deprivation of personal liberty must be lawful (in accordance with the law), and justifiable on a factual basis. In R. Lillich's words: "...the deprivation of liberty therefore must not only be in accordance with the law, but also in conformity to the principles of Justice".(108) According to J. Swarup: "Arrest or detention is arbitrary if it is on the grounds or in accordance with procedures other than those established by law, or under provisions of

law, the purpose of which is incompatible with respect to the right to liberty and security of person."(109) If the municipal law lays down unreasonable grounds upon which arrest or detentions may be permitted, or unjust procedures to be followed thereafter, it would still be regarded as an arbitrary deprivation. In short, the deprivation of liberty must be neither 'illegal' nor 'unjust'. The Article under examination does not define the meaning of 'arbitrary arrest or detention'. Yet, the second sentence of paragraph (1) provides that: "No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." There is no indication as to what those generally accepted grounds for lawful deprivation of personal liberty are. Such an ambiguity may provide a basis for some states parties to argue that arbitrary arrests and detentions have been carried out in accordance with their domestic constitutions and laws and therefore do not contravene the Covenant. The answer to this is that the HRC would have the last word in the assessment of the compatibility of these laws and constitutions with the provisions and the spirit of the Covenant and therefore may pronounce the detention to be arbitrary though it was carried out in accordance with the domestic law. In Communication No. R.12./52. the HRC pronounced the detention of the victim to be arbitrary and contrary to Article 9(1) although the state party argued that his detention was carried out in accordance with the "Prompt Security Measures", and that the person was charged under the Military Penal Code of Uruguay.(110)

Commenting on this paragraph the HRC stated that the right to freedom from arbitrary arrest and detention has often been somewhat

narrowly understood in the reports of states parties. It was also pointed out that this provision was

> "applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control etc. It is true that some of the provisions of Article 9 (part of paragraph 2 and the whole of paragraph 3) are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4 ... applies to all persons deprived of their liberty by arrest or detention"[111]

In order to meet their legal obligations under this Article read in conjunction with Article 2, states parties must firstly abolish all incompatible legislation and practices. Secondly, they must enact the required legislative measures within their legal systems. Such measures are to protect personal liberty and prevent arbitrary arrest or detention, by defining the grounds upon which a person may be deprived of his liberty, and the procedures to be followed thereafter. Thirdly, adequate remedies must be made available to those unlawfully detained or wrongfully convicted. Finally, to ensure compliance with the above measures, disciplinary and criminal penalties must be imposed upon anyone who unlawfully deprives a person of his personal liberty, whether the offender is a private person or a government official acting in his official capacity.[112]

The Jordanian Constitution of 1952 provides that "personal liberty shall be safeguarded" (Article 7). According to Article 8, "No person may be detained or imprisoned except in accordance with the provisions of thelaw".Similar provisions may also be found in other Arab constitutions[113]. But what kind of laws are those by virtue of which deprivation of personal liberty may be acceptable? Who enacts those laws? Who applies them? In practices,however,those constitution-

al provisions do not seem to offer much protection to the liberty of the individual because of the manner in which the law is being enacted and applied in most of these countries. In Jordan, this right is protected under Article 346 of the Penal Code of 1960 which renders unlawful deprivation of personal liberty a criminal offence punishable by law. It reads as follows:

> "Anyone who detains a person, depriving him of his liberty in an unlawful manner, shall be punished by imprisonment for a term not exceeding one year or a fine not exceeding 50 J.D."(114)
> If the detention was made in a false official capacity or warrant, imprisonment shall be six months to two years."

Furthermore, under Article 178,

> "Unless authorized by law, any government officer who detains or arrests a person, shall be liable on conviction to imprisonment from three months to one year."

Similar sentences are also applicable to prison officers or guards or any other person of such function if they admit any person without a warrant or judicial order, or if they keep that person in jail beyond the date defined therein.(115) If the above persons or any constable, police officer or civil servant refuses or delays the bringing of an arrestee or a detainee before a competent judge, he shall be liable on conviction to imprisonment for a term not exceeding six months or a fine not exceeding 50 J.D.(116) However, it seems that those penalties have never been implemented in practice, apparently, not because the above provisions have never been violated, for the HCJ itself has issued many writs of *habeas corpus* relating to unlawful imprisonments and arbitrary deprivation of personal liberty.(117) It has never imposed sanctions on those persons responsible, neither has any other court(s).(118) If unlawful arrest

is a criminal offence under the law of Jordan, then what are these grounds and procedures for lawful arrest and detention? As far as the Criminal Procedures Code is concerned, a distinction is made between arrest with a warrant and that without. According to Article 99:

> "Any member of the Judicial Police[119] may order the immediate arrest of the offender who is present, when there is sufficient evidence to prosecute him in any of the following cases:
> 1. Felonies;
> 2. If caught 'red-handed' in a misdemeanour punishable by six months imprisonment or more;
> 3. A misdemeanour punishable by imprisonment, when the offender is under police control or has no address in the Kingdom;
> 4. Misdemeanours of theft, assault, resistance of public authorities by force, and offences involving moral turpitude."

Also, any person may arrest without a warrant an offender caught 'red-handed' in the course of the commission of an arrestable offence, and bring him to the nearest public authority.[120]

In all the above cases arrest is permissible without a warrant. To confirm the exceptional nature of this procedure Article 103 provides that: "No person may be arrested or detained unless upon a valid warrant issued by a competent authority in accordance with the law." Therefore, any arrest without a warrant other than in the specified cases, must be regarded as an arbitrary arrest or detention and consequently an evident infringement of Article 9 of the Political Covenant. The ordinary procedures to be followed in the case of a criminal offence are, firstly, that the public prosecutor should summon the prisoner and then after interrogation he may issue a warrant of commitment if he deems it necessary. Secondly, commitments must not exceed fifteen days initially, extendable if necessary by a new warrant. Thirdly, in the case, where the defendant does not appear before the public prosecutor on the defined day, or it is most likely

that he would abscond, the latter may issue a warrant of arrest.(121) Fourthly, arrest warrants should be signed by the public prosecutor, stamped by his official stamp and should clearly indicate *inter alia* the full name of the person to be arrested and the reasons for the arrest.(122) Fifthly, a warrant of commitment should mention *inter alia* the nature of the charge(s), the specific Article(s) under which it has been made and the period of detention.(123) In both cases, a copy of the warrant must be handed to the defendant.(124)

However, what might have been a lawful arrest and detention in accordance with these requirements, could become, in some cases, an arbitrary deprivation of personal liberty not only in breach of Article 9(1) of the Political Covenant but also of the above legal provisions themselves. In practice when the defendant appears before the public prosecutor, and after initial investigation, the latter may deem it necessary to remand him in custody for further interrogation for fifteen days in accordance with Article 114. In some cases however, the fifteen day limit expires without the person being released or a new commitment warrant being issued.(125)

During field work in September 1984, the present writer interviewed two persons who were in the process of bailing out their relatives at the Palace of Justice in Amman. Sixteen days had passed since the first commitment warrant had expired and nine days in the case of the second. In both cases no new warrants had been issued nor had the detainees been released. When the present writer applied for permission to visit the central prison in Amman to investigate other such cases, access was denied.

Moreover, despite the wide powers to arrest without a warrant granted under Article 99, especially paragraph (4) thereof, the Jordanian

legislature has substantially expanded those powers under various exceptional legislation, such as the Defence Law of 1935 and the regulations made thereunder.(126) and the Martial Law Instructions of 1967;(127) which as will be shown (in Chapter VII) below have been widely abused in practice in terms of administrative detention and arbitrary deprivation of personal liberty regardless of the procedural guarantees provided for in the Criminal Procedure Code.

It seems that Mr. Tomuschat (a member of the HRC)was referring to this situation when he asked the representative of Jordan whether the normal procedures for arrest were respected in practice; and whether administrative detention was applicable in Jordan and how long could it last? In reply the Jordanian representative categorically stated that in Jordan "... no one could be arrested unless he was charged with an offence."(128) Obviously, this statement is not entirely correct because Article 9A of Defence Regulations No. 2 of 1939, which is frequently invoked in practice, entitles the administration to order indefinite detention of any person without any specific charge being brought against him.(129)

B. THE RIGHTS OF THE ARRESTED PERSON.

If the protection of the right to personal freedom requires the prohibition of all forms of arbitrary arrest and detention, it equally requires the preservation of the rights of those lawfully arrested or detained.

In order to execute a lawful arrest the following rights of the arrested person have to be observed:

1) The right to be informed at the time of arrest of the reasons and grounds for such arrest. Since the individual is required to submit

and not to resist the police or public authorities in exercising their lawful powers, he is in return entitled to be told, when being arrested, the reason for the police action and of the crime which he is alleged to have committed.This is a fundamental safeguard, directly derived from the general rule providing for the entitlement of everyone to his personal liberty and applies to both arrest with or without a warrant.

In the words of Lord Simmons:

> "It is a condition of lawful arrest that the man arrested should be entitled to know why he is arrested. ...The law requires that, where arrest proceeds on a warrant, the warrant should state the charge on which arrest is made. I can see no valid reason why this safeguard for the subject should not equally be his when the arrest is made without a warrant. The exigency of the situation, which justifies or demands arrest without a warrant, cannot, as it appears to me, justify or demand either a refusal to state the reason of arrest, or a mis-statement of the reason. Arrested with or without a warrant, the subject is entitled to know why he is deprived of his freedom, if only in order that he may without a moment's delay take such steps as will enable him to regain it.<130>

Article 9(2) of the Political Covenant provides that:

> "Anyone who is arrested shall be informed, at the time of the arrest of the reasons for his arrest and shall be promptly informed of any charges against him."<131>

The HRC has put more emphasis on this right. Having considered a number of initial reports of the state parties under Article 40 of the Political Covenant, the HRC asked for more information on pretrial procedures, especially the right of the person arrested to be informed of the reasons of his arrest. Members of the HRC have made it clear that the reasons must be set forth at the time of arrest, and expressed doubts that doing so 'as soon as is reasonably practicable' would satisfy this requirement.<132> In Case No.43/1979, the HRC concluded that Article 9(2) was violated because the victim was not

informed, at the time of his arrest, of any reason for his arrest and of any charges against him.(133) In another case the HRC stated that this right was violated because the victim was not informed of the reasons for his arrest until over two years later.(134)

In the law of Jordan, there is no explicit provision providing for this safeguard, but nonetheless it could be argued that it is included in the general provisions of Articles 7 and 8 of the Constitution read together.

However, it seems that the judiciary has not had an opportunity to pronounce upon the practices of the police in this regard, apparently because such practices have never been challenged before a court of law.(135) Whether this means that this right has never been violated, or never existed in practice, no definite answer can be given. To the best of the author's knowledge, the police do state the reasons for the arrest in most cases.

Such an explanation is not required if the arrested person is caught 'red-handed' in the course of a criminal act or when he himself makes it impossible to be informed of those reasons. The arrestee cannot argue that he was not informed with the necessary information if he had immediately engaged in a fight with the police or ran away. As to the form in which he is to be informed of the reason of his arrest, there is no conventional formula or defined procedure to be followed. It can be made in writing or delivered orally, by reading out the warrant or merely by handing it to the person. The warrant in itself would give sufficient information for this purpose. Detailed information about charge(s) is not necessary at the time of the arrest. All that is required is a general statement of the nature of the offence and the true reasons of the arrest.(136)

What if the arrestee does not understand the language in which he is informed? This question poses a practical difficulty. From a legal point of view, it could be argued that, in order to fulfil the purpose of such information, it must be expressed in a language understandable to the arrested person. On the other hand, one cannot expect all arresting officials to speak the appropriate language.
Therefore, in such cases a later translation may be satisfactory. However, Article 9(2) of the Political Covenant does not mention this problem at this stage.
Although Article 5(2) of the EHR has made it clear that the information is to be conveyed in a language understandable to the arrested person, the EUCM has held that this requirement has been complied with even though the warrant was drawn up in Flemish, since the applicant was interrogated in French, which was a language he understood.(137)

In Jordan, it has been said that the police always do their very best to employ foreign languages if Arabic is not understood by the arrested person.(138) However, the legislature has made it mandatory by law to provide (at the expense of the government) a translator in all subsequent proceedings, in the case of a person who does not understand or speak Arabic. A similar right has also been guaranteed to deaf persons.(139)

2) <u>The right to be brought before a judge or a judicial officer</u>.

An arrested person must be given the opportunity to challenge the validity of the grounds upon which he has been arrested, especially the existence of the wrongful act alleged to have been committed by him and the adequacy of the reasons to believe that he is guilty of

such an offence. Post-arrest proceedings provide vital protection for the right to personal liberty. An immediate recourse to a review of the validity of the arrest makes it possible to restrict the drastic effects of the police powers to arrest on mere suspicion, and prevent abuse of such powers. It also acts as a check on the arrestee's physical condition before it becomes too late.

The Covenant requires that: "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..."(140) The HRC has made it clear that the term "promptly", requires that the period must not exceed a few days.(141) However, in a number of cases where an extended period of time lapsed without the person being brought before a judicial officer, the HRC held that Article 9(3) was violated.(142) On the other hand the HRC found no violation of Article 9(3) where the person was arrested on the 28th of September 1978 and charged before a military examining judge on the 7th of November 1978. A period of six weeks was thus deemed to be within a reasonable time.(143)

The Jordanian Constitution lacks a provision necessitating the immediate judicial review of the legality of an arrest. Leaving aside the exceptional powers to arrest for indefinite periods of time under the Defence Law and Regulations, and the Instructions of The Martial Law Administration,(144) the matter ultimately rests with the Criminal Procedure Code. Under the latter the competent officer is the public prosecutor.(145) For this purpose a distinction is made between two types of cases. On the one hand, a person arrested upon a warrant issued by the public prosecutor, must be interrogated by him within twenty-four hours of arrest.(146) On the other hand, a person

arrested without a warrant, may be kept for forty-eight hours in police custody for questioning. If this time limit is about to expire but the police still suspect him, he should be presented to the public prosecutor within the time limit.(147) In both cases, if twenty-four hours expire without any interrogation, the guard of the *Nazarh* (the place for temporary custody) must take the person(s) to the public prosecutor, who may order his release or issue a commitment warrant for fifteen days renewable if he deems it necessary.(148)

However, the Supreme Court of Jordan does not seem to regard those restrictions as an important safeguard for personal liberty against arbitrary detention. Thus, the court has decided that, disregard of these provisions does not render the detention illegal. In Case No.67/75, the defendant was confined in custody much longer than the law permits, without being brought before any judicial authority, (public prosecution). The court stated that "The expiry of the deadline provided for in Article 100 of the Criminal Procedure Code should not affect the legality of any subsequent proceedings... it only meant to speed the interrogation up, nothing less or more".(149) In another case, the same court held that "...the fact that the public prosecutor had not interrogated the arrested person until four days after his arrest by the police, does not affect the legality of his detention nor of the latter proceedings".(150) Evidently this is inconsistent with Article 100 of the Criminal Procedure Code and Article 8 of the Constitution, which says, "No person shall be detained or imprisoned except in accordance with the provisions of the law", and in some cases may not be permissible under Article 9 of the Political Covenant. All the above provisions were mentioned in the reports of Jordan, but no reference to the judicial interpretation was made.(151)

3) The right to humane treatment while in custody (freedom from torture).

Infliction of severe physical or mental pain upon the arrested person in order to obtain information about another person, or to force him to confess his guilt, is a practice known and used in interrogation from time immemorial. In contemporary legal systems torture has been strictly prohibited. All major international human rights declarations contain provisions prohibiting any form of torture, degradation or ill treatment.(152) The Political Covenant provides that: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person", Article 10(1). "No one shall be subjected to cruel, inhuman or degrading treatment or punishment..."(Article 7).

According to many writers and legal commentators, the prohibition of torture and inhuman treatment has been regarded as an integral part of Customary International law, and it may even have acquired the status of a peremptory norm of general international law, i.e., *jus cogens*.(153)

However, neither the Political Covenant nor the other general human rights instruments give a definition of the term 'torture'. Such a definition appears in the General Assembly Declaration on the prohibition of torture and inhuman treatment adopted in 1975.(154) It says:

> "Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of public officials on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed, or intimidating him or other persons. It does not include pain or suffering arising only from inherent in or incidental to lawful sanctions to the extent consistent with the standard minimum rules for the treatment of prisoners.

> Torture constitutes an aggravating and deliberate form of cruel, inhuman or degrading treatment or punishment".

Similar definition has also been adopted under the United Nations Convention Against Torture of 1984.(155) According to Dinstein:

> "The key elements of this definition are beyond dispute. First, torture may be either a mode of punishment (for instance, drawing and quartering) or a form of treatment having other purposes. Second, the reason motivating torture — including confessions, eliciting information, instilling fear (in the victim or other person) or even sheer sadism — is immaterial. Third, torture may be either physical or mental as applied to the individual, i.e., whether the victim's particular tolerance to pain may be a determining factor in establishing whether a specific act amounts to torture or not".(156)

The jurisprudence and practice under the EHR are helpful in clarifying these terms. In the 'Greek Case', the ECUM had considered the relationship between the terms used in Article 3 and stated that:

> "All torture must be inhuman and degrading treatment, and inhuman treatment also degrading and that the word 'torture' is often used to describe inhuman treatment which has purposes, such as the obtaining of information or confessions, or the infliction of punishment and it is generally an aggravated form of inhuman treatment".(157)

In Ireland v. U.K., the EUCT while agreeing with the Commission's view that the five techniques used by the British security forces in Northern Ireland constituted inhuman and degrading treatment, the majority of the Court defined torture as "deliberate inhuman treatment causing very serious and cruel suffering", and held that the conduct established did not occasion suffering of the particular intensity and cruelty implied by the word 'torture' as so understood.(158)

Although the HRC has not committed itself to a specific definition of the term "torture", it has stressed that the prohibition under Article 7 of the Political Covenant is not limited to torture as it is

"normally understood", but also includes the kinds of ill treatments referred to under this Article. The HRC has declined to establish precise definitions of the concepts mentioned in Article 7 of the Covenant and seems to prefer to judge individual cases in the light of the surrounding circumstances of every case. It was also added that in the consideration of such cases, the provision of Article 10(1) must be taken into consideration because of the link between the two provisions. It says,

> "As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood. It may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment. These distinctions depend on the kind, purpose and severity of the particular treatment. In the view of the Committee the prohibition must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure. Even such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to this article. Moreover, the article clearly protects not only persons arrested or imprisoned, but also pupils and patients in educational and medical institutions. ... For all persons deprived of their liberty, the prohibition of treatment contrary to article 7 is supplemented by the positive requirement of article 10(1) of the Covenant that they shall be treated with humanity and with respect for the inherent dignity of the human person. ... In particular, the prohibition extends to medical or scientific experimentation without the free consent of the person concerned (article 7, second sentence)."(169)

In Communication No. R7/28, brought before the HRC on behalf of Mr. I Weinberger in May 1978, it was said that, the government had denied that he had been detained for over a hundred days, until his name eventually appeared on a list of detained persons. Yet his family was not informed of his place of detention nor allowed to visit him during the first 10 months of the detention. Throughout that period he was kept blindfolded for most of the time, with his hands tied together,

and was forced to remain sitting on a mattress for fourteen hours a day.[160] The Committee had *inter alia* held that Articles 7 and 10(1) were contravened because of the treatment which I. Weinberger received during the first ten months of his detention.[161]

In another case (Communication No. R 14/63) submitted on behalf of Mr. R. S. Antomaccio, the HRC decided that Articles 7 and 10(1) were violated because he was held in solitary confinement in an underground cell, and was subjected to torture for three months in 1978 and was also denied the medical treatment which he needed while in detention.[162]

The Covenant has guaranteed unqualified protection to the arrested person against torture or any other kind of inhumane treatment under all cirumstances. Thus, states parties are required to bring their practices and laws into conformity with such a prohibition.[163] Constitutional provisions recognizing this right as a constitutional right and penal provisions providing for penal punishments for those who may inflict torture or inhumane treatment on arrested persons, must be introduced if not already provided for by the existing laws. States parties should also take any practical violations of this prohibition by their agents very seriously. The HRC has in this regard expressed the view that where the complainant has given adequate particulars of the acts concerned, including the names of their alleged perpetrators, "a refutation of these allegations in general terms is not sufficient. The state party should have investigated the allegation in accordance with its laws and obligations under the Covenant, and brought to justice those found to be responsible".[164]

The Constitution of Jordan 1952, was promulgated before the adoption of the UN Covenants in 1966. The human rights provisions pre-

dated even the UDHR (1948), because (as has been mentioned)[165] the chapter on the rights and duties of the Jordanians in the present Constitution is a copy (with some expansions in certain aspects) of the analogous chapter in the Constitution of 1946.[166] So, as a result, no reference was made to the prohibition of torture nor to the treatment of the arrested person in the Constitution. By contrast all other recent Arab Constitutions contain provisions providing for the protection of arrested person(s) against torture and inhuman treatment.[167]

However, so far as the ordinary laws are concerned, the Jordanian Penal Code 1960 provides in Article 208(1) that:

> "Anyone who inflicts any form of violence or cruelty not permitted by law on a person in order to obtain from him a confession of an offence or related information thereto, shall be punished by imprisonment from three months to three years".[168]

Being the only available legal protection for arrested persons against torture and inhuman treatment, it falls short of the international standards required under the Covenant. According to the above Article, the prohibition applies only to 'violence or cruelty not permitted by law'. It appears as if the Jordanian law may permit such actions in certain circumstances whereas this is absolutely prohibited under the Covenant. On the other hand, the said Article does not render such a confession or information inadmissible as an evidence in the trial before a court of law. On the contrary, Article 159 of the Criminal Procedures Code made a confession admissible if the public prosecution submitted 'a convincing explanation' proving that it was given voluntarily.[169] Apparently, the public prosecution is never short of 'convincing explanations', whatever the circumstances may be. In most cases, it is rather difficult, and some-

times quite impossible for the defendant to prove that duress or inhumane treatment has been inflicted during police questioning. What usually happens in practice is that while being questioned by the police, the accused may under pressure of compelling methods, give any information or confession(s) to avoid any further torture on his person or, on any member of his family. In doing so he may hope to rely on the independence of the court before which he will have the opportunity to tell the truth, freely and without any threats or inducements. Therefore, revocation of the confession by the accused person before the court should be considered in itself an indication that it was not made voluntarily; and therefore, the court must take this in consideration. Nonetheless, the Jordanian courts have constantly taken the view that the confession obtained by the police is admissible evidence, unless it has been proved by the defendant that it was given under duress or compelling measures.This has been the established view of the Jordanian courts since 1955. In 1955, the Supreme Court stated that:

> "...revoking of the confession by the defendant before the Court of First Instance, does not affect the admissibility of such evidence, so far as it has not been proved to have been taken by coercion."(170)

In another case, the same court stated:

> "...Although the information was given in the police station, it was still valid evidence since the defendant failed to prove that it was obtained by coercion."(171)

Furthermore, with direct reference to Article 159 above, the court held that:

> "...any information or confession given by the defendant — even though it was not given before the public prosecutor — could be used against him; notwithstanding the allegation that it was obtained by coercion."(172)

The Jordanian courts seem to have followed the example of the Egyptian Court of Cassation, which in 1944 held that:

> " it is the established view of the court that the court may disregard the allegation before the public prosecutor and at the hearing, that the confession made during the police questioning was not freely given by the defendant... if it was not proved to be made under coercion."(173)

However, in the rare instances where it was possible to prove that the confession was not made voluntarily, the courts held it to be inadmissible. In Case No.173/84, the Supreme Court stated that:

> "Although the confession was made before the public prosecutor, the court may consider it inadmissible evidence if it was satisfied that the confession was not made voluntarily ...it has always been the right of the accused to prove that he confessed before the public prosecutor under duress and pressure."(174)

In another case, the same court upheld the judgement of the Court of Appeal and held that:

> "...It is the duty of the Court of Appeal to disregard the confession, since it has been proved that the defendant (arrested person) has been beaten in order to confess his guilt of the alleged offences."(175)

In Mahmued Nasser's Case, in October 1980 the Military Court rendered the report of the investigating officer (commander of the military unit) and consequently the confession included therein, inadmissible evidence. In his testimony before the court the investigating officer said: "I beat him (the defendant) all night long till I made him confess the truth included in this report."(176)

The burden of proof should not be placed on the arrested person, because in most cases it is far too difficult to prove that there has been torture and ill treatment. The ECUM has dealt with this problem in the 'Greek Case',(177) and drawn attention to the inherent difficulties in proving an allegation of torture or inhuman treatment:

> "First, a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisal... Secondly, acts of torture or ill-treatment by agents of the police or armed services would be carried out as far as possible without witnesses, and perhaps without the knowledge of higher authority. Thirdly, where allegations of torture or ill-treatment are made, the authorities, the police...or the ministers, must inevitably feel that they have a collective reputation to defend... In consequence there may be reluctance of higher authority to admit, or allow inquiries to be made into facts which might show that the allegations are true. Lastly, physical traces of torture or ill-treatment may with lapse of time become unrecognizable, even to medical experts, particularly where the form of torture itself leaves little external marks.<178>

Although it is difficult to prove torture in practice, Jordan has submitted contradictory reports regarding torture. In the first supplementary report (CCPR/C/1/Add.55) submitted in 1981 it was stated that

> "As to Article 7, the laws of Jordan outlaw any form of torture or cruel, inhumane or degrading treatment or punishment and prosecute all persons who perpetrate such treatment whether they have an official function or otherwise. There are sometimes excesses by some public security personnel but these excesses are not institutionalized and have always been condemned and outlawed. Equally, no one may be subjected without his consent to medical or scientific experimentation. All security personnel are trained to observe the laws of Jordan against torture and similar treatment as they are part and parcel of their training.
>
> Furthermore, evidence procured by illegal means such as by torture or cruel or inhuman means is not admissible in a court of law. This is well substantiated in article 159 of the Criminal Law Procedure Law No. 9 of 1961."<179>

It is true that the law of Jordan outlaws such practices and that excesses by the official authorities or their agents do occur from time to time; it is also true that the law does not permit medical experiments be carried out on a person without his consent. As for the second paragraph, it seems that the authors of the report

were not aware of the case law and of the manner in which the courts have interpreted the provision of Article 159 of the Criminal Procedure Code. As mentioned above the Jordanian courts have interpreted this provision to mean that a confession procured by such means is admissible evidence unless proved by the defence that it was not freely given.

In the second supplementary report (1982) Jordan has categorically denied that torture or similar treatments have been committed in Jordan. It says, "With regard to torture, to which, Article 7 of the Covenant, no person is to be subjected to, we confirm that the practice of torture has not been adopted either by the judicial or the investigative authorities in Jordan."(180)

4) The right to enforceable compensation in the case of unlawful arrest or detention.

To be dealt with under the rights of a convicted person. (The right to enforceable compensation in the case of false imprisonment or miscarriage of justice).(181)

C. THE RIGHTS OF THE ACCUSED PERSON.

A person, whether lawfully arrested or otherwise, cannot be legally held in custody for an indefinite time without a specific charge being made against him. Most of the national constitutions and municipal laws therefore require that arrested persons be brought before a court or a judicial officer within a short time after his arrest (usually 24 or 48 hours) so he may be charged or otherwise released. This is the rational outcome of the entitlement of everyone to his personal liberty. If the arrested suspect is indicted, he is regarded as an accused person and therefore is entitled to some minimum rights and safeguards. They include:

1- The right to be informed, in detail, of the charges brought against him.

2- the right to be presumed innocent until proven guilty by a court of law.

3- The right to be released on bail pending trial.

4- The right to a fair trial.

1) The right to be informed in detail of the charges brought against him.

To answer the charge and initiate his defence, the accused person must be "informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".(182) This is different from the right to be informed at the time of arrest. For the latter, a brief statement of the reasons of the arrest, and of the charge is considered sufficient,(183) while at this stage the indicted person should be provided with substantial information about the charge, including the facts upon which it has been based, the legal classification of the wrongful act, and the legal provisions

infringed by that act. Noting that states parties do not explain how this right is respected and ensured in practice, the HRC stated that this right;

> "applies to all cases of criminal charges including those of persons not in detention. The Committee notes further that the right to be informed of the charge "promptly" requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3(a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based."(184)

In the Jordanian legal system, the accused should be brought before the public prosecutor within the time limit as prescribed by Article 139 of the Criminal Procedures Code. However, Article 63(1) of the same Code stipulates that: "When the suspect appears before the public prosecutor, the latter shall... recite the charge upon him and ask for an answer". In this Article, the Jordanian legislature has used the word *'yatloo'* (recite) which does not meet the requirements of Article 14 (3a) of the Covenant. Under the latter, substantial information clarifying the details of the charge and identifying the relevant legal provision(s) of the law that have allegedly been violated, must be made available to the accused person. Although the arrest warrant must contain most of the required information, the right to receive full information upon indictment must be observed. Therefore, Article 135 is very important in this respect, for it makes it mandatory that a Bill of Indictment, whether signed by the public prosecutor or the Attorney-General, contains the following information:

a) The full name of *al-mushtaki*(the complanaint) if any;

b) The full name, age, address... of the defendant;

c) If in custody, the date of his detention;

d) Statement of the facts;

e) The date of the offence and the legal nature of the charge and the evidence

f) The applicable legal provisions, and

g) The reason upon which the indictment has been issued.

This information seems sufficient enough to meet the requirements of Article 14(3)(a) of the Covenant, and since it has been made a mandatory requirement for the validity of the Indictment Bill, it has usually been adhered to. In any case where these requirements are not complied with, the Indictment Bill would be considered invalid and subsequent deprivation of personal liberty would be considered arbitrary. In a number of cases where substatial information about the charges was not made available to the victms, the HRC has held that Aticle 14(3)(a) was violated by the state party concerned.[185]

2) The right to be presumed innocent until proven guilty by a court of law.

A man is innocent by his very nature, and therefore, who ever accuses him of any offence against the law, whether it be the community (public prosecution) or a private person, must prove his allegation. This general rule was adopted in criminal procedures under Islamic law in the seventh century,[186] but later on it was neglected and disregarded inside and outside of the Islamic World. It was not until late in the eighteenth century that this rule re-emerged through

the revolutionary declarations of human rights of that epoch. The rule of presumption of innocence has been adopted by all major international human rights instruments and expressed in almost identical language. Article 14(2) of the Political Covenant provides that: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".

Accordingly, the gravity or seriousness of the alleged offence should not deprive the accused of his right to be presumed innocent. He is entitled to be treated as such until his guilt is established according to a final judgement by a competent court. The presumption, therefore, does not collapse upon mere confirmation of the charge(s) or introduction and submission of evidence by the public prosecutor or other person(s). The principle of the presumption of innocence thus requires that on the one hand the court should not be predisposed to find the accused guilty. On the other hand, the accused should at all times be given the benefit of the doubt on the rule *in dubio pro reo*.[187] In the words of the HRC:

> "By reason of presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is therefore a duty for all public authorties to refrain from prejudging the outcome of a trial.[188]

The presumption of innocence serves many purposes in the proper administration of justice. First, it protects the accused person from being treated as guilty before his innocence has been proven. Secondly, it prevents improper convictions simply because the accused has failed to prove his innocence. Finally, disregard of the presumption

would certainly decrease the confidence of the public in the courts and the public prosecution.(189)

The crucial elements of the presumption of innocence are:

a) Placement of the onus of proof on the prosecution, i.e., the accused is not required to prove his innocence because it is presumed by law. The prosecution must prove that the offence was committed by the accused himself.

b) Giving the accused the benefit of the doubt. If the court harbours any doubt that the alleged offence has in fact been committed by the accused person, such doubts are to be interpreted by the court in favour of the innocence of the accused.

c) Treatment of the accused as an innocent person until pronounced guilty by the final judgement of a competent court. Any pre-trial or conviction, action by the police or the investigating judge or any publicity that refers to the accused as a guilty person, may constitute an infringement of this right.(190)

Most of the modern Arab constitutions and penal codes provide for the presumption of innocence as a legal safeguard for the liberty of the accused person.(191) In the case of Jordan, neither the Constitution nor the Penal Code contains any provision relating to this right. Some Jordanian lawyers have adopted a rather broad interpretation of Article 7 of the Constitution, arguing that it implicitly provides for the presumption of innocence. Judge Kilany says: "The logical consequence of the wording of Article 7 (personal liberty is safeguarded) is the right to such a presumption".(192) Such an interpretation seems to lack a legal foundation, and is too broad to be acceptable. Therefore, an explicit provision in the Constitution, providing that: "A person accused of a criminal offence shall be pre-

sumed innocent until he is pronounced guilty in a final judgement of a competent court", would appear indispensable. Similar provision may also be added in the Criminal Procedures Code. In the initial report of Jordan under Article 40 of the Covenant, it was stated that; "... the Jordanian courts proceed on the principle that an accused person is to be considered innocent until his guilt has been legally established at a public trial."(193)

As far as the case law is concerned, the Supreme Court has indirectly implemented the principle as a whole, or at least some of its elements. In 1953 the court ruled that "...in a criminal charge, the court should not convict the accused unless undoubted evidence has been introduced proving that the alleged offence was committed by the accused himself".(194) Three years later, the court changed its view and ruled that: "It is the accused who must prove that he had acted in good faith and that all due taxes and duties were properly paid".(195)

In 1965, the court reverted to implementing some of the elements of the presumption of innocence. It said that: "If the public prosecution presented doubtful evidence, such doubt is to be interpreted to benefit the accused and consequently the accused should have been acquitted from the alleged offence".(196)

Yet, in other cases the court has turned the presumption of innocence 'up-side down', since it has required the accused to prove that his confession in the Police Station was obtained involuntarily.(197)

On matters and facts relating to the defence pleas, the court has constantly required the accused to prove the facts or his good faith.

In other words the court seems to have presumed him guilty and required him to prove his innocence.(198)

In criminal proceedings, the accused must be presumed innocent, it is the prosecution which is required to prove the facts, not vice versa. Accordingly it could be stated that the Supreme Court of Jordan has neither explicitly denounced nor confirmed the right to presumption of innocence as a human right under the law of Jordan. Nonetheless, there are some cases where the court has implemented some elements of this principle. In many other cases, the court has simply ignored it.(199) Thus, the statement that the Jordanian courts proceed on the bases that the accused is innocent until his guilt is proven by a final judgment is not fully supported by the case law; and therefore a new provison providing for this right at the constitutional level is required.(200)

3) The right to release pending trial.

As a general rule alawfully detained person against whom a criminal charge (or charges) has been properly made, is entitled to be released on bail pending trial. This right has been provided for in Article 9(3) of the Political Covenant, which says:

> "...It shall not be the general rule that the 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 arise for execution of the judgement."

This right to release on bail stems directly from the right to be presumed innocent, therefore its denial without reasonable justification implies denial of that right also. Obviously it is not an absolute right, but may be subject to limitations and conditions. A just balance between the right of everyone to his personal liberty and

the legitimate interests of the community as a whole has to be maintained.

Bail in criminal cases is meant to guarantee the appearance of the accused to answer the charges and to submit to the judgement of the court. It is not an end in itself, but rather a means, and therefore, if forfeited or paid, it is still not a satisfaction for the offence or a punishment. Observation of this right is useful for both the accused and the proper administration of justice. That is to say, it protects those who have been wrongfully accused from suffering imprisonment until they are acquitted by the court. It also enables the accused to plan and conduct his defence via legal consultations and searches for evidence and witnesses.

Despite the above advantages release on bail always involves great risks, such as absconding. A wide discretion is therefore given to the court to decide upon each case depending on the adequacy of the guarantees given by or on behalf of the accused.

However, in the modern legal systems the guarantee takes the form of a 'bail bond' or a 'sum of money', or both, to ensure the appearance of the accused on demand. Since it depends largely on the discretion of the judge, his decision should, therefore, always be subject to higher judicial review.(201)

In Jordan, the right to release on bail is usually respected in practice, although restrictions may be imposed depending on the circumstances of the particular case. A separate chapter has been devoted to this right in the Criminal Procedure Code 1961, which deals with it in detail.(202) Both of the above forms of bail are applicable on the choice of the public prosecutor or the court.(203)

The legislature has divided criminal offences for the purposes of bail into two categories:

a) Non-bailable offences. "No release on bail shall be guaranteed to a person who is accused or convicted of a crime punishable by the death penalty, hard labour or imprisonment for life."[204] Some other felonies are also unbailable as a general rule. Nonetheless, under special circumstances, the court may order release on bail if it is satisfied that such release would not be prejudicial to justice or public security.[205] The Supreme Court has stated that: "...bail is impermissible if the provided punishment is the death penalty, hard labour or imprisonment for life. In other felonies where punishment ranges from temporary to hard labour for life, only the court may order the release on bail".[206]

b) Bailable offences. According to Article 121, the public prosecutor may order the release of anyone detained for a misdemeanour. The court may also do so when the case is referred to it.[207] In practice, release on bail is usually guaranteed for most of the bailable offences, if and when sufficient guarantees have been introduced. However, the decision itself, the form and the amount of the bail are all matters for the public prosecutor or the court to decide at their own discretion according to the situation. A right to appeal against the decision is provided under Article 124. Decisions of the public prosecutor in this respect may be appealed to the Court of First Instance, decisions of the latter and the Justice of the Peace are to be appealed to the Court of Appeal within three days. The Supreme Court has classified those decisions as administrative decisions, which means that they could be reviewed or withdrawn by the same court that passed them in the first instance, with or without a

new application.[208] In another case, the same court (the Supreme Court) overruled the decision of the Court of First Instance and decided that the latter;

> "should have considered the appeal against the decision of the public prosecutor rejecting the release on bail, despite the fact that it was not submitted to it in its capacity as a court of appeal when it should have been according to the law."[209]

4. The Right to Fair Trial.

A lawfully arrested person, with a criminal charge properly brought against him, and presumed innocent, whether released on bail or not, must be brought to a fair trial as soon as possible. Article 14(1) of the Political Covenant provides that:

> "In 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 trial and public hearing by a competent, independent and impartial tribunal established by law."

As is clear from the provision of this paragraph and as has been emphasised by the HRC[210], the right to a fair hearing applies not only to those charged with criminal charges, but also to any suit at law for the determination of one's rights and obligations. In conjunction with Article 2(3) it gives rise to the right to judicial review of administrative action by a competent, independent and impartial tribunal.[211]

The term 'fair trial' may be defined as; a public and speedy trial by a competent, independent and impartial tribunal, in which all guarantees necessary for the defence are fully observed. Accordingly, fair trial consists of four essential elements: these are the character of the tribunal, the public nature of the hearings, speedy trial and the defence guarantees.

a) The character of the court; or the tribunal.

A court conducting a criminal trial must possess the three required qualifications of independence, impartiality and competence. The first two qualifications will be discussed elsewhere in this work.[212]

However, the term independent, as used here, should be interpreted in the sense of the doctrine of separation of powers, i.e., the judge or the court must not be subject to the control or influence of the executive or the legislature.[213] Impartiality requires the equality of the parties before an unbiassed court, conventionally translated in the doctrine that: "No man may be a judge in his own cause".[214] The third requirement 'competence' has been referred to in the Covenant as, a "competent...tribunal established by law". As is used here the word competent refers to jurisdiction, not to the ability of the court or its members.[215] It seems that this requirement is directed at all *ad hoc* and special tribunals. Therefore, a trial before any illegally created court or a court-like institution, would constitute a violation of Article 14(1). If so, does the court have to be pre-established? In other words, does the institution of a special tribunal, (lawfully created after the commission of the offence), for the purpose of trying the offender(s), contravene the requirement of a competent court? Taking into consideration the present wording of Article 14(1), the answer would be negative. An amendment, therefore, was suggested by some Latin-American members of the commission[216] to include the word 'pre-established' and also to cover all *ad hoc* tribunals. This was firmly opposed and overwhelmingly defeated.[217] However, as Harris has observed, the limited value of the texts as it stands makes it difficult if not impossible to improve upon it by any

other formal prescription. He says: "...the important consideration is whether the court observes certain other requirements once it begins to function, however it might be created". The emphasis is to be put on the due respect given to the other requirements of fair hearings before that tribunal, no matter if it was pre-established or not.(218) However, the drafters of the AMR seem to have managed to avoid such difficulty by providing explicitly for the pre-establishment of the court.(219)

In Jordan, Chapter Six of the Constitution entitled 'The Judiciary', contains some guarantees for the independence and impartiality of the courts, leaving the distribution of and the limitations on their jurisdiction to the relevant laws. It says: "Judges are independent in the exercise of their judicial functions, they are subject to no authority other than that of the law."(220) It also provides that the regular courts exercise their jurisdiction over all persons in all matters, including claims brought by or against the government.(221) On the other hand, the Constitution has also authorised the Government to establish special courts and tribunals, provided that they are bound by their particular laws. Article 110 states that, "Special courts shall exercise jurisdiction in accordance with the provisions of the law constituting them". Under that Article various types of special tribunals have been established.(222)

b) Speedy trial (Without undue delay).

This is an important feature of the fair trial. The right of the accused person to fair trial would not be fulfilled if he were to face interminable criminal proceedings. A prolonged trial adds to the anxiety and pressure experienced by the accused, and impairs his

endurance and his ability to conduct his defence. Simply because of undue delay in the proceedings an innocent man may be imprisoned for a long time before a final judgement is passed. Even if he is eventually convicted, he may already have been kept in custody for a period much longer than the due imprisonment actually prescribed by the law.

Commenting on Article 14(3)(c), the HRC stated that:

> "this guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay". To make this right effective a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal." ‹223›

However, what is required is a speedy trial not speed for its own sake. Unreasonable speed or a hasty trial could have even more damaging consequences for the accused, therefore speed is a matter of degree, dependent upon the circumstances of the trial itself. There is no general provision in the law of Jordan providing for this right. Nonetheless, inspired by the importance of this element of fair trial, the Jordanian legislature has established *Mahkamat al-Genait al-Cuopra* (The Court of Capital Felonies).‹224› Allowing the public prosecution to take its time at the investigating stage in conducting the investigation and preparation of the case, the legislature has imposed restrictive time limits for the proceedings before the court.‹225› The jurisdiction of the court is restricted to certain types of criminal offence (capital felonies) which usually attract great public concern. These are included in Article 326, 327, 328, 330, 338, 292, and 302 of the Penal Code, i.e., committed and attempted murder, intentional killing and sexual offences. Article 8-13 of the special law establishing the court (law No. 33 of 1976) reflect the object of the court to work intensively and speedily on the case under its

jurisdiction. It provides that the public prosecutors should carry out all investigations in a speedy manner and that they personally are liable to criminal prosecution in case of an undue delay in the process.(226) It requires the public prosecutor to indict the suspect within seven days of the conclusion of the investigations. His decision is to be referred to the Attorney-General who must issue a bill of indictment within seven days also. Within the following three days the case must be referred to the court and registered with the secretariat.(227) The court has to proceed with the case within ten days of the registration. Hearings should continue on daily basis. Adjournments should not exceed 48 hours unless absolutely necessary for defined reasons to be mentioned in the same decision.(228) Final Judgements should be pronounced within ten days of the conclusion of the trial.(229)

In practice, the court has been staffed by judges with long experience and a high degree of competence, supported by a highly trained staff. After about ten years in operation the court has shown much success in achieving its objectives. Therefore, it seems to be a standard model to be imitated by other Arab countries, and perhaps the Third World countries, where delays in criminal trials are all too common.

c) Public trial.

Publicity is also an essential element of a fair trial. In the darkness of secrecy, evil in every shape has full rein. Indeed: "where there is no publicity there is no justice ... It keeps the judge himselfwhile trying under trial in the sense that the security of securities is publicity."(230) A court of justice is a public forum. It is through publicity that the citizens are satisfied that

the court renders even-handed justice, and it is therefore necessary that the trial should be open to the public. There should be no restraint on the publication of the reports of the court proceedings.(231) Article 14(1) of the Political Covenant provides that: "...everyone shall be entitled to a fair public hearing...." Publicity is intended to serve as a safeguard against arbitrary actions by the prosecution or by the court.(232) If that is the case, the question that might be asked is, whether the right to public trial is a personal right of the accused or one that belongs to the public? Divergent answers may be given to such a question. Some may argue that, it is a personal right belonging to the accused. If this is difficult to accept, it is also equally incorrect to argue that it belongs to the public, and has nothing to do with the accused person.(233) Therefore, the argument that it belongs to both of them seems more accurate. It protects the interest of the accused in his personal liberty and the legitimate interest of the public in a proper administration of justice. When considering the question, Lord Denning stated that:

> "It must always be remembered that besides the interest of the parties in a fair trial...there is another important interest to be considered. It is the interest of the public in matters of national concern. and the freedom of the press to make fair comment on such matters. The one interest must be balanced against the other."(234)

But how public should a trial be? Does it require the actual presence of the public during the whole trial or any part of it? What if some people are denied admission to the court because available seats are already occupied? Endless problems and difficulties might be experienced in practice with regard to this guarantee. Nonetheless, a public trial may be defined as a trial that takes place in an

open court with relatively adequate number of available seats and free admission for those who may wish to attend. It certainly does not include the right of the spectators to photograph, record, televise or transmit the proceedings to the public outside the court without permission. However, the HRC has provided a clear and direct answer to that question. It says:

> "The publicity of hearings is an important safeguard in the interests of the individual and of society at large. ... the Committee considers that a hearing must be open to the public in general, including members of the press, and must not for instance, be limited only to a particular category of persons."(234a)

Further, the HRC seems to require that not only should the hearings be made public but that also the judgement of the court , except in exceptional cases, be made public as well.(235) In Case No.44/1979 the HRC concluded that Article 14(1) was violated because the victim was denied the right to a public hearing because the judgment rendered against him was not made public.(236)

Since the right to public trial is not an absolute right, there are some circumstances where secrecy might be permissible or even required by law. Therefore, Article 14(1) of the Political Covenant provides that:

> "...the press and the public may be excluded from all or part of the trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

As far as this provision is concerned one may firstly observe that although the first three limitations (morals, public order and national security) are also reasons to impose restrictions on other rights in the Covenant,(237) they are broad enough to cover almost any

denial of the right to public trial.[238] Secondly, although it is a general rule of interpretation that limitations must be construed in a rather narrow way, the insertion of the phrase "in a democratic society", is apparently intended to put more emphasis on the limited character of the permissible restriction on the right to public trial and to enable the HRC to control the correctness of the application of those limitations by a domestic court. Yet the question one may pose here is what is a democratic society?

So far, the HRC has not provided an authoritative interpretation of these terms and phrases, and prefered to judge individual cases in the light of surrounding circumstances. Nonetheless, in a number of cases the HRC has decided that the requirements of publicity were infringed. In Case No.70/1980, for instance, where it was established that the victim "was tried in camera, the trial was conducted without her presence and the judgement was not rendered in public" the HRC held that this constituted a violation of Article 14(1) "because she [the victm] did not have a fair and public hearing".[239] In another case (No.44/1979) where the victim was sentenced "in a closed trial conducted in writing and without his presence and the judgement of the court was not made public", it was also concluded that Article 14(1) was violated.[240]

In Jordan, the right to public trial is protected by the Constitution. Article 101 provide that:

> "(I) The courts shall be open to all and are free from any interference in their affairs. (II) Hearings shall be public unless the court deems it necessary to sit in camera for the sake of public order or decorum."

The Criminal Procedure Code has followed along the same line, but with more restrictions. Article 171 therein provides that:

> "trials shall be public unless the court decides it to be held in camera for the sake of public order or decorum; in all circumstances juveniles or any category of the public may be excluded".

It is clear that the right to public trial is a constitutional right, which may not be restricted except by the court, on either or both of the limitations as defined by the Constitution. Nonetheless, the legislature has added a new limitation, authorizing the court to exclude any category of the public, or to prevent them from attending the hearings.[240a] Such limitation appears to fall outside the constitutional restrictions. Yet the constitutionality of Article 171 of the Criminal Procedure Code has never been challenged before any court. Furthermore, in 1968 the Juvenile Law was enacted.[241] Article 10 of the latter reads as follows:

> "A juvenile shall be tried in camera, no one may be admitted to the hearing except the *Moraqeeb assulwok* (The social worker), the parents or the guardian, the lawyers and other persons directly involved in the case."

Prima facie, this is an unwarranted legislative restriction on the right guaranteed under the Constitution. In 1976, the constitutionality of this Article was questioned before the Court of First Instance in Amman. The court pronounced it unconstitutional and therefore held the trial publicly, although the accused was a juvenile. The Court of Appeal overruled the lower court on the grounds that it had violated Article 10 of the Juvenile Law. When the case eventually came before the Supreme Court, the majority of the court reversed the Appeal Court's decision, stating the following principle:

> "Since the Constitution has conferred the power to decide on the secrecy of the trial solely on the court, Article 10 of the juvenile law by making it obligatory upon the court to sit in camera in all cases involving juveniles, is inconsistent with Article

> 101(2) of the Constitution.The Constitution supersedes the other laws."[242]

In his dissenting opinion, Justice A. Mo'ath argued that: "since the rules relating to publicity and secrecy of trials have nothing to do with the requirements of justice or the rightsof the defence...but only relate to public order and decorum , in accordance with Article 101(2) of the Constitution...such a violation is not fundamental and therefore does not require that the decision of the Cout of Appeal be reversed."[243] Obviously, the argument of Justice A . Mo'ath, reveals a gross misunderstanding of the nature of this guarantee and the role it plays in criminal proceedings.

few months later, the Supreme Court changed its attitude and departed from the previous decision in an almost identical case. In this case the Court of Appeal adopted the view expressed by the Supreme Court in the previous case, and this time upheld the decision of the Court of First Instance. Having reversed the decision of the Court of Appeal, the Supreme Court stated the following reasoning:

> "...(2) secret trial in a criminal case is designated for the maintenance of public security[244] and decorum as provided in Article 171 of the Criminal Procedure Code. A public hearing when the trial should have been held in *camera*, renders the judgement void...Para. 2 of Article 101 of the Constitution authorizes secret trials if publicity would be prejudicial to public order or decorum...When the legislature imposed secrecy on all proceedings involving juveniles (Article 10) it was done for the sake of public order and decorum, and so that the youngsters would not have to stand before the public as accused criminals, a situation which might affect them psychologically or morally in a detrimental way."[245]

It seems that these contradictory decisions are the result of the vagueness of the limitations provided for by the Constitution and the Criminal Procedures Code. In the first case, the Supreme Court had in

mind the explicit provision of the Constitution, (Article 101(2)) which makes the court the sole authority that may decide upon secrecy and publicity in the trial. So the imposition of secrecy upon the court in all cases involving juveniles, by Article 10 of the Juvenile Law, was on the face of it an unconstitutional measure. Thus the verdict and the reasoning seemed correct in the light of the explicit wording of Article 101(2), which confers an exclusive discretion on the court.

On the other hand, the second judgement (the contemporary attitude of the court) is difficult to defend on the basis of the present constitutional provisions, even though it seems sounder than the previous decision . The standing opinion of the court and Article 10 of the Juvenile Law have brought the judicial practice and the law of Jordan into line with the Political Covenant, which requires special procedures, in the case of an accused juvenile that takes into consideration his age and the desirability of promoting his rehabilitation.(246) It seems that the Supreme Court had this objective in mind when it stated in the reasoning that Article 10 of the Juvenile Law is a necessity to protect the youngsters from appearing before the public in the court as accused criminals, a situation which could lead to lasting psychological and moral problems.

Here we have two inconsistent judicial opinions delivered by the same court on the same issue. The first correctly upheld the provision of the Constitution as it stands. The second has carried the constitutional provision much further than it could legally reach, and has stretched it in an unappropriate way in order to give constitutional justification to Article 10 of the Juvenile Law. Although

the second opinion is more desirable in practice because it brings the law of Jordan into harmony with the international standards of human rights, it is difficult to sustain in the light of the present provisions of the Constitution.

In order to overcome such a legal and practical difficulty, Article 101 of the Constitution should be amended to enable the court to follow special procedures in the case of a juvenile person, as is required under the Covenant. This could be achieved by adding a third paragraph to Article 101. There is no reason why it could not be paragraph 4 of Article 14 of the Covenant itself, which reads as follows:"In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation".

However, apart from the views of Justice Mo'ath,and the confusion over the constitutionality of Article 10 of the Juvenile Law, the right to a puplic hearing is provided for in the law of Jordan and implemented in practice .Judgments of the courts are always rendered in public even if the hearings were conducted in *camera*. Except in some special cases judgments of the regular courts are regularly reported in the JBR; the Jordanian press also sometimes report and make comments on the decisions of the courts especially those of the Supreme Court and the Court of Appeal. Access to unreported cases by those who may be interested, requires a special permission from the Clerk of the court where the records are held.

In the case of the Military and the Administrative Governers Tribunals publicity is not always observed in practice, Because the decisions of these tribunals are not subject to appeal to the Supreme Court, the latter is unable to assess their appreciation of the

interest of public order and national security. most cases before these tribunals are tried in *camera* on the grounds of public order and national security. Decisions of these tribunals are not reported and access to their records is very restricted. This practice does not only raise a violation of Article 14(1) of the Political Covenant but also of Article 102 of the Jordanian Constitution itself.

5) The right to a proper defence.

A proper defence requires the observation of certain 'minimum' guarantees. Article 14 of the Political Covenant provides that "In the determination of a criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality". Describing them as 'minimum guarantees' clearly indicates that they are essential, but by no means exhaustive. Deprivation of any of these guarantees in itself may be interpreted as a denial of the right to fair trial.

Such essential guarantees are enumerated in paragraph (3) of the same Article, and in addition to the right to be informed in detail of the nature of the charge(s)[247] they include the following:

a) The right to have adequate time and facilities for the preparation of one's defence:[248]

Time is a crucial factor in criminal proceedings and either extreme can be detrimental. That is to say a prolonged criminal trial could hinder the ability of the defence either by the sheer psychological pressure which usually accompanies such trials or by the loss of valuable evidence of a witness. Hasty proceedings and convictions, on the other hand open a wider margin for errors and deprive the accused of a proper presentation of his defence.

However, what may be regarded as an 'adequate time' is a matter of appreciation, dependent on the exigencies of each case. The word 'facilities'[249] should be interpreted to include all information and objects which the defence may reasonably need. These may include official, non-confidential documents and police reports.

In Case No.158/1983, the person who was convicted on a traffic offence claimed that he was not able to prepare his defence adequately

because the court did not provide him with copies of all relevant documents about the traffic violation. Declaring the case inadmissible the HRC stated that;

> "from 26 August to the date of the hearing on 21 October the author could have examined, personally or through his lawyer, documents relevant to the case at the police station. He chose not to do so, but requested that copies of all documents be sent to him. The Committee notes that the Covenant does not explicitly provide for a right of a charged person to be furnished with copies of all relevant documents in a criminal investigation, but does provide that he shall have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. Even if all the allegations of the author were to be accepted as proven, this would be no ground for asserting that a violation of Article 14 paragraph (3)(b) occurred."(250)

The law of Jordan, guarantees a minimum period of seven days for the preparation of the defence. Article 207 of the Criminal Procedure Code provides that "the public prosecutor shall communicate the indictment along with the list of witnesses, at least seven days ahead of the day of the hearing". Whether such a period of time is equivalent to 'adequate time' required under the Covenant or not, is a matter which varies from one case to another. However, Article 207 prescribes a minimum period, so the public prosecutor or the court may balance the time given with the facts of the case. On the other hand, the defence may also plead for additional time in order to complete the necessary preparations.

The Supreme Court of Jordan does not seem to appreciate the importance of this right. It has pronounced upon this guarantee and in effect denied the accused this basic right. In a celebrated case before the court, the defence argued that the minimum time to prepare the case had not been given. The Supreme Court stated that:

> "...the procedure established under Article 207 is not a fundamental one. Non-communication of the indict-

> ment to the accused before the hearing as prescribed under the said Article, does not render the judgement of the Court of First Instance voidable. Thereupon violation of this kind is not a valid reason for revision by the Supreme Court."(251)

This interpretation appears inconsistent with both Article 14 of the Covenant and Article 207 itself. However, in case of modification of the charge by the court during or after the first hearing, the established practice varies according to the nature of the modification. If such a modification would suggest a graver punishment, the court must inform the defence of such changes and postpone the hearing for any period of time considered necessary by the court.(252) In one of its typical judgements in this context, the Supreme Court stated:

> "In case of modification in the charge, the court should inform the accused of such modification, and give him adequate time to prepare his defence in accordance with Article 234..."(253)

This may seem fair and compatible with the requirements of the Covenant, but nonetheless in the case of a mitigating modification in the charge that suggests a lesser punishment, e.g. from murder to homicide, there is no similar provision, and the established practice of the Supreme Court does not recognise the right to have the hearing postponed for the preparation of the defence in accordance with the modified charge.(254) Such a practice is a severe encroachment on the defence's rights, and is contrary to the basic principles of criminal justice. The defence may have a sound argument and evidence to prove the initial charge false. The modified charge, although mitigated, if proved because of the shortcomings or weaknesses of the defence, would still entail serious consequences affecting the personal liberty of the defendant.

It is difficult to see any legal or rational justification for the distinction between the two cases, and therefore, it could be suggested that Article 234 of the Criminal Procedure Code be amended in the sense that such a distinction be eliminated. An adequate time for the preparation of the defence in both cases must be guaranteed.

As to the second requirement for the preparation of the defence, 'facilities', it seems that access to documents and materials necessary for the defence is usually respected in practice unless it requires the disclosure of private or official confidential documents. In Case No. 56/73, the HCJ rejected the request of the defence to obtain a copy of the letter of the Director of the General Intelligence Agency, because it was testified by the Prime Minister that it was confidential and that the disclosure of its contents would be harmful to national security.(255)

However, Article 209 of the Criminal Procedure Code entitles the defence to copy, at his expense, all documents which he deems necessary for his case. This may include police reports, investigation documents, decisions of the court in previous cases, testimonies of witnesses and all other official but non-confidential documents.(256)

b) The right to legal assistance (to be defended by a counsel).

The Covenant requires that every person charged with a criminal offence be given the right,

> "to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right, and have legal assistance assigned to him in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."(257)

Under a free legal aid system, the choice of a lawyer has always been left to the state. The accused cannot insist that the state pay the lawyer he selects. If the lawyer is paid by the accused himself or anybody else on his behalf other than the state, then the rule of free choice becomes applicable. ECUM, for instance, has held that the state is free to regulate the use of legal aid and to exclude particular lawyers. Therefore, the state is responsible for the conduct of the case by the lawyer appointed under legal aid.(258) Accordingly, the state's control of legal aid must not impair the adequacy of the defence, the 'equality of arms' or any other aspect of the right to fair trial.

In Jordan, legal representation is generally an optional right belonging to the accused. However, in cases where the prescribed punishment is death, imprisonment or hard labour for life, legal representation becomes mandatory. This right commences at the very beginning of the inquisition and continues throughout the whole proceedings. Article 63 of the Criminal Procedure Code provides that:

> "When the suspect appears before the public prosecutor... the latter shall recite the charge upon him and ask the suspect to answer it, reminding him of his right not to answer unless in the presence of his lawyer, such a reminder must be mentioned in the report. If the suspect refuses to appoint a lawyer or the latter fails to appear within twenty-four hours, the interrogation shall be resumed without him."(259)

However, paragraph 2 of the same Article has laid a significant limitation on this right. It says, "In case of urgency because of the fear of losing the evidence, the suspect may be interrogated without a lawyer, providing that all the records be made available to him (the lawyer) later."

This is a widely drawn exception, which is liable to abuse in practice as it could be argued that the element of 'urgency' may exist in most cases on the sole judgement of the public prosecutor, and may be used as a pretext, in order to avoid the presence of lawyers at the most important initial stages of the investigation, where the accused may be induced or misled into making serious admissions. Knowing that all statements or confessions made before the public prosecutor are admissible evidence unless proved to have been obtained under coercion (a task which is extremely difficult, if not impossible to prove in the majority of cases),[260] one may appreciate the importance of this stage.

Another important aspect of this right is the duty of the public prosecutor to remind the accused of his right to have legal assistance and not to answer the charges unless in the presence of his lawyer. The importance of the right to be informed stems from the fact that most of the accused are laymen who are usually not aware that they are entitled to such a right. Therefore Article 14(3)(d) of the Covenant puts emphasis on the right of the accused person to be specifically informed of this right.

Both the public prosecution and the Supreme Court of Jordan seems reluctant to recognise this right as such. It seems that the public prosecution is always in a hurry, and it does not seem to have respect for the right of the accused to be informed of his right to have legal assistance. In a considerable number of cases the Supreme Court has ruled that it is not one of the fundamental defence rights. If has not been observed, it does not render the proceedings voidable. In one of those cases the court stated that:

> "...non-recitation of the criminal charge to the accused or reminding him of his right to remain silent

> and not to answer unless in the presence of his lawyer, does not make the proceedings void."(261)

It seems that the established opinion of the Jordanian courts (directed by the Supreme Court) is that, as far as there is no formal objection by the accused to the proceedings without legal representation, the proceedings are held to be lawful. In 1979, the Supreme Court had clearly embodied that conclusion in the following words: "If the records do not include any objection by the accused to him being tried without legal assistance, proceedings in the absence of the lawyer would be lawful."(262) This justification seems far from being acceptable unless the accused is informed in the first place of his right to object, and then if he does not so do, it might be interpreted as a relinquishment by the accused of his right to have legal assistance.

It was not until 1981 that the Supreme Court departed from its previous attitude to a more appropriate judicial interpretation. In Case No. 52/81, the court stated the following view:

> "If the public prosecutor does not inform the accused of his right not to answer the charge without the presence of his lawyer, and mentions this in the records, he would be violating the law and neglecting a fundamental defence right guaranteed under the law."(263)

There have been no reported cases on this issue since this judgement has been passed. However, the wording of this judgement and its future context clearly suggest that it was intended to establish a new method of judicial interpretation, to be followed in future cases.

Turning again to the Criminal Procedure Code, we find that the legislature has introduced a somewhat strange limitation under Article 65(1): "None of the parties may be helped by more than one lawyer". This seems an unnecessary limitation, since the lawyer(s) is not al-

lowed to speak unless permitted by the investigator. Where such permission is not granted, it must be mentioned in the report, and the right of the lawyer to include his observation in written form is reserved.(264) The most serious limitation on the right to be defended by a lawyer has been imposed by Article 66, whereby the public prosecutor may prevent or sever any contact between the accused and his lawyer(s) at his own discretion, without even offering any reason for that.(265) When applied to specific cases this may be regarded as a violation of Article 14(3)(d) of the Covenant. It would also undermine another important guarantee of this right, provided under Article 152 which says: "Correspondence between the accused and his lawyer shall not be admissible evidence." Such an important guarantee would be meaningless if the accused was deprived of any contact with his lawyer. Therefore, it has to be amended in order to meet the international standards of this right. Accordingly, the last sentence of paragraph (2) of Article 66, "...unless the public prosecutor so decided", must be eliminated.

As has been pointed out, legal assistance in certain cases becomes mandatory by the law. Article 208(1) provides that:

> "In all cases where the prescribed punishment may be the death penalty, imprisonment or hard labour for life, the president of the court or a delegated judge from among its members, must summon the accused and ask him whether he has chosen a lawyer to defend him or not. If he has not and is financially unable to do so, the president or the delegated judge shall assign a lawyer for him."

Paragraph (2) of the same Article requires that such a legal assistance be furnished free of charge.(266) Accordingly, the free legal assistance systems in Jordan is restricted to some serious offences only.(267) Jordan has reported to the HRC that under the Jordanian legal system, when the accused is

> "summoned to appear and, if the charge against him is punishable by the death penalty or by hard labour for life or imprisonment for life, he is asked whether he has chosen an attorney to defend him. If he has not chosen an attorney because his material circumstances are not such as to enable him to appoint legal counsel, the presiding judge or his deputy , appoints an attorney to defend him at Government expense."(268)

Commenting on this paragraph of the report Mr. Bouziri asked "whether that meant that the accused was judged without an attorney when he did not risk the death penalty or a life sentence; that would be contrary to the provisions of article 14, paragraph 3(b) of the Covenant."(269) In reply to this the Jordanian representative stated;

> "... a person brought before the public prosecutor had to wait for an attorney before answering the charge against him. If there was no attorney, the prosector imposed a 24 hour deadline for the appointment of an attorney. No court could judge a person who was not assisted by an attorney if the person was subject to a prison sentence of over five years; if the accused had no money to pay for an attorney, the Government paid for one. For less serious offences (minor offences) the presence of an attorney was not compulsory, but in such cases the court took charge of the interests of the accused and asked him questions for his benefit as if a lawyer was there."(270)

Obviously, the representative of Jordan had misinterpreted the law (Article 208 of the Criminal Procedure Code) and was not aware of the case law especially the judgement of the Supreme Court in Case No.18/74 where the court explicitly stated that free legal assistance did not apply in crimes where the prescribed punishment was the *E'atiqal Mou'akat* (3-15 years imprisonment).

However, in a complaint before the HRC where the author claimed that his right to free legal assistance under Article 14(3)(d) was violated, the state party argued that the right to free legal assistance "must be seen in the light of the nature of the offences with which he was charged". The latter were trivial and ordinary

traffic violations and the punishment was light (a fine of NKr. 1,000 or 10 days imprisonment if the fine was not paid). Declaring the communication inadmissible, the HRC stated:

> "The Covenant foresees free legal assistance to a charged person in any case where the interests of justice so require and without payment to him in any such cases if he does not have sufficient means to pay for it. The author has failed to show that in his particular case the interest of justice would have required the assignment of a lawyer at the expense of the state party."(271)

However, it still could be argued that the law of Jordan does not meet the requirements of the Political Covenant with regard to this right, because it has restricted the right to free legal assistance to the cases of death penalty, imprisonment or hard labour for life whereas, under the Covenant legal assistance should be made available to "everyone charged with a criminal offence", i.e., any criminal offence without restricting it to certain categories of criminal offences. It seems that the sole qualification is that the accused is financially unable to engage a lawyer to defend him and that legal assistance is required in the interests of justice. States parties appear to be therefore, under legal obligation to provide free legal assistance to everyone charged with any criminal offence, when the interests of justice so require if he does not possess the means to engage a lawyer at his own expense.

c) The right "to examine, or to have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same condition as witnesses against him".(272)

It is important that the accused should always be enabled to stand on an equal footing with the public prosecution, especially in respect of summoning and examining witnesses. However, the phrase 'on his be-

half', as interpreted by the ECUM, does not give the accused the right to nominate as witnesses whoever and as many as he wants. The court may refuse to summon a witness(es) if his/their appearance before the court is not likely to assist in discovering the truth. In the words of the ECUM,

> "it (the right) ...does not permit an accused person to obtain the attendance of any and every person and in particular of one who is not in a position by his evidence to assist in establishing the truth...does not forbid the court to refuse to call persons who cannot be witnesses on behalf of (the person charged).(273)

In Jordan, this right has been adequately provided for by the law and highly respected in practice. During preliminary investigation, Article 68 of the Criminal Procedure Code, empowers the public prosecutor to summon all persons whose names are mentioned in the complaint and any other persons whom the suspect may nominate. Those persons are to be notified of the proceedings twenty-four hours before the day on which they are requested to appear for testimony.(274) Any person nominated and duly notified must appear before the public prosecutor at the defined date under penalty of law.(275) However, the suspect's forbears, descendants, wife or husband are exempted from the duty to testify. If they wish to do so, their testimonies on oath are accepted as valid evidence for or against the suspect.(276)

During the proceedings before the court, the latter may summon upon its own initiative any person if it deems that his testimony may be significant. As a general rule all testimonies should be given on oath. Should a witness refuse to take the oath or to answer the questions without a reasonable justification, the court may imprison him for a period not exceeding one month.(277)

With regard to summoning, examining and cross-examining witnesses, the law has placed the accused person and the defence on an equal footing with the public prosecution. According to Article 173(1), the court should summon and hear the witnesses for the prosecution, to whom the prosecution, *al -mushtaki* (the complainant) and the defence may put questions and discuss the answers. If the accused does not have a lawyer, the court should ask him after each testimony whether he wishes to ask the witness any questions. Both the questions and the answers must be documented in the record of the hearing.(278) As to the defence witnesses, Article 175(2) provides that: "After the accused makes his statement, the court shall ask him whether he wishes to summon witnesses, if so the court must summon and hear them."(279) The defence and the accused may ask the defence witnesses questions, on which they may be cross-examined by the prosecution and the complainant as well.(280)

Another fundamental guarantee in this respect has been provided for under Article 207 of the Criminal Procedure Code. It stipulates that the list of the prosecution witnesses must be communicated to the accused seven days before the day of the hearing. According to Article 217, neither the Public Prosecution nor the complainant may summon any witness whose name is not included in such a list unless the accused (the defence) has received a special notification for that purpose.(281)

It seems that the Jordanian courts have always observed the right of the accused to summon and cross-examine witnesses. The Supreme Court has confirmed this right from the very beginning, in 1953 the court overruled the decision of the Court of Appeal and stated: "...acceptance of the medical report in the evidence without summoning

the authors, would deprive the defence of the right to examine their testimonies and discuss their conclusions."(282) Acting under the present Criminal Procedure Code, the court has reconfirmed its previous attitude in rather determined language. It says: "...the Court of First Instance should have heard all the defence witnesses summoned on behalf of the accused."(283)

Similar language was used in another case; "...no prosecution witness may be admitted unless his name has been previously communicated to the defence."(284)

Finally, as mentioned before,(285) the court may disregard the request of the accused to summon someone, without infringing this right, if the court considers his testimony insignificant or otherwise unacceptable. In Case No. 9/57, the Supreme Court of Jordan rejected the request of the defence to summon the public prosecutor of Amman as a witness in that case on the grounds that the statement made by the accused before him was not accepted in the evidence anyway.(286)

d) The right to an interpreter.(287)

It is unfair to bring a person before a court if he cannot speak or understand the language used therein. The assistance of an interpreter is therefore an indispensable requirement for a fair trial in such cases. The services of the interpreter must be free of charge, but does this right apply to the whole proceedings, or only to the oral pleadings before the court? According to the actual wording of the relevant clause in the Covenant, it applies to the latter only.(288) Taking into consideration that, what is guaranteed under the Covenant is merely the obligatory minimum standards, it may be argued that the state should provide this service free of charge at

all stages of the trial, especially if the accused person is financially unable to pay for the service.

In Jordan, such a right is guaranteed under Article 227 of the Criminal Procedure Code, it reads as follows:

> "If the accused or any of the witnesses are not competent in the Arabic language, the president (president of the court) must assign an interpreter to him, the interpreter must not be under eighteen years of age and should take the oath to translate accurately and honestly to him and to the court."

Two noteworthy observations may be pointed out regarding the wording of the above Article. On the one hand, the right to an interpreter is extended to the witnesses and not only to the accused person, while it is obligatory only with respect to the accused.(289) This would allow the accused to summon non-Arabic-speaking witnesses without worrying about the costs if he thinks that their testimony may be of some significance for the defence. On the other hand, the services are made available to any witness or the accused who cannot 'properly' speak or understand Arabic, that is, merely being acquainted with the Arabic language would not be enough to deprive him of such assistance. Obviously, the legislature meant to enable the person to express himself clearly, and nothing therefore would be more satisfactory than his mother tongue, or any equivalent language.

To ensure the implementation of this guarantee, Article 227 provides that: "non-compliance with the provisions of this Article shall render the whole proceedings voidable."(290) However, being a free service, does not mean that it may be an arbitrary one, the interpreter therefore must be impartial. The law stipulates that, in no circumstances, may he be selected from among members of the trying court, even with the consent of the accused and the prosecution.(291)

Accordingly, the defence as well as the prosecution may object to the appointment of a person as an interpreter in a particular trial, providing that he has valid reasons upon which the court shall pronounce immediately.(292) If this is the situation, could then the interpreter be a relative of the accused? There is no reason why he should not be, on the contrary, it seems to serve the purpose of this service in an effective way.(293)

This guarantee has also been extended to deaf or dumb accused persons or witnesses in accordance with Article 230 and 231 of the Criminal Procedures Code. The Supreme Court has ruled that there was no violation of the defence guarantee, since the dumb defendant was assisted by her husband as an interpreter in accordance with Article 230, so far as all the gestures made by her were translated into words by her husband (who was accustomed to communicating with her) to the court.(294)

e) Freedom from self-incrimination (the right to remain silent).

In the Covenant it says that no one shall "be compelled to testify against himself or to confess guilt."(295) It has been mentioned that(296) obtaining confessions or statements by physical or psychological pressure, violates the right of the arrested person to a humane treatment.(297) It also violates the right of the accused to freedom from self-incrimination.(298) Therefore, the accused must be allowed to give or withhold evidence if he wishes, or to make unsworn statements, or to remain silent.

As far as Jordan is concerned, this right has been provided for by the law and implemented by the courts in practice.

According to Article 63 of the Criminal Procedures Code, when the accused appears before the public prosecutor, the latter should recite the charges upon him and "ask him to answer". During the hearings the accused is also under no obligation to make any statement or confession. Article 216 reads as follows:

> "...the president shall ask the accused to answer the charge. If the accused admits the charge, he (the president) shall order that it be recorded in the original words of the accused... If the accused remains silent or denies the charge, the court should proceed to examine the evidence as normal."(299)

Thus, according to the law, the public prosecutor and the court should only ask the accused to answer the charge, nothing more, nothing less. His right to remain silent must not be interpreted as a confession of his guilt, on the contrary, the law explicitly provides that it must be understood as a denial of the alleged charge.(300) His right to speak and defend himself in person (even though he has a lawyer) is always reserved. Article 175 says: "As the public prosecution has demonstrated the evidence the court shall ask the accused if he wishes to make a statement defending himself..."(301)

In the second supplementary report of Jordan to the HRC, it was stated that;

> "At the beginning of the trial, the clerk of the court reads out the charge and other relevant papers or documents, after which the representative of the Public Prosecutor's office and the plaintiff, or his attourney, explain the circumstances of the case. The court then asks the accused how he wishes to plead. If the accused denies the charge or refuses to answer, or if the court is not satisfied with his plea of guilty, the evidence is heard in accordance with the code of the court procedure."(302)

Turning to the case law, it appears that, this right is adequately observed before the courts. In an early case, when the

Supreme Court was working under the previous Criminal Procedure Code (the Ottoman Code),[303] it was stated that:

> "...at the beginning of the hearing the court should ask the accused, before the pleading of the prosecution, if he admits the charge as has been defined in the indictment bill. Having examined the evidence against him, it should ask the defendant again whether he wishes to make any statement."[304]

In another case, it was decided that: "the silence of the accused should not be interpreted or used in support of the prosecution's evidence."[305]

Under the present Code, the court has constantly confirmed its established view. In 1975, the court overruled the judgement of the Court of First Instance and stated the following: "...as the prosecution has concluded its pleadings the court should have asked the defendant whether he wishes to make any observations, without any comment or remarks by the court."[306]

In 1982, the court held that the interrogation was lawful, since the public prosecutor had told the accused that he did not have to answer the charge, but he had chosen to speak and defend himself personally.[307]

It has already been mentioned that, in all cases where it was proved that the accused was compelled to speak or to make an involuntary confession, the Jordanian courts have considered it void and thus inadmissible as evidence.[308]

D - THE RIGHT OF A CONVICTED OR ACQUITTED PERSON.

Deprivation of personal freedom as a penalty for violating valid laws is a long-known and acceptable punishment. If it is invoked upon valid grounds and in accordance with lawful procedures it cannot be described as an arbitrary deprivation of personal liberty contrary to the international standards of human rights. However, even though all the above discussed guarantees and rights of the accused person were fully observed, if convicted the person would be entitled to the following rights:

1) The Right to Appeal.

Considering the grave nature of criminal conviction and the fact that criminal tribunals are composed of human beings, liable to error and mistakes, the right to appeal would seem to be a substantial guarantee for the protection of personal freedom. It is true that, if the judge (court) knows from the beginning that his judgement is subject to a subsequent review by a higher tribunal, he will take extra care in examining the merits and applying the law respectively.

The Covenant requires that: "Everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law."(309) The wording of this clause may cause some ambiguity in practice. The phrase review according to law may give the impression that the matter rests ultimately with the municipal law. However, in Case No.64/1979, the HRC has clarified the situation and pronounced that:

> "... the expression 'according to law' in Article 14(5) of the Covenant is not intended to leave the very existence of the right to review to the discretion of the states parties, since the rights are those recognized by the Covenant, and not merely those recognized by domestic law. Rather, what is to be determined "according to law"

> is the modalities by which the review by a higher tribunal is to be carried out."(310)

On the nature of the criminal offence, it says: "convicted of a crime." In many countries, including Jordan, criminal offences are divided into three main categories: *Mukhalfat* 'violations', *Junah* 'Misdemeanours', and *Gen'ayat* 'felonies'. For each of these categories procedural as well as substantive laws vary even within the same country. Commenting on Article 14 of the Covenant the HRC stated that: "Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito, "prestuplenie") which show that the guarantee is not confined to the most serious offences."(311) In Case No.R.14/61, the HRC concluded that:

> "It is true that the Spanish text of article 14(5) which provides for the right to review, refers only to "undelito," while the English text refers to a crime and the French text refers to "une infraction". Nevertheless the Committee is of the view that the sentence of imprisonment imposed on Mrs. Consuelo Salger De Montego, even though for an offence defined as "contravencion" in domestic law, is serious enough, in all circumstances, to require a review by a higher tribunal as provided for in article 14(5) of the Covenant."(312)

Another difficulty that may arise in practice is that of the type and status of the reviewing tribunal, which may satisfy the requirement of this clause. It requires a review by a higher tribunal whether this means a court of appeal, before which both the merits and the application of the law may be examined, or merely a court of cassation before which only legal questions may be discussed without examining the merits again is not clear. In the case of Jordan this question is of special importance. Since 1976 the most serious criminal offences are being reviewed only by way of cassation before the Supreme Court only.(313) The question to pose here is whether a review by an administrative authority would fulfil this obligation or not? The Covenant says: "tribunal".

Obviously, the office of the Prime Minister, for instance, or the head of the relevant department, is not a tribunal, within the meaning of Article 14(5).

In Jordan, the Criminal Procedure Code 1961, has guaranteed the right to appeal from the decisions of the various criminal courts,[314] either to the competent court of appeal, or directly to the Supreme Court. Most of the laws establishing special tribunals also contain provisions relating to appeals from the final judgements of those tribunals. Only two types of those special tribunals may be regarded as incompatible with the requirements of Article 14(5) since there is no way of appealing against the sentence passed by them, namely; The Administrative Governors' Tribunals and Martial-law Courts. So far as the latter is concerned, their decisions are executable upon approval by the Martial Law Governor-General, or the King if the sentence happens to be the death penalty. It has been stated that decisions of that court shall not be subject to any review by any tribunal whatsoever.[315]

Administrative Governors are also vested with wide judicial powers under various pieces of legislation. They may pass sentences ranging from small fines to indefinite detention. In most cases, these decisions may not be reviewed save by the Minister of the Interior.[316]

Such legislation is manifestly incompatible with the requirements of the Covenant, which explicitly requires that every criminal conviction should be made subject to appeal to a higher tribunal. After more than ten years of the entry into force of the Covenant, nothing has been changed.

2) Freedom from double jeopardy: "The rule *non bis in idem*"

Trying a man twice for the same crime is one of the oldest grievances to be found in the history of civilization. Its roots run deep into Greek and Roman times.[317] The idea that one trial and one punishment were enough remained alive through the canon law and the early Christian teachings. Those teachings were revived in the eighteenth and nineteenth centuries, and became part of the American Constitution.[318]

The theme of this safeguard is that the state with all its powers should not be empowered to keep individuals under perpetual threat of penal trials and punishment for an offence for which they have already been tried. That is to say, where a person was tried for an offence, whether convicted or acquitted, he should not be subjected to trial again for the same offence. If that is to be permitted, personal liberty would be in continuous jeopardy, when and as the state pleases. Therefore Article 14(7) of the Political Covenant provides that: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedures of each country." According to Harris, "This final qualification robs the text of its character as an international guarantee."[319] That might be true, but the sentence "in accordance with the law and penal procedures of each country", does not seem to add any real limitation on this guarantee, since trials would always be conducted within the municipal law of the state concerned. The real difficulty that might be experienced in the light of such a qualification is when a person is tried (acquitted or convicted) in state 'A' for an offence which is also a criminal offence in accordance with the law of state 'B', his home country. Some may argue that, trial and punishment of the same

person for the same offence in both countries would not fall under the prohibition of Article 14(7) because of that sentence.

In Jordan, neither the Constitution nor the Criminal Procedure Code offers any protection against double jeopardy. Although Article 58(1) of the Penal Code provides that " a person may not be punished more than once for the same offence", practice, however, reveals grave violations of this right, especially on the part of Administrative Governors acting under emergency laws and regulations. As it will be explained later, these laws and regulations, which confer sweeping emergency powers on the administration, have been applied continuously for a long time in Jordan.[920]

a) Acquitted persons.

In 1964, the Governor of Jerusalem had imposed compulsory residency in the city of *Al-Khaleel (Hebron)* on Mrs. X for two years under direct police control, in accordance with Articles 8 and 18 of the Defence Regulations No. 2, 1939. The lady was acquitted by the court of the alleged charge (pimping). When the lady complained against the administrative order, the HCJ upheld the Governor's decision and pronounced it lawful.[921] Accordingly, that lady was punished for the same offence even though she had been tried and pronounced innocent by a final judgement of a competent court of law.

b) Convicted persons

Here one may find several precedents of 're-punishing' persons after they have already been tried and punished for the same offence. From among these the following may be mentioned:

- Mr. X was convicted by the competent court in Amman on 2nd January 1952, and sentenced to four years of hard labour in accordance with Article 2 of the Anti-Communism law. Before he finished his sentence, the Minister of the Interior had tried him *in absentia* on 21st November 1954 and issued a Defence Order providing for his detention for an indefinite period, in accordance with Article 18 and 9A of Defence Regulations No. 2, 1939. When the case was brought before the HCJ, the decision was overruled by the court, who stated that:

> "An order issued by the Minister of the Interior, detaining a person for an undefined period in accordance with the Defence Regulations, on the grounds that the said person had committed an offence against the public interest and public security while this person was actually convicted under the Anti-Communism Law and hitherto serving his sentence, is void and therefore must be abrogated."[illegible]

- Another Mr. X was tried and convicted by the competent court in Amman on spying activities and sentenced to seven years of hard labour. Having served his sentence and on the day he was due to be released, the Administrative Governor of the capital tried him *in absentia* and passed a Defence Order detaining him for an indefinite period on the same charge. When the validity of the administrative decision was challenged before the HCJ, the majority of the court held that the Governor's decision was a lawful administrative measure. It seems that only Justice N. Reshidat had heard of the right, not to be subjected to double jeopardy or not to be punished twice for the same offence. In his dissenting opinion he stated:

> "Since it is known for sure that the complainant was in jail serving his sentence... and therefore he could not have committed any offence against the safety of the Kingdom... he has already been punished for the original offence that he had committed seven years ago and there-

> fore he must not be punished again for the same offence."[323]

In another case (No. 83/62), the Supreme Court itself stated that:

> "Trial and conviction of a person before the Governor of the Capital on a charge (smuggling and distributing drugs) in accordance with Defence Regulations No. 23, 1960, does not prevent the ordinary courts from trying him for the same charge."[324]

It seems that the Jordanian courts and the administration have misunderstood the rule "*non bis in idem*" and did not believe that a man must not be tried twice for the same offence. It also shows that the authors of the Jordanian report under Article 40 of the Covenant (CCPR/C/1/Add.56) and the representative of Jordan were not aware of the Jordanian case law when they stated in the report that "it is a recognized principle in both jurisprudence and judicial practice that no person may be tried or punished twice for the same offence."[324a]

3) The right to enforceable compensation for unlawful deprivation of personal freedom.

A man, unlawfully deprived of his personal liberty, should receive compensation. This is the last and minimum protection of the right to personal liberty if all other guarantees have failed. The state has various weapons by which it may deprive any individual of his liberty. The individual has only one way to restore his liberty, and that is legal proceedings which usually take a long time and may cost him everything he possesses. Accordingly, this right has acquired a great deal of attention from the Human Rights Commission. Two provisions have been included in the Political Covenant in order to cover all forms of unlawful deprivation of personal liberty. Article 9(5) states that: "Anyone, who has been the victim of unlawful arrest or detention, shall have an

enforceable right to compensation." If the person is detained for a certain period of time without trial or without being convicted of any criminal offence, either because he was not the right person or because the alleged wrong act had not, in fact, been committed, payment of compensation will be the least that one would hope for. Unlawful arrest or detention is in itself a valid reason for compensation, but does the length of the detention matter? In the light of the explicit wording of Article 9(5) above, it should not affect the entitlement to compensation even if it was for one day or less. Yet, the length of the period (among other factors) would certainly affect the sum of the compensation involved.

However, if the judicial proceedings ensue and result in an erroneous conviction of the accused, the unfairness and oppression would be even graver. Therefore, Article 14(6) provides that:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or has been pardoned on the ground that the new or newly-discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

This right applies only when the miscarriage of justice is redressed by a reversal or pardon based on a newly-discovered fact. The new fact might relate to the constituents of the alleged crime itself, or to a fundamental error in the judicial proceedings. Accordingly, compensation is not required if the accused is responsible for non-disclosure of the fact.

The right to compensation in the case of miscarriage of justice, Article 14(6), and in the case of unlawful arrest or detention, Article 9(5), is an essential part of the legal protection of personal liberty.

Apparently this right could cause some practical difficulties in respect of its implementation, since it has been referred to the domestic law to decide the issue of compensation, "...shall be compensated according to law..." The question that arises here is, who shall pay the compensation? The government or the agent(s) who made the error or violated the law? What about the traditional argument that the judiciary is an independent branch of the government, and therefore the latter is not responsible for its wrongful actions? So far, in many countries the domestic law is yet to establish the responsibility of the state for wrongful judicial actions.

All these are valid arguments and questions, but they fall outside our concern here, they relate to adjacent subjects, namely, the responsibility of the state for wrongful action of the judiciary.(325) What concerns us here is the legal obligation of the state party under the above international provisions.

To meet this obligation, states parties should introduce sufficient municipal provisions guaranteeing adequate compensation to the injured person. It is a matter of little importance, after that, who in fact will pay, the government or the individual agent at his own expense. That is so because the relation between the three branches of national government and their relations with their officials and agents, is a matter which rests within the domestic law of the state concerned.

As far as Jordan is concerned, payment of compensation for arbitrary or unlawful deprivation of personal liberty is a cumbersome issue, and a basic right that has received little attention in practice. The Constitution lacks a provision entitling the individual to receive compensation in such cases. The only provision in the law of Jordan is Article 178 of the Criminal Procedure Code, which entitles (upon the

request of the defendant) the court to award compensation against the complainant if his claim is proved to be false or illfounded, but not against the Government. On the contrary, the law of the Government Proceedings has exhaustively enumerated the cases in which an action may be brought against the Government for payment of compensation.(326) Arbitrary deprivation of personal liberty is not included in these cases, and therefore, actions against the Government in this context would be considered inadmissible.

However, this leaves open the possibility that an injured person may bring an action for tort against the individual agent, who has violated the law, in his personal capacity. Nonetheless, available records and sources do not indicate any cases where such an action has been brought against those individuals, nor that any such compensation has been awarded by any Jordanian court so far.

Available records and resources however, reveal that in some cases a person is arrested upon an administrative decision, issued by an Administrative Governor, which provides for his detention for an indefinite period of time. Most of these decisions are made immune from judicial review by the HCJ under Article 20 of the Instructions of the Martial Law Administration of 1967. As for the rest, the regular courts are practically unable to assess the legality of those decisions because the law does not require the administration to state any specific reason for its actions; all that is required is to mention that the decision has been issued in accordance with the relevant Article(s) of the Defence Law or Regulations or the Martial Law Instructions.(327)

When individuals are eventually released after a period of detention, they, generally, do not seek compensation through the court and in the very rare instances when they do, they are faced with the fact that the

administrative decision upon which they were detained was a valid decision since it was not nullified by the HCJ, and therefore no compensation can be awarded as a result of a lawful measure. As the Supreme Court has put it:

> "...If not abrogated by the Administrative Court (the HCJ) during the time limit (60 days), the administrative decision would be treated as a lawful decision, and therefore the ordinary courts are powerless to question its validity, even for the purposes of compensation."(328)

Consequently, the right of the injured person has been trapped between an administrative court, which is prevented from nullifying the administrative decision, and a civil court which is powerless to award any compensation unless the administrative decision (the detention order) is nullified by the administrative court.

It seems that the Jordanian courts do not have much regard for the right of the individual, who is unlawfully deprived of his personal liberty, to receive compensation. In a case before the HCJ, a person was unlawfully detained for a period of two months, in accordance with an administrative decision. When he had been released, he raised a complaint before the HCJ, in order that it might pronounce his detention unlawful, so he could sue the administrative agent for tort before the ordinary courts. The HCJ rejected the complaint, and stated that:

> "... Hence, the period of detention (two months) has already been served and the complainant is released... the complaint must be rejected because there is no merit in passing any judgement in this case."(329)

Accordingly, this person was unlawfully deprived of his personal liberty, and also lost his legitimate right to be compensated. Had the HCJ pronounced his detention unlawful, he could have claimed damages before the ordinary courts. Without such a pronouncement the latter cannot award any compensation because the administrative decision has not been

nullified by the competent court and therefore must be treated by the ordinary courts as if it were a lawful decision.

Such legislative and judicial practice is a plain violation of the minimum international standards granted under the provisions of the Political Covenant. As a state party, Jordan is under legal obligation to bring its laws and practices into line with the requirements of the Covenant in this respect. A new constitutional provision adopting the theme of Articles 9(5) and 14(6) of the Covenant should be introduced. The jurisdiction of the HCJ may also be extended to enable the court to award compensation in cases of unlawful or arbitrary deprivation of personal liberty. Until such adjustments are made, Jordan shall continue to be in breach of its obligations under the Political Covenant.

In a considerable number of cases under the latter where it was proved that the victims were unduly deprived of their personal liberties, the HRC had pronounced that the authorities of the states parties concerned should pay fair compensations.[329a]

3 - THE RIGHT TO FREEDOM OF EXPRESSION.

A — IN GENERAL.

The right to express one's views and beliefs is a fundamental human right.[330] The relation between this right and all other cultural and political rights is rather special, that is to say, the amount of regard and protection it receives in any country, reflects clearly the true situation of human rights in that country. According to a leading human rights lawyer in the Middle East[331] the disregard for freedom of expression in most of the Third World countries has led to the neglect and suppression of all other human rights. The experience of the Arab World indicates that, man's fears to express his views and opinions, because of the increasing number of exceptional laws enforced by secret tribunals which strip him of his rights and deprive him of any guarantee, have in many cases led to violence and revolts against the legal and political systems.[332]

Historically speaking, this right was denied by many ancient civilizations. Men were prosecuted for expressing what were then considered to be dangerous or heretical views.[333]

However, it was not until late in the eighteenth century that this freedom was recognized as a human right.[334] According to Article 11 of the French Declaration of 1789,

> "The unrestrained communication of thought or opinion being one of the most precious rights of man, every citizen may speak, write and publish freely, provided he is responsible for the abuse of this liberty in the cases determined by law."[335]

Thus, ever since the struggle between public authorities and individuals over the freedom of expression has become worldwide, and this right has begun to flourish and spread gradually in the constitutions of

the nineteenth and twentieth centuries.[336] However, most modern constitutions contain provisions providing for the right to freedom of expression as a constitutional right.

B — ISLAMIC LAW.

According to many Islamic jurists, exercise of the right to freedom of expression is "not only a right but also a duty of all believers". According to A. Mawdudi, for instance, this right is guaranteed to every one in order to advocate righteousness and to fight evil. He says: "Islam gives the right to freedom of thought and expression to all citizens of an Islamic state on condition that it is used for propagating virtue and not for spreading evil."[337]

It is interesting to notice that this concept is somewhat similar to the communist concept of the freedom of expression. As to the latter, expression is free as far as it serves the aims and objectives of the Communist Party. Communism may tolerate criticism, but certainly not opposition.[338]

Although there is no explicit reference to the right to freedom of expression in the 'Qur'an, Muslim jurists[339] argue that it is implied in many Qur'anic verses.[340] However, the Prophet was reported to have said:

> "If any one of you comes across an evil, he should stop it with his hand, if he is not in a position to do so, he should try to stop it by means of his tongue, i.e., he should speak against it."[341]

The Islamic D.H.R. provides that:

> "a) Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons.

b) Pursuit of knowledge and search after truth is not only a right but a duty of every Muslim.
c) It is the right and duty of every Muslim to protest and strive (within the limits set out by the law) against oppression....
d) There shall be no bar on the dissemination of information provided it does not endanger the security of the society or the state and is confined within the limits imposed by the law.
e) No one shall hold in contempt or ridicule the religious beliefs of others or incite public hostility against them. Respect for the religious feelings of others is obligatory on all Muslims."(342)

C - MODERN INTERNATIONAL LAW.

The right to freedom of expression has been entrenched in all major international human rights instruments. Article 19, of the UDHR provides that:

> "Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any medium and regardless of frontiers."(343)

Article 19 of the Political Covenant stipulates that:

> "(2) everyone shall have the right to freedom of expression, this right shall include freedom to seek, receive or 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 medium of his choice."(344)

Freedom of expression cannot be established as an absolute right,(345) therefore, paragraph (3), of the same Article, provides that:

> "The exercise of the right provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> a) For respect of the rights or reputation of others.
> b) For the protection of national security or of public order (*ordre public*) or of public health or morals."

In order to define the scope and the legal dimensions of the obligation of states parties with regard to the right to freedom of expres-

sion, one must analyse the structure and the terms of Article 19 of the Covenant, as well as the limitations provided for by the same Article:

1) A comparison between Article 19 of the Political Covenant and its counterpart in the UDHR, clearly shows that the former has distinguished between the right to freedom of opinion and that of freedom of expression.(346) They appear in two separate paragraphs.(347) It is also explicitly stated that the limitations mentioned in paragraph (3) apply only to freedom of expression, and not to the freedom of opinion, paragraph (1). In the UDHR they are both subject to the same limitations referred to under Article 29. This was probably what Partsch meant when he said that the Covenant had improved upon the UDHR in this respect.(348) Thus, it is evident that the right to freedom of opinion is an absolute right, and therefore no restrictions may be imposed thereupon, whereas freedom of expression, as a public matter of social importance requires some limits. The right to hold opinions without interference, excludes any limitation whatsoever. A proposal to limit the prohibition to interference by public authorities only, was rejected on the grounds that, an opinion is a private matter which should be protected from outside interference of any kind.(349) To this end the HRC stated that "this is a right to which the Covenant permits no exception or restriction." (350 Accordingly, states parties should not impose any restrictions nor should they sanction any interference with the right of individuals to hold opinions. The state must intervene to prevent official agencies as well as private individuals from interfering with this right.

2) It seems that the Article under examination has borrowed the terminology of Article 19 of the UDHR, it says: "this right shall include the freedom to seek, receive and impart information...". Indeed, freedom to "impart" information through a medium of one's choice is an integral part

of the freedom of expression. If freedom to "receive" information is considered part of the freedom of expression in the sense that it is a means whereby one could form and express one's views and opinions, some may ask, in what sense could the freedom to "seek" information constitute a part of the freedom of expression? Therefore the inclusion of this element caused a great deal of opposition during the framing of Article 19. The principal objection was that it was irrelevant and might provide a means of interference into the affairs of others.[351] This objection was rejected on the ground that such fears were inconceivable under the limitations of the clauses of paragraph (3) of the same Article.

However, the HRC has stressed that,

> "paragraph (2) requires protection of the right to freedom of expression, which includes not only freedom to "impart information and ideas of all kinds", but also freedom to "seek" and "receive" them "regardless of frontiers" ... . Not all states parties have provided information concerning all aspects of the freedom of expression ... . In order to know the precise regime of freedom of expression, in law and in practice, the Committee needs ... pertinent information about the rules which either define the scope of freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right. It is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual's right.[352]

Accordingly, the HRC has made it clear that the right to freedom of expression embraces the three elements (seek, receive and impart information and ideas of all kinds, regardless of frontiers) and therefore, states parties are under legal obligation to implement these elements together. The HRC has also required the states parties to provide it with "pertinent information" on the laws which define the scope of the freedom of expression and the restrictions imposed thereby. Nonetheless the HRC did not provide precise definitions of the meaning of

the terms and the concepts used in Article 19(2). Thus, until an authoritive interpretation is pronounced by the HRC the exact scope and legal contents of these concepts remain uncertain. This however, should not discourage one from casting some light on the main aspects of each of these concepts. Reports of the states parties offer little help in this regard, for, as has been noticed by the HRC, they are not only brief on this particular Article, but also tend to generalize. What may be helpful in this respect are the comments made and the questions raised by the individual members of the HRC during the consideration of the reports of the various states parties. Summary records of the meetings where these reports were considered indicate that members of the HRC were more concerned with issues such as the right of the person to express political views different from those preached by the official authorities;[353] and one's right to manifest peacefully ideas and beliefs of one's choice without undue restrictions;[354] censorship of the printed press, radio and television programmes, films and video tapes, and other cultural and political enterprises.[355] One of the most frequently raised issues especially in the more recent discussions, is the availability of foreign newspapers, books and films, and the free flow of information and data to and from the country. Openness of the government about official and nonconfidential data and information is also becoming an increasingly important subject.[356]

During the consideration of the second report of Hungary (CCPR/C/37/Add.1), for instance, members of the HRC wanted to know what restrictions were imposed on the freedom of the press and the mass media by the law, and whether the courts and the administrative authorities could impose restraints on the expression of political views. Mr. N'diye, noted that two questions were left unanswered during the discussion of

the initial report of Hungary, "namely whether a person who did not agree with the social order could express his views openly, and whether there were political prisoners or detainees in Hungary who had not undergone trial". He also added that the provision of Article 19(2) could only be implemented in practice when individuals have access to information, and asked what means were available to an individual to influence public opinion in a manner which could result in an amendment to the Constitution and the political system. Professor Higgins, noticed that the Press Act of 1985, mentioned in the report, was of special importance because it increased restrictions and, "seemed to tie in with the provision on incitement of hatred contained in article 269 of the Criminal Code". She also added that she knew that, "fines for the publication of unauthorized literature in recent months had become very large", and asked for further information about the Press Act. With regard to the latter Mr. Opsahl asked about the justification for restricting the establishment of periodicals only to certain bodies, such as state organs.[357]

In the consideration of the initial report of Jordan (CCPR/C/1/Add.24), Mr. Hanga, noted, the importance of Arab culture and wondered, "whether that culture was made accessible to the broad masses of the population and to what extent their participation was assured in the active and passive use of the mass media."[358] During the consideration of the second supplementary report of Jordan (CCPR/C/1/Add.56) Mr.Tranopolsky, referred to the part of the report dealing with Articles 19, 22, 25, and 26 of the Covenant, which in general terms, confirmed freedom of opinion and association and the right to equality, and asked,

> "whether the enforcement of martial law required every person holding a government position, to take an oath of

> allegiance or to undergo security clearance. Although those procedures were justified for certain positions when those holding them were likely to know secrets of state, their extension to all citizens would be in conflict with the provisions of the Covenant."[359]

Taking into consideration the above discussion, the general rules of interpretation, the nature of the right to freedom of expression and the ordinary meaning of the words used in Article 19(2), the three concepts (impart, receive and seek) may be interpreted to include the following.

The right to "impart" information and ideas of all kinds, includes the right of everyone (without discrimination) to express his ideas and to disseminate information to the outside world through a medium of his choice. Subject to the permissible limitations referred to under paragraph (3), this right is not limited to verbal communication or writing, but it also includes gestures, drawings and cartoons as well as all other methods and mediums of expression and communication between individuals. As for the mass media instruments, it has generally been accepted that this right does not entitle every member of the public to a share of their time or space in order to express his ideas or opinions. In Case No.61/1979, the HRC held that:

> "While not every individual can be deemed to hold a right to express himself through a medium like TV, whose available time is limited, the situation may be different when a programme has been produced for transmission within the framework of a broadcasting organization with the general approval of the responsible authorities."[360]

In the same direction the ECUM held that this right does not entail a right to be granted radio or television time to express one's views and ideas.[361] Yet, denial of this right for a specific group(s), a political party or a particular minority, may be challenged on different grounds.

The question that may be asked in this regard is, whether this right entitles the individual to establish a private radio or television station

in order to impart his views or any other information he may wish to broadcast to the public. As a starting point, the answer should be positive. Nonetheless, because of the nature of this function, it is a commonly acceptable practice for the state to impose some restrictions and conditions on the establishment of private radio and television. So far as such regulations are not discriminatory they may not be regarded as a violation of Article 19(2) of the Covenant.

Without prejudice to the provision of Article 19(3), this right entitles the individual to express "ideas and information of all kinds." As interpreted by the ECUT; this right (the right to impart) is not limited to " 'information' and 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population".(362) In Case No.61/1979, relating to censorship of radio and television programmes on homosexuality, the HRC accepted that the rights of the complainants under Article 19(2) of the Covenant were restricted, but nonetheless found that the restrictions were justified under paragraph (3) and therefore held that no violation of Article 19(2) had occurred.(363) In a number of other cases the HRC has held that Article 19(2) of the Covenant was violated when the victims were prosecuted for expressing political views. In Case No.28/1978, for instance, the HRC found that Article 19(2) had been violated, because the victim "was detained for having disseminated information relating to trade unions activities."(364)

Finally, it may be asked whether Article 19(2), interpreted in the light of Articles 18 and 19(1) of the Political Covenant, could protect the right of the individual to abstain from performing military service as a form of expression of his personal convictions and ideas. The HRC

declared a communication inadmissible on the ground that, "the Covenant does not provide for the right to conscientious objection; neither article 18 nor article 19 of the Covenant..., could be construed as implying that right."[366] Although the records do not indicate whether Article 19(2) was specifically invoked or not, the HRC dismissed the communication without analysing the nature of the objection and the scope of the provision of Article 19(2). Instead it had relied on the conclusion that the right of conscientious objection was not included in the Covenant. This conclusion seems questionable, because Article 19(2) of the Covenant entitles the individual to express (within the limits of paragraph (3)) opinions and ideas "of all kinds" and not only those referred to under the Covenant. The question that the HRC should have addressed itself to was, whether or not the objection to military service on the ground of personal convictions and beliefs may be regarded as a form of expression of such personal convictions and beliefs within the meaning of Article 19(2).

The right to "receive" information and ideas of all kinds without obstacles or undue restrictions is closely related to the right to "impart" such information and ideas. This includes the right of the individual and the public at large to be properly informed of matters of personal or public concern. Although it does not require the state party to inform everyone, in his individual capacity, of matters which may not be of specific concern to him, it nonetheless imposes an obligation to keep the public informed of matters of public concern. The public is entitled to receive adequate information on such matters from the official authorities, as well as from the mass media. Official authorities must not interfere with the right of the mass media to function freely, and to provide the public with facts and information and to make fair

comments on such matters in order to keep the public properly informed.(366)

Freedom to receive information includes everything that is available provided that it is by its nature open to the public. Subject to the local regulations it also includes the right of the individual to erect a powerful antenna or to install a satellite dish in his garden in order to receive radio and satellite programmes from foreign and distant stations. Another important aspect of this element of the freedom of expression is the right of the individual to import for his personal purposes foreign books, newspapers, films and video tapes even if the production or publication of such materials is illegal in the country. When the production or publication of such materials is illegal in the country the authorities may lawfully prevent the person from "imparting", publishing or distributing such materials in that country.(367)

The third element of the right to freedom of expression as expressed in Article 19(2) is the right to "seek" information and ideas of all kinds regardless of frontiers and through a medium of one's choice. This element is more difficult to define than the other two. Contrary to the right to "receive" information and ideas, it does not impose an obligation on the state authorities to provide the individual with information and ideas. Like the right to "impart" information and ideas, it imposes, in the first place, a passive obligation on the state not to interfere with this freedom. Primarily, it means access to public and non-confidential information and data. In the words of the ECUM, it is "a right of access by interested persons to documents which although not generally accessible are of particular importance for its own position."(368) Accordingly, official authorities may not deny the individual access to such records and information though they are not intended for publication

and the individual does not have to justify his interests because he is entitled by law to have access to them. Within the limits of the permissible limitations provided for in Article 19(2) it also imposes an obligation on the state not to interfere with the freedom of research and journalistic investigations and the rights of those who are interested to investigate any matter of public or private concern in order to establish the facts and discover the truth. Freedom to seek information entitles the individual to leave his country in order to seek knowledge and information abroad, but does it impose an obligation on a state party to grant entry visas to foreigners who wish to seek knowledge and information in that country? The position is not quite clear yet, but two basic factors should always be kept in mind. On the one hand, this right overlaps with other rights which may be subject to different conditions and limitations; on the other hand, freedom of information is an essential feature of the democratic society. ‹369›However, as for private foreign individuals, once they are inside the country and are subject to the jurisdiction of the state party they are normally entitled to this freedom just like its own citizens. As far as foreign correspondents and journalists are concerned the state party should enable them to fulfill their task and in normal circumstances may not subject them to continuous surveillance and censorship. However, under special circumstances the state may impose reasonable limitations on their activities without infringing this right, providing that these limitations are not discriminatory and apply to all foreign correspondents and journalists equally.

3) Paragraph (3) also contains some concepts which are difficult to define and liable to different interpretations. Although the limitation

clause in Article 19 (3) is the only one in the Covenant to be preceded by a preamble, it nonetheless has followed in the general trend with regard to the terminology. Terms such as 'morals', 'public health', and 'national security' have also been used as restrictions on other rights in the Covenant.

The HRC does not seem to have committed itself to precise definitions of these phrases and prefers to judge individual cases in the light of their own circumstances. However, some of these phrases are more difficult to define than others and therefore, are more liable to different interpretation from one country to another. 'Public morals' for instance are a matter of social conception which varies from one country to another and, even within the same country from time to time. What may be regarded as immoral in this country may be quite acceptable in some others. What may be regarded as acceptable behavior nowadays might have been considered immoral ten or twenty years ago. In Case No.61/1979, when this particular ground was invoked by the state party to justify the action of the national authorities, the HRC stated that, "public morals differ widely. There is no universally applicable common standard. Consequently, in this respect a certain margin of discretion must be accorded to the responsible national authorities."(370) The concept of public order *(ordre public)* is also difficult to define in a precise manner. It varies from one state to another depending on the nature of its political and social system and the development of its public institutions. It is certainly wider than the concept of public security and national security or public safety, but it is quite impossible to draw an exclusive list of the matters which maybe included under the concept of public order as applied in all countries. However, phrases such as public health are less problematic, because what may constitute a threat

to public health in one country is usually so with regard to another. Article 12, of the Economic Covenant provides an important indication as to what may come under public health. Some have suggested that "what a state is required to do by that article is surely permissible under the Covenant, even if it entails small, normal limitations on other individual rights"(371)

As to the concept of "national security", A.C. Kiss suggested that a definition could be derived from the two words "national" and "security". He says:

> "The word "national" is generally used to refer to that which concerns a country as a whole. Thus, restrictions on human rights can be adopted under this concept only if the interest of the whole nation is at stake. This excludes restrictions in the sole interests of a government, regime, or a power group."

With regard to the word "security" he stated that; "... it may be suggested that the term security used in the Covenant corresponds to the term "national security" as used in the Charter."(372)

To explain this he argued that the U.N. Charter stipulates for the maintenance of international peace and security i.e peace between states and the security of every state. To this end the Charter forbids the use or threat of force against the political independence or territorial integrity of another state, and then concluded that;

> "national security in the Covenant means the protection of territorial integrity and political independence against foreign force or threats of force. It would probably justify limitations on particular rights of individuals or groups where the restrictions were necessary to meet the threat or the use of external force. It does not require a state of war or national emergency, but permits continuing peacetime limitations, for example, those necessary to prevent espionage or to protect military secrets."(373)

Indeed, this argument contains a great part of the truth, but it has to be admitted that threats to national security are not limited to

"threat or use of external force" which is prohibited under the U.N. Charter. It should be remembered that the Charter refers to "national security" in the context of international relations between states, while the Covenant refers to it in terms of domestic implementation and domestic circumstances. For the purposes of the Covenant national security could seriously be jeopardized by the threat or the use of internal forces from within the state. In addition to the prevention of espionage and the protection of military secrets, preservation of national security may justify other measures and limitations on the right to freedom of expression if they are deemed necessary in the light of the surrounding circumstances which may not necessarily involve a threat or use of external force.

However, one common element among all the grounds for permissible limitations under Article 19(3), is that they are all difficult to define and that they leave a margin of appreciation to the national legislature when imposing limitations on the freedom of expression. Furthermore, all the permissible limitations under these grounds are subject to the the requirement that they should be "provided for by law and are necessary". This in itself poses considerable difficulties. One may wonder, whether the term "law" as used here is limited to legislation or whether it also includes national customary laws ? This question is of special importance in the case of such a universal document which is meant to be implemented in many countries which all have remarkably different customary laws. The question was raised under the corresponding provision of the EHR (Article 10). In the Sunday Times Case; it was asked whether or not freedom of expression may be restricted by limitations imposed by unwritten common law. The ECUT stated:

> "The court observes that the word "law" in the expression 'prescribed by the law' covers not only statute but also unwritten law... . It would clearly be

> contrary to the intentions of the drafters of the Convention to hold that a restriction imposed by virtue of the Common Law is not 'prescribed by law' on the sole ground that it is not enunciated in legislation".(374)

The word "necessary" is an important qualification on the discretion of the domestic legislature in this regard. It means that in order for the restrictions to be legitimate it is not enough that they be provided for by the domestic law, they must also be necessary for the protection of one or more of the values enumerated under subparagraphs (a,b) of Article 19(3). The question would thus be, who may decide upon the necessity of or the need for such limitations? Obviously it falls, in the first place, to the national legislature to assess the need for any limitation to protect national security, moral or public order in the light of the domestic circumstances. Nevertheless, assessment and appreciation of the need for such limitations by the national authorities are not final and are subject to the judgement of the HRC who may disagree and consider the restrictions to be unnecessary and therefore contrary to the requirements of the Covenant.

The HRC has stated that:

> "Paragraph 3 expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsiblities and, for this reason certain restrictions on that right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a state party imposes certain restrictions on the exercise of freedom of expression, this may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to those conditions that restrictions may be imposed. The restrictions must be "provided by the law"; they may only be imposed for one of the purposes set out in subparagraph (a) and (b) of paragraph 3; and they must be justified as being "necessary" for that state party for one of those purposes."(375)

The state party is thus under obligation to show that the restrictions imposed by the law are necessary in the case of that

particular country or otherwise they would be considered impermissible restrictions. During the consideration of the second periodic report of Hungary,[376] Professor Higgins referred to this particular requirement with regard to the Press Act 1985 of Hungary and asked "why restrictions which were not regarded as necessary in other countries were considered essential in the case of Hungary."[377]

However, the effectiveness of the assessment of the need for and the legitimacy of the restrictions imposed by a state party on the freedom of expression, may be hindered by the vagueness of the concepts used in paragraph (3). That is to say, that the task of the HRC is not always an easy one. This is because the reasons or the grounds upon which the imposition of those restrictions may be justified are very vague and not easily definable. In Case No.61/1979, for instance, where the state party invoked "public morals" to justify its action, the HRC experienced the difficulty of defining those grounds and the permissible limitations which may be allowed under any one of them. Although the HRC had accepted that the rights of the authors under Article 19(2) were restricted, it noted that "public morals differ widely" and that there was no "universally applicable common standard" and thus a margin of appreciation should be left to the "responsible national authorities." Consequently it was concluded that

> "the Committee finds that it can not question the decision of the responsible organs of the Finnish Broadcasting Corporation that radio and TV are not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour."[378]

As a result the HRC pronounced that no violation of the authors' rights under Article 19(2) was found.

In conclusion one must agree that these are very vague grounds and that the HRC will always face difficulties in judging limitations under these grounds, but the basic fact that one should always keep in mind is that the restrictions are exceptional and as such that they must always be construed restrictively. In the interpretation of such restrictions attention must be given to the general rules of interpretation, the nature of the right to freedom of expression and the circumstances of the particular country.

D - THE LAWS OF JORDAN.

In Jordan, the right to freedom of expression has been developing in a parallel line with the development of the constitutional system itself. In the first Constitution (1928) for instance, no Article was devoted to this right, but it was briefly mentioned (among other rights) under Article 11. It provided that:

> "All Jordanians, are entitled to express and publish their opinion and beliefs, and to hold meetings together, to establish and join societies in accordance with the law."

Although it did not go much further than its predecessor a separate Article was devoted to the right to freedom of expression in the Constitution of 1946. Article 17, provided that:

> "Freedom of opinion shall be guaranteed, everyone shall have the right to express his thought, orally and in writing, within the limits of the law."

The present Constitution (1952) has expanded upon this right and legitimized many new forms of expression, it also added, for the first time a new paragraph providing for the freedom of the press.[379] Article 15 (1) provides that:

> "The state shall guarantee freedom of opinion. Every Jordanian shall be free to express his opinion by 'word of mouth', in writing or by means of photographic re-

> presentation and all other forms of expression within the limits of the law."[380]

Obviously, this Article refers only to one element of the right to freedom of expression, namely, freedom to "impart" ideas and information through a medium of one's choice. It has already been mentioned that Article 19(2) of the Political Covenant includes three elements (freedom to seek, receive and impart ideas, and information of all kinds), thus on the face of it Article 15(1) of the Jordanian Constitution is not in total conformity with Article 19(2) of the Political Covenant. It falls short of the international standards, and therefore the Jordanian legislature may take this into consideration and extend this right to include freedom to seek and to receive information and ideas of all kinds regardless of frontiers.

As mentioned earlier the right to freedom of expression is not an absolute right, the legislature therefore, may impose some restrictions on the exercise of this right. If these restrictions are necessary and do not negate the right itself, they might be regarded as legitimate limitations, and therefore could not be seen as an infringement of Article 19 of the Political Covenant. Since the Constitution has referred the matter to the legislature, we shall be reviewing the relevant legislation to consider the existing limitations, in order that we may be able to assess them, and their real impact on the scope of the right to freedom of expression in practice.

A general review of the 'ordinary' laws of Jordan let alone the exceptional laws (emergency powers),[381] would show that there are various limitations on the freedom of expression. They could be summarized under several subtitles according to the values they intend to protect:

a) <u>The security of the realm (national security)</u>

It is prohibited under penalty of law, to express by any means of publicity any opinion or point of view which in effect might endanger national security. Several Articles have been devoted to this purpose in the Penal Code of Jordan.(382) Under the latter, a term of five years hard labour is the prescribed sentence for any Jordanian who incites by means of speech or writing, the detachment of a part of Jordanian territory and its annexation to a foreign country.(383) According to Article 161, anyone who encourages another person(s), by means of writing or speech, to commit any of the offences enumerated in Article 159, is to be sentenced to two years of imprisonment.(384) Furthermore, printing, publishing or selling, displaying or sending by post of a book, pamphlet, manifesto or a newspaper for or on behalf of a banned society or political party, is an offence punishable by six months imprisonment or a fine not exceeding 50JD.(385)

b) Dignity of the government and the financial credibility of the state.

Any display of contempt towards the Monarch or any member of the Royal Family, the national symbol of the state or the flag by any means of publicity, is a criminal offence under the law of Jordan and is punishable by imprisonment from one to three years.(386) Among the other offences punishable under the Penal Code, are censure or abasement of the Royal Armed forces, members of the public administration and defamation of civil servants, in connection with the execution of their official duties. It says,

> "Slander or abasement *(al-tham)* shall be punishable by imprisonment from three months to two years, when it is directed against the National Assembly or any one of its members during or in connection with his official function; or against one of the official authorities or a court or any other department of the public administration or the Armed Forces or any civil servant during or in connection with his official duties."(387)

Similar prohibitions apply to protect the national economy and national currency. According to Article 152, publication or broadcast of rumours, false news or propaganda by writing, verbally or by any other means of publicity, in order to devalue the national currency or to decrease the credibility of or the faith in the financial ability of the state, are all offences punishable by imprisonment from six months to three years and a fine not exceeding 100 J.D..(388) The same punishment is also applicable to anyone who may use similar methods of publicity to urge the public to:

1. Withdraw the money deposited in the public funds and banks.
2. Sell government bonds or any public bonds or to refrain from buying them.(389)

c) Safety, dignity and reputation of individuals.

Indeed, freedom of expression does not entitle a man to cry 'fire' in a crowded theatre. Nor does it include the right to defame the reputation of others. The safety, dignity and reputation of others are all strictly protected under the Penal Code of Jordan.(390) According to Article 189, any disparagement, censure or defamation by any means of publicity, whether verbally, (paragraphs 1 and 2), or in writing (paras.3 and 4), is totally prohibited and punishable by imprisonment from one to six months. According to paragraph(3)"slander" by print shall include open letters and postcards, as well as daily and periodical newspapers and pamphlets, or any other forms of printed publications.(391)

d) The dignity of courts and the proper administration of justice.

Unruly behaviour in a court of law may be regarded as contempt of court and considered to be a criminal offence. Under Article 191 of the Penal Code, contempt of court and slander of judges during or in connection with their official duties are punishable by imprisonment from six months to three years. Freedom of expression cannot be used to cause

disorder in the court. Those who attend the hearing are required to observe order and decency.(392) Thus, the general rule of public trial, freedom of expression and publication, may be restricted in some cases where the proper administration of justice so requires. The latter prevails in many cases over the right of the press to make fair comment on trials of public concern, when such publicity may prejudice the conduct of a case pending trial. The Penal Code of Jordan, forbids the publication of any news, information or criticism that may influence a judge or a witness, or prevent any person from revealing vital information.(393) According to Article 225, a fine of 5 to 25JD has been prescribed for the publication of any of the following:

- a document of a criminal investigation before being used in a public hearing;
- secret trials;
- any part of a trial if the court has decided that it should not be published.(394)

e) Broadcasting and Television.

In Jordan, as in many other countries, the national television station and Radio Jordan are state owned. In a developing country these institutions play a crucial role in the social and cultural development of the society. This is probably what makes state control a common phenomenon in all Third World countries.(395) In Jordan, however, not only radio and television, but also all other mass media institutions are either owned by the government or placed under the control or supervision of the Ministry of Information. The latter supervises and censors all films, movies and video tapes. It has been said in this regard that the purpose of the censorship is to protect public morals and religious feelings of the public and to place such restrictions (age

limits) considered necessary to protect youngsters from the effect of seeing films or other entertainments of an obscene or violent nature.

It (the Ministry of Information) also censors and licenses all cinema enterprises, drama and fairs.[396] Television and radio in Jordan have joined together to form one public institution which enjoys administrative and financial independence and which is managed by a board of directors. Nonetheless, the Ministry of Information seems always to have found ways to interfere in its policies when it deems it necessary.

f) Copyright and registered trade marks.

The rights of others pose an overall limitation to the freedom of expression. Specially protected rights, such as copyrights, patents and trade marks, are of special importance in this regard. These rights are strictly protected under the law of Jordan, especially law No. 22 of 1953.[397] The latter protects the rights of authors, composers and designers and forbids publication or reproduction of their works without their consent. Freedom of expression does not entitle the individual to violate the lawful rights of others; and therefore any form of expression which may violate such rights is prohibited under the law. Criminal penalties may be imposed in this regard in accordance with Article 416 of the Penal Code.

These are some of the general limitations imposed by the ordinary laws of Jordan on the right to freedom of expression. Obviously, they are widely drawn restrictions and not all of them may be justified under Article 19(3) of the Political Covenant. Most of them are expressed in general terms and therefore they are liable to misinterpretation and abuse. As an example one may refer to the provision of Article 191 of the Penal Code which refers to slander and defamation of civil servants in

connection with the execution of their official duties. Although Article 188 defines the meaning of slander and defamation, Article 191 refers to civil servants in general and does not specify in what sense the defamation may be regarded as "in connection with the execution of their official duties." Similar criticism may also be raised with regard to the protection of the national currency and the financial credibility of the state (Article 152). The provision of this Article is undoubtedly capable of wide interpretation to the extent that it could be applied to unfavourable analysis of the national economy, the balance of payments or the financial market.

Further restrictions have also been introduced under exceptional legislation (emergency powers) and also by special provisions in the Law of Print and Publication. In accordance with the Defence Law and Regulations, for instance, the Government is endowed with absolute power to control and seize any pamphlets, books, maps, manuscripts, photographs, etc. including radio sets if it deems it necessary in the interests of public safety and national defence.(398) Under Defence Regulations No. 5, 1948, the administration is empowered to prevent the publication of any book, pamphlet, manifesto or any other printed material, if it is deemed harmful to public safety or defence of the realm.(399) This is to be carried out through final administrative decisions, which may not be challenged before any court of law. As one example, the case of F. Kilany may be mentioned here. In a decision dated 22 May 1972, the Director General of Print and Publication invoked the above Defence Regulations and banned the circulation of the book *'Shariat Al-a'sha'ir fi Al Watan Al-Arabi'*. (Tribal Law in the Arab World) written by Judge F. Kilany. This was a text book dealing with the laws, the judicial systems and legal practices among tribes in Jordan and some other Arab countries.

The administration did not state any reasons for the administrative action save that of maintaining public safety and national security. A complaint was therefore brought before the HCJ on behalf of the author.(400) The decision was challenged on various grounds among which was the unconstitutionality of the decision itself and of the Defence Regulations upon which it was based.(401) On this point, however, the HCJ pronounced the Regulation and consequently the decision, constitutional.(402) In the court's view, Article 124 of the Constitution permits the introduction of the Defence Law of 1935,(403) in accordance with which the Censorship Regulations were issued.(404) It says:

> "Hence, paragraph (1)(a) of Article 4 of the Defence Law of 1935, which was issued in accordance with Article 124 of the Constitution, considers the censorship of printed materials a matter of public security and national defence, Censorship Regulation No. 5, 1948, did not contradict Article 124 of the Constitution, nor Article 4 of the Defence Law."(405)

In short, the court accepted the argument of the Attorney General that the banning of that book was a matter of public security and that it was done in defence of the realm, though it was a law book dealing exclusively with legal issues. The court did not examine the need for the administrative action, in order to ensure that it was necessary for the protection of public safety or defence of the realm. Instead, it had relied on the provisions of the Defence Law and Regulations which confirmed discretionary powers on the Government to act when it (the Government) deems it necessary.

However, an "ordinary" law (the Law of Print and Publication) was enacted to regulate the publication of printed materials.(406) It contains some exceptional provisions imposing severe restrictions on the freedom of expression, especially by means of printed material.(407)

It gives the Government direct control over all means of freedom of expression and enables it to have the final word on the scope of this freedom.(408) It regulates and governs the publication of all printed materials whether they are books, newspapers or even invitation cards.(409) The Law of Print and Publication imposes severe restrictions on the freedom of printing and publishing houses and makes all types of printed materials subject to administrative censorship prior to distribution.

The distinction has been made between *Matbou'ah* (printed article) which applies to printed materials in general including journals, newspapers, books, pamphlets and all other kinds of printed articles using words, shapes, letters, pictures or drawings on the one hand; and *Matbou'ah Sahafyeh* (regular press) on the other which according to Article 2 includes daily newspapers, magazines and regular periodicals of all kinds.

In this section the intention is to examine the main restrictions imposed on the freedom of information in general i.e. those which apply to all forms of printed materials. Provisions and restrictions relating to the freedom of the press in particular, shall be considered separately in the relevant section below.

Article 38 of this law imposes rigorous restrictions on the freedom of expression and freedom of information, and forbids any form of publication of the following categories of news or information by any means of publicaton except as prescribed by this Article itself.

1 - News of the King or the Royal Family unless previously authorised by a special official of the Royal Palace.

2 - Deliberations and discussions of the confidential meetings of the National Assembly.

3 - Reports, books, letters, articles, pictures and news which may be regarded as offensive and repugnant to public morals.

4 - Articles which imply disrespect for any religion or religious group or sect whose religious freedom is guaranteed by the Constitution.

5 - Any information about the size of the Armed Forces or its weaponry, ammunition, stations or movements, unless previously authorised by a responsible army official; or any other news, reports or comments which may cause disorder or confuse public opinion concerning any matter related to the Armed Forces, the Public Security Services or General Intelligence Agency.

6 - Letters, papers, files, information or news, which the Minister of Information may regard as confidential.

7 - Articles or informations which imply slander or disrespect for the the Heads of "Friendly States" (*al-dowal al-sadeeqah*).

8 - Political declarations and statements issued by the foreign representatives in Jordan, unless authorised by the Director of Print and Publication.

Unauthorised publication of any of the above news or information is punishable under Article 42, by imprisonment of not less than one year and a fine of not less than 500 J.D.. Article 40, forbids nonpolitical press from publishing any news, research, cartoons or any comments of a political character. According to Article 41, what may be regarded as a political matter for the purposes of Article 40, includes *inter alia*, news, comments and cartoons concerning official persons; any praise or slander of any person which is intended for political or election propaganda for or against such persons. A violation of the provisions of Articles 40 or 41, is punishable by imprisonment of a period not less than one month and a fine of not less than 10 J.D..

According to Article 54, nobody may own or run a printing house without a valid licence issued by the Ministry of Information. The licence must indicate the names and the address of the owner and of the manager if different, in addition to the name and the address of the printing house and the kinds of machines and the shape of letters which it uses. Any change in any of these particulars must be notified to the Ministry of Information within one week (Articles 55-60). The law also requires that the manager of the printing house maintains a register in which all articles printed in the house are listed by serial numbers with the number of issues, their titles and names of their author also denoted alongside. The register must be made available for inspection by official authorities on request and at any time.(410) Article 62, requires the manager of the printing house to provide the Ministry of Information with two copies, free of charge and before distribution, of any article printed in his house. This applies to all types of publication except journals which are subject to a different provision. The Minister may confiscate any printed material if he considers its publication to be prejudicial to the public interest.(411)

Anybody who wishes to establish a publishing house, a bookshop or a distributing house in Jordan must apply for a licence from the Ministry of Information. The application must include *inter alia*, the name and the address of the applicants, the name and address of the house and of its manager, the name and address of the printing house where it is to print its publications and the name and address of the manager of that printing house. If the applicant is a company, the application must also include the names of the members of the board of directors, their nationalities and addresses, a copy of its internal regulations and a registration certificate from the Ministry of Trade and Industry showing

its registered capital. If the application is comp_lete the Minister is obliged by law to issue a licence.(412)

The law permits the import of foreign books, newspapers and all kinds of printed materials. Nonetheless, Article 71 requires the distributors or sellers to provide the Ministry of Information with a copy of any printed material imported from abroad for sale or distribution inside Jordan, for approval prior to sale or distribution. The same Article empowers the Director of Print and Publication to confiscate or to prevent the circulation of such articles if he deems it to be harmful to the public interest.

These are the restrictions placed by the Law of Print and Publication on the freedom of printing and publication of printed material whether printed in Jordan or imported from abroad. As mentioned above, there are some provisions and restrictions which apply to the press only.

E - FREEDOM OF THE PRESS.(413)

The word "press" is used here in the same meaning as defined in Article 2 of the Law of Print and Publication i.e. it applies to all regular or periodical journals and newspapers, including daily and weekly newspapers and magazines and all other regular pamphlets, newsletters and journals. In essence freedom of the press means freedom from restraints which is essential to enable editors and journalists to enlighten public opinion by making fair comments on matters without which democracy would not be maintained.(414) Therefore freedom of the press is an essential rquirement of the democratic society.

In Jordan, Article 15 of the Constitution guarantees the freedom of the press and stipulates that:

> "II. Freedom of the press and publication shall be ensured within the limits of the law. III. Newspapers

> shall not be suspended from publication nor their permits withdrawn except in accordance with the provisions of the law. IV. In the event of the declaration of martial law or a state of emergency, a limited censorship on newspapers, pamphlets, books and broadcasts in matters affecting public safety or national defence may be imposed by law. V. Control of the resources of newspapers shall be regulated by law."

It might thus, be said that the Constitution offers a fair protection to freedom of the press. What seems to have been misconceived by the Jordanian legislature is the phrase "within the limits of the law." The legislature seems to interpret this to entitle it to impose any restrictions it pleases, so far as it is provided by the law. The Jordanian courts seem to approve of this interpretation.(415)

In reality, the Jordanian press is relatively limited in its size and its influence on public opinion. This may be attributed to many political, social and legal factors, and, to the short history of the Jordanian experience in this regard.(416) Because there are no political parties in Jordan there is no opposition press. As Mr I. Bakr has put it, "except for some specialized periodicals, the Jordanian press is merely a news publishing commercial press, owned by individuals and private corporations/co-operatives".(417) However, the Jordanian Government does not seem to agree that political parties play an important role in promoting the right to freedom of expression. Replying to a question raised by a member of the HRC (Mr. P. Vallejo) regarding the impact of the absent political parties on the right to freedom of expression, the representative of Jordan stated: "... the right of individuals to freedom of expression did not depend on political parties. The existence of political parties was guaranteed by the Constitution, although the Government had had to dissolve some of them in 1957".(418) The statement of the Jordanian representative may give the impression that there are some

political parties in Jordan. In fact, there have been no licenced political parties in Jordan since 1957.

In addition to the various restrictions imposed on the freedom of the press by the emergency powers, and the restrictions imposed on the freedom of information and printed materials in general by the Law of Print and Publication, the latter contains several restraints and limitations which apply to the press in particular. Contrary to its predecessor, the present Law of Print and Publication (Law No. 33 of 1973) lacks a provision guaranteeing freedom of expression for the press. Instead, says a prominent Jordanian lawyer, the law is molded into, "numerous definitions, restrictions and restraints which have in effect rendered 'journalism' a monopolized personal profession rather than a vehicle for freedom of expression and participation in the conduct of public affairs".(419)

Perhaps it was because of such discrepancy that the Government of Jordan chose to report to the HRC in 1978 a law which had been repealed since 1973, instead of the law in force. Although the previous Law of Print and Publication, Law No. 16 of 1955, was repealed in 1973 and replaced by the contemporary Law of Print and Publication, Law No. 33 of 1973, the report stated that:

> "with regard to the press, article 2 of Act No. 16 of 1955 provides that the press, printing and publishing shall be free and that everyone shall have the right to express his opinion and to disseminate truthful news and opinions through the various publication media, and that this freedom shall not be restricted otherwise than by law.
>
> Under the above-mentioned Act, any person, whether Jordanian or not, may issue printed publications such as newspapers or periodicals, provided, in the case of an alien, that he is resident in the Hashemite Kingdom of Jordan and that there is a reciprocal arrangement regarding such matters between Jordan and the country of which he is a national...".(420)

It can not be confirmed whether the drafters of the report and the representative of Jordan were unaware of the fact that Law No. 16 of 1955 was already repealed and replaced by the contemporary law which does not contain such a provision or whether they sought to mislead the HRC on this issue. As mentioned above, the present Law of Print and Publication imposes many restrictions on the freedom of the press and enables the Government to have the final word on the scope of this freedom. It confers absolute discretion on the administration, with regard to licencing, censorship, confiscation and suspension of any newspapers or journal. As far as licencing is concerned, the law requires all newspapers and journals and any other periodicals to obtain valid licences from the the Council of Ministers through the Ministry of Information. Providing that all the formal and substantive requirements including that of the deposition of 1.000 J.D. as a financial guarantee (Article 14), are fulfilled, Article 16 empowers the Council of Ministers to grant or withhold the licence at its own discretion. The decision of the Council of Ministers in this regard is final and can not be reviewed by any court of law in any sense whatsoever. Article 16 reads as follows:

> "(1)The Council of Ministers, upon a reccomendation by the Minister (Minister of Information) may issue, re-issue, refuse to issue, suspend or cancel the licence of any journal. When issuing or re-issuing a licence, the decision must be sanctioned by a Royal Decree.
> (2) The decison of the Council of Ministers under paragraph (1) of this Article shall be final and may not be questioned in any court of law in any sense whatsoever. The Minister shall inform the applicant or the owner of the journal of the decision".

Any journal published without a valid licence or before the deposition of the financial guarantee is liable to suspension and confiscation of all its copies by the Minister of Information, and its owner is punishable

under Article 75 by one year of imprisonment or a fine of not more than 100 J.D., or both.

According to Article 32, if a journal publishes false or incorrect news or information concerning a public institution, the Minister of Information or an official delegated by him may require the journal to publish, free of charge, a correction or a statement stating that it was false news or information. This should be published in the "next edition and in the same place and shape". Should the owner or the editor-in-chief refuse to publish the correction or the required statement, he will be punished under Article 75 by imprisonment of up to one year or a fine of up to 100 J.D., or both. The same applies to foreign journals, and in the case of refusal to publish the correction, the Minister of Information must ban its circulation and distribution in Jordan.[421]

The right to reply is also guaranteed for private persons, whether they are natural or legal persons. Article 33 described this right as an absolute right and extended it to industrial owners, authors, artists and scientists in the case of comment/ concerning their works. It says:

> "(1) If any news or information is published in a journal with a direct or indirect reference to a specific natural or legal person, he is entitled to reply... This is an absolute right and may be exercised by authors, artists and scientists with regard to comments concerning their works.
> (2) When the reply exceeds the size or the space of the original article or news, the journal may require the payment of charges for the extra parts. In the case of a deceased person, the right to reply may be exercised by one of his heirs on behalf of them all".

If the journal refuses to publish the reply for any reason, the person may complain to the Minister of Information who must issue a final decision within one week. If the Minister decides that the reply should be published, it must be published as explained above, in the next edition. Should the journal refuse to execute the decision of the Minister,

it would be regarded as a violation punishable under Article 75. In the latter case the reply may be published in any other journal at the expense of the first journal.

Like all other kinds of printed materials, journals are subject to administrative censorship prior to distribution. Article 26,stipulates that:

> "The Editor-in-Chief of the journal must submit five copies of any edition, to the Directorate of Print and Publication in the Ministry of Information, so the Director or his deputy may authorise its distribution".

One of the most serious restrictions imposed on the freedom of the press in Jordan by the Law of Print and Publication is the provision of Article 23. The latter contains some rather vague grounds upon which the Council of Ministers may revoke the licence of or suspend the publication of any journal. It says:

> "If the newspaper publishes anything that may be regarded as harmful to the national entity or which may endanger the safety of the state or the public interest or the constitutional foundations of the realm..."(422)

However, what may be considered harmful is a discretionary matter and rests ultimately with the Council of Ministers.(423) The judiciary would have no opportunity to pronounce upon the validity of those measures, because paragraph (2) of the same Article provides that: "the decision of the Council of Ministers shall be final and may not be reviewed by any court in any sense whatsoever."(424) When this provision was invoked on the first of June 1981, there was only one daily newspaper remaining in the whole country.(425) A similar provision was introduced in the previous law (Law No. 16 of 1955) under Article 62. In 1971, the Council of Ministers invoked this Article and cancelled the permit of a newspaper called '*Al-Defa'a*' (The Defence). A complaint was therefore raised before the HCJ, in order to pronounce the administrative

decision void. The constitutionality of Article 62 was challenged on the grounds that it contravened Article 15 of the Constitution, which guarantees the freedom of the press, as well as Article 101 and 102 with regard to the right to access to court.

The court upheld the validity of the administrative decision and declared Article 62 of the Law of Print and Publication, constitutional. It ruled that:

> "...the Article in question does not contradict Article 15 of the Constitution, because the latter does not say that the press is free without limitations... indeed it says free... within the limits of the law."<426>

This argument can not stand up to critical legal analysis. It seems that the court has interpreted the phrase "within the limits of the law" to entitle the legislature to introduce whatever limitations it pleases. This was surely not the intention of the drafters of the Constitution. As to the other point, the court ruled that Article 62 does not deprive the applicant of the right to access to court. It only provides those decisions with 'an immunity against judicial review'. According to the HCJ imposition of such restrictions on the jurisdiction of the judiciary by means of a statute is a measure entirely permissible under Article 100 of the Constitution. In other words, the court has recognized the right of the legislature to oust the jurisdiction of the courts even with regard to the constitutional rights. It calls denial of access to court, 'immunity against judicial review', and therefore considers the latter to be permissible under Article 100 of the Constitution. The court seems to have failed to notice that Article 100 of the Constitution only allows the legislature to distribute the jurisdiction between the various courts, but not to oust any part of this jurisdiction by preventing the courts from pronouncing upon any

particular type of dispute by providing immunity from judicial review.(427)

F - AN ASSESSMENT.

Having examined the scope and the contents of the right to freedom of expression as embodied in Article 19(2&3) of the Political Covenant, it is clear that it is not an absolute right and therefore states parties may lawfully impose some restriction on the exercise of this right, if deemed necessary for the protection of certain values referred to under paragraph (3) of the same Article. Such restrictions must be provided by the law and are necessary as explained above. In any case they must not be such as to destroy the right itself nor to deprive it of its substance, otherwise, the state party would be in violation of its obligation under the Covenant. As far as Jordan is concerned, we have examined the provision of Article 15 of the Constitution and the relevant provisions in the ordinary law as well as the emergency powers. The reports of Jordan to the HRC under Article 40 of the Covenant are exceptionally brief with regard to the right to freedom of expression, for they do not seem to go much further beyond the provision of Article 15 of the Constitution. Restrictions imposed on the freedom of expression under the law of Jordan were not reported to the HRC, and therefore the latter had no opportunity to consider them. However, during the discussion of the initial report of Jordan in 1978, some members of the HRC did ask for additional information regarding the restrictions imposed on the rights referred to under several Articles, among which was Article 19.(428) In response it was stated in the supplementary report submitted in 1981, (429) that,

> "... the right of freedom of thought within the purview of Article 18 of the Covenant is guaranteed by Article

> 15(1) of the Constitution. The said Article 15(1) states that the state guarantees freedom of thought and that any Jordanian may express his thoughts freely either orally, in writing or in print, etc., provided that such expression is manifested within the limits of the law of the land....
>
> From reading the foregoing paragraph, it will be noted that the principles embodied in Article 19 of the Covenant have already been dealt with in the preceding paragraph".

Indeed no restrictions were reported, although they were specifically asked for by members of the HRC. The Government has managed to avoid mentioning the contemporary Law of Print and Publication (Law No. 33 of 1973), and thus, deprived the HRC of an opportunity to assess its provisions, in the light of Article 19(2&3) of the Covenant.

As has been pointed out the ordinary law of Jordan imposes several restrictions on the right to freedom of expression in general, under various pieces of legislation. It was also noted that they were widely drawn restrictions and that not all of them may be justified under Article 19(3) of the Covenant, as being permissible and necessary limitations. When it comes to the exceptional powers conferred upon the Government under the emergency legislation, they must be looked at as emergency powers and as such they have special status.(430) Subject to certain conditions, they could be made into permissible limitations by filling a notice of derogation under Article 4 of the Political Covenant. Jordan has not done so and thus, they remain unlawful restrictions and constitute an infringement of Article 19 (2&3), of the Covenant. As for the restrictions imposed under the Law of Print and Publication, they go far beyond what may be regarded as necessary limitations, and therefore they can not be reconciled with the obligations of Jordan as a state party to the Political Covenant. Articles 14, 38 and 40 of this law impose serious restrictions on the freedom of print and publication and

freedom of information in general . Articles 26, 62, 70 and 71 have subjugated all kinds of printed materials to censorship by the Ministry of Information prior to distribution in Jordan whether they are printed in Jordan or imported from abroad. Articles 16 and 23 have empowered the administration (the Council of Ministers acting upon a recommendation by the Minister of Information), to revoke or to cancel the licence of any newspaper or journal, or to suspend its publication indefinitely at its own discretion. Furthermore, the decisions of the Council of Ministers on any of these matters are final and exempted from judicial review of any kind. The judiciary has no role to play in this process. It can not interfere in the trial of the newspapers by the Council of Ministers, nor can it assess the legality of the administrative decision after it has been made. Clearly, these powers are not only contrary to the Political Covenant, but also to the Jordanian Constitution itself.

However, it must be observed that in practice freedom of expression in Jordan is not as restricted as it may appear from the provisions of the law, and, that it is far more respected than in many other neighbouring Arab countries. This could be attributed to the rare application of these provisions in practice and the fact that censorship is being exercised in a relatively liberal minded manner, in addition to the special nature of the political and social system of Jordan. One of the most important provisions of the Jordanian Constitution, which is also highly respected in practice, is the provision of Article 17 which provides that:-

> "Jordanians are entitled to address the public authorities on any personal matters affecting them, or any matter relative to public affairs, in such a manner and under such conditions as may be prescribed by law".

There are no formal restrictions or limitations imposed on this right by the law, except for some general customary rules and traditions established by usage over a period of time on the manners of addressing public authorities. This provision is based on the Islamic concept of "accessibility" of the public authorities to the ordinary citizens, which goes back to the early days of the Islamic state.(431) In contemporary Jordan, Jordanians have made the most of this right to the extent that it is an observed practice for public authorities from the Administrative Governors to the King and Crown Prince, to make themselves accessible to the public and to listen to what they have to say whether in person or through correspondence. Open letters, telegrams and complaints to such authorities from ordinary individuals are not very uncommon in Jordanian newspapers.

It has been said that a member of the public addressed King Hussain directly in a public meeting with the following words, "We have not seen you for a long time, we have been oppressed by some government officials and I have many complaints", and then he produced a long list of complaints, some personal and others relating to public matters and official policies.(432)

It seems that Jordanians do discuss politics in public and sometimes do express disagreement with the Government on political matters. Although it is difficult to confirm or prove this, it has been argued that, unless such views are followed by some kind of illegal action nobody may be prosecuted or imprisoned for expressing different or unfavourable political views. However, in some special cases individuals may be summoned to the offices of the General Intelligence Agency for questioning with regard to such matters.(433)

Freedom of academic and scientific research also seems to be respected in practice. That is to say, available sources indicate that there are no reported or unreported cases where criminal charges have been brought against an author or a researcher for his academic work, though restrictions on publication or distribution may be imposed in some special cases.(434)

As for the availability of foreign books, newspapers and journals, it is a fact that newsstands and bookshops are full of such material. An inspection of a newsstand in Amman showed that there was quite a number of foreign newspapers, magazines and novels in various languages. However, it was said that there was a long black list of foreign newspapers, journals, authors and publishers held by the Ministry of Information.

The Jordanian T.V. and Radio Jordan, though owned by the state, have been made into one independent public institution which is run by its own board of directors which enjoys administrative and financial independence. News and programmes are not subject to censorship prior to broadcasting. In practice, however, there seems to be an unwritten code of conduct which is usually observed by all news-editors, programme planners and producers, and, that the work is carried out under the supervision of the Ministry of Information who tend to interfere by various ways and means. The news departments of both the T.V. and radio of Jordan are directly connected with many national and international news agencies; editorial teams receive the news through these agencies, editing and broadcasting them according to their own professional judgement. Yet it is not quite unusual for the Minister of Information or some other Government departments to telephone them to draw their attention to the importance of one national or international news item.

As far as Radio Jordan is concerned, it has played an important role in giving effect to the concept of accessibility and availability of public officials to the ordinary citizen. For more than ten years it has maintained a daily programme of two hours of live broadcast (*al-bath al-moubasher* 8 a.m. - 10 a.m.) where any individual can telephone and express his opinion or point of view with regard to any public matter directly on the air; if it is a personal complaint he may address it to the department concerned or may ask to speak to the responsible government official and discuss the matter on the air. Listening to this programme one hears all sorts of complaints and points of view regarding many matters of private and public concern. Usually it is a dialogue or a discussion between a private citizen and a government official or Minister and, in some cases, the issue is settled over the phone.

As for the Jordanian newspapers, journals and periodicals, the provisions of Articles 16 and 23 of the Law of Print and Publication are very rarely invoked in practice. Over the last ten years, Article 23 has been invoked only twice, in 1977 and in 1981.

Accordingly, some may argue that the restrictive provisions, whether those in the Law of Print and Publication or in the other laws are not intended to oppress the freedom of expression in practice, but rather to give the Government a flexible control which can be relaxed or tightened in accordance with the circumstances. The restrictive provisions also release the hands of the Government from legal bonds and enable it to act swiftly and effectively when there is a genuine need for action. This might be true, but it does not change the fact that the law of Jordan, as it stands at present, does not meet the requirements of Article 19(2&3) of the Political Covenant; and that upon comparison, the former has fallen seriously short of the latter. Thus, it has to be concluded

that Jordan is in evident breach of its legal obligation under the above-mentioned international provision. In order to bring the law of Jordan into line with the minimum international standards of the right to freedom of expression, the following changes in the law of Jordan should be considered.

Article 15 of the Constitution which, as mentioned earlier, refers only to the right to express ideas and opinions should be amended in order to include the right of the individual to receive and to seek ideas and information of all kinds regardless of frontiers in accordance with the provision of Article 19 (2) of the Political Covenant. The general restrictions imposed on the freedom of expression by the various laws should be relaxed and reduced to what is truly necessary for the protection of the values mentioned in Article 19(3) of the Political Covenant. As for the Law of Print and Publication, in particular, a provision guaranteeing freedom of the press in accordance with Article 15(2) of the Constitution should be added. Restrictions imposed on the freedom of information and freedom of print and publication under Article 38, as well as those relating to prior censorship by the Ministry of Information under Article 26, 62, 70 and 71 may be repealed. It is also essential for the freedom of the press that Articles 16 and 23 be repealed or at least be amended in such a way that their application be made subject to a court order, or that the latter should be empowered to assess the legality of the decisions of the Council of Ministers when applying these provisions.

Finally, emergency powers (Defense Regulation of 1948), relating to censorship and control of print and publication and the mass media should cease to operate. It is not open for the Jordanian Government to argue that the state of emergency still exists in Jordan and therefore

that the application of emergency powers is a lawful measure, because even if such a situation does in fact exist, Jordan can not rely on that because it has not derogated from its obligations with regard to this right, or indeed from any other rights under the Covenant.[435]

4 - THE RIGHT TO EQUALITY BEFORE THE LAW.

Equality is a notion which has attracted the attention of social reformers, politicians and lawyers throughout history.(436) It has been regarded as the most cherished goal of many social liberation movements over the last few centuries. The wide usage of the term "equality" has led to a great deal of confusion and misconception. Concepts such as natural equality, social equality, political equality, non-discrimination, etc., are all used, even interchangeably.(437) It is not our intention to deal with these concepts, what concerns us here is the principle of equality in its juridical sense, i.e. equality before the law as a human right. The latter may be defined as the right of everyone to have equal opportunities and equal protection by the law. As far as modern legal systems are concerned, such a right first appeared in the French Declaration of 1789.(438) Ever since, the principle of equality before the law has become one of the general principles of modern constitutional law.(439) Nonetheless, it was not until the second half of this century that discriminatory laws were at least officially denounced in some countries. Such legislation, not to mention policies and practices, are still in force in many others, especially Third World countries. As to Muslim countries, their legal systems are largely influenced by the Islamic concept of the principle of equality before the law, and Jordan is no exception.

Therefore, before analysing the legal content of this right as embodied in modern international law, particularly in the Political Covenant against which the law of Jordan shall be examined, one must briefly look at the Islamic concept of the right to equality before the law. As the question of the status of women (equality of the sexes) poses some special difficulties in the case of Muslim countries, we shall deal with it

separately. Accordingly, this section may be divided into four sub-sections followed by an assessment.

A - ISLAMIC LAW.

As a universal law meant to be recognised and implemented throughout the world, Islam had to denounce all discriminatory practices and to establish the new community on a different basis. It starts from the very basic idea of the common origin of mankind and the concept of brotherhood of all human beings. In the Qur'an it says: "Oh mankind, we have created you from a male and a female, and we set you up as nations and tribes so that you recognise each other."(440) Descending from the same father and mother, all human beings should therefore be treated equally. Based on this starting point, the Islamic concept of equality before the law was established. According to Mawdudi: "God has given man this right of equality as a birthright. No man, should therefore be discriminated against.(441) Muslim scholars explain this as follows:

Since all are brothers and members of one big family, no discrimination may be recognised by the law that governs the distribution of rights and duties among its members. On the contrary, the law should, or indeed must, seek to maintain just equality between them, even though it has sometimes to differentiate between them in order to achieve its aim in the long run.(442)

To quote the Qur'an again: "Indeed the noblest among you before God are the most heedful of you."(443) Superiority of one member over another is only on the basis of God-fearing, not on that of colour, race, language or sex. No member is therefore justified in assuming an air of superiority over other members of the family. The Prophet was reported to have said: "No Arab has any superiority over a non-Arab nor does a

non-Arab have any over an Arab... You are all the children of Adam, and Adam was created from clay."(444)

Article 3(a) of the Islamic DHR, provides that: "All persons are equal before the law and are entitled to equal opportunities and protection of the law." Accordingly, race, colour, place of birth, property or social status are all irrelevant factors in the determination of rights and duties. Every member of the human family should have an equal total share of rights and duties. To maintain the balance the law may sometimes be weighted in favour of those who would otherwise have been handicapped by special rules. This is not to render them privileged but to make them equal with others.(445)

This is the basic concept of equality in Islamic law, which has been subject to various misinterpretations and criticisms even by some Muslim lawyers. Such criticisms reach a peak when it comes to the status of women.(446)

However, the core of this philosophy has never lost its importance and still exerts a great influence on the contemporary legal systems of many modern Muslim states, including Jordan. Moreover, it has already been mentioned that the Islamic notion of equality between all members of the human community was adopted under Article 1 of the French Declaration of 1789 and re-introduced in the universal declaration and the U.N. Covenants on Human Rights.(447)

B - INTERNATIONAL LAW.

The right to equality before the law and freedom from arbitrary discrimination has occupied a prominent place in the contemporary international law of human rights. It has dominated the general international instruments, as well as several others dealing with particular types of discrimination, such as sexual and racial discrimination.(448)

The rather determined language and the emphasis placed on the right of every human being to equality with others by the U.N. Charter, were the natural result of the discriminatory policies and practices which the world had experienced during the first half of this century. The Charter has referred to it in more than one place. In the preamble, for instance, it confirms the faith of the peoples of the United Nations in the principle of equal rights and self-determination of peoples,(449) and the promotion and encouragement of respect of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.(450) Similar emphases and further details were also provided for in the UDHR. It recognises the equal and inalienable rights of all human beings without discrimination as a "foundation of freedom, justice and peace in the world."(451) More than one third of its thirty Articles have referred to the right to equality and freedom from discrimination. To quote but a few examples: Article 1 stated that "All human beings are born free and equal in dignity and rights". Article 2, provides that "Everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind, such as race, colour ..."(452)

From these provisions it can be said that a general rule of international law recognising the right to equality before the law and prohibiting discrimination on any ground has existed since the very early stages of the U.N. era. This conclusion, however, was contested by the respondent state in the 'South West Africa' Case before the ICJ in 1966. It was argued that such a rule did not exist in international law and, even if it had, it was not a binding one.(453) In 1970, the court by an overwhelming majority adopted the view of Judge Tanaka in the previously mentioned case.(454) In the 'Barcelona Traction' Case (second phase), the court recognised the existence of this norm in contemporary international

law.[455] The principles and rules concerning the basic rights of human beings, (including protection from slavery and racial discrimination) were referred to as *erga omnes* obligations.[456] In other words, these principles possess the status of *jus cogens*,[457] by which all states are bound.[458]

The relentless international efforts towards the realisation and protection of this precious right did not stop at this stage. Several international declarations have been promulgated, all of which recognised the right to equality before the law and denounced discrimination.[459] In order to translate these general and declarationary provisions into specific legal obligations, a series of international conventions and covenants were drafted and ratified, both at the regional and universal levels. As far as the former are concerned the best two examples are the American (AMR)[460] and the European (EHR)[461] conventions of 1969 and 1953 respectively. At the universal level, under the auspices of the U.N. and its specialised agencies, a number of international instruments prohibiting discriminatory treatment in general or on particular grounds have been enacted, creating a substantial body of rules in this field.[462] Prominent among these general instruments, is the Convention on the Elimination of all Forms of Racial Discrimination (1966).[463] The Convention requires the signatories to take practical measures toward the abolition of all forms of racial discrimination.[464] It also provides for special machinery for its enforcement.[465] As defined by the Convention, 'racial discrimination' means:

> "...any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[466]

The Political Covenant refers to this right in more than one Article, namely, 2(1), 3, 14(1), and 26. In spite of the variation in the terminology, the theme of all these Articles taken in conjunction is the recognition of one fundamental human right (the right to equality before the law). The preparatory works clearly indicate that concepts such as equality, equality before the law, equality before the courts, equal protection of the law, non-discrimination and non-distinction were all used interchangeably during the debates.(467)

Article 26 provides that:

> "All persons are equal before the law and are entitled without discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons, effective protection against discrimination on any ground such as race, colour, etc."

This Article contains a general prohibition of discrimination on any grounds whatsoever. The question which arises here, is whether this prohibition is limited to the rights mentioned in the Covenant or not .

Although Article 2(1) has restricted the prohibition of discrimination to the rights and freedoms catalogued in the Political Covenant and within the limits of the jurisdiction of the states parties,(468)

B. Ramcharan, argues that a violation of a right outside the catalogue in discriminatory manner would violate Article 2(1) as well as Article 26.(469) In his view, for the purposes of Article 2(1), the right to equality before the law and freedom from discrimination has been recognized as a substantive right in itself under Article (26).

Criticising Ramcharan's interpretation, Meron stated that the attempt

> to reconcile the apparent conflict between Arts. 2(1) and 26 by suggesting that because equal protection is guaranteed in the latter article, equal protection can be regarded as a right recognized in the Political Covenant for the purposes of Art. 2(1), ... is attractive, but, perhaps, not entirely convincing. The prohibition of discrimination stated in Art. 2(1) encompasses all

> substantive rights granted by the Political Covenant ... Art. 26 addresses, however, an unlimited spectrum of national laws *en dehors* the Political Covenant. If Article 2(1) states that rights a, b, and c, are covered by the prohibition of discrimination, Article 26 would, according to Ramcharan's interpretation, add a prohibition of discrimination with regard to all the national laws, whatever their subject, thus outlawing discrimination in general.[470]

One may agree with Meron's interpretation of Ramcharan's point of view, which in itself is correct, but one may equally disagree with Meron's conclusion that there is a real conflict between the provision of Article 2(1) and 26 of the Political Covenant. It seems that this confusion has resulted from the number of Articles in which the Covenant refers to the right to equality before the law and freedom from discrimination, and also from the loose usage of the language therein. A single and carefully worded provision would have sufficed and perhaps would have been more effective.[471]

The preparatory works are of no help in supporting either of the two interpretations and do not provide a clear answer to the question we posed earlier. As for the jurisprudence of the HRC the position is not quite clear. In previous applications under the Optional Protocol the HRC has concluded that whenever a substantive right in the catalogue is violated in a discriminatory manner, this would be considered to be a violation of both Articles 2(1) and 26 in conjunction with the relevant Article of the Covenant.[472] In a later case, the HRC adopted a different point of view. In this case although the right at stake was from outside the civil and political catalogue, the main issue was the right to equality before the law. The author of the communication was a Dutch citizen who claimed to be the victim of a violation by the Dutch Government of Article 26 of the Political Covenant. The applicant was trained as a radio and TV-repairman. As he was unemployed for a long

period of time, he managed to maintain his working capacity by taking on occasional work as a TV-repairman without obtaining a licence from the Chamber of Commerce. Consequently, he was subjected to criminal prosecution before the Dutch Courts. The applicant claimed to be discriminated against by the Dutch legislation which prevented him from gainful employment and punished him for seeking an alternative to being unemployed. He also referred to Article 6 of the Economic Covenant which guarantees the right to work as a human right.

Having examined the communication, the HRC concluded that:

> "...no facts have been submitted in substantiation of the author's claim that he is a victim of a violation of any of the rights guaranteed by the International Covenant on Civil and Political Rights."(473)

and therefore, declared the communication inadmissible.

What makes the conclusion of the HRC questionable is that it did not consider the communication inadmissible because the author had failed to prove that he had been discriminated against or that the Dutch Law itself was discriminatory, and therefore Article 26 was inapplicable, but rather because there was no violation of a right guaranteed under the Political Covenant. It seems therefore that the HRC has restricted the prohibition of discrimination provided for under Article 26 to the rights recognized under the Political Covenant only. Such interpretation is contrary to the explicit clauses of Article 26 quoted above. What the HRC seems to have overlooked is that despite the technical complications, the right to equality before the law has been referred to as a substantive right in itself under Article 26 of the Political Covenant, and that it has been recognized as a human right under customary international law.

However, in a more recent case, the HRC seems to have abandoned the above interpretation and changed its opinion regarding the scope of the

prohibition of discrimination under Article 26 of the Political Covenant, and concluded that the prohibition was not limited to the rights recognized under the Political Covenant; and thus the said Article may be invoked with regard to any discriminatory law or practice adopted by a state party. It says;

> "For the purpose of determining the scope of article 26, the Committee has taken into account the "ordinary meaning of each element of the article in its context and in the light of its object and purpose ... The Committee begins by noting that article 26 does not merely duplicate the guarantees already provided for in article 2. Its basis stems from the principle of equal protection of the law without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and protected by public authorities. Article 26 is thus concerned with the obligations imposed on the states in regard to their legislation and the application thereof."(474)

Accordingly, in order to feature the elements of the legal obligation of the states parties under the Political Covenant, one should read all the above discussed provisions, together, and interpret them in the light of the international law of human rights. By doing so, it becomes evident that each state party has pledged itself to do the following: first, to recognise the right to equality before the law as a human right and to abolish all domestic laws and practices of discriminatory effect; secondly, to provide by means of legislative and practical measures, an effective protection against discrimination on any grounds, and finally, not to sanction any discriminatory laws and policies in the future. These are the legal requirements to which each state party is required to comply.

C - THE LAWS OF JORDAN.

In Jordan the right to equality before the law (equal protection and equal opportunities) is regarded as a fundamental constitutional principle of the Jordanian legal system. The HCJ has repeatedly asserted this in all cases involving this right.(475) It has also headed the catalogue of rights in the successive Jordanian constitutions ever since the first constitution in 1928.(476) As to the present constitution, Article 6 initiated the Bill of Rights by declaring that: "(I) Jordanians are equal before the law"; and that: "...there shall be no discrimination between them as regards their rights and duties, on grounds of race, language or religion." Beside the principle of equal duties provided for in the above paragraph, the authors added, for the first time, a new clause cited as Paragraph (II). It says: "...and (the Government) shall ensure a state of tranquility and equal opportunities to all Jordanians." The theme of this Article and the principle it contains need hardly be explained. What may seem vague however, is the scope of this principle. Apparently such vagueness is due to the rather confusing wording of the second clause of paragraph (I), i.e. "there shall be no discrimination between them as regards their rights and duties, on grounds of race, language, or religion." The direct reference to these particular grounds may give rise to a crucial question, that is, whether the said three grounds are exclusive or merely exemplary. In other words, does the Constitution forbid discrimination based on some other grounds, for instance, colour, social origin, sex or place of residence? As it stands, the clause is vague and could be construed in either way. That is to say, two different arguments may be brought forward for the interpretation of this clause, each of them leading to an entirely opposing conclusion.

On the one hand, some may contend that the structure of this clause has made it self-evident that those grounds are exclusive, and therefore discrimination on grounds other than those is permissible. Such a conclusion would rely upon the actual wording of the clause itself for support. The latter says: "There shall be no discrimination between them (The Jordanians) ...on grounds of race, language or religion". If it were not the intention of the authors, to make it exclusive, they would have used the phrase 'such as' instead of the preposition 'of'; so it reads: "...on grounds such as..."; or at least they could have put a comma instead of 'or' between the words 'language' and 'religion', to read: "...race, language, religion... etc." Furthermore, if the reference to the said grounds were merely illustrative, the authors could have made that clear by adding an indication to that end. Instead of ending the clause with the word 'religion' they could have added the phrase 'or any other grounds' to indicate their real intention. In that case it would read: "...race, language, religion or any other grounds."

Finally, if the authors's intention were to bring about a total prohibition of discrimination they would not have referred to any particular ground at all, and might have ended the first paragraph with the word 'duties'. So the whole paragraph would become: "Jordanians shall be equal before the law, there shall be no discrimination between them regarding their rights and duties." Consequently, since the authors did not use any of those alternatives and preferred to limit the prohibition to the particular grounds mentioned in Article 6, discrimination on grounds other than those mentioned therein is permissible under the Constitution.

On the other hand, it also can be argued in favour of the other possible interpretation, i.e., that the grounds referred to in Article 6(1)

are mere examples. They cannot be considered as the only grounds upon which discrimination is prohibited, despite the technical structure of that clause which may suggest the contrary.

This interpretation could be supported by the Constitution as a whole body of rules, instead of analysing one Article on its own. Further evidence also may be derived from the administrative and legislative practices of Jordan, as well as the judicial precedents. As far as the Constitution is concerned, the right to equality before the law is directly or indirectly mentioned in thirteen other Articles. None of these Articles provides for any distinction whatsoever, and repeatedly assertained the right of all Jordanians to equality before the law.(477) Article 9, for instance, provides that: "(I) No Jordanian shall be exiled... (II) No Jordanian shall be prevented from residing at any place, or be compelled to reside in any specified place..." In this and many other Articles, terms such as 'all Jordanians', 'no Jordanians', 'any person' and 'no person', have been constantly used to confirm over and over again the real intention of the drafters of the constitution, and to indicate an overwhelming tendency towards the equality of all Jordanians regarding their rights and duties. If it were the intention of the authors to permit discrimination on grounds other than those mentioned in Article 6(1), they would not have repeatedly asserted the right to equality before the law in the other Articles.(478) The only exception is the provision under Article 28 with regard to the succession to the Hashemite Throne. It says: "The Throne of the Hashemite Kingdom is limited by inheritance to the dynasty of King Abdullah Ibn al-Hussein in direct line through his male heirs as provided in the following..."(479) Such a distinction between male and female heirs is being justified in accordance with the

principles of Islamic jurisprudence which has made the *Imamate* (the ultimate leadership) of the nation a masculine post.

Leaving aside the question of the equality between the sexes,[480] one cannot see any visible discriminatory elements in the legislative or administrative practice of Jordan. After a comprehensive survey of the Jordanian laws, whether presently in force,[481] or those previously abrogated, the present author has failed to find a single Article that may be regarded as an expressly discriminatory provision. It seems that the administrative practice is also going in a parallel line.[482] This remains true, although some discriminatory measures might have been or could be taken by the Administration from time to time. These are rather rare incidents and in no sense could they reveal an established policy or a consistent practice. Having considered such a possibility, the legislature has provided for a judicial remedy by allowing the injured party to raise a complaint before the HCJ. In most cases the court nullifies the administrative measures if proved to be discriminatory.[483]

Two examples from these discriminatory administrative measures may be mentioned here. The first, concerns a decision made by the Administrative Governor of *Zaraqa*, preventing certain persons from selling their goods in the city market, whereas other persons were selling similar goods in the same market without being subjected to the same prohibition. When a complaint was raised before the HCJ, the latter pronounced the administrative action illegal and a *prima facie* violation of the principle of equality before the law.[484] In the other case,[485] the Court held the decision of the Provincial Commission void, on the ground latter had violated the principle of equality between citizens which ought to have been implemented since they were in similar circumstances. The complaint was raised by Mr. X. against the decision of the Provincial Commission,

whereby he was required to leave more empty space (*irtidad*) around his building than was required from his neighbour. Reversing the decision, the court firmly stated that: "...No distinction should have been made between the two neighbours, since the surrounding circumstances were the same.[486]

As for the judicial interpretation of this principle, we have already mentioned that the HCJ has repeatedly asserted its status as a fundamental constitutional principle.[487] In Case No.107/64,the court nullified the administrative decision and concluded that: "...the administration had infringed a fundamental constitutional principle in the legal system of Jordan (the principle of equality before the law)."[488]

However, as far as Article 6 of the Constitution is concerned, the court has made direct reference thereto in two cases. Although neither of them offers a decisive answer to the crucial question we have mentioned earlier, they both may be lined up in support of the second argument. The first incident concerned an administrative decision banning (Diesel-fuelled) Taxis from travelling in certain areas. When the complaint was made before the HCJ, the latter ruled that the banning was a discriminatory measure. It was so, because its application was restricted to Diesel-fuelled taxis, whilst some other Diesel-fuelled vehicles (private cars, busses and lorries) were allowed to travel in the same areas. Such decision was a plain violation of the principle of equality between citizens. It gave a right to some citizens and deprived others of the same right, though the circumstances were similar in both cases. Referring to Article 6(1), the court stated that: "...the said decision was a violation of Article 6(1) of the Constitution which provides that, Jordanians are equal before the law, and that there shall be

no discrimination between them as regards their rights and duties."[489] It is interesting to note that, when quoting the Constitution, the court had cut off the controversial clause of Article 6(1), i.e. "...on the grounds of race, language or religion." No reason for this partial quotation was given by the court. It is not presently clear whether it meant to undermine the role of that clause because it is an exemplary clause, or merely because none of those grounds was relevant in that case.

In the second case, the verdict was different, and the court concluded that there was no violation of the principle of equality before the law. What concerns us most here is the judicial interpretation of the scope of the right guaranteed under Article 6(1) of the Constitution. On this occasion the applicant had *inter alia* challenged the constitutionality of the applicable law,[490] on the grounds that it contravened the principle of equality before the law, provided for under Article 6 of the Constitution. Answering this allegation, the court stated:

> "The established opinion of the Judiciary and the Jurists is that what is meant by the right to equality before the law, under Article 6 of the Constitution, is the prohibition of discrimination between members of the same category; not equality between a category of people such as (the civil servants) and another category (students) for instance."[491]

On the face of it, this is a rather ambiguous interpretation, based upon an irrelevant comparison. In the case of Jordan, the ambiguity stems from the fact that the Jordanian HCJ had copied (word for word) part of an earlier judgement delivered by the High Administrative Court of Egypt.[492] The court was relying on an allegedly established opinion of the Judiciary and the Jurists. It may be legitimate for the Egyptian

court to say so, but it is certainly not for the Jordanian one; simply because there is no such thing in the case of Jordan.

However, both in Egypt and Jordan the judicial interpretation has become subject to many criticisms by legal commentators. In Egypt, Prof. F. Atta'ar criticised the attitude of the judiciary on the grounds that this allegation does not stand critical legal analysis, though it appears attractive. He says: "What was meant by the principle of equality before the law was not merely the non-discrimination between members of the same category; but indeed equality between all persons whenever their violated rights are the same."(493) Commenting on the attitude of the Jordanian court, Judge F. Kilany argued that, the principle of equality before the law means equality between all citizens, i.e. equal rights and equal duties. No matter, after that, whether they belong to the category of the civil servants or the students.(494)

Whether one agrees with the judicial interpretation of the meaning of the principle of equality or not, it is of no help at all in answering the question we raised earlier.(495) It has already been mentioned that the said Article (6) could be interpreted in two distinct ways, leading to entirely different conclusions.(496) The first view which led to the conclusion that the Constitution prohibits discrimination based on any of the grounds listed in Article 6(1) only, and therefore, discrimination on grounds other than those is permissible. Such a conclusion is far from being acceptable and is contrary to the spirit of the Constitution itself, although the actual wording of Article 6(1) may support it. The second point of view, which led to the conclusion that discrimination is totally prohibited under Article 6(1) of the Constitution, seems more desirable. It also finds support in the preparatory works, and fourteen other Articles of the Constitution, all together with the established

legislative and administrative practices of Jordan. The reports of Jordan to the HRC also seem to give support to the second interpretation.[497]

However, in order to avoid possible misinterpretation, the scope of the prohibition must be made clear. Therefore, Article 6(1) of the Constitution needs to be reformed, by adding the phrase 'or any other grounds' at the end of the paragraph (1), so that it would read as follows: 6(1) "Jordanians shall be equal before the law. There shall be no discrimination between them as regards their rights and duties, on grounds of race, language, religion, or any other grounds".

Finally, it should be known that a similar problem does exist in most of the modern Arab constitutions. Article 6(1) of the Constitution of Jordan, and its counterparts in the others, could be traced back to a common legal and historical source which is Section II of the Egyptian Constitution of 1923. This says: "All Egyptians shall be equal before the law, there shall be no discrimination between them as regards their origin, language or religion." This section has been re-introduced by most of the subsequent constitutions, including those of Jordan and Egypt. The 'permanent' Constitution of Egypt (the present constitution) 1971 provides that: "All citizens are equal before the law. They have equal public rights and duties, without discrimination between them due to race, ethnic origin, language, religion or creed.[498] An almost identical provision is introduced in the Constitution of Kuwait, Article 29, which provides that: "All people are equal in human dignity, and in public rights and duties before the law, without discrimination as to race, origin, language or religion."[499]

However, there are a few other Arab constitutions which did not follow this general trend and which have successfully escaped such a difficulty. They recognise the right of all citizens to equality, but with

no reference to any particular grounds. Prominent among this group is the Algerian Constitution of 1976, which provides that "All citizens are equal in rights and duties."(500)

D - EQUALITY BETWEEN THE SEXES.

The idea of equal rights and duties for men and women is a major controversy facing the implementation of the right to equality before the law. It also poses some rather complicated legal questions in the case of all Muslim and Arab countries, including Jordan. Since the Second World War, the United Nations has put an increasing emphasis on the equality between men and women. Beside the various provisions included in the Charter and the UDHR, both the principal and the subsidiary organs of the Organisation have been intensively working towards this goal.(501) One of the most active organisations in this field is the Commission on the Status of Women, a functional commission within the ECOSOC, established in 1946.(502) Since the focus of its work is the realisation of legal equality between men and women, we shall be referring to two of its major achievements in this context (the Declaration and the Convention on the Elimination of Discrimination against Women). Ending four years of lengthy and detailed drafting debates in the Commission and the General Assembly, the latter unanimously adopted the Declaration in 1967.(503) In the preamble, the United Nations expressed its worries that despite the Charter, the Universal Declaration, the Covenants, and other documents on human rights, there continues to exist considerable discrimination against women.(504) For the same reason the Commission continued its comprehensive work toward the drafting of an international convention for the elimination of discrimination against women. The convention was adopted by the General Assembly in 1979, opened for signature in March

1980, and entered into force on 3 September 1981.[505] It defines discrimination against women as:

> "Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of rights, by women, irrespective of their marital status on a basis of equality of men and women... in the political, economic, social, cultural, civil or any other fields."[506]

States parties agreed to take all necessary measures to eliminate all forms of sexual discrimination. Among other things they pledged themselves to "embody the principle of equality of men and women in their national constitutions and to introduce appropriate legislative measures prohibiting discrimination against women."[507] They also undertook to establish legal protection of the rights of women on an equal footing with men through the national tribunals or other public institutions and to modify or abolish existing laws, regulations, customs and practices, which in effect discriminate against women.[508] Jordan has not ratified the convention yet.

Nonetheless, Jordan and most Arab countries are parties to the Political Covenant, which demands similar measures and requirements. Also, it is equally significant to observe that none of these countries has made any reservation regarding these requirements.[509] Under the Political Covenant, States parties are bound to guarantee all the rights enumerated therein, to everyone (men and women) without discrimination, and also, to abolish all legislation and practices that might be regarded as discriminatory on any grounds whatsoever, including sex.

So far as Jordan is concerned, we have already mentioned that the Constitution does not contain any discriminatory provisions, save that of Article 28, which excludes Hashemite women from the right to succeed to the throne of the Kingdom.[510] On the contrary, the Constitution has

provided Jordanian women with special protection (positive discrimination) regarding some of the rights therein. It says: "It is the right of every citizen to work... special conditions shall be made for the employment of women and juveniles".[511] Nonetheless, some have argued that the Constitution has discriminated against women and degraded them by making their employment subject to special conditions similar to those of juveniles. On the face of it, this argument is rather superficial and poorly founded. It only indicates a poor knowledge of the history of the Constitution as well as the labour law of Jordan. Accordingly, one might find it difficult to accept such an interpretation, simply because on the one hand, positive discrimination can by no means be described as sex discrimination in the real meaning of the term. Evidently, the right of women to work on an equal footing with men has been granted under paragraph (1) of the same Article, which recognises: "the right of every citizen to work." What is meant by sub-section (d) of paragraph (2) is the provision of more care and facilities in places where they might work.[512] On the other hand, the clause applies to women and juveniles, which certainly includes both sexes; and therefore, it is not based on the sex factor at all. It also must not be seen as a degrading underestimation of the role of woman in the working sector, but indeed a constitutional guarantee to facilitate her access to work, and to enable her to play her role in the national development process.

The Jordanian approach to the question of equality between sexes, although less sophisticated than that of the Egyptian and the Iranian,[513] is far more practical and realistic than many other Arab constitutions. As to the latter, most of them have tried to solve the problem by some general provision for equality between men and women, without taking into account the Islamic legal principles and their status

in the hierarchy of their laws. In the case of Algeria, for instance, while Article 2 of the Constitution provides that: "Islam is the religion of the state", Article 42 declares that, "All political, economic, social and cultural rights of the Algerian woman are guaranteed by the constitution."[514] Such a contradiction has created a legal dilemma and renders the Constitution's provisions practically meaningless. Obviously, such constitutional provisions cannot be implemented in practice, side by side with the Qur'anic law of succession which gives the Algerian woman only one half of the share of her brother. Similar criticism also could be made in the case of the P.D.R. of Yemen.[515]

The method of the Egyptian Constitution seems more practical and less problematic. It has successfully avoided the technical difficulties as well as the legal contradictions created by many other Arab constitutions. Like most of them, it declares that: "Islam is the religion of the state",[516] and, at the same time provides for the right to equality between men and women, but has added the provision of Article 11 which has made all the difference. The said Article stipulates that such a right must be understood in the light of the principles of Islamic jurisprudence. It says:

> "The state shall guarantee the proper co-ordination between the duties of the women towards the family and her work in society, considering her equal with man in the fields of political, social, cultural and economic life, without prejudice to the rules of Islamic jurisprudence."[517]

A similar approach has been adopted by the Islamic Republic of Iran, Article 20, of the Constitution of 1979, provides that:

> "All persons, whether men or women, shall be equal under the protection of the law and shall enjoy all human, political, economic, social and cultural rights with due observance of the Islamic precepts."

Article 21 stipulates that:

> "The Government shall guarantee the women's rights in every respect with due observance of the Islamic precepts and shall proceed to:
> 1- create a favourable atmosphere for upgrading the personality of women and restoration of their material and spiritual rights.
> 2- protect mothers, especially during pregnancy and nursing, and also orphan children.
> 3- assign a competent court to protect the existence and survival of the family..."

In this way, the Constitution enables the courts to implement the right to equality between the two sexes without contravening Islamic norms, which in many aspects are being regarded as *jus cogens* rules.(518) It seems, therefore, highly recommendable for the Jordanian legislature to follow suit.

In Jordan, the supplementary laws introduced under the present Constitution have progressively guaranteed considerable equal rights for men and women. At the political level, for instance, the right of women to vote and to be elected, to all national institutions including Parliament and municipal councils, has been implemented since 1974.(519)

Jordanian women have held many high executive, diplomatic and political posts.(520) There are many successful professional Jordanian women who have reached notable positions in all kinds of professions. The right to work has also been guaranteed for men and women on an equal footing in terms of opportunities and payment.(521) The author has failed to find any judicial precedent, whereby a case had been brought before the court by a Jordanian woman claiming that she has been discriminated against in her employment or payment on the grounds of sex.(522) Elementary and preparatory education is compulsory for both girls and boys under sixteen years of age. High School, University education and post-graduate studies are open to all, equally and on the same competitive conditions. Sex, therefore, never seems to be taken into

consideration for purposes of admission to such institutions. Figures from the latest statistics of the University of Jordan, for instance, indicate that the rate of female students is not only on a par, but in the case of some colleges, female students outnumber their male colleagues.[523]

In these and all other rights, the law has proclaimed equal rights for men and women. The sole exception is the law of inheritance, were the *Sharia* Courts apply Qur'anic provisions which dictate that: "Allah commands you concerning your children; a male shall have as much as the share of two females."[524] Obviously, this rule is incompatible with the requirements of the Covenant. Article 3, which explicitly requires full equality between men and women is only one example.[525] Jordan has reported to the HRC that:

> "With regard to Article 2 of the Covenant, ... there are some distinctions between men and women with regard to inheritance. The differences with regard to inheritance are deeply rooted in the Islamic religion and are based on the Islamic sense of economic justice ...
> Article 3 deals with the equality between the sexes and as has been pointed out earlier, there are no distinctions made between the two sexes except of course in reference to their physiological differences. As to political and civil rights, women now have the right to vote equally with men ... "[526]

Apart from the vague reference to the Islamic sense of economic justice and the physiological differences, Jordan has admitted that there are some distinctions between men and women based on sex. Undoubtedly, such distinctions constitute a violation of not only Articles 2 and 3, but also other Articles in the Political Covenant. Some may argue that such distinctions are required under Islamic Law and are justifiable in the context of an Islamic society. This might be true, but it does not change the fact that the law of Jordan, as it stands, is incompatible with the requirements of the Covenant. Jordan therefore, is in breach of its

obligations under the Political Covenant. The dilemma consists of two conflicting facts: on the one hand, Jordan is a party to the Political Covenant and therefore it is bound by its provisions. On the other hand, neither the legislature nor the government of Jordan could abrogate or modify a Qur'anic provision.(527)

Accordingly, since the accommodation of the two rules together is legally impossible, one of them would have to give way to the other. Because it is impossible to modify a Qur'anic provision, a reservation on the provisions of the Covenant seems inevitable. That is to say, Jordan should have reserved the right to interpret the provision of the Covenant in the light of the Qur'an and the general principles of Islamic jurisprudence.(528) However, until such a reservation is made, Jordan will continue to be in breach of the Covenant.

Equality between the sexes has given rise to many questions during the consideration of the reports of Jordan by the HRC. Members of the latter seemed very concerned with the welfare of the Jordanian women and wanted to know, to what extent they enjoy the declared rights in practice.(529)

It has to be mentioned that the Jordanian women do not, in practice, enjoy the proclaimed rights on an equal basis with men. Declaring a right is one thing, but exercising it is something else. There are many drawbacks in the way of full enjoyment of equal rights. Women live in a society which has inherited rigid traditions and highly regarded social religious values, which are not expected to change over a short period of time. That is to say, in spite of the impressive achievements towards that end over the last few decades, Jordanian women are still short of being able to enjoy equal rights with men in all fields. The most important thing is that there is a noticeable progress towards that goal, and

the government is taking practical and legislative measures to overcome such difficulties and to open wider opportunities for women to enjoy equal rights in practice. However, the status of women in Jordan appears to be one century ahead of the status of women in many neighbouring countries like Saudi Arabia and the Gulf countries. In Kuwait for instance, Parliament had debated a private members bill concerning the recognition of the right of women to vote.(530) When the Parliament decided to seek a recommendation from the Ministry of *Al-Awqaf* (Islamic Affairs), a recommendation was passed, suggesting that such a bill must not become law because it is contrary to the *Sharia* (Islamic law).(531)

E - ASSESSMENT.

It has already been mentioned that the right to equality before the law has been provided for under Article 6 of the present Constitution of Jordan. We have also analysed the said Article in an attempt to feature the scope and the legal dimension of the right recognised thereby. It was made clear that the actual wording of Article 6 as it stands now is insufficient and could give rise to some complicated legal problem. In order to remedy these inconsistencies a modification was suggested to ensure the prohibition of all forms of discrimination on any grounds whatsoever. As to the case law, the Jordanian courts have asserted, on more than one occasion that the principle of equality before the law is one of the fundamental constitutional principles of the legal order of Jordan. It was also mentioned that the supplementary laws enacted under the present Constitution, along with the administrative practices, reveal a relentless effort on behalf of the Jordanian authorities toward the promotion and realisation of this right.(532) Naturally, the possibility of a discriminatory measure being taken by the administration has always

been there. The legislator is aware of this possibility, and therefore, in most cases a judicial remedy has been made available. In practice, these incidents remain too rare to constitute a tangible official policy. On the contrary, the overall view is that all Jordanians are equal in their rights and duties, despite colour, religion...etc. They are all subject to the same laws and judicial jurisdiction. The vote of a woman or a black man is just as valid as the vote of a white Jordanian male. All citizens are guaranteed an equal standing before a court of law.

So far as the status of women is concerned, we have uncovered some short-comings in the law of Jordan, particularly a situation which rendered Jordan in breach of the Political Covenant from the very moment it entered into force. In all previous cases where a breach has been discovered, the author has constantly suggested an amendment to the Jordanian law in order that it be brought into line with the provisions of the Covenant. As the law of Jordan on this particular point is indispensable and beyond modification, we are faced with a rather delicate question. Therefore, it has been suggested that Jordan must reserve the right to interpret the relevant provisions of the Covenant in accordance with the principles of Islamic jurisprudence.

Finally, it has to be mentioned that the right to equality before the law is a common element between the two international covenants on human rights. States parties must implement this right with regard to both civil and political rights as well as to economic, social and cultural rights.

Chapter III. NOTES.

(1) The first crime (homicide) on the face of this earth is said to have been committed in protection of the right to life. See Al-Tabari;'The Analyses, Vol.II, 1879, p.142

(2) See: Chapter I, p.8. For the Arabs before Islam, it was an acceptable practice for the father to bury his newly born daughter alive. See Mahmassani, op. cit., p. 101

(3) The Qur'an; 6/151, also 5/32

(4) The Qur'an; 4/29

(5) The Qur'an; 2/178

(6) See for instance:

UDHR,	Art. 3,	"Everyone has the right to life..."
ADRDM,	Art. 1,	"Every human being has the right to life"
AHR,	Art. 4,	"Every person has the right to have his life respected..."
EHR,	Art. 2,	"Every person has the right to have his life... protected by law."
AFR,	Art. 4	"Human beings are inviolable. every human being shall be entitled to respect for his life and the integrity of his person.."
Islamic DHR,	Art. I.	"Human life is sacred and inviolable and every effort shall be made to protect it.."

(7) See for instance, W.P. Gormley, "The Right to Life and the Rule of Nonderogability: Peremptory Norms of Jus Cogens". in The Right to Life in International Law ed. by B. G. Ramcharan, Dordrecht/Boston/Lancaster, 1985, p. 121.

(8) See: Resolution No. 37/189 A, of 18 December 1982. See also the U.N.H.R. Commission's decision No. 7/1982 and 43/1983 of 19 February 1982 and 9 March 1983 respectively.

(9) HRC Report, GAOR, Supplement No.40 (A/37/40) p.93 (1982).

(10) Ibid.

(11) Ibid.

(12) See the EUCM, (5207/71) CD 39,99. See also H.A. Kabaalioglu, "The Obligation to 'Respect' and to 'Ensure' the Right to Life" in Ramcharan, the Right to Life. op. cit. p. 166.

(13) See HRC Report, GAOR, Supplement No.40 (A/38/40) p. 132 (1983)

(13a) See No.7154/75 DR 14, 31 and No.6040/73 CD 44, 121.

(14) See Nos.6780/74; 6950/75, Report of 10 July 1976.

(15) See the Commission's Annual Report, 1976, p.19.

(16) E/CN.4/SR.309-312. See also: the annotation prepared by the Secretary-General, 'Draft International Covenants on Human Hights', UN Doc. No. A2929, pp. 82-85

(17) See GAOR, 12th Session, 1957, 3 Comm: A/C.3/SR, 762-834.

(18) See P. Hassan, "The Word 'Arbitrary' as used in the Universal Declaration of Human Rights: 'Illegal' or 'Unjust'?", 10 Harv. I.L.J. 225, 225 (1969).
L. Marcoux, "Protection from Arbitrary Arrest and Detention under International Law", 5 Boston Coll.Int & Comp. L.R. 345 (1982)

(19) P. Hassan, "The International Covenant on Human Rghts: An Approach to Interpretation", 19 Buffalo, L. Rev., 35 (1969).

(20) P. Hassan, See above note 18, 254.

(21) R.B. Lillich, "Civil Rights",in Human Rights inInternational Law, ed. by T. Meron, Oxford, 1984, Vol. I, p.122,(herein after refer'd to as Lillich, Civil Rights)

(22) C.K. Boyle, "The Concept of Arbitrary Deprivation of Life, in Ramcharan, The Right to Life", op. cit., 221, 234

(23) Y. Dinstein, "The Right to Life, Physical Integrity and Liberty", in The International Bill of Rights, ed. by L. Henkin, New York,1981, p.116 (hereinafter referred to as Henkin, The International Bill of Rights).

(24) D.D. Nserenko, "Arbitrary Deprivation of Life: Controls on Permissible Deprivation,in Ramcharan, The Right to Life. op. cit., p.248

(25) Report of the HRC, GAOR, Supplement No.40 (A/37/40), p. 93 (1982)

(25a) Ibid p.137.

(26) It provides that:
"Art. 1. For so long as public order remains disturbed and national territory is in a state of siege, Art. 25 of the Penal Code shall read as follows:
Art.25. The [Penal] act is justified if committed:
...(4) by members of the police force in the course of operations planned with the object of preventing and curbing the offences of extortion and kidnapping and the production and processing of and trafficking in narcotic drugs." Ibid, p. 142

(27) Ibid, p. 146

(28) "...The committee is accordingly of the view that the state party should take the necessary measures to compensate the husband of Mrs. de Guerrero for the death of his wife and to ensure that the right to life is duly protected by amending the law." Ibid.

(29) The Convention on the Prevention and Punishment of the Crime of Genocide 1948. Like all other war crimes, genocide is not subject to statutory limitations. See: The Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968.

(30) "Personal liberty shall be safeguarded."
Protection of personal freedom would necessarily include protection of life. However this is only one example of what was meant when it was stated earlier that the Jordanian constitution refers to human rights in rather general and some times vague provisions. See above p.17

(31) Art. 372.

(32) Art. 327, See also the Supreme Court, Case No. 29/74, JBR (1974) p. 944

(33) See the Supreme Court Case No. 25/78, JBR. (1978), p.95 .
The Court held that since the victim is one of the offender's ancestors, the offence is punishable by the death penalty in accordance with Art. 328(3).

(34) Art. 372.

(35) Art. 339 (1+2)

(36) As a human right, the right to life means the right in itself and its peaceful enjoyment. The Supreme Court of the U.S. has held that the expression 'deprived of life' should not be construed to refer only to the extreme case of death; the term life as used in the Fourteenth Amendment to the U.S. Constitution means something more than mere animal existence. The Court extended the prohibition against deprivation to all the faculties by which life is to be enjoyed. Munn v. Illinois 94 U.S. 133 (1876).

(37) See Art. 158 (1,2)

(38) Ibid, Para. (3)

(39) Case No. 56/53, JBR. (1953), p. 537. See also Case No. 17/53 in the same volume, p. 313.

(40) King Hussain himself has set an example by his personal participation in rescue missions, putting his own life at risk to save the lives of individuals, especially in natural disasters.

(41) An interview with a former P.L.O. officer, Amman, January 1985.

(42) Three of the terrorists were killed during the operation and the other one was convicted by the competent Court of terrorist acts, leading to the death of a number of civilians and

soldiers. See Amnesty International Report (Jordan), A.I. Publications 1984

(43) For details of the legal and medical controversy over the question of abortion, see the American Supreme Court in Roe v. Wade, 410 U.S. 113, 35 L Ed. 2d 149. Mr. Justice Blackman delivered the opinion of the court. He stated:
"We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, and of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy and experiences, one's exposure to the raw edge of human existence, one's religious training, one's attitudes towards life and family, and their values, and the moral standards one establishes and seeks to observe are all likely to color one's thinking and conclusions about abortion."
p. 156.

(44) See: The Penal Code of Jordan, (Arts. 321-325), and Syria, (Arts. 525-532)

(45) The Syrian Court of Cassation in 30 Years, 1949-1980, 5 volumes Damascus, 1st ed., 1981, p.275.

(46) See for instance, The Penal Code of Egypt, (Arts., 260-264) and Iraq, (Arts., 229-231).

(47) The Criminal Law in the Soviet Union. See Hameed Al-Sa'idi, Crimes Against Persons, Baghdad, 1964, p. 276. For more details on these divisions see Kamal Assa'eed, "The Crime of Abortion: A comparative Study" Derasat Review', University of Jordan, Amman, 1984, pp. 172-173.
Dr. Assa'eed is in favour of the first trend, as he says:
"As a matter of fact, we could not agree with the last two trends... It is not true that the pregnant woman is the victim in such a crime. The real victim is the embryo who cannot be considered a human being because he has not seen the light of day yet." Ibidp. 173.

(48) U.S. Supreme Court Decision in Roe v. Wade, See above note 43, p. 148.

(49) U.K. The Abortion Act, 1967.

(50) In an amendment to Art. 317 of the French Penal Code, 21st December 1979, abortion was legalized by adding a new paragraph to that Article, permitting abortion if performed by a physician in a hospital before the 10th week of pregnancy.

(51) The Qur'an says: "Do not kill your children..." 6/151, and: 17/31

(52) See the proposal of Pelgium, Brazil, Salvador, Mexico and Morocco. U.N. Doc. A/C.3/L654.

(53) See Ramcharan, The Right to Life, op. cit. p. 51.

(54) See J. Feinberg, Rights, Justice, and the Bounds of Liberty, Princeton, 1980, p.180.

(55) D. Lasok, "The Right of the Unborn", in Fundamental Rights, a volume of Essays to commemorate the 50th anniversary of the founding of the Law School in Exeter, 1923-1973, ed. J.W. Bridge, D. Lasok and others, with a Foreword by Lord Denning, London, 1973, p. 28

(56) R.B. Lillich "Civil Rights" op. cit., p. 123. See also:
Y. Dinstein, who talks about the right of woman to abortion, op. cit., p. 122

(57) See Art. 322, para 1

(58) Ibid, para 2.

(59) Case No. 143/75, (unreported), Art. 323.

(60) See Art. 325.

(61) See Art. 321-325

(62) This is a further step in protecting the right to life by the Jordanian Law. Since the prohibition of abortion is meant to protect life in the first place, it would be meaningless if it becomes in itself a threat to the life of the pregnant woman.

(63) It seems that the Jordanian legislature had followed the Islamic Law on the principle (The principle of necessity) and the English Law (Abortion Act 1967) on the details and the requirements in such circumstances.

(64) See Art. 44.

(65) The Public Health Law No. 20, 1971,
see Art. 26; compare this provision with Section I. of the UK Abortion Act of 1967.

(66) Ibid, para (2)

(67) K. Assa'eed, op. cit., p. 216

(68) K. Assa'eed, op. cit., p. 215

(69) On the 'right to abortion', see Roe v. Wade, 410, US 113, 35 L Ed. 2d, above note no.43.

(70) Amnesty International has waged a continuous campaign against the death penalty. In 1965, the organization circulated a resolution at the U.N. for the suspension, and eventual abolition of the death sentence for peacetime offences. At the Vienna meeting of the Council of Amnesty International in 1973, it was decided that the death penalty must now be seen as a violation of the right not to be subject to torture,

inhuman or degrading treatment. In December 1977, A.I. convened in Stockholm an International Conference on the death penalty. Delegates from 50 countries issued a declaration condemning executions committed by governments. See Amnesty International, The Human Rights Story, ed. Power, Oxford, 1981, pp. 32-35; see also Amnesty International Report, The Death Penalty: a Survey by Country, I.A. Publications, 1984.

(71) See U.N. Doc. No. (A/C.3/L.644).

(72) Art. 6(2).

(73) Art. 6(6).

(74) See the Annotation prepared by the Secretary-General, above note 16.

(75) Ibid. See also ECOSOC, Official Records, 9th Session, supplement No. 10 (E/137), Annex 1 and 2.

(76) Ibid. See also R. Sapienza, "International Legal Standards on Capital Punishment", in Ramcharan, The Right to Life op. cit. p. 285.

(77) General Comments on Article 6, Report of the HRC, GAOR, supplement No. 40 (A/37/40) p.94 (1982).

(78) Ibid.

(79) See R. Sapienza, op. cit. p.287,.

(80) Art. 328, see also the Supreme Court of Jordan, Cases Nos., 182/72, JBR (1972), p. 318, 25/78, JBR (1978) p. 95.

(81) See: Art.s 110-113.

(82) See: Art.s 135-139, 142 and 148.

(83) See paragraphs (1&2).

(84) See U.N. Doc. No. CCPR/C/SR.362, p.3 (1982).

(85) Ibid. p.4.

(86) Ibid.

(87) Case No. 54/76, JBR (1976), p. 1636. See also Case No. 68/76, JBR (1976), p. 1648.

(88) See U.N. Doc. No. CCPR/C/1/Add.24, p.3 (1978).

(89) See the Summary Record of the 103rd meeting, U.N. Doc, No. CCPR/C/SR.103, (1978).

(90) Law No. 24, 1968. The JOG., No. 2089 of 16th April 1968, p. 555.

(91) Ibid, Art. 18(2).

(92) Ibid, Art. 2.

(93) See Art. 17(2) of the Penal Code of Jordan.

(94) Ibid, Art. 357.

(95) Art. 357(1) of the Criminal Procedures Code, (law No.9 1961) JOG No.1539 of 16th of March 1961 p.311.

(96) Ibid, (2,3).

(97) King Hussain is well known for his reluctance to give his approval for the carrying out of the death sentence. There are very rare cases in which the Royal Assent is granted. Most of these cases are murder, with one or more aggravating factors revealing dangerous criminal conduct.

(98) See: Art. 358.

(99) See: above p.68.

(100) See: below p.180.

(101) See: The HCJ, Case No. 59/70, JBR (1971) p. 146.
It is the established practice of the Ministry of the Religious and Islamic Affairs to bury any dead person at the expense of the Government, when there are no close relatives to take the responsibility. It seems that the Jordanian practice was influenced by the Islamic view that the burial is a human right. See the Islamic DHR, Art. 1(b) "Just as in life, so also after death, the sanctity of a person's body shall be inviolable. It is the obligation of the believers to see that a deceased person's body is handled with due solemnity."

(102) See: Chapter I. above, p. 13-15.

(103) Arts. 1, 3. See also: The ADRD."Every human being has the right to... liberty and the security of his person". Art.I."No person may may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law..." Art. XXV. The Islamic D.H.R. also provides that: "a) Man is born free. No inroads shall be made on his right to liberty except under the authority and in due process of the law." See Art. II.

(104) See those five specified cases in the same Art.

(105) Arts. 5 and 7. See also the AFR, Art. 6.

(106) Arts. 9 and 14.

(107) See above, p. 65.

(108) R.Lillich," Civil Rights", op. cit. p. 138. For almost an identical definition see Dinstein, op. cit., p. 130.

(109) J.Swarup, op. cit. pp.52-53.

(110) Report of the HRC, GAOR, Supplement No.40 (A/36/40) p.176 (1981).

(111) Ibid, Supplement No.40 (A/37/40) p.95 (1982).

(112) See: Art. 2.

(113) See: The constitution of Egypt of 1971.
"Individual freedom is a natural right and shall not be touched..." Art. 41.
The constitution of United Arab Emirates (1971).
"Personal freedom shall be guaranteed to all citizens... no person may be arrested, searched or detained... except in accordance with the provisions of the law..." Art. 26

Kuwait (1962)
"Personal liberty is guaranteed" Art. 30.
"No person shall be arrested, detained... except in accordance with the provisions of law..." art. 31.
P.D.R. OF Yemen (1978)
"personal freedom shall be ensured...arrests are allowed only in connection with punishable actions and should be based on the law..." Art. 39.
Algeria (1976)
"No one can be prosecuted, arrested or detained except in cases provided by the law and in the manner that it prescribes" Art. 51.

(114) Jordanian Dinars.

(115) See: Art. 179.

(116) See: Art. 180.

(117) See: below, pp. 504-506.

(118) Upon extensive research of the reported and partly unreported Jordanian cases since 1952 until the end of 1986, the author has failed to find a case where the above provisions have been implemented, despite the considerable number of unlawful arrest and detention cases decided by the HCJ.

(119) According to the Jordanian Criminal Procedures Code 'Judicial Police' includes the following persons:
1. Members of the Public Prosecution
2. Judge of the Peace in some districts
3. Provincial Administrative Governors
4. Director of the Public Security
5. The Leader and officers of the county's police force

6. Criminal detectives
7. The *Mokhtars* (Village Chiefs)
8. Captains of Jordanian ships and aeroplanes
9. Any officer vested with such function in accordance with specific legislation. See Art. 9.

(120) See: Art. 101.

(121) See: Art. 111, paras (1,2).

(122) See: Art. 115.

(123) See: Art. 117

(124) See: Art. 118

(125) It is in such cases that the provisions of Arts. 346 and 178 of the Penal Code are meant to be invoked. See above p.91.

(126) See: J.O.G. No. 473, 19/3/1935

(127) JOG, No.2010, 5/6/1967. Because of the severe impact of the exceptional powers on human rights in general and in Jordan in particular, they shall be dealt with separately in Chapter VII. below.

(128) See UN Doc. No . CCPR/C/SR.362,p.5 (1982).

(129) See below p.498.

(130) Christie v.Leachinsky, [1947] I All E.R 567,575.

(131) Equivalent provisions in the EHR is Art. 5(2): "everyone arrested or detained shall be informed promptly in a language which he understands, of the reasons for his arrest and of any charge against him".

(132) See Report of the HRC, GAOR, Supplement. No.40 (A/33/40) (1978)

(133) See HRC Report, GAOR, Supplement No. 40(A/38/40) p.192 (1982).

(134) Case No.146/1983, see Report of the HRC, GAOR, Supplement No. 40(A/40/40) p.187 (1985).

(135) After an exhaustive research into all reported and a large number of unreported judgements of the Jordanian courts from 1952 until the end of 1986, the present writer has failed to find a decision or a case relating to the practices of the police in this context.

(136) The legal nature of the alleged offence is of special importance at this stage, because arrest is not allowed for some offences no matter under what circumstances (in Jordan, violations and some misdemeanours). In cases of a misdemeanour punishable by fine, arrest, as a general rule, is not permissible, and therefore the individual is under no obligation to submit to the police. Furthermore, if the indicated charge, has been proved to be false or does not justify arrest, the arrested person would be able

to claim damages for false imprisonment, even though a latter charge has been discovered which would have justified arrest if it were introduced at the time of arrest. See Christie v. Leachinsky, p. 57 above note NO. 130.

(137) See Delcourt v. Belgium, No. (2689/65) C.D. 22, 48.

(138) An interview with Police Captain *O. Al-Thara*, Madaba, September 1986.

(139) See the Criminal Procedure Code, Arts. 227-231.

(140) Art. 9(3)

(141) HRC Report, GAOR, Supplement NO. 40 (A/37/40) p.95 (1982).

(142) See for instance Case NO. 90/1981 and Case NO. 84/1981, HRC Report, GAOR, Supplement NO.40 (A/38/40) p.197 (1983).

(143) Case NO. 43/1979, HRC Report, GAOR, Supplement NO.40 (A/38/40) p.192 (1983).

(144) See below, Chapter VII.

(145) See Art. 63.

(146) Art. 99.

(147) Art. 112.

(148) Art. 100.

(149) JBR. (1975), p. 962.

(150) Case NO. 54/76,JBR (1976) p.1011; compare this judgement with Art. 100 of the Criminal Procedure Code,
"A member of the judicial police shall question the arrested person, if not satisfied; he must bring him before the competent public prosecutor within 48 hours, who shall interrogate him within 24 hours and release or confine him".

(151) See U.N. Doc. No.CCPR/C/1/Add.24 (1978); CCPR/C/1/Add.55 (1981); CCPR/C/1/Add.56 (1982).

(152) UDHR., Art. 5 "No one shall be subjected to torture or to cruel, inhuman or degrading treatment."

EHR., Art. 3. "No one shall be subjected to torture or inhuman or degrading treatment or punishment."

AMR., 5(2).
"No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

AFR., 5

"...torture, cruel, inhuman or degrading punishments and treatment shall be prohibited."
The Islamic DHR., Art. VII, "No person shall be subjected to torture in mind, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime...."

(153) Lillich, Civil Right, op. citp. 163; see also O'Bogle, "Torture and Emergency Power under the European Convention of Human Rights", 71 AJIL, 687-688, (1977).

(154) G.A. Res.3452, 30 GOAR supplement No. 34, Doc.A/10034 (1975).

(155) Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, Dec. 1984. See ILM. Vol. 23 (1984) p. 1027

(156) Y. Dinstein, op. cit., p. 123

(157) Y.B. 12 (1969) p. 186

(158) 2 EHRR. 25.

(159) HRC Report, GAOR, Supplement No.40 (A/37/40) p.94-95 (1982).

(160) Communication No. R7/28, U.N. Bulletin of Human Rights (30/80); see also HRC Report, GAOR, Supplement No.40 (A/36/40) p.114 (1981).

(161) Ibid.

(162) HRC Report, GAOR, Supplement No.40(A/37/40) p.114 (1982).

(163) No derogation or any reservation with regard to the prohibition of torture is acceptable.

(164) Ramirez v. Uruguay, (Communication No.R1/4), HRC Report, GAOR, Supplement No.40 (A/35/40) p.121. (1980).

(165) See: Chapter I.

(166) Ibid.

(167) See for instance: The Constitution of Kuwait (1962) Art. 31
"No person shall be subjected to torture or to degrading treatment."
The constitution of the Sudan, (1971), Art. 28(3)
"No one shall be subjected to physical or mental torture or degrading treatment, the law shall designate punishments for those so doing."
The constitution of Egypt, (1971) Art. 42
"Any person arrested, detained... shall be treated in the manner concomitant with the preservation of his dignity. No physical or mental harm is to be inflicted upon him... If confession is proved to have been made by a person

under any of the above mentioned forms of duress or coercion, it shall be considered invalid and futile."

(168) Para. 2, "If such activities resulted in sickness or injury the punishment shall not be less than six months to three years, unless a greater punishment is required in accordance with the results."

(169) Art. 159 reads as follows: "A confession made by the defendant... without the presence of the public prosecutor... admissible only if the public prosecution provides evidence of the circumstances in which it was given, and the court convinced that it was given voluntarily."

(170) Case No. 14/55, JBR (1955), p. 146. A similar conclusion was reached in: Case No. 113/56, JBR (1956), p. 112.

(171) Case No. 22/58, JBR (1958), p. 267. See also:
Case No. 28/58, 33.60, and 41/61.

(172) Case No. 66/73, also Case No. 92/78. In Case No. 66/75:
"...the confession obtained during the questioning of the arrested person by the police is admissible evidence since there was no violence or compelling measures proved to be used..." See also:
Case No. 93/75, JBR (1975), p. 1112.

(173) *Majmuat al-qawaid al-qanonnia* (The collection of the Legal Principles decided by the Court of Cassation), vol. 6, Case No. 340/44, p. 464. See also Case No. 1594/60, 10/5/1960, Ibid. p. 512.

(174) JBR (1985), p. 656.

(175) Case No. 86/75, JBR (1976), p. 638.

(176) An unreported case of which the present writer has personal knowledge. Mr. Nasser was serving his military service at the time and while on duty his rifle went off by mistake and killed one of his colleagues. In accordance with the Military Penal Code, the commander of the military unit had to arrest him and initiate a preliminary investigation, the report on which had to be referred with the defendant to the military public prosecutor. The officer beat the defendant all night long demanding a confession that he had intentionally killed his colleague, and eventually (and not surprisingly) Mr. Nasser made his confession. The confession was recorded in the officers report and some aggravating factors were also added.

(177) 'The Greek Case', Y.B. 12 (1969) p. 196.

(178) Ibid.

(179) UN Doc.NO. CCPR/C/1/Add.55 (1981).

(180) UN Doc.NO. CCPR/C/1/Add.56 (1982).

(181) See below, p.154.

(182) The Political Covenant Art. 14(3)(a).

(183) See above p.94.

(184) General Comments on Art. 14 of the Political Covenant, see HRC Report, GAOR, Supplement No.40 (A39/40) p.145 (1984).

(185) See fore instence, Communication NO. R.14/63, HRC Report, GAOR, Supplement NO. 40 (A/37/40) p.114 (1982).

(186) One of the main principles of criminal procedure in Islamic law is: "Innocence is certain, certainty does not disappear upon mere doubt". In the Islamic DHR it says "No person shall be adjudged guilty of an offence and made liable to punishment except after proof of his guilt before an independent judicial tribunal." See also:
F. Kilany, The Law of Criminal Procedures, Amman, 1981, Vol. I, p. 116. See also The Islamic DHR., Art. V.,
"No person shall be adjudged guilty of an offence and made liable to punishment except after proof of his guilt before an independent judicial tribunal."

(187) See: F.G. Jacobs, The European Convention on Human Rights, Oxford, 1975, p. 113

(188) See above note NO.184.

(189) F. Kilany, op. cit., p. 120

(190) In application No. 2343/64 before the ECUM, the applicant alleged that before he was convicted the police had revealed to the press that the accused was a fraudulent person, and that remark was published by a newspaper in Vienna. The Commission observed that, under certain circumstances, information given to the press by officials before the conviction of a person accused of an offence could prejudice the presumption of innocence established by the convention, Case No. 2343/64, Y.B. 10, (1967), p. 182

(191) See the Constitution of Egypt 1971, Art. 67, and the constitution of Syria 1973, Art. 28, "Every accused person is innocent until pronounced guilty in a final judgement."

(192) op. cit., p. 117

(193) UN Doc. NO. CCPR/C/1/Add.24,p.2 (1978).

(194) Case No. 17/51, JBR (1953), p. 41

(195) Case No. 59/54, JBR (1954), p. 398. Similar judgement was also rendered in Case No. 74/55. JBR. (1955), p. 685

(196) See Case No. 89/65, JBR (1966), p. 694.

(197) See the cases cited above notes 195 and 196.

(198) See Case Nos. 241/77, JBR (1977), p. 217 and 39/81, JBR. (1981) p. 912.

(199) Case No. 1/76, JBR (1976) 972.

(200) See the seconed supplementary report of Jordan, UN Doc. NO. CCPR/C/1/Add.56 (1982).

(201) If the denial of the right to bail involved damaging effects on both the interest of the accused and justice. Abuse of the discretionary power by the judge or the court, i.e., exaggeration in the requirement for the release (excessive amounts of bail) may be of even more damaging consequence, as President Johnson pointed out at the signing of the US Bail Reform Act of 1966, when he remarked, "The defendant with means can afford to pay bail. He can afford to buy his freedom. But the poorer defendant cannot pay the price. He languishes in jail. He does not stay in jail because any sentence has been passed. He does not stay in jail because he is any more likely to flee before trial. He stays in jail for one reason only, because he is poor. There are hundreds, perhaps thousands, of illustrations of how the bail system has inflicted arbitrary cruelty. A man was jailed on a serious charge brought last Christmas Eve. He could not afford bail and spent 101 days in jail without a hearing. Then the complainant admitted the charge was false. A man could not raise $300 bail. He spent 54 days in jail waiting trial for a traffic offence, for which he could have been sentenced to n more than four days. A man spent two months in jail before being acquitted. In that period he lost his job and his car, and his family was split up. He didn't find another job for four months." As quoted by Swarup, op. cit., p. 59.

(202) Arts. 121-129

(203) Art. 126(3) "...who decides the bail-out may accept the deposition of a sum of money instead of the bail bond".

(204) Art. 123(1).

(205) Ibid, (2).

(206) Case No. 101/66, JBR (1966), p. 1092.

(207) See Art. 121(1), para. (2) provides that "If the maximum sentence is less than a year, providing that the accused has a known address in the Kingdom, the Public Prosecutor may release him without bail after five days of interrogation, on the condition that this should not include persons previously convicted of a felony or imprisoned for more than three months."

(208) Case No. 15/55, JBR (1955), p. 138.

(209) Case No. 40/65, JBR (1965), p. 1120

(210) See above note 160.

(211) See below chapter VI.

(212) See Chapter V.

(213) See Harris, "The right to fair trial as a human right",16 ICLQ (1967) 352, 354; hereinafter referred to as Harris, The right to fair trial.

(214) Ibid.

(215) Authorising international organs or institutions to check upon the ability of the national judges and their qualifications would be too far from being acceptable by states. An amendment to make clear that the adjective does not relate to the ability of the court was rejected as being unnecessary. The amendment was defeated in Third Committee of the General Assembly by 32 votes to 22, with 17 abstentions. See Harris, The right for fair trial, p. 357.

(216) Chile and Guatemala.

(217) Two votes against eight, with six abstentions, E/CN.4/SR.110, p. 4

(218) Harris, The right to fair trial, p. 356.

(219) Art. 8(1) reads as follows: "every person has the right to a hearing... by a competent independent and impartial tribunal, previously established by law.

(220) Art. 97.

(221) Arts. 102 and 103. For details see below chapter V.

(222) See Judge F. Kilany, The Special Tribunals in Jordan, Beirut 1969; for further details see below Chapter V.

(223) General Comments on Art. 14, HRC Report, GAOR, Supplement No.40 (A/39/40) p.145 (1984).

(224) Law No. 33 of 1976.

(225) See Art. 6, 7, and 10.

(226) Art. 8.

(227) Art. 9.

(228) Art. 10.

(229) The time limit here may be extended upon a reasoned decision by the court. See Art. 10

(230) J. Swarup, op. cit., p. 84

(231) Ibid.

(232) That is on the assumption that judges, lawyers and witnesses perform their respective functions more responsibly in an open court than in secret proceedings.

(233) See J. Swarup, op. cit., p. 88.

(234) Lord Denning, The Due Process of Law, London, 1980, p. 46.

(234a) General Comments on Art. 14, HRC Report, GAOR, Supplement No.40 (A/39/40) p.144 (1984).

(235) Ibid.

(236) See HRC Report, GAOR, Supplement N0.40 (A/36/40) p.153 (1981).

(237) The right to freedom to leave the country. Art. 12(1), and also the right to freedom of expression, see below pp.163-64.

(238) Criticizing the provision of Art. 6(1) of the EHR which bears great resemblance to Art. 14(1) of the covenant, J. Fawcett stated that it is doubtful whether the requirement of a public hearing under the Convention is likely in practice to yield much protection,
J. Fawcett, Application of the European Convention on Human Rights, Oxford, 1987, p. 164; See also below, p.172.

(239) HRC Report, GAOR, Supplement No.40 (A/37/40) p.174 (1982).

(240) See above note N0.236 .

(240a) Art. 171 of the Criminal Procedures Code.

(241) Law No. 24 (1968), see JOG No. 2089 of 16/4/1968.

(242) Case No. 58/77, see JBR (1977), pp. 826-831.

(243) Ibid., at 830.

(244) The court had used the term *al'amin al-a'am* (public security) as a synonym for *al-Ned'am al-a'am* (public order).

(245) Case No. 251/77, JBR., (1978) p. 228.

(246) See Art. 14(4), it says that: "in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation."

(247) See above p. 109.

(248) Art. 14(3)(a)

(249) The AMR uses the word 'means' instead of 'facilities'.

(250) HRC Report GAOR, supplement NO.40 (A/40/40) p.204 (1985).

(251) Case No. 87/61, see JBR (1961), p. 617

(252) This measure is mandatory under Art.234, which reads as follows: "The court may modify the charge to the form it deems appropriate, providing that such a modification is not based on facts not included in the evidence. If the modification shall require a graver punishment, the court must postpone hearings for the period it deems necessary for the accused to prepare his defence according to the modified charge."

(253) Case No. 16/64, JBR (1964), p. 489. See also Case No. 119/77, JBR (1977), p. 1310.

(254) In a number of cases the Supreme Court has reversed the judgement of lower courts when they did postpone the hearings or gave the defence time to answer the modified charge. See for example 58/73, JBR (1973), p. 848. In Case No. 11/79, the court explicitly stated: "A modified charge which does not require a greater punishment, the court should not have postponed the hearings upon the request of the defence to prepare itself to answer the modified charge, because Art. 234 is not applicable in such cases." See JBR (1979), p. 452. In many other cases the Supreme Court has upheld the decisions of the lower court in which they refused to give the defence any time to answer the modified charge. See for instance, 16/64 JBR (1964), p. 489, and 15/77 (1977), p. 553.

(255) See the HCJ, Case No. 56/73 (1973), p. 1305.

(256) Ibid.

(257) Art. 14 (3)(d).

(258) X. v. The Federal Republic of Germany, Y.B. 5 (1962), 104, 106.

(259) Para. 1.

(260) The Supreme Court has ruled that: "in case of a hurry, because of the fear of losing the evidence, the public prosecutor may interrogate the suspect without the presence of his lawyer. Statements given on that occasion constitute legally obtained evidence on which the court could lawfully rely for the conviction." See Case No. 85/67, JBR (1967), p. 1318.

(261) Case No. 95/72, JBR (1972), p. 1078.

(262) Case No. 135/79 JBR (1979), p. 85. Also see 72/76 JBR (1976), p. 1929. 95/72, JBR (1972), p. 1078, and 60/57, JBR (1957) p. 814.

(263) See the JBR (1981), p. 1336.

(264) Art. 65 (2, 3).

(265) Art. 66(2), "The prevention should not include the lawyer... unless the public prosecutor so decided."

(266) "To be paid from the treasury of the government to the lawyer appointed in accordance with the foregoing paragraph an allowance not exceeding five JD for a hearing plus transportation".

(267) In Case No. 18/74, the Supreme Court ruled that "...since the prescribed punishment is temporary imprisonment, the accused is not eligible for free legal assistance.",JBR, (1974) p.699.

(268) The second supplementary report, U.N. Doc. No.CCPR/C/1/Add.56, (1982) p.15.

(269) Summary record of the 362nd meeting, 15 July 1982, U.N. Doc. No.CCPR/C/SR.362 p.3 (1982).

(270) Ibid.

(271) Case No.158/1983, see above note 250.

(272) Art. 14(3)(e).

(273) See Application No. 753/60, X. v. Austria, Y.B. 3, (1960) p. 320. See also Application No. 617/59 X. v. Austria, Ibid., p. 370.

(274) Art. 69.

(275) Such persons however, are entitled to compensation for transport expenses and other damages (Art. 77).

(276) See Art. 153-155.

(277) Art. 165.

(278) See Art. 173(1-3).

(279) Paragraph 3 empowered the court to summon the defence witnesses at the expense of the accused. This may be considered as a limitation on his right, but has never been implemented.

(280) Ibid. (4).

(281) Art. 217.

(282) Case No. 60/53, JBR (1953), p. 583. See also No. 9/53 JBR., p. 375

(283) Case No. 81/64 JBR (1964), p. 910.

(284) Case No. 67/75 JBR (1975), p. 962. See also 64/82, JBR (1982), p. 1017

(285) See above p. 142.

(286) See JBR (1957), p. 264.

(287) Art. 14(3)(f)

(288) See Harris, The right to fair trial, p. 368.

(289) Compare the two texts.

(290) Art. 227(2).

(291) Art. 229.

(292) Art. 228.

(293) In 1980, the Supreme Court of Jordan had adopted a similar opinion for almost the same reasons ;See Case No. 154/80 JBR (1980), p. 110.

(294) Case No. 15/77, JBR (1977), p. 553; See also N0. 154/80, Ibid., p. 111.

(295) Art. 14(3)(g). There is no comparable provision in the EHR.

(296) See above pp. 102 — 107

(297) Arts. 7 and 10 of the Covenant.

(298) Ibid., Art. 14(3)(g).

(299) See Art. 216, paras. 3 and 4.

(300) Art. 216(4)

(301) Art. 175(1).

(302) UN Doc. N0. CCPR/C/1/Add.56, p.15, (1982).

(303) The Ottoman Criminal Procedures Code which remained in force in Jordan until it was replaced by the present Code in 1961.

(304) Case No. 19/53 JBR (1953), p. 318.

(305) Case No. 13/54, JBR (1954), p. 274.

(306) Case No. 65/75, JBR (1975), p. 1331.

(307) Case No. 129/82, JBR (1982), p. 1304.

(308) See above pp. 104-105 especially Case No. 173/84 and No. 86/75'

(309) Art. 14(5). There is no counterpart provision in either the AHR or the EHR . However, it is possible, says Harris, to interpret the term 'trial' used in both of them in such a way as to include all of the judicial proceedings in which the

accused's guilt or sentence is under consideration, The Right to Fair Trial, op. cit. p. 371.

(310) HRC Report, GAOR, Supplement No.40 (A/37/40) p.168 (1982).

(311) Ibid. p.146.

(312) Communication No.R.14/61, HRC Report, GAOR, Supplement No.40 (A/37/40) p.161 (1982).

(313) See the Law of the Court of Capital Felonies, Law No. 33 of 1976. See particularly Art. 13.

(314) See Art. 256-298

(315) Art. 19 of the Martial Law Instructions of 1967.

(316) See chapters VI. and VII; See also, F. Kilany, op. cit., pp. 183-207.

(317) See J. Swarup, op. cit., p. 64.

(318) See the Fifth Amendment. See also the effect of Christianity on the philosophy of human rights and human rights declarations in Europe at that time. Chapter I.

(319) Harris, The right to fair trial, op. cit., p. 376.

(320) See Chapter VII.

(321) Case No. 74/64 JBR (1964), pp. 14-17.

(322) Case No. 12/55 JBR (1955), p. 368.

(323) Case No. 81/69 JBR (1969), p. 908.

(324) Case No. 83/62, JBR (1962), p. 883.

(324a) See U.N. Doc. No.CCPR/C/1/Add.56 (1982) p.16.

(325) See R. Ash-Sha'ir, Responsibility of the State with Regard to Non-Contractual Relations, Cairo, 1978, pp. 80-120

(326) See below p. 428.

(327) See below Chapter VI; see also Case No.40/66, JBR.(1966) p.736

(328) See Case No. 166/67, JBR (1967), p. 893. Similar views were also expressed in Case No. 248/68, JBR (1968), p. 36.

(329) Case No. 77/56, JBR (1956), p. 673.

(329a) See for instance, Communication No. R.17/70 and Communication No. R.6/25, HRC Report, GAOR, Supplement No.40 (A/37/40) p.174 and 187 (1982) respectively.

(330) See the United Nations, G.A. Res. No. 59 (UN DUC A/649 1 (1946); see also J. Humphrey, "Political and Related Rights", in Meron, op. cit., Vol. I., p. 171, 182.

(331) Prof. A. Sarhan, *Manuel de Droits de l'Homme*, Cairo, 2nd ed., 1984, pp. 212-213.

(332) A situation which has resulted in continuous political instability in that part of the world.

(333) "When Galileo published his discoveries about the phases of Venus, etc. he showed that they 'incontestably proved the motion of the earth'. But this idea of the motion of the earth was declared heretical by an assembly of Cardinals, Galileo was hauled before the Inquisition and compelled to recant under pain of severe punishment." See J. Swarup, op. cit., p. 218-219.

It is also reported that Plato himself has suggested the forcing of science, poetry and religion to function as producers of ideologies into service of the state. He also proposed the suppression of all liberty of thought by instituting a state monopoly upon ideology in a form of dictatorship to which not only the will and activity of man submit, but also their opinions and beliefs. See Kelsen, What is Justice? Beckeley, Los Angeles, London, 1971 p. 96.

(334) That is true, although during the 17th century the English Bill of Rights in 1688 stated that the freedom of speech and debate in Parliament was not to be impeached or questioned in any court or place out of Parliament.

(335) Three years later, the American Bill of Rights, 1791, was promulgated. In Article I, it proclaims that "Congress shall make no law... abridging the freedom of speech or of the press."

(336) In France itself, Napoleon was reported to have said to Metternich, "I would not undertake to govern for three months with the freedom of the press." See J. Humphrey, op. cit., p. 181.

(337) See A. Mawdudi, op. cit., p. 28; He came to the conclusion that "any government which deprives its citizens of this right is in conflict with divine injunction. Such a government is not in conflict with its people only but also with God. It is trying to usurp that right of its people which God has conferred not merely as a right but as an obligation." p. 29.

(338) For further details and comparative analysis of these conceptual issues, see A. Wandieen, unpublished Thesis, op. cit., pp. 86-88

(339) See for instance, S. Mahmassani, Basic Concepts of Human Rights, p. 141.

(340) Among these verses are, 3/104, 9/67, 9/71. The story of Omar, the second Caliph is a frequently quoted incident with regard to the right to freedom of expression. One day, the Caliph was addressing the public in the Mosque, when a woman rose and expressed total disagreement with him on a key issue. He argued with her, but eventually he was convinced she was right, then he turned to the crowd and said: "the lady was right and the Caliph was mistaken." See A.A. Al-Hakeemi, op. cit., p. 125.

(341) I. Annani, op. cit., p. 29.

(342) See Art. 12.

(343) See the EHR., Art. 10(1), AMR. Art. 13. See also AFR. Art. 9, and the ADRD. Art. 4.

(344) Para. (1) declares that "Everyone shall have the right to hold opinions without interference."

(345) General Comments on Art. 19, HRC Report, GAOR, Supplement No. 40 (A/38/40) p.110 (1983).

(346) Which happens to bear the same number (19). Furthermore, there is some similarity between the actual wording of the two Articles, thus, the reader may take this in consideration.

(347) (1) and (2)

(348) K.J. Partsch, "Freedom of Conscience and Expression, and Political Freedoms", in L. Henkin, The International Bill of Rights, p.217.

(349) See the arguments of the UK and France. Un Doc 4/SR 200, para. 5, and UN Doc 4/SR 320 para 6, respectively.

(350) General Comments on Art. 19, HRC Report GAOR, Supplement No.40 (A/36/40) p.109 (1981).

(351) See the argument of India and others, UN Doc. A 5000, paras 9, 11, 12 (1961).

(352) See above note 350.

(353) See the discussion of the report of Tanzania (CCPR/C/1/Add.48) UN Doc. Nos. CCPR/C/SR.281, 282 and 288 (1981); see the discussion of the report of Nicaragua (CCPR/C/14/Add.2) UN Doc. Nos. CCPR/C/SR.422 and 428 (1983).

(354) See for instance, the discussion of the report of Iceland (CCPR/C/10/Add.4), UN Doc. Nos. CCPR/C/SR.392 and 395 (1983); see also the discussion of the report of Austria (CCPR/C/6/Add.7) especially Doc. No. CCPR/C/SR.416 (1983).

(355) See the comments made and the information required with regard to the report of Australia, UN Doc. Nos. CCPR/C/SR.403 and 407 (1983); see also the information required with regard to the

report of Mexico (CCPR/C/22/Add.1) especially UN Doc. No. CCPR/C/SR.397 (1982); and also the questions raised and the comments made during the discussion of the report of the United Kingdom and Northern Ireland (CCPR/C/32/Add.5) UN Doc. Nos. CCPR/C/SR.594-597 (1985).

(356) See e.g, the discussion of the Second Periodic Report of the USSR (CCPR/C/28/Add.3) UN Doc. Nos. CCPR/C/SR.564-570 (1984).

(357) See UN Doc. No. CCPR/C/SR.687 (1986).

(358) UN Doc. No. CCPR/C/SR.103 (1978).

(359) UN Doc. No. CCPR/C/SR.362 (1982).

(360) Case No.61/1979, HRC Report GAOR, Supplement No.40 (A/37/40) p.165 (1982).

(361) X and Association Z v. United Kingdom, No. 4515/70, C.D.38, 86; X v. Sweden, No. 9297/81, D.R.28, 204.

(362) 'The Handy Side Case', Judgment of 7 Dec. 1976, Ser.A. 24,23

(363) See above note No. 360.

(364) See above note No. 161; see also Case No. 11/1977 HRC Report, GAOR, Supplement No.40 (A/35/40) p.132 (1980); 44/1979 HRC Report,GAOR, Supplement No.40 (A/36/40) p.153 (1981).

(365) Case No. 185/1984, HRC Report,GAOR Supplement No. 40 (A/40/40) p.240 (1985).

(266) See 'The Sunday Times Case', Ser. A. 30, 41.

(367) See M. Bullinger, "Freedom of Expression and Information: an essential element of democracy", 6 HRLJ, 339, 353 (1985).

(368) X v. Germany No. 8383/78, D.R. 17, 227.

(369) See M. Bullinger, above note No. 367 p.345.

(370) See above note No. 360.

(371) A.C. Kiss, "Permissible Limitations on Rights" in L. Henkin, The International Bill of Rights, p.303.

(372) Ibid.
(373) Ibid.

(374) Decision of 27 October 1978, Ser A, Vol. 30, p. 30

(375) See above note No. 350.
(376) UN Doc. No. CCPR/C/37/Add.1 (1986)

(377) Summary records of the 687th meeting, UN Doc. No. CCPR/C/SR.687 (1986).

(378) See above note No. 360.

(379) Para. (2) See below p. 188.

(380) Similar, and sometimes identical, provisions have been included in almost all other Arab constitutions: See for instance:
Egypt, (1971) Art. 47
Lebanon, (1926) Art. 13
The Sudan, (1971) Art. 48
U.A.E., (1971) Art. 30
Bahrain, (1973) Art. 24
Tunisia, (1971) Art. 8
Syria, (1973) Art. 38
Iraq, (1970) Art. 26
Kuwait, (1962) Art. 36 and 37

(381) See Chapter VII.

(382) See Art. 107-109 and 110-112

(383) See Art. 114 and the revised para. (2) of Art. 118.

(384) See also Art. 119.

(385) Art. 163, see also the Official Secrets Law No. 50/1971, particularly Art. 17

(386) Arts. 118-125, 195-197, of the Penal Code.

(387) Art. 191, see also Arts. 192, 140-142, 185-186, 200-202.

(388) Art. 152

(389) Ibid.

(390) Art. 188-189.

(391) See also Art. 198.

(392) See the Jordanian Criminal Procedure Code, Arts. 141-145.

(393) See Art. 224

(394) See Art. 225 and also Arts. 222 and 226.

(395) In all Arab countries radio and television stations are state owned. Only in the Lebanon are privately owned radio and television stations allowed.

(396) See the Law of Print and Publication Law No. 33/1973, JOG No. 2429 of 1/2/1973, p. 8 and the previous law No. 16/1955.

(397) See the JOG, No. 1131, 17 March 1963, p. 491. See in particular Arts. 11 and 21.

(398) See Art. 4 (1)(a) of the Defence Law of 1935

(399) See also Regulation No. 4, 1954, and No. 6, 1954, JOG (1193, p. 626), dated 26 August 1954, which eliminated the Defence Regulation No.1, 1952. See also Regulation No. 2, 1955, which altered Defence Regulations No. 3, 4, 6, 7, of 1964. See JOG, No. 1236, 16 May 1955.

(400) Case No. 76/72, the verdict and the reasoning are published in JBR (1972) pp. 1182-3.

(401) Ibid.

(402) Ibid.

(403) Law No. 16 (1935), see the text of Art. 124 of the Constitution, below p. 493.

(404) Defence Regulation No. 5 (1948).

(405) It seems that the court had ignored the fact that the Defence Law (1935) and the Defence Regulation (1948) preceded the Constitution of 1952.

(406) Law No. 33 of 1973, which replaced the previous law.

(407) See particularly Arts. 16 and 23.

(408) See Arts. 16-32, 38-46, 63-67 and 73-76.

(409) Art. 2.

(410) See Art. 61.

(411) See Arts. 63 and 70.

(412) See Arts. 66 and 68.

(413) For a fully documented chronology of the Jordanian Press, see O.B. Shrame, The Jordanian Press, between 1922-1983, Amman, 1984.

(414) See M. Bullinger, above note No. 369.

(415) See Case No. 76/72 above note No. 400

(416) See above note No. 413.,

(417) See I. Bakr, "Human Rights", JBR., Amman, June 1981, p. 45.

(418) UN Doc. No. CCPR/C/SR.362, (1982), 4.

(419) S. Reshadat, "Freedoms and the Law", JBR, May 1975, p. 769.

(420) UN Doc. No. CCPR/C/1/Add.24, (1978), 3.

(421) See Art. 32(a&b)

(422) "... upon a recommendation from the Minister of Information, the Council of Ministers may cancel its permit or suspend its publication for a period of not less than a week, or a fine from 150 to 500 JD".

(423) There is no restriction on the powers of the Council of Ministers in this regard.

(424) Furthermore, according to para. 3 of the same Article, an application for a new permit shall not be considered until a whole year has passed since the original permit was cancelled.

(425) See I. Bakr, op. cit., p.46.

(426) Case No. 101/71, JBR (1971) pp. 1201-3. See also Case no. 61/61, JBR (1961) p. 515.

(427) Judicial review of administrative actions will be treated in Chapter VI below.

(428) See U.N Doc. No.CCPR/C/SR.103, (1978), p.7.

(429) UN Doc. No. CCPR/C/1/Add.55, (1981)

(430) See Chapter VII below.

(431) See General Sir John Glubb, My Years with the Arabs, Institute for Cultural Research, England, 1971, p. 8. (Glubb 'Pasha' was the British officer comanding the Arab Legion between 1938 and 1956, he joined the Arab Legion in 1930.)

(432) Personal interview, Amman, 1985.

(433) I. Bakr, op. cit., p.45.

(434) See cases cited above notes Nos. 400 and 426.

(435) See below Chapter VII.

(436) See John Rees, Equality, Pall Mall, London, first ed., 1971, pp. 91-101.

(437) Ibid.

(438) The Declaration provides that the law "should be the same for all, whether it protects or punishes" and that "all are equal in its sight." See P. Sieghart, op. cit., p. 264.

(439) Most of the constitutions of the 19th and 20th centuries adopted the principle included under article (7) of the French Declaration. See H. Lauterpacht, op. cit., p. 88-90

(440) Qur'an, 49/13

(441) op. cit., p. 22

(442) See A. Mawdudi, op. cit., p. 21
M. Shaltoot, op. cit., p. 218
I. Annani, op. cit., p. 93

(443) Qur'an, 49/13

(444) See above note 442.

(445) The Islamic taxation system (*Zakat*) clearly manifests this philosophy.

(446) Abd Allah Lahud, Human Rights, Civil and Political, in Lebanese Law, Beirut, 1972, pp. 17-36

(447) See Chapter 1, p.17

(448) See below p.221 and p.261 respectively.

(449) See also The U.N. Charter, Article 1.

(450) Ibid. Under Article 8 of the Charter, the General Assembly is vested with the power to initiate studies and make recommendations and to take measures toward the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, etc. See also Articles 13, 55, 62, and 76.

(451) The Preamble.

(452) See also Art. 4, 7, 10, 16, 18, 21, 23, and 26.

(453) ICJ Report (1966). In that particular case the court was evenly divided on the question of admissibility. Because of the casting vote of the President, the court did not deal with the substance. Nonetheless, the dissenting opinion of Judge Tanaka (the Japanese member) is of special importance in clarifying the issue. He had opposed the argument of the respondent state and proved the existence of an international rule, legally binding on all member states, in accordance with the main three sources of international law referred to in Article 38 of the statute of the court, i.e. conventions, customs and general principles of law. See pp. 286-301. See also Judges Padilla and Mervo, pp.455-6 and 467-9, respectively.

(454) The South West African Case.

(455) ICJ Reports (1970), pp. 3-35

(456) Ibid. p. 32

(457) These are "rules that cannot be set aside by international treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect." See Brownlie, The Principles, op. cit., p. 513.

(458) ICJ Report, (1970), (second Phase). See also the separate opinion of Judge Ammoun in the same report, p. 304

(459) See for instance, ADRD Art. 11: "all persons are equal before the law and have the rights and duties established in this declaration, without distinction as to race, sex, language, colour or any other factor."; AFR, Art. 3(1) "every individual shall be entitled to protection of the law."

(460) Art. 24 provides that "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection from the law."

(461) Art. 14 contains a general prohibition of discrimination with regard to the rights guaranteed by the Convention and the protocols. It says: "the enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion..." On the meaning and scope of this right under the European Convention see Jacobs, op. cit., pp. 188-193; see also the Judgement of the European Court in The Belgian Linguistic Case, Y.B. 11, (1968) pp. 832-50.

(462) See A.Z. Drzemczewski, Human Rights: Cases and Material, London ,1982, Vol.3., Vol. 3; Brownlie, The Basic Documents, op. cit..

(463) The Convention was adopted by the General Assembly on 21 December 1965, opened for signature on 7 March and entered into force on 4 January 1969.
Jordan is a signatory to the convention. See U.N. Treaty Series, Vol. 660, p. 195.

(464) Art. 2, "State parties condemn racial discrimination and undertake to pursue by all means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races and, to this end... c) each state party shall take effective measures to review governmental, national and local policies and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."

(465) See Art. 14.

(466) See Art. 1.

(467) See for instance, U.N. Document A/C.3/5R. 1184, para. 7 (1962); U.N. Document E/CN.4/528, para. 69 (1951).

(468) Art. 2(1), provides that: "Each state party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present covenant without distinction of any kind, such as race, colour... or any other status."

(469) B.B. Ramcharan, "Equality and Non-Discrimination", in L. Henkin, The International Bill of Rights, p. 256, hereinafter referred to as Ramcharan, Equality.

(470) T. Meron, Human Rights Law Making in the United Nations A Critique of Instruments and Processes, Oxford, 1986, p. 120, hereinafter referred to as Meron, Human Right Law Making.

(471) Drafters of the EHR have evaded such a difficulty by referring to this right in one Art. and explicitly restricted its application to the right enumerated in the Convention; see Art. 14; see also Jacobs, op. cit., and the Belgian linguistic case, Y.B. 11, (1968), p. 832.

(472) In Aumeeruddy-Cziffra et al. v. Mauritius, (No.R.9/35) the HRC had taken the view that there was a violation of Articles 26, 2(1) and (3) in conjunction with 23(1), where the laws of a state party enable the government to restrict access to, and remove from, its territory the alien husband of a female citizen, but not the alien wife of a male citizen. In another case (Pictraroia v. Uruguay), (No.44/1979) concerning restriction on political rights under Article 25, the HRC decided that, although such restrictions may be permissible under the said Article, they would violate both Articles 2(1) and 26, if they are based upon political opinions. See HRC Report, GAOR, Supplement. No.40(A/36/40), p. 134 and p. 153 (1981) respectively

(473) Communication No. 178/1984, HRC Report, GAOR, Supplement No. 40 (A/40/40) p. 226 (1985).

(474) Case No. 182/1984, HRC Report, GAOR, Supplement No.40 (A/42/40) (1987).

(475) See No. 107/64, JBR (1964), pp. 1056-8; No.15/67, JBR (1967), p. 734; No. 67/69, JBR (1969), pp. 137-9.

(476) Art. 5, "All Jordanians shall be equal before the law, notwithstanding the difference of race, religion and language." In the Constitution of 1946, Article 6 was worded as follows: "Jordanians are equal before the law, there shall be no distinction between them in their rights and duties, regardless of the differences in their origin, language or religion."

(477) Those Articles are: 9(1), (2); 11; 13; 15; 16(1), (2); 17; 19; 22(1), (2); 23(1); 75; 76; 101 (1) and 102.

(478) Ibid.

(479) "The Royal prerogatives shall pass from the holder of the throne to his eldest son, and to the eldest son of that son..."

(480) See below p. 220.

(481) That survey included *inter alia*: The Civil Code (1976); the Labour Code (1961); The Law of the Independence of the Judiciary, law No. 19 (1955); The Penal Code (1961); The Criminal Procedure Code (1961); The Law of the University of Jordan, law No. 36 (1965); The Law of the General Election, law No. 24 (1960); The Civil Service, law No. 41 (1952); The National Service, law No. 1 (1976); The Social Security, law No. 30 (1978).

(482) See the HCJ Case No. 27 /55, JBR (1956), p. 466.

(483) For a full assessment of the effectiveness of this remedy, see Chapter VI.

(484) Case No. 15/67, JBR (1967), pp. 1056-7.

(485) Two years later.

(486) HCJ Case No. 67/69, (1969), pp. 137-8.

(487) See above Note No. 465.

(488) Case No. 107/64, JBR (1964), p. 1087.

(489) Ibid.

(490) The Law of Civil Pension, law No. 15 of 1976.

(491) Case No. 34/77, JBR (1977) pp. 977-80.

(492) The High Administrative Court's Reports, Cairo, 1947, Case No. 101, p. 975

(493) According to Prof. Atta'ar, the key issue is the right itself, not the group to which the person may belong; and since all citizens are entitled to the same rights, they all should have equal standing in the eyes of the law whether it protects or punishes, "The Right to Access to Court", in the Revue des Sciences Jurisdiques et Economiques, vol. II, 1959, Cairo, p. 667; see also Abu-Al-Majid, Review of the Constitutionality of Laws in the USA and Egypt, Cairo, 1958, p. 620. He says: "...even between members of different categories discriminatory treatment violates the principle of equality before the law."

(494) F. Kilany, Independence of the Judiciary, 1st ed. Amman, 1977, p. 270, hereinafter referred to as F. Kilany, Independence.

(495) Does the Constitution of Jordan allow discrimination on grounds other than those listed in Article 6(1)?

(496) See above pp.221-216.

(497) See UN Doc. Nos. CCPR/C/1/Add.24 (1978); CCPR/C/1/Add.55 (1981) and CCPR/C/1/Add.56 (1982).

(498) Compare with Art. 38 of the Constitution of 1971 of the Sudan.

(499) Art. 34 of the Constitution of the P.D.R. of Yemen of 1978 provides that "All citizens are equal in their rights and duties regardless of their race, origin, religion, language or degree of their education or their social status." See also the Constitutions of:
United Arab Emirates (1971), Art. 25
Iraq (1970), Art. 19
Qatar (1970), Art. 9
Bahrain (1973), Art. 18

(500) Art. 39(2). See also the Constitutions of:
Tunisia (1971), Art. 6;
Syria (1973), Art. 25(3)
Lebanon (1926), Art. 7
Moroco (1972), Art. 5

(501) Among many other outstanding achievements in this field see:
The Declaration on the Elimination of Discrimination against Women, 1967;
The Convention on the Elimination of Discrimination Against Women, 1980;
The Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 1974;
The Convention on the Political Rights of Women, 1952;
The Convention on the Nationality of Married Women, 1957;
The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962;
The Convention for the Suppression of the Traffic in Persons and of exploitation of the Prostitution of others;
The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956;
UNESCO Convention against Discrimination in Education, 1960

(502) The Commission was established by the ECOSOC Resolution No. (11 (II) of 21 June 1946). It consists of 32 members; and is charged with the task to prepare recommendations and reports to the council on the promotion of women's rights in the political, economic, social and educational fields; and to bring to the attention of the council any urgent problem affecting the right of women, as well as the implementation of the principle of equal rights of men and women; and to develop proposals to make such recommendations effective.

(503) Resolution No. 2263 (XX II) of 7 November 1967.

(504) The Declaration consists of a preamble and eleven substantive Articles. It presents a general pronouncement of the U.N.'s policy with regard to equality of men and women, and the

elimination of discrimination based on sex. It also emphasised a number of principles, many of which were embodied in earlier international instruments emanating from the U.N. and its specialised agencies. See for instance Arts, 1, 2, 3, 7 and 9.

(505) See General Assembly Resolution No. 34/180 (1979).

(506) Art. 1.

(507) Art. 2(a) and (b).

(508) Ibid. paras. (c) to (f).

(509) Attitudes of the Arab countries are indeed confusing. Most of them have already accepted the Political Covenant without any reservation, yet they seem reluctant to ratify the Convention, in spite of the fact that the requirements are the same in both cases.

(510) This right is restricted to the male heirs only. This is done in accordance with Islamic jurisprudence which prevents women from assuming the responsibilities of the ultimate leadership of the nation '*imama ussma*'. Such a Constitutional rule was established in the early days of the Muslim state and has been observed for more than fourteen centuries, during the *Khelafh* system as well as in the modern Islamic states. Compare the Jordanian Article with its counterpart in the Constitution of Moroco (Article 20). It is not at all likely that this rule would completely disappear from the Islamic Constitutions, neither in the present nor in the foreseeable future.

(511) Art. 23, paras. (1) and (2d).

(512) Facilities such as separate changing-rooms, ladies rooms, fully paid maternity leave; the law also protects them from employment after certain hours at night.

(513) See below, p. 223.

(514) On the encouragement and the facilities provided for the Jordanian woman to facilitate her joining the work-force and the labour market as an equal competitor with man see Articles 39 and 41. The former says: "...any discrimination based on sex... must be abolished."

(515) See the Constitution Art. 36 in conjunction with Art. 31. On the status of woman in the law of Tunisia see: H. Shugare, Al-Arab newspaper, London, 25 April 1985, p. 7.

(516) Art. 2.

(517) Art. 11. See also Arts. 10 and 12.

(518) According to the Egyptian Constitution, Islamic norms supersede all ordinary laws. It has been described in the Constitution as the principal source of the law of the land. See Art., as amended in 1977.

(519) Act No. 16 of 1974. See also the paper presented by Jordan to the United Nations Conference on the U.N. Decade for Women, Nairobi, Kenya, July 1985.

(520) Since 1970, almost all Cabinets have included at least one female Minister (Member of Council of Ministers). Many have also reached the rank of Director-General, members of High Committees, etc. See also 'Asha'ab Symposium on the status and the achievements of the Jordanian Woman', Asha'ab newspaper, Amman, 1 August 1985, p. 19.

(521) See the Labour Codes, Law No. 21, 1960

(522) Such things might have happened in practice but certainly never been laid before a court of law. This is based upon a comprehensive exclusive survey of all published cases decided between 1952 and June 1986, as well as various interviews with Jordanian lawyers, judges and working women.

(523) See the Year Book 1984/5. However, one must take into account the fact that male students seek University education outside Jordan more than females do. According to the statistics of the Ministry of Education for the same year, the total number of Jordanian males who receive University education is much higher than that of the females.

(524) "...if there are only female inheritors numbering more than two, they will receive two-thirds of the inheritance; if there is only one woman heir, she will receive half of it... The parents shall have the sixth for each of them if he has a child; but if he has no child and his parents are his heirs, then his mother shall have a third, and if he has brothers and sisters, then his mother shall have a sixth after the payment of any bequests he may have bequeathed or of debt..." (Verse 12: 3-4).

(525) See also Arts. 2 and 26.

(526) See UN Doc. No. CCPR/C/1/Add.55, (1981), 2.

(527) None of the Muslim or Arab countries including Jordan has noticed such a conflict at the time of signing or ratifying the Covenant.

(528) The suggested measure is practically and legally possible, and would eliminaye such inconsistency. It would also encourage the rest of the Arab and Muslim countries to ratify the Covenant. This problem is not limited to Jordan, it arises in the case of most Arab and Muslim countries and thereore what has been said with regard to Jordan is equally true in their cases. For those who have retified the Covenant see for

instance, the discussion of the report of Egypt (CCPR/C/26/Add.1./Reve.1) UN Doc. Nos. CCPR/C/SR.500-505 (1984); with regard to the discussion of the report of Morocco (CCPR/C/10/Add.2) and the answers given by its representative see UN Doc. No. CCPR/C/SR.332 (1981).

(529) For instance, Mr. Tarnopolsky, remarked that, the obligation under Article 3 of the Covenant to ensure the equal rights of men and women went beyond merely ensuring equality before the law and necessitated the implementation of positive measures. It was gratifying to know that women had entered the armed forces and the police services and served as ministers. It was a little disquieting, to learn that only 15-18 per.cent of those taking the secondery school examination were girls. Sir V. Evans, asked whether women had the right to vote or not and enquired about the role of women in soceity in general. See UN Doc. No. CCPR/C/SR.361 (1982); see also the remarks of Mr. Bouziri, UN Doc. No. CCPR/C/SR.331 (1981).

(530) See Al-Qabas newspaper (International edition), London, 8 July 1985, p. 1

(531) It is certain that Muslim women were allowed to vote in the presence of the Prophet Muhammed himself, and under his supervision, in the very early days of Islam fourteen centuries ago.

(532) See King Hussain of Jordan, 'My Career as a King', the Arabic version, translated to Arabic by G.A. Tocan, Amman, 1978, pp. 249-65. See also the Jordanian Documents 1984, Ministry of Information, Department of Press and Publications, Hereinafter referred to as the Jordan Documents. See also 'The Speech of the Throne', at the opening of the second ordinary session of the 10th Parliament, Jordan Documents (1984).

CHAPTER IV.

ECONOMIC, SOCIAL AND CULTURAL RIGHTS.

In the previous Chapter, we discussed the international standards of civil and political rights embodied in the Political Covenant, against which, the laws and practices of Jordan were examined. Likewise, in the present Chapter, we shall be dealing with the economic, social and cultural rights, and assessing the relevant laws and practices of Jordan against the international standards established under the UN Covenant on Economic, Social and Cultural Rights.(1)

However, before the examination of the substantive provisions of the Covenant and its counterpart in the Constitution and laws of Jordan, we must explore the scope and the legal dimensions of the obligation of states parties to the Covenant. This in itself requires some elaboration on the general provisions of the Covenant, especially Article 2, and some of the key concepts introduced therein.

THE NATURE AND LEGAL DIMENSION OF THE OBLIGATION OF STATES PARTIES TO THE ECONOMIC COVENANT.

Economic, social and cultural rights (social welfare rights),(2) represent a recent development in the human rights system, or a second generation of human rights. They were briefly mentioned in the French Declaration of 1789, and in the Constitutions of the nineteenth century.(3) It is only since the beginning of this century that the constitutions and legislators began to put greater emphasis on social welfare rights.(4) They owe a great deal of their existence and development to the socialist philosophy, revolutions and declarations of

the 20th century, and to the fundamental changes in the role of the state in society.[5]

On the international level, the UDHR, adopted in 1948, contains a short list of social welfare rights (Article 22-27). However, their distinctive character was a matter of wide controversy,[6] especially in the first years of the work of the UN Commission on Human Rights. The question was one of whether to draft a single instrument, listing civil and political rights, along with social welfare rights, or whether to draft a separate instrument for each group of rights.

The General Assembly itself seemed to have been confused by the controversy over the issue, especially over the distinction and the relationship between the second and first generation of human rights. At its fifth session (1950), the General Assembly was of the opinion that the enjoyment of civil and political freedoms, and that of social welfare rights, "are interconnected and interdependent" and it instructed the Commission to include in the draft covenant "a clear expression of economic, social and cultural rights in a manner which relates them to civil and political freedoms proclaimed by the draft covenant".[7] However, at the sixth session 1951/2, the General Assembly adopted the other approach and alternatively instructed the Commission to prepare two covenants, one covering the civil and political rights, and the other devoted to social welfare rights.[8]

Apparently, the principal reason for this important decision, was the substantial differences in character between the two groups of rights. That is to say, while civil and political rights are enforceable in all countries regardless of their wealth or resources, the enforceability of social welfare rights must vary according to the prosperity of each country. Civil and political rights are rights of the individual 'against'

the state, or rather, against unlawful and unjust action by the state, whereas, social welfare rights are rights which the state must take positive action to promote and to ensure. Furthermore, being 'legal' and 'fixed' rights, civil and political rights are 'absolute' and immediately applicable. Social welfare rights are more in the nature of 'relative' and 'programmatic' rights.

Such a fundamental difference in the nature and character of the two groups makes it self-evident that it was impossible to embody a single system of implementation for both of them. Differentiation in the measure of implementation and instrumental supervision was inevitable. Implementing civil and political rights means introducing laws and revising Constitutions, while guaranteeing social welfare rights means establishing programmes as well.(9) It was argued that some rights, for example, the right to freedom of expression (Article 18) could be enacted immediately into domestic legislation, while social welfare rights, for example, the right to health (Article 12) would require programmes of action over a period of time before it could be ensured. Thus, a court, or a court-like institution could be created on the international level to deal with alleged violations of civil and political freedoms, where no such thing could be created in the case of social welfare rights.(10)

It is these differences which make some scholars and legal commentators confuse the legal enforceability of rights with the given method of implementation, and consequently to misconceive the nature and legal dimensions of the obligation of states parties to the Economic Covenant. As it will be soon explained, some of them have understood the idea of programmatic or progressive implementation as equal to a legally unenforceable obligation. Some have raised the question of whether the rights set forth in the Economic Covenant are, technically speaking,

rights at all, in the sense of being subjective, enforceable and justiciable rights.

According to a group of legal commentators, the Economic Covenant does not impose any obligation on the states parties.[11] Prof. A. Robertson, for example, believes that it only establishes standards which states parties should seek to attain.[12] Others have argued that the Covenant only imposes 'programmatic' or 'promotional' obligations, not legally enforceable obligations. In the words of Prof. Brownlie, "the type of obligation [in the Economic Covenant] is programmatic and promotional except in the case of the provisions relating to Trade Unions (Article 8)."[13] In the same direction, the notion of 'programme' or 'promotional' rights, and 'programmatic' and 'promotional' obligations, has been pushed even further by Prof. E. Vierdag. He says that:

> "Social rights are often said to be not 'real', not 'legal' rights, but 'programmatic' rights, or 'promotional' rights. Since every right implies an obligation which corresponds to that right, social rights will therefore generally entail 'programmatic or promotional obligations'."[14]

Having criticized Prof. Brownlie for not explaining the meaning of 'programmatic' or 'promotional' obligations, he took the initiative himself, and stated:

> "To the extent that social rights are 'programmatic', i.e. lead to the adoption of programmes for the taking of measures intended to result in conditions under which what the rights promise can be enjoyed, they seem indeed not to be enforceable."[15]

Indeed, it is difficult to agree with any of the above conclusions. They seem to be the result of both a misunderstanding of the nature of social welfare rights and an inaccurate generalization. Consequently, this has led to the confusion of the idea of progressive realization with the enforceability of these obligations.

— It is a misunderstanding of the nature of social welfare rights because:

a) The separation of the social welfare rights from the traditional civil and political rights was not meant to imply that they are not 'real' rights at all. On the contrary, the legislative history of the two Covenants, as well as many other UN documents firmly confirm the interdependence and interconnections of the two categories. In Resolution 421 (V) and 543 (VI), the General Assembly firmly stated that: "the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent" and that: "when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal for the free man.(16) In his annotation on the contents of the draft Covenants, the Secretary-General of the UN asserted that all human rights must be promoted and protected. Without social welfare rights, civil and political rights would be purely nominal; without the former, the latter could not be ensured for long.(17)

b) It is true that social welfare rights, generally and by their very nature, require money to be spent and programmes to be carried out, in order to create sufficient conditions for their implementation. But this by no means makes them inherently unenforceable rights.

— It is an inaccurate generalization, because:

a) Not all the rights included in the Economic Covenant are 'programmatic' rights. Besides the single exception, which Prof. Brownlie has admitted, there are many other immediately applicable rights in this group. Some illustrative examples may be mentioned: Article 2(2) lays down an immediately applicable prohibition on discrimination in the enjoyment of the social welfare rights. It says: "states parties to the

present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination..." The same is true with regard to the provision of Article 3.[18] Another forthwith enjoyable right is the right to strike, provided that it is exercised in conformity with the laws of the particular country.[19] Moreover, by virtue of Article 13(3) of the Economic Covenant, states parties pledged themselves to have respect for the liberty of parents to choose the schools for their children, other than those established by the government, providing that they conform to the approved minimum educational standards; and to ensure the religious and moral education of their children in accordance with their own convictions.[20]

b) Not all the rights listed in the Political Covenant are rights of immediate application. There are some 'promotional' and 'programmatic' rights in this category as well. Among these are the right to self-determination,[21] and the provision of Article 23(4) which provides that states parties shall take appropriate steps to ensure equality of rights and responsibilities of spouses to marriage, during marriage, and at its dissolution.[22]

c) One should not make a general statement saying that the Economic Covenant imposes only 'programmatic' obligations in all cases. The notion of 'programmatic' or 'promotional' obligations applies to the developing countries only, that is to say, social welfare rights are 'programmatic', not because they are incapable of immediate application, but indeed because special social and economic conditions have to be created prior to the full implementation of those rights. Thus, for most of the developing countries, where such conditions are lacking, full realization of many social welfare rights would be achieved gradually over a number of years, maybe decades. By contrast, in the case of

developed and industrial countries, where the required conditions are already present, social welfare rights are immediately applicable. Full realization of those rights was due at the time of entry into force of the Economic Covenant for those countries. So, the obligations of those countries could not be described as 'programmatic', nor as non-binding undertakings.

— It seems that the meaning and the purposes of the principle of 'progressive realization' has been misunderstood. That is to say, being a 'programmatic' obligation does not necessarily mean that it is non-binding; on the contrary, it might indicate the opposite, though this may be over a period of time. The principle of 'progressive realization' is a common element in several UN Human Rights documents, without them being described as non-binding instruments. The International Convention on the Elimination of all forms of Racial Discrimination, is an outstanding example.[29] Thus, it could not be held that the Economic Covenant does not lay down binding legal obligations, simply because they are 'programmatic' obligations, which could be realized progressively in effect.

The present writer is of the view that, it is incorrect to insist that all the rights enshrined in the Economic Covenant are 'programmatic' rights and impose only 'programmatic' and therefore non-binding obligations. It has to be admitted, that social welfare rights are legally enforceable rights and that the Covenant does impose binding legal obligations on the states parties. The difficulty however resides in the definition of the scope and the legal dimension of these obligations.

Under Article 2, each state party undertakes to take steps, individually and through international assistance, especially technical co-operation, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the

Covenant, by all appropriate means, including particularly, the adoption of legislative measures.(24) States parties also pledge themselves to guarantee that there shall be no discrimination in the enjoyment of the rights referred to in the Economic Covenant.(25) However, developing countries, with regard to 'economic' rights only, are allowed to differentiate between nationals and aliens.(26) Lastly, although discrimination on any grounds, including sex, is prohibited under Article 2(2); special reference to equality between men and women has also been made under Article 3: "the states parties... undertake to ensure the equal rights of man and woman to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."

In order to feature the main elements of the actual undertaking of states parties to the Economic Covenant, a brief consideration of the following concepts appears necessary:

A — International Economic and Technical Co-operation;

B — The concept of 'maximum available resources';

C — The principle of 'progressive realization';

D — The principle of non-discrimination and equality between sexes;

E — Developing countries and the differentiation between nationals and aliens with regard to economic rights.

A — International Economic and Technical Co-operation:

Under Article 2 of the Covenant, all states parties undertake to take steps, individually and through international economic and technical assistance, aimed at full realization of social welfare rights. Clearly, such an undertaking means that inadequate national resources are no longer an acceptable reason for failing to promote and realize those rights. Developing countries are, therefore, under legal obligation to

seek international assistance with regard to the full realization of social welfare rights, if they do not have sufficient means of their own. Yet, is there any corresponding obligation for the rich (developed) countries to co-operate and furnish such assistance?

Considering the provision of Article 2(1), the purpose and the provisions of the Covenant as a whole, along with the UN Charter, and many other documents, the answer would be affirmative. It was made clear from the very beginning that the International Bill of Rights was intended to be a detailed interpretation of the human rights provision of the UN Charter.[27] The latter declares, as one of the purposes of the Organization, the achievement of international co-operation to solve international problems of economic, social, cultural and humanitarian character, as well as the promotion and encouragement of respect for human rights and fundamental freedoms for all, without discrimination.[28] Furthermore, emphasis on this goal has also been made under Article 55. It stresses the necessity for international co-operation for the promotion of higher standards of living, full employment and conditions of economic and social progress and development, and to provide solutions for international economic, social, health and related problems.[29] Under Article 56, all member states pledged themselves to take joint and separate action in co-operation with the Organization for the achievement of those purposes.[30] Yet despite the above undertakings, and the fact that the provisions of the Economic Covenant are a detailed specification of those undertakings, some have argued that the Economic Covenant does not impose any obligation on developed countries to co-operate and to assist in the efforts to the realization of those undertakings. In the words of Prof. D. Trubek,

> "The drafters [of the Economic Covenant] wished to leave the question of assistance from developed countries up

> to individual states, either through bilateral decisions or through future international agreements."[31]

Considering the provision of Article 56 of the Charter and Article 2(1) of the Economic Covenant, such a conclusion is untenable. However, in support of his argument, Prof. Trubek produced two pieces of evidence, neither of which seems sufficient enough. He argued that Article 11 speaks of "international co-operation based on free consent." According to him, the addition of the term 'free consent' suggests an intent to encourage aid from rich to poor parties, but not to require it by the terms of the Covenant. It might be true that the legislative history of the Covenant does not provide a clear answer to this point, but the actual provisions of the Covenant, especially Article 2(1), do. That is to say, a partial quotation of the last sentence of Article 11(1) could not be presented as exclusive evidence of a presumed intention on behalf of the drafters. By contrast, Article 11, if taken as a whole, and in conjunction with 2(1), would clearly show that developed states parties have pledged themselves to co-operate and help, freely or otherwise, under the terms of the Covenant. They are legally obliged by virtue of the provisions of the latter to participate in the process of the realization of social welfare rights. Another presumed intention of the drafters is also said to be derived from the provision of Article 23, which suggests some examples of the methods to be followed by states parties, in order to organize their efforts to achieve the international standards defined by the Covenant. According to Prof. Trubek: "the drafters may have thought that subsequent agreements could be the vehicle to create an aid-giving obligation."[32] Such a presumption does not only lack foundation, but is also misleading: a) because Article 23 provides us with the explicit intention of the drafters, expressed in plain English, which hardly needs any interpretation. It declares that:

> "The states parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the government concerned."

It is therefore highly unrealistic for one to rely on what the drafters 'might have thought', whilst putting aside what they have explicitly stated; b) What is provided for in Article 23 are suggested means of executing an already existing obligation, not one that is yet to be created.

The other evidence presented in support of Trubek's argument is a letter by President J. Carter to the U.S.A. Congress. It has been mentioned that, in his letter of submission of the Economic Covenant to the US Congress for its advice and consent to ratification:

> "President Carter noted that the obligations under Article 2 do not include any obligation on the part of developed signatories to give economic aid to less developed states parties."(33)

As far as this point is concerned, it has to be noted that the United States of America is not a party to either of the two Covenants. Secondly, President Carter's beliefs and interpretation of Article 2 of the Economic Covenant, cannot be taken as exclusive evidence. It is difficult to accept the argument that the President of any country, even the United States could increase, or reduce, by his own judgement, the obligations of all other states parties as defined under an international agreement.

B — THE CONCEPT OF 'MAXIMUM AVAILABLE RESOURCES':

No country would commit itself to an obligation which is beyond its ability and resources. The concept of maximum available resources is an interesting, flexible qualification on the obligations of the states parties to the Economic Covenant. The need for such a flexibility stems from the nature of social welfare rights, and the special requirements for their implementation.(34) It helps developing countries to co-ordinate their performance with their development process without being held in breach of their obligations under the Covenant. In accordance with the notion of maximum available resources, the scope of the legal obligations of individual states parties varies from one country to another, according to degree of development and the availability of resources. The scope of the obligation of Jordan or the Sudan, with regard to a given right (education or health, for instance) is much less than that of the U.K. or Sweden. That is to say, what could be considered as a satisfactory performance by one country might not be as such in the case of another.

Because of the importance of the principle of maximum available resources, some have raised the question of whether the term 'maximum' means an over-riding priority for social welfare programmes, or whether it leaves the allocation of resources between social welfare and other goals entirely to the individual states; to the extent that state 'X' could say: "we have no available resources for social welfare because we have decided to spend all our budget on defence or industrial development."(35) Manifestly, both these interpretations are extreme and neither of them could have been intended by the drafters. The word 'maximum' itself is qualified by the word 'available'. The latter refers to funds whose allocation to social welfare programmes does not seriously hinder other vital

national programmes. Consequently, a state party is not required to pour all its resources into social welfare at the expense of the other sectors. The marriage between the two words suggests that reasonable attention or even preference should be given to social welfare programmes, but not necessarily an over-riding priority.

Finally, does the phrase 'available resources' include international aid, or does it refer exclusively to national resources? In other words, in assessing the balance between the performance of a state party in the field of social welfare rights, and its available resources, should we take into account the international aid to that particular country, or only the domestic resources. Since the Covenant says 'its' resources, it could be argued that what counts for that purpose is only its own national resources. Nonetheless, this seems a rather narrow interpretation. A complete reading of the whole paragraph would suggest the opposite.(96) It has already been mentioned that under this very paragraph, developing countries are obliged to seek international assistance in cases of limited national resources, and that developed countries are also under a legal obligation to furnish such assistance.(97) Thus, when international aid is made available to a state party, it becomes part of its available resources, within the maximum of which, it could act with a view to achieving progressively the full realization of the social welfare rights.

C — THE PRINCIPLE OF 'PROGRESSIVE REALIZATION'.

Progressive implementation is a technique which has been invoked by the United Nations with regard to several human rights' instruments. It has been adopted as the most desirable and realistic approach in cases where the nature or the subject of an instrument renders immediate application too difficult or impossible. In general, it means that states

parties are obliged to carry out a programme of activities including, but not limited to the specific measures listed in the instrument, for the realization of the rights recognized therein.[38] So far as the Economic Covenant is concerned, we have already mentioned that the adoption of this method is not because the social welfare rights are inherently incapable of immediate application, but because their implementation requires the creation of some environmental conditions, which might not be obtainable in all states parties at the time of entry into force. As M. Ganji has put it:

> "The Covenant provides the immediate basis for action at international and regional levels, as well as for the translation of its standards into national reality... Its only drawback is that in most of the developing countries its provision can only be implemented progressively, according to their level of development, availability of resources and size of population."[39]

Article 2(1) of the Covenant therefore requires developing countries to initiate programmes and plans aimed at the full achievement of the recognized rights. Obviously, the time required for the achievement of such a goal would vary from one developing country to another, depending on the above-mentioned factors.

It seems thus, difficult to agree with the view that this principle applies to any state that has ratified the Economic Covenant, regardless of its resources or economic development.[40] Such a generalization defeats the object of the principle of progressive realization and delays the full realization of social welfare rights in countries where it is presently possible. The principle, therefore, applies only to those countries where full realization of social welfare rights is not yet attainable. After ten years of its entry into force, it is still inconceivable to expect equivalent performance in the field of social welfare rights in the Sudan and Sweden, for instance, or to argue that the

scope of these rights is the same in Jordan and the U.K. Even in the same country, the contents and the scope of these rights changes from time to time, in line with its social and economic prosperity. As we shall see in the case of Jordan, the right to education, for example, has undergone considerable improvement and wider implementation over the last ten years (after the entry into force of the Economic Covenant).

Thus, it is not true that all the states parties to the Economic Covenant assume equal obligations regardless of their own circumstances. They do not only differ from one country to another, but also for the same country from time to time within the limits of the available resources.

D — THE PRINCIPLE OF NON-DISCRIMINATION AND EQUALITY BETWEEN SEXES.(41)

E — THE RIGHT TO DIFFERENTIATE BETWEEN NATIONALS AND ALIENS WITH REGARD TO ECONOMIC RIGHTS.

Another distinctive feature of the Economic Covenant is the provision of Article 2(3). It gives yet another advantage to developing countries, by allowing them to differentiate between aliens and their own nationals with regard to economic rights. It provides that:

> "Developing countries with due regard to human rights and their national economy may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."(42)

Despite the general tendency in the UN's human rights work against discrimination, this provision constitutes an exception designed to encourage developing countries to sign and ratify the Economic Covenant.

Thus, one must bear in mind that discrimination on the basis of nationality within the meaning of this paragraph is an exception to the general prohibition on discrimination and should always be seen in that

context. This exception is limited to economic rights and therefore does not include social and cultural rights. Furthermore, it applies to developing countries only, so developed states parties could not benefit from it.

In this section we have been trying to throw some light on the legal character of the social welfare rights, and to define the central features of the obligation of states parties under the Economic Covenant. We have stressed the fact that implementing social welfare rights requires some conditions different from those we have seen with regard to civil and political rights in the previous chapter; and as a result, the undertakings of states parties under the Economic Covenant are somewhat different from those under the Political Covenant. Under the former, states parties undertake to introduce the necessary laws and legislation, and to carry out social and economic development planning, and programmes aimed at the full realization of the recognized rights. It also allows developing states parties (countries who do not possess sufficient means for full realization) to implement these rights gradually and within the limits of their resources. We have also discussed, and defined, the meaning and the legal implications of some key concepts in defining the obligation of a state party under Article 2, such as 'international co-operation', 'progressive realization', and 'maximum available resources'.

Having done so, we shall now turn to the substantive rights recognized under the Economic Covenant, for these resemble the international standards of social welfare, that each state party should ensure or seek to ensure. It is against these international standards that the performance of Jordan, as a state party, shall be examined, in terms of its law, practice and social planning. Since the Covenant provides for a large number of substantive rights, we shall confine ourselves to some

examples such as, education, work, freedom of Trade Unions and social security.

1 — THE RIGHT TO WORK.

The right to work was among the first human rights to receive international attention. Establishment of minimum international standards of the right to work and the rights of workers was a practice known even before the creation of the United Nations.(43) However, the International Bill of Rights was initiated by the proclamation of the UDHR, which refers to the right to work under Article 23:

"Everyone has the right to work, to a free choice of employment, to just and favourable conditions of work, and protection against unemployment."(44) This, and other related rights, have been confirmed again under the Economic Covenant. With further details, the latter provides for the modern international standards of the right to work which states parties undertake to implement or to seek their progressive implementation. Article 6, provides that states parties:

> "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."(45)

Article 7 stipulates for the rights of workmen to enjoy just and favourable conditions of employment. Accordingly, we shall be dealing with this right under the following subtitles:

A — Work as a Human Right.

B — Freedom from Forced Labour.

C — The Right to Just and Favourable Conditions of Employment.

A — THE RIGHT TO WORK AS A HUMAN RIGHT.

It has to be mentioned at the outset that, recognition of this right as a human right does not impose an obligation on the state party to provide a job for every individual person, where and when he may wish to have one. Nor does it entitle one to sue the government in a court of law for failure to provide such a right. It is true that the government has a general duty to provide jobs and to fight unemployment, but this is a political obligation for which it is accountable to public opinion, not to the judges. Basically, it means that everyone should be entitled to the opportunity to earn his living by a job which he has freely chosen or accepted and the prohibition of forced or compulsory labour. It also implies that, once the individual has got a job, it is his right, like all other rights, of which he may not be deprived in an arbitrary manner. Thus, the law must protect this right, and provide protection against arbitrary deprivation of work.

Besides the general obligations of the states parties to the Covenant, and the duty to take legislative measures to safeguard this right, Article 6(2) suggests some of the extra measure to be taken by the states parties in order to achieve the full realization of this particular right. They may include:

> "technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment and conditions safeguarding fundamental political and economic freedom to the individual."(46)

As far as the legislative aspects are concerned, each state party must introduce legislative measures intended to guarantee the enjoyment of the right to work to everyone subject to its jurisdiction. National constitutions and domestic laws should first of all recognize the right

to work as a human right, and provide detailed provisions concerning the exercise of the right and the protection of the vital interest of the workers. Domestic laws are to regulate *inter alia* the relationship between employers and employees, and to prevent arbitrary practices with regard to access to employment, conditions and termination of employment.

In Jordan, it was not until the proclamation of the present Constitution (1952), that the right to work was first recognized as a human right, and protected as such.[47] Article 6 of the Constitution of 1952 provides that: "the Government shall ensure work... within the limits of its possibilities, and shall ensure a state of tranquillity and equal opportunities, to all Jordanians".[48]

Article 23 declares the right of every citizen to work, and lays down the constitutional principles upon which such a right is to be based. It says:

> "(i) It is the right of every citizen to work, and the State shall provide opportunities for work to all citizens by directing the national economy and raising its standard.
> (ii) The State shall protect labour and enact a legislation therefore based on the following principles:—
> (a) Every workman shall receive wages commensurate with the quantity and quality of his work.
> (b) The number of hours of work per week shall be limited. Workmen shall be given weekly and annual days of rest with wages.
> (c) Special compensation shall be given to workmen supporting families and on retirement, illness, old-age and emergencies arising out of the nature of their work.
> (d) Special conditions shall be made for the employment of women and juveniles.
> (e) Factories and workshops shall be subject to health rules.
> (f) Free Trade Unions shall be formed within the limits of law."

Nine years later, the Labour Code was enacted and came into effect on the 21st of June 1961. It contains 117 Articles, divided into sixteen chapters dealing with a wide-ranging variety of issues and industrial relations, such as individual employment and collective agreements, minimum wages, Trade Unions, settlements of industrial disputes, etc.[49]

Having, recognized the right to work as a human right, at the constitutional and the statutory level, the Jordanian legislature has introduced several legislative measures for the protection to this right in practice. Apart from the prohibition of forced labour and the provisions concerning the favourable conditions of employment, several other Articles have been devoted to protecting workers against arbitrary deprivation of work.

Except for reasons specified by Article 17[50] the labour code forbids the instant termination of employment by the employer.

— In the case of employment for an unlimited period of time, and after the lapse of the probation period,[51] an employer may not terminate the employment unless he gives a week's notice or pay in lieu of notice to the worker who is employed on hourly, daily, weekly or piece-work basis, or one month's notice or pay in lieu of notice to the worker who is employed on a monthly basis. However, the worker is entitled to leave work three days earlier in the former case, and seven days earlier in the latter.[52] Furthermore, if the termination of work is on any ground other than those mentioned in Article 17, the employer must pay the employee a special compensation (*mukafat nehayet al-khedmh*) in addition to those referred to under Article 16.[53] The compensation (*mukafah*) is to be calculated on the basis provided for in Article 19(2).

These provisions have been constantly applied by the judiciary, in all cases involving termination of employment for an unlimited period by the employer.

In Case No. 288/70, for instance, the Supreme Court of Jordan ruled that:

> "Employment of a worker in other projects after the completion of the one in which he was originally appointed, is in fact a new employment for an unlimited period. Thus, termination of such an employment because of later redundancies, or because that particular worker is no longer needed, qualifies him for the lieu of notice and the compensation referred to in Articles 16 and 17 of the Labour Code."(54)

With direct reference to Article 19(1) of the Labour Code, the court has defined the circumstances in which employers must pay the special compensation to the dismissed worker as follows:

1. Termination of employment for any reason outside those specified under Article 17 or an illness that is not included under sub-paragraphs (a) and (b) of paragraph (1) of Article 19.
2. Termination of employment by the worker for any reason under Article 18,(55) or marriage in the case of a female worker, in accordance with sub-paragraphs (c) and (e) of Article 19(1).(56)

— In the case of employment for a limited or a fixed period of time, greater obligations are imposed upon the employer in order to ensure the right of the worker to keep his job for the whole of the agreed period. The standing view of the Supreme Court of Jordan may be summarized as follows: Should the employer wish to terminate employment before the end of the fixed or expected time, he would be considered liable to pay all supposed wages and payments for the rest of the agreed period. As far as labour relations are concerned, two examples may be put forward. In Case No. 246/72, before the Supreme Court, a worker based his claim for compensation on the grounds that the company had dismissed him before the end of his contract despite the fact that he was employed for a fixed period of time. In its ruling the court noticed that the company was in

breach of the employment contract, and held it responsible for breach of a contractual relation, and awarded compensation in accordance with the principle of contractual responsibility. It was decided that: "the worker is entitled to damages and all the losses he has suffered because of such behaviour."(57) The compensation consisted of all wages and payments due for the rest of the specified period. In another case, the same court ruled that the absence of Mr. 'X' from his work for a period of 17 days as a result of detention during the events of public disturbance in Amman in September 1970, was an absence for an external reason, over which he had no control: "Dismissal from his work for such a reason is arbitrary dismissal, for which he is entitled to damages and due compensation for arbitrary dismissal."(58)

Finally, it is important to notice the difference in the positions of the employers and the employees regarding the unilateral termination of employment. The differentiation is based on the idea of work as a human right and on the principle that a person could give up his right if he does not wish to enjoy it any longer. Thus, while imposing heavy obligations and penalties on the employer, in order to protect the right of the worker to work and to keep his job, the Labour Code enables the latter to free himself from employment, with no obligation other than that of a notice to be given to his employer; sometimes even without any notice, if the case is under Article 18. This helps to prevent employment from being or becoming unfair, or forced employment which does not coincide with the notion of work as a human right nor with the right to free choice of work.

B — FREEDOM FROM FORCED LABOUR.

The Economic Covenant not only recognizes one's right to work, but adds: "...work which he freely chooses or accepts..."(59) The right of everyone to a free choice or acceptance of a profession or a job, requires first of all, the prohibition of forced or compulsory employment. It is therefore for the national constitutions and the legislatures to introduce the necessary legal provisions to ensure this. Yet, what are the necessary legal provisions, required at the national level? In order to understand and appreciate the role of the national constitutions and the legislatures in this regard, the term 'forced labour' must be precisely defined.

The Economic Covenant does not offer much help on this point, since the term 'forced labour' itself is not mentioned therein. Nonetheless, Article 8(3) of the Political Covenant explicitly provides for the prohibition of forced labour, and for some exceptions thereto. It says:

"No one shall be required to perform forced or compulsory labour."(60) Sub-paragraph (c), however, stipulates that for the purpose of Article 8(3), the term 'forced or compulsory labour' may not include:

1. Any work or service not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or a person during conditional release from such detention;
2. Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
3. Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
4. Any work or service which forms part of normal civil obligations.

Similar provisions have also been introduced in the EHR and in the AMR.[61]

None of those general instruments contain a clear definition of 'forced labour'. However, Article 2(1) of the ILO Convention on Forced Labour of 1930, defines it as follows:[62]

> "For the purposes of this Convention, the term forced labour or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[63]

According to this Convention, the term forced labour does not include:

1. Work or service exacted in virtue of compulsory military service laws;
2. Work or service which forms part of ordinary civic obligations of citizens;
3. Work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;
4. Work or service exacted in case of emergency or calamity... or in any circumstances that would endanger the existence or the well-being of the whole or part of the population;
5. Minor community services of a kind which, being performed by the members of the community in the direct interest of that community, provided that members of the community or their representatives have the right to be consulted with regard to the need for the said services.[64]

The definition of forced labour offered by the ILO Convention (Article 2) and the exceptions referred to thereunder, provided a guide

for human rights legislators, both on the national and international levels. Nonetheless, it has been admitted that an exclusive definition of the term forced labour is not an easy task.[65] Some of the technical difficulties in this regard have been discussed by Fawcett, who argued that: "The margin between the planned use of labour and the direction of labour, between free and compulsory employment, can become almost indiscernibly narrow."[66] He also criticised the definition offered by the ILO and described it as 'incomplete', on the grounds that it does not mention the 'element of oppression'.[67] The concept of forced or compulsory labour was analysed by four members of the majority of the ECUM in the Iversen Case. It was concluded that:

> "The concept cannot be understood solely in terms of the literal meaning of the words, and has in fact come to be regarded in international law and practice, as evidenced in part by the provisions and application of ILO Conventions and Resolutions on forced labour, as having certain elements... first, that the work or service is performed by a worker against his will and secondly, that the work or service be performed is unjust or oppressive... or itself involves avoidable hardship."[68]

Obviously, in this case, the ECUM has taken into consideration the provision of the ILO Convention, in determining the scope and the meaning of the term forced labour, under Article 4 of the EHR.

In another case however, (The Twenty-one Detained Persons v. The Federal Republic of Germany) the ECUM seems to have completely ignored a substantial limitation on one of the permissible forms of forced labour, namely that, forbidding the hiring or placement of the prisoner to or under the disposal of private individuals, companies or societies. This time the applicants complained that part of the work required from them during their detention was performed on behalf of private firms under contracts concluded with the prison administration.[69] It was also alleged that the said practice has created a state of slavery for

the prisoners concerned. The ECUM ignored the requirements of the ILO Convention and decided that the practice complained of was justifiable under the provisions of the EHR and the practices of the member states of the Council of Europe. It was concluded that the form of work against which the complaint was made, was permissible and fell within the meaning of Article 4(3) (a) of the EHR.[69a]

It is important to notice that both the EHR and the Political Covenant have fallen short of the requirements of the ILO Convention and therefore they provide less protection in practice. On the one hand, EHR and the Covenant have extended the exception to include the compulsory employment of detainees, while under the ILO Convention the exception is limited to those who have been convicted by a court of law, i.e. under the latter, imposition of forced labour upon detained persons, violates the prohibition of forced labour, because it falls outside the permissible form of compulsory labour. On the other hand, while ILO Convention forbids the hiring or placement of the prisoner to or under the disposal of private individuals or firms, both EHR and the Covenant remain silent on this question. As far as the provision of the EHR is concerned, the ECUM has made it clear that the hiring of prisoners or even detainees to private firms or maybe private individuals, does not violate the prohibition of forced labour under the said Convention.

The departure from the ILO approach seems unjustifiable and difficult to understand. When the ILO Convention was drafted and adopted in 1930, it was probably hoped that the then recognized exceptions would disappear in time, or at least would become even narrower, and consequently forced labour would be confined to the narrowest possible form. Unfortunately, the contrary seems to have happened. New forms of permissible forced

labour have been added and traditional ones have also in turn been expanded to include yet new types of practices.

As to the Constitution and laws of Jordan, forced labour was strictly prohibited long before the international prohibition. That is to say before the International Bill of Rights, or even before the ILO Convention of 1930. Indeed, it was prohibited at the highest legislative level (the Constitution) even before the constitutional recognition of the right to work as a human right in 1952. Such an early initiative could be attributed to the unpleasant experience which the Jordanians had during the Ottoman rule, under what was then known as the *SUKHRA*[70] System. It was an established practice that the Government could employ a person in any job for any period of time without payment, except for food.[71]

Article 8(2) of the first Jordanian Constitution (The Constitution of 1928) provided that: "forced labour shall not be inflicted on anyone, the law however, may impose:"

1. Work or service on any person in a case of war or public emergency or natural disasters such as fire, flood, famine, earthquake etc.
2. Work or service in accordance with a final judgement of a court, provided that it be performed under direct supervision of an official authority and that the person may not be hired to or placed at the disposal of private individuals, companies or societies.

The same provision was re-introduced under Article 13 of the Constitution of 1946, which has been transferred under the same number to the present Constitution.

Based on the provision of Article 8 of the Constitution of 1928, a special law has been enacted. It is known as The Law of the Prohibition of Forced Labour of 1934.[72] Article 2 of this law defines forced labour as: "any work or service imposed upon any person with the threat

of material or moral damages if he does not perform it voluntarily." It provides for the same exceptions mentioned under Article 8 of the Constitution of 1928, i.e. work or services imposed in accordance with a final judgement of a competent court, on the condition that the performance of such work or service be carried out under the supervision of a public authority and that the convicted person is not to be hired to or placed at the disposal of private individuals, companies or societies; and work or services exacted in special circumstances (emergency) as specified in Article 2(b).[73] Outside these exceptions, the law prohibits the imposition of forced labour. "Forced labour shall not be imposed in Trans-Jordan" (Jordan);[74] and provides for penal punishment for anyone who may violate the said prohibition.[75] An important reservation has been made under Article 4(2).[76] It says that nothing in the law of the prohibition of forced labour nor in any measure taken thereunder may deprive any person from any protection conferred upon his rights by any other laws or regulations in effect in Jordan. This reservation is meant to enable those who may suffer, as a result of the imposition of forced labour, to demand compensation.

As far as the Labour Code is concerned, it is quite evident that the legislature has the above principles and the principle of freely chosen or accepted profession, (which resembles the other side of the coin when it comes to the prohibition of forced labour) in mind when regulating the relationship between employer and employees. We have already mentioned that, in the case of employment for an unlimited period of time, the Labour Code entitles the worker to terminate his employment upon notice being given to his employer, if he is no longer willing to perform the work.[77] The right to freely chosen or accepted work continues during the whole term of employment. Article 18(1) guarantees the right of the

worker to terminate his employment immediately (without notice), if the employer is to impose upon him work that is substantially different from that which he had accepted, or even similar work that would require him to change his place of residence, unless it has been provided for in the contract, or to transfer him to a lower job or pay.(78)

It may thus be concluded that the Constitution and laws of Jordan have prohibited the practice of forced or compulsory labour, long before the entry into force of the UN Covenant and that they have guaranteed a wider protection than is necessary under international standards (Article 8 of the Political Covenant).(78a) That is to say, the Constitution has kept the permissible forms of forced labour in the narrowest possible scope and within the limits of Article 2 of the ILO Convention No. 29 of 1930.

C — THE RIGHT TO JUST AND FAVOURABLE CONDITIONS OF WORK.

Recognition of work as a human right requires, besides the right to a free choice of work and the prohibition of forced labour, the right to just and favourable conditions of work. According to Article 7 of the Economic Covenant, this right consists of:

1. Remuneration which provides all workers with fair wages and equal remuneration for work of equal value without distinction of any kind.
2. Safe and healthy working conditions.
3. Equal opportunity for everyone to be promoted in his work to an appropriate higher level, subject to no considerations other than those of seniority and competence.
4. Rest, leisure and reasonable limitations on working hours, and periodic holidays with pay, as well as remuneration for public holidays.

It is thus for the national constitutions and domestic laws of the states parties to translate these requirements into practical reality. In this section however, we shall be focusing on two important aspects of the requirements of the favourable conditions of work, and the contents of the Constitution and laws of Jordan with regard to those two aspects. Those are the right to fair remuneration and the right to rest, limitation on the working hours and holidays with pay.

1) The Right to Fair Remuneration and Protection of Wages.

In the law of Jordan, this right has been made one of the principal constitutional elements of the right to work. Article 23(2) (a) of the Constitution requires the legislature to safeguard *inter alia*, the right of every worker to "receive wages commensurate with the quantity and quality of his work."(79) The Labour Code uses the term 'wages' in its broad meaning or as a synonym of the word 'remuneration'.(80) Article 2 provides that:

> "Wages, means the consideration which the worker receives from his employer in accordance with an employment agreement (whether written or verbal) expressed in cash, or kind, share in the profits, a commission or on the basis of piece work."(81)

Several Articles in the Labour Code have been devoted to the protection of the right of workers to receive fair wages and to ensure regular payment of wages without undue deductions therefrom. The Supreme Court in its turn, has ruled that 'wages' are the first and foremost right of the worker. A right of which he must not be deprived under any circumstances whatsoever. It says:

> "...even in cases where the law entitles the employer to dismiss the worker without notice or compensation, the right of the latter regarding his wages remains unaffected, and the former remains under legal obligation to pay all wages due for the previous work. Payment for overtime work is just as important as all other wages, which could not be withheld even under Article 17."(62)

As far as the Labour Code is concerned, protection of fair wages has been manifested in two policies: namely the minimum-wage-fixing policy and protection of payment of wages.

a) Minimum-Wage-Fixing.

For a start, what may be considered as fair wages is a matter that has been left to the contracting parties to decide. It is therefore up to the free will of the parties to define the amount of remuneration in accordance with the conditions of the market and the rule *pacta sunt servanda*. Under the latter, neither of the two parties could alter the terms of the contract by a unilateral decision increasing or reducing payments or wages. In a series of cases, the Supreme Court has upheld the above rule and decided that the reduction of wages by a unilateral decision of the employer is an arbitrary termination of employment and so it awarded compensation for the worker. In Case No. 128/64, for instance, the court stated:

> "Reduction of wages by the employer is a unilateral termination of the contract and consequently an arbitrary dismissal of the worker who did not accept the reduction."(63)

However, in order to protect the weaker party (the worker) in this relationship, the legislature has imposed some restrictions on the contractual freedom of the parties, especially with regard to the amount of wages, which has been made subject to the *'al-Had aladna min al-Ejour'* (Fixed Minimum Wages Limit). Article 24 of the Labour Code provides for the establishment of special machinery for setting up and reviewing the

fixed minimum payable wages to workers in a given area or industry. It says:

> "The Council of Minsters may, upon recommendation from the Minister of Labour, fix minimum payable wages to workers in any particular area, either generally or for any trade or section of trade."[84]

Before fixing the minimum rate of wages, the Minister of Labour is required to appoint such temporary committees as he deems necessary to study the conditions and the situations of employment in the given area or trade, and to report to him on the suggested new or adjusted minimum rate which seems appropriate thereafter.[85] Furthermore, the Minister of Labour is also required to appoint an advisory board to consider the work of the said temporary committees, and to give general advice concerning the fixing or adjustment of minimum wages.[86] The advisory board consists of six members, two of each being representatives of the government, the employers and the employees. Representatives of employers and employees are to be appointed in co-ordination with relevant Trade Unions.[87] The newly fixed or adjusted minimum wages are to be published in the official Gazette, and unless otherwise indicated, become effective six weeks after its publication.[88] Once a notice concerning minimum wage rate has been duly issued, the wages which an employer may pay to any employee must not be less than the established rate specified in the said notice, without any deduction therefrom save those allowed under the Labour Code. Notwithstanding the provisions of the employment contract, the employer is liable to a fine of 10 JD for every case of violation of the specified rate.

Thus, if the payable wages happened to be less than the fixed minimum rate, the employer would not only be under legal obligation to pay the difference, but also liable to penal punishment under Article 24(b).

b) Protection of Wages.

Payment of wages is a prime concern of the worker and in most cases it is the sole source of income and his only means of livelihood. Protection of wages is meant to prevent arbitrary methods or abuse of payment of wages; and to ensure the regular payment of the worker's wages in a way which enables him to spend it according to his choices and priorities. Several provisions have been devoted to this purpose in the Labour Code.

Under Article 25, for instance, the employer and the manager of the establishment are jointly responsible for the payment of wages within seven days from the date on which they become due, without making any deduction therefrom except for those permissible under the Labour Code.(89) As to the permitted deductions, the same Article entitles the employer, with the prior consent of the Director of the Department of Labour, to impose a fine on the worker or to suspend him from work without wages if the latter neglects or contravenes the publicized or circulated instructions or orders of the employer, providing that the latter has previously warned the worker in writing or in the presence of witnesses, at least once for each contravention, and on the condition that the fine does not exceed three times the amount of daily wages, or the suspension does not exceed three days.(90)

Paragraph (3) of the same Article contains a list of lawful deductions which may be imposed for specified reasons.(91) Nonetheless, the first five JD of the monthly salary, or the first two hundred fils of the daily wages may not be attached except for alimony or settlement of the cost of food or clothes for the worker or his dependants, providing that the amount does not exceed one fourth of his wages. However, any amounts in excess may be attached in accordance with the law, for the

settlement of debts, provided that the amounts are due for alimony, and debts for food and clothing. Debts for food and clothing are to be given precedence over other debts.

In order to ensure the implementation of these provisions, the law has established special machinery to enforce the full payment of due wages on time; and to deal with any other claim relating to payment of wages. Article 26 provides that the Council of Ministers may, on the recommendation of the Minister of Labour, appoint a qualified person with authority to consider in a specified area, wage cases and claims arising out of deductions from, deficiencies or delay in the payment of the wages of any worker in that area; and to determine such claims urgently.(92) The said authority is not required to follow the procedure and formalities observed by the ordinary courts, but it may exercise the powers conferred on the ordinary courts with regard to the following matters:

- The power to compel any person to appear before it and to examine him on oath;
- The power to compel any party to introduce any document or paper which it may deem necessary in order to determine the case.(93)

Penal punishment is also imposed on any employer or person responsible for the payment of wages, who violates any of the provisions relating to the protection of wages in chapter 8 of the Labour Code. The penalty is a fine of 50 JD for each violation.(94)

Finally, despite the strict provisions of chapter eight of the Labour Code, a serious gap in the wages protection system under the Law of Jordan could easily be discovered. In the event of bankruptcy of the employer the law of Jordan does not offer any preference or privilege to the worker's wages. Such a privilege would be a crucial guarantee to

ensure the worker's rights in such circumstances. Dr. H. Hashem has sharply criticized the Jordanian legislature for such deficiency and urged it to introduce the necessary provisions to give precedence to the payment of all due wages over all other debts.(95) The Supreme Court however, has remedied the situation by ruling that: "unpaid wages take precedence over all other debts owed by the company in the event of bankruptcy."(96)

2) The Right to Rest and Leisure Time.

Availability of jobs with fair payment, could be damaging to the workers if employers were to overwork their employees and deprive them from rest and normal family life.(97) It has thus been realized that the law should intervene to impose some restrictions on the freedom of contract when it comes to working hours and rest time. This crucial element of the right to work had attracted international attention long before the establishment of ILO in 1919. The labour legislation of some Western industrial countries, particularly England, started to impose limitations on working hours during the 19th century especially with regard to women and juveniles.(98) Article 17 of the Islamic DHR, provides that: "...He [the worker] is not only to be paid his earned wages promptly, but is also entitled to adequate rest and leisure." As to the modern international standards, Article 7 of the Economic Covenant provides that:

> "The states parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensures in particular...: d) Rest, Leisure and reasonable limitations of working hours and periodic holidays with pay as well as remuneration for public holidays."(99)

In order to understand the precise meaning of the general terms used in Article 7 of the Covenant, such as 'reasonable limitations on the

working hours', and 'periodic holidays' .. etc... a reference to the ILO work would be inevitable. The latter has introduced a considerable number of instruments spelling out in detail the meaning and the context of those terms.

a) Limitations on Working Hours.

The ILO has carried out a substantial amount of work in the form of conventions, decisions and recommendations, concerning limitations on working hours. It has initiated its work by convention No.(1) of 1919, which lays down the principle of the 'Eight-Hour Day' and the 'Forty-eight Hour Week' in industrial enterprises.(100) This principle was previously adopted in the ILO constitution which was made part of the peace-treaty of 1919.(101) In 1935, the ILO adopted the 'Forty-Hour Week' Convention, which provides that the application of this principle should not cause a reduction in the standards of living.(102) With more emphasis on the maximum limit of 48 hours a week, Recommendation No. 116 calls upon member states to pursue a policy of gradual reduction of working hours with a view to attaining the forty hour week.(103)

In Jordan, the Labour Code has adopted the principle of the 'Eight-Hour Day' and the 'Forty-eight Hour Week'. Article 37 provides that, subject to the provisions of Articles 41 and 42,(104) a worker may not be required to work more than eight hours per day. The same Article however, exempted the employees of Hotels, Bars, Restaurants, Cafes, Cinema-Houses and like establishments from this principle and announced that they may be required to work for nine hours a day.(105) Moreover, Article 38 emphasizes the same principle but with regard to the weekly limitation. It says: "Subject to the provisions of Article 41 and 42, a worker shall not be required to work for more than 48 hours a week, but, a worker who is employed in a Hotel, Bar, Restaurant or similar estab-

lishments may be required to work 54 hours a week." The inclusion of this Article in the Labour Code has created some confusion and has given rise to the question as to whether to take the daily or weekly limitations as the decisive criterion in considering the number of the legally permissible working hours per day. In other words, would it be legally possible to employ a worker for more than eight or nine hours a day (as the case may be) providing that the weekly total does not exceed 48 or 54 hours? According to Dr. H. Hashem the answer is negative, he argued that the daily limitation is the decisive element, violation of which would be a violation of the principle of limited working hours, even if we remain within the weekly limitation. He firmly concluded that unless otherwise permitted, a worker may not be required to work for more than eight hours a day. The weekly total could not, therefore, be used to undermine the daily limit.(106)

This conclusion is based on the established view of the Supreme Court of Jordan. The latter has constantly upheld the principle of eight hours a day and decided that the law is violated whenever the daily work exceeds eight hours regardless of the weekly total. In Case No. 141/66, for instance, the court ruled that:

> "... A worker must not be required to work more than eight hours per day, whether he works for a regulated establishment(107) or any other employers... rest-time and breakfast and lunch breaks are not included in the working hours, and therefore no overtime wages are required for these hours."(108)

In another case, the court observed that:

> "... The Labour Code forbids the employment of workers for more than the specified number of hours prescribed in Articles 37 and 38 (8 or 9 hours). It punishes both the worker and the employer if they violate such a prohibition. Any agreement to employ the worker for more than the daily limit would be considered 'null', because it contravenes both the Labour Code and public

> order (al-Nedham al-'am) in accordance with Article 174 of the Civil Procedure Code."[109]

However, in some cases, where the daily legal limit has been exceeded, the court has awarded compensation to the worker for the extra working hours. This has been justified on the grounds that:

> "Although the law forbids the employment of the worker for more than eight hours a day, the worker is entitled to his wages for the extra hours, and the employer must not benefit from violating the law."[110]

This is not a departure from the principle of eight hours a day, as it may appear. In this case, the court was faced with, on the one hand, a worker who had agreed to exceed the legal daily limit of working hours, and on the other hand an employer refusing to pay wages for the extra work, on the ground that the agreement was void in the first place. When the case reached the court, the latter awarded compensation, not as wages for legal working hours, but in accordance with the general principle of 'unjust enrichment'.

However, during the eight-hour day of work, the law also stipulates that intervals of rest be given to the workers. According to Article 39, a worker may not work for more than five hours continuously without being given a rest interval of half an hour, or for more than six hours continuously without at least a one-hour rest interval. Rest intervals are not to be counted as working hours.[111] Finally, in order to ensure the purposes of the limitation on working hours, and to prevent employers from holding the employees on the premises longer than would be reasonable. Article 40 provides that: "the total of working hours and rest intervals shall be so arranged as not to exceed eleven hours per day."

Nevertheless, there are some cases where the limit of eight or nine hours prescribed by Articles 37 and 38 could be legally exceeded. As far as these exceptions are concerned, a distinction may be drawn between

those directly prescribed by the law on the one hand, and those dependent on the consent or approval of the Minister of Labour on the other.

Within the first category there are some temporary exceptions and permanent ones. Under Article 42, the provisions of Articles 37, 38, 39, 40, and 41[112] do not apply in cases of national emergency, natural disaster, urgent work which must be carried out to repair machinery, equipments or buildings, and in the case of *force majeure*[113] The permanent exception from the limits of Articles 37 and 38 applies to the supervisory and managerial personnel in regulated establishments, persons employed in a confidential capacity and those whose duties involve travel and occasional work outside the premises of the establishment.

As to the second category of exceptions, i.e. those dependent on the consent or the approval of the Minister of Labour; the Minister has been granted a wide discretion under the present Labour Code in *ad hoc* exceptions from the standard limits. Under Article 43, the Minister is empowered to:[114]

1. Permit the employment of port and rail transport workers or any other categories of workers, for a maximum of ten hours per day or 60 hours per week in the following cases -
   a) If he is of the opinion that such work is necessary for off-loading or loading goods from or on a ship, the clearing of such goods, and the transport of passengers.
   b) If he is satisfied that the yearly average of working hours of such workers will not exceed 48 hours per week.[115]
2. By a special order, increase the number of working hours prescribed by Articles 37 and 38, in the case of shift-work, which for technical reasons requires uninterrupted work despite the changing of workers in

each shift; provided that the worker's right to the weekly day of rest is observed.[116]

3. After consultation with the relevant Trade Union of the employers and workers, the Minister of Labour may sanction:
   a) Permanent exceptions to the provisions of Articles 37 and 38, in the case of a preparatory or complementary operation; or for special categories of workers whose work is not continuous.
   b) Temporary exceptions when necessary to prevent damage to perishable goods, or risk in technical work or other reasons including enabling an establishment to carry out certain work in an emergency arising out of pressure of work.[117]
4. Increase the number of working hours prescribed for the basic working day and working week, if he is satisfied that there is a shortage of skilled or unskilled workers.[118]

Obviously, the discretion of the Minister of Labour is too wide to be brought under control because of the terminology used in Article 43. Such generous exceptions are undoubtedly capable of rendering the limitation on working hours virtually nominal. Thus, the position as it stands under the law of Jordan is that the law does provide for limitations on the working hours in accordance with the international standards, but it empowers the administration to waive those limitations via administrative decisions. Exceptions from the standard limitations are acceptable or even desirable in some cases, but if they are to be provided for in the same way as in the law of Jordan, they will not only violate the established standard of the 'eight-hour-day', but make the right to limited working hours meaningless. So, it seems legitimate to suggest that the Jordanian legislature should review the above exceptions

and reduce them to the narrowest possible margin, and impose some restrictions on the administrative discretion in order to ensure the right of the worker to limited working hours.

b) The Day of Rest, Holiday and Annual Leave.

— The Day of Rest.

The Labour Code provides for Friday to be observed as the weekly day of rest, with the possibility that the manager of the establishment may, by prior notice to the Labour Inspector, substitute any other day as a regular weekly day of rest.(119) This provision is well respected in practice. Muslims (who constitute nearly 95% of the entire population) have observed Friday as the weekly day of rest long before the introduction of modern labour laws. Friday, however, is not a mandatory holiday under Islamic law. All that is required is that only a few hours be set aside for the *Jumah* (Friday prayers). For Christians, Sunday is the usual day of rest. Some foreign enterprises, which apply the 'five-day working week' system, usually give Friday and Sunday as a weekend rest.(120)

Except for the categories who are completely excluded from the protection of the Labour Code, the weekly day of rest applies equally to all workers, whether in regulated or non-regulated establishments. The main difference is that it is a paid holiday only in the case of those who work for regulated establishments. However, in 1965, Article 5(1) was amended to extend the privilege of a paid weekly day of rest to workers employed in "road-works, railway, land and air transport including workers engaged in the loading and unloading of goods at ports".(121)

According to Article 42(2), a worker who has worked in a regulated establishment for six consecutive days prior to the weekly day of rest,

is entitled to wages for that day at a rate equal to his average daily wage (excluding wages for overtime work) during the six days which he had worked.[122]

Thus, the Labour Code of Jordan recognizes the right to a weekly day of rest for all workers subject to its provisions, but it restricts the pay for such a day of rest to those who are employed by regulated establishments and a few others,[123] but nonetheless many are still excluded from the right to a paid weekly day of rest. Undoubtedly, this is in consistent with either the ILO Convention,[124] or the UN Economic Covenant.[125]

The legislature should thus, remedy such an unjust position and ensure the right of all workers to a paid weekly day of rest without any distinction whatsoever.

— Public Holidays.

So far as the public holidays are concerned, the present Labour Code does not contain any provision guaranteeing such holidays nor any remuneration if the worker has actually been compelled to work on a public holiday. The only reference to the public holidays, 'official holidays', is the above quoted[126] part of Article 41(2) with regard to a weekly day of rest. It refers however to the case where the establishment itself is closed on an official holiday, that day is to be considered as a working day in respect of which the worker is entitled to wages.[127]

The term public holiday, as used here, means official and religious holidays. However, neither the Labour Code nor the Supreme Court has defined what may be regarded as an official or religious holiday. Consequently, upon a request from the Prime Minister, the Special Tribunal (*Diwan Kha'as*) has defined it as follows:

> "... Hence the Labour Code has not defined the meaning of the official and religious holidays, it should therefore be defined in the light of the relevant laws.
>
> According to Article 4(d) of the Civil Service Regulations, an official holiday is any regular or occasional holiday, considered as such by a special announcement issued by the Council of Ministers. Religious holidays are all days specified for special practice of a recognized religion in the Kingdom of Jordan in accordance with Article 14 of the Constitution,(128) which guarantees the freedom of religion and religious practice. It is thus a factual matter to be decided by the competent authority upon consultation with the relevant sect.(129)

If that is the position one may wonder, could a worker be obliged to work on an official or religious holiday (public holiday) and if not is it a paid holiday? Also, if a worker does work on a public holiday would he receiving the normal pay or the higher rate set for work outside the normal working hours or days? Neither the Labour Code nor the Special Tribunal offers any explicit answer to any of these questions. All these issues were laid down before the Supreme Court in 1964. In Case No. 169/64, a worker was dismissed without proper notice or compensation on the grounds that he had refused to work on two official holidays and disobeyed the written instructions of his employer in this regard. The court ruled that: "It is the right of the worker to refuse to work on official holidays. Such a refusal does not constitute a violation of the instructions or of the conditions of employment, which justifies the application of Article 17(e)."(130) Although it did not say so, it seems that the court had taken into consideration the provision of Article 45, which excludes official and religious holidays from the working days to be counted as the annual leave.(131) However, Dr. H. Hashem has criticised the judgement of the court and stated: "we cannot agree with the court's conclusion." In his view, the distinction should be made between a religious holiday on which there is no obligation to work, and

an official holiday for which the law does not guarantee leave, and therefore the worker is under an obligation to perform the work unless the employer voluntarily observes such holidays.[132]

If one is to choose between the two opinions, the Supreme Court's view would seem more desirable and indeed brings the law of Jordan yet a few steps further towards the International Standards. On the contrary, the opposing point of view seems to lack legal foundation and would aggravate the gap between the laws of Jordan and International standards.

In a more recent case, the court has re-confirmed its previous opinion and stated:

> "In accordance with the provisions of Articles 5, 41, and 45 of the Labour Code, it can be ascertained that the weekly, religious and official holidays are guaranteed to all categories of workers to whom the Labour Code is applicable."[133]

As to the question of payment, the position was not clear and became even more complicated after the first judgement of the Supreme Court (Case No. 169/64) in which the court had confirmed the right of workers to be on leave on official and on religious holidays, but without deciding whether it was a paid holiday or not. Thus, the question has been raised again before the court in the second case. In the latter the court had to deal with the question of payment, and pronounced that:

> "...all categories of workers to whom the Labour Code is applicable are entitled to... official and religious holidays, but it is unpaid except in the case of those employed by regulated establishments and road, railway and transport workers, i.e. other categories are entitled to those holidays but without pay, however, if they do work on such days they are entitled to normal wages only."[134]

Thus, although the Labour Code of Jordan does not explicitly recognize the right to public holidays, the judiciary, led by the Supreme Court,

has guaranteed this right, but as an unpaid holiday, for the majority of workers in Jordan.

Obviously, this is another gap between the law of Jordan and the established international standards under the ILO Convention and under Article 7(d) of the Economic Covenant which stipulates for "periodic holidays with pay, as well as remuneration for public holidays."

The above mentioned judgement was issued only a few months after the entry into force of the Covenant in 1976. Nonetheless, the court seems to have failed to take notice of this factor and the fact that Jordan is a party to the said Covenant.

— Annual Leave.

Annual and other paid leaves are explicitly provided for in the Labour Code of Jordan. It stipulates that every worker in a regulated establishment is eligible for a Two-Week paid leave. Such a leave becomes due upon the completion of at least 240 days during a period of 12 months.(135) The payable wages for the period of the leave are the normal rates payable for working days.(136) It is always the duty of the employer to notify the worker of the date on which he becomes entitled to the leave each year. Annual leaves may not be accumulated over a period of more than two years. The worker's right to the leave, due for the first year, is obsolete at the end of the third year.(137)

Some other occasional paid leaves are also provided for in the same Article it says, any worker in a regulated establishment is entitled to a two-week 'paid illness leave in any one year',(138) provided that he has completed six months of service in that establishment. Such an entitlement is subject to the production of a medical report by a General Practitioner specified by the establishment.

Finally, training and education leaves are guaranteed to any worker in a regulated establishment when participating in a training or education course. According to Article 45(7), "every worker in a regulated establishment who participates in an educational course for workers shall be entitled to ten days paid leave."

Here again, we find that the Jordanian legislature has restricted those privileges to the workers of the regulated establishments, roads, railways, land transport and those engaged in the loading and unloading of goods at ports,[139] and excluded a great number of the work force, contrary to the established international standards.

However, it has to be mentioned that the provisions regulating the weekly day of rest, annual and all other paid leaves, apply equally to workers of both sexes. Some additional privileges have also been granted to female workers, and these are mentioned elsewhere in this thesis.[140]

2 — THE RIGHT TO FREEDOM OF TRADE UNIONS.

Freedom of trade unions has become an increasingly important right. It is a right whose implementation is not an end in itself but rather a means to protect the enjoyment of other fundamental rights and freedoms. Freedom of trade unions seems to occupy an intermediate position between economic and political rights. It contains an element of both, and this may justify its position, as an area of elaboration between the two Covenants (Article 22 of the Political Covenant and Article 8 of the Economic Covenant). Some international instruments have regarded it as a political right,(141) others as an economic right,(142) while others see it as having an element of both economic and political rights.(143)

This mixed character may explain the suspicious attitude of many Third World governments towards this right. That is to say, many of them tolerate and implement some economic and political rights, but they always seem to be suspicious of trade union activities, and tend to impose various restrictions on them. The ILO supervisory bodies and the International Labour Conference have repeatedly recognized the close relationship between the freedom of trade unions, and the effective enjoyment of civil and political rights.(144)

In a resolution adopted in 1970, for instance, the International Labour Conference firmly stated that the absence of the civil liberties enunciated in the Universal Declaration and the Covenant on Civil and Political Rights, renders the concept of trade union rights meaningless.(145)

As far as the Economic Covenant is concerned, the right to freedom of Trade Unions has been provided for under Article 8, in accordance with which state parties undertake to ensure:

> "a) The right of everyone to form trade unions and join the trade union of his choice...;

b) 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...;

c) The right of trade unions to function freely."(146)

The same Article however, provides that the right to form and to join trade unions and the right of trade unions to function freely may be made subject to: "Such limitations as are prescribed by the law and are necessary in a democratic society, in the interests of national security, public order, or for the protection of rights and freedoms of others."(147) It also allows States parties to impose special restrictions on the exercise of this right by members of the armed forces, the police and the administration of the state.(148)

It is against these provisions and limitations that we shall be judging the relevant laws of Jordan and the restrictions introduced thereunder. Accordingly, the subject may be dealt with under the following sub-titles:

A The Right of Everyone to Form and to Join a Trade Union of his Choice.

B. The Right of Trade Unions to Function Freely.

C. The Right of Trade Unions to Form National Federations and to Affiliate with International Trade Union Organizations.

A — THE RIGHT OF EVERYONE TO FORM AND TO JOIN A TRADE UNION OF HIS Choice.(149)

Before 1948, there were no trade unions in Jordan.(150) A number of factors had militated against the establishment of a powerful trade union movement. The major obstacles were the prevalence of government supervision, the political and social structure which made individual

workers look first to their families and tribes rather than the trade unions to protect their interests, and above all, the small number and size of the industrial establishments. The annexation of the West Bank, after the Arab-Israeli War of 1948 and the influx of refugees, brought into the country many workers with previous experience in union movements.(151)

Sir John Glubb reported that during the period of Mandate in Palestine, the British Government gave orders that trade unions must be established.(152) When the British left Palestine, there were two major federations of trade unions: the 'Arab Workers Society' with 30 member unions and an aggregate membership of about 20,000 workers, and the left-wing 'Federation of Palestine Workers', with about 8,000 members.(153)

In 1951, the Arab Workers Society moved its headquarters to Amman, but kept its branches in the major cities of the West Bank in an attempt to earn the support of the labour force in both Banks. In the following year however, the Jordanian Government, suspecting communist tendencies, banned all labour unions.(154) Such a decision caused a great deal of public displeasure among the workers and provoked strong political opposition. Consequently, the Government introduced the Trade Unions Law (Law No. 35 of 1953) which for the first time permitted the formation of trade unions and regulated their functions.(155) More than ten labour unions were formed during the same year, and in 1954, the General Federation of Trade Unions was established (GFTU) and officially registered. By 1956, there were 27 registered trade unions in Jordan, 25 of them being members of the GFTU. They were classified into four major groups (vocational, industrial, public offices and agricultural workers' trade unions).

According to Miss S. At'tal,[156] the unstable political situation during the second half of the fifties had badly affected the freedom of trade unions. In an attempt to reduce the number of those who were eligible to form or to join trade unions, a great controversy was created around the definition of the term 'worker', referred to in the law of 1953. The question was therefore referred to the *al-Diwan al-Khass* (Special Tribunal), which pronounced that the word 'worker', used in the Law of Trade Unions No. 35 of 1953, does not include government officers. Subsequently, the Government dissolved all government officers' trade unions,[157] who remain to this day deprived of this right. Moreover, the Government also banned all political parties and imprisoned leading members, and dissolved all trade unions except 9 strictly industrial workers' trade unions.[158]

A new era has been marked by the introduction of the present Labour Code, which recognises the rights of trade unions and regulates their formation and administration.[159] It defines a trade union as a group of workers organised into a corporate body in accordance with the provisions of the law, for the purpose of safeguarding their interests with regard to wages, collective bargaining and other matters which would improve their financial. cultural and social standards.[160]

With the exception of government and municipal employees and labourers, Article 69, entitles all workers engaged in the same profession, trades or crafts, to form a trade union for themselves.[161] Thirty such workers or more, may form a trade union and, after drafting the internal regulations, they must apply for registration.[162] A workers' body may not be recognized as a trade union, unless it has been registered in accordance with Article 89. It states that: "No organization shall be deemed to be a trade union within the meaning of this law

[the Labour Code], unless it has complied with its provisions regarding registration."[163]

Thus, the legal character of the trade union is entirely dependent upon its registration with the Ministry of Labour. In order to register as a trade union under Jordanian law, it is necessary to comply with a series of highly complicated formalities and procedures. A written application is required and must include the following particulars: names, occupations and addresses of all members and union officers,[164] the address of the union's headquarters and the names, ages and addresses, and occupations of the members of the Executive Committee.[165] The application must be supplemented by a copy of previously adopted Internal Regulations, which provide, *inter alia*, for the following:[166]

— A prohibition against engaging in any political or religious issues or any competitive trade or financial dealings.[167]

— The method of election and term of office of the unions' Executive Committee.[168]

— The safe handling and custody of the union's funds and annual auditing of the union's accounts, and free access to them by the members.[169]

— The time and manner of convening general meetings and the method of voting and the powers of the Executive Committee.[170]

Furthermore, the Registrar may require any additional details, as he may deem necessary in order to satisfy himself that the application conforms with the provisions of the law, and may suspend registration until such information is supplied.[171]

Having received the application and the internal regulations, examined their contents and found that they complied with the requirements of Articles 69 and 70 of the Labour Code, the Registrar must enter the

name and the particulars of the trade unions in his register, and accordingly, issue a certificate of registration.[172] In the case of a refusal, any person(s) aggrieved by such decision may submit an appeal against it to the HCJ within 30 days from the date of the said refusal. The court may dismiss the appeal, or accept it and order the registration of the trade union. Two appeals have been filed with the HCJ so far. The first was No. 27/61, with regard to which the court stated that:

> "...(1) Labour Code, No.21 of 1960 which regulates the affairs of the workers, imposes a duty upon the Registrar of trade unions to register the trade union and to issue a certificate of registration, if the requirements of Article 69-71 of the said law have been fulfilled. (2) the Registrar is unjustified in rejecting an application to register the union, because of the opposition to formation of trade unions in general, since the law itself has permitted it."[173]

The second case was concerning the registration of *Niqabat Saiqi Sayyarat al-Shahin al-Khareji* (Lorry drivers who operate between Jordan and other countries) When the latter applied for registration as a trade union in Jordan in accordance with Article 69 and 70 of the Labour Code, the Registrar wrote to the Minister of the Interior seeking his opinion in this regard. The Minister recommended non-registration of the said union and the Registrar therefore rejected the application. Consequently, an appeal was brought before the HCJ against the refusal. The court (unanimously) overruled the decision and ordered the registration of the *Nigabah* as a trade union.[174] It was stated that:

> "Article 72 of the Labour Code stipulates that if a trade union has complied with the provision of Article 69, 70 and 71 with regard to registration, the Registrar must enlist the name and the required particulars in his register and issue a registration certificate...
>
> None of the above provisions requires the Registrar to seek the opinion of the Minister of the Interior on the admissibility of an application. A negative recommendation therefore, must not lead to the rejection of a duly submitted application. In view of the fact that the application was rejected solely on the basis of the Minister's statement that the formation of the said

> union was prejudicial to public security, and not because of failure to comply with the conditions required by the law, ...hereby we declare the Registrar's decision null, and order the registration of the *Niqabah* as a lawful union in accordance with Article 74(2) of the Labour Code."[175]

However, it is important to point out that under the law of Jordan, the right to form and join trade unions is not confined to the workers. Indeed, it has been extended to the employers as well. That is to say, subject to the prescribed conditions and procedures concerning the formation of the worker's trade unions, employers engaged in the same or inter-related professions, crafts, or industries, may also form a union among themselves.[176]

Over the last few years, an increasing number of employers' organizations have been registering themselves as trade unions within the meaning of this term under Article 69 of the Labour Code, especially in the West Bank.[177]

In order to preserve the right of the workers to form or join a trade union of their choice, an important guarantee has been introduced under Article 79, preventing interference by employers in the freedom of employees in this regard. It says, that an employer may not make the employment of any worker contingent upon not joining a trade union or renouncing his membership thereto. He also may not dismiss a worker or otherwise prejudice his rights on the account of his being a member of a trade union or of his participation in the activities of a trade union outside working hours.[178]

Yet, it has to be admitted that despite these legal provisions and guarantees, the freedom to form and to join trade unions, under the present laws of Jordan, is still far from being secured or fully implemented. It is not fully implemented because, in spite of the language

of Article 69 of the Labour Code, a large number of workers are still suffering from deprivation of this right. That is so because some of them are excluded from the protection of the Labour Code in general and others are deprived of this right in particular.

As has already been mentioned, government and municipal employees, persons employed in agricultural work, house servants, gardeners, cooks, and all those engaged in such occupations are excluded from the protection of the Labour Code, and deprived of the rights provided thereby.[179] Even for those who are entitled to the protection of the Labour Code, and supposedly to the enjoyment of the rights provided thereunder, the Minister of Labour is specifically empowered to impose restrictions on their freedom to form or join trade unions. Under Article 84(a), the Minister may issue a decision classifying exclusively those professions, trades and industries whose workers are allowed to form trade unions. He may also define groups of professions, trades or industries whose workers are not allowed to form more than one trade union. Furthermore, he may order that such a decision be applied to existing trade unions.[180] In other words, the Minister, by an executive order, may abolish existing trade unions simply because he thinks that there are too many of them, or because it appears to him that there are several trade unions relating to a group of inter-related industries or professions. Such discretionary powers constitute a serious threat to the freedom to form or join a trade union of one's choice. In fact, they are capable of rendering this freedom virtually nominal at any time. The Minister has used the above powers in his decision dated 10/2/1976, whereby he has drawn up an exclusive list of some 17 trades, industries and professions allowing only these to form trade unions.[181] Any worker who is interested in trade

unions must join with the relevant trade union, obviously without a free choice.

Needless to say, such laws and practices do not comply with the role designated for domestic legislation under the Covenants regarding the acceptable standards of this right; they also violate the ILO Convention No 87, to which Jordan is a party.(182)

B — THE RIGHT OF TRADE UNIONS TO FUNCTION FREELY.

As to the recognized trade unions or those which are lawfully operating in Jordan, the law has granted them a certain degree of autonomy with regard to the drafting of their Internal Regulations and administration, but indeed has kept them under tight governmental supervision.

It has already been mentioned that the Constitution requires the legislature to enact a law ensuring the formation of trade unions within the limits of the law. It says: "Free trade unions shall be formed within the limits of the law."(183) However, it seems that the last phrase of this paragraph has been abused (within the limits of the law); as will soon be explained, these limits have exceeded the usual or the acceptable limitations or restrictions on the freedom of trade unions, and indeed have put the laws of Jordan well below the minimum international standards.

Theoretically, the formation of trade unions in Jordan is free and does not require previous authorization by the Government. In practice, nonetheless, the legislature has undermined this guarantee by conferring uncontrollable discretionary power upon the Minister of Labour, allowing him to specify the professions, trades and industries which may or may not form trade unions.(184)

The Labour Code guarantees the right of trade unions to draft their own internal regulations and to elect their executive committees 'without interference'. This remains true, although the law stipulates that certain particulars are to be included within the Internal Regulations,[185] and that a member of the Executive Committee should be a workman or a full-time employee of the trade union, who has not been convicted of a felony or misdemeanour involving morals.[186] The law also recognizes the legal personality of all registered trade unions. Under Article 76, and from the moment of registration, "every trade union becomes a corporate body known by its registered name, having legal existence and an official seal."

In this capacity, a trade union may acquire and possess movable and real property, conclude contracts, sue and be sued in any competent court.[187] In order to enable trade unions to carry out their lawful functions the law provides that no legal action or proceedings may be taken against an employee or a member of a labour union as a result of an agreement among its members to carry out any legal purpose of the union, provided that such an agreement does not violate any laws or regulations in force.[188] Furthermore, Article 81 stipulates that "A labour union shall not be considered an illegal body on the sole grounds that any of its activities is alleged to be in restraint of trade."[189]

The law also allows trade unions to open branches in any part of the country and to form federations amongst themselves in accordance with their internal regulations.[190]

Finally, with the approval of a two-thirds majority of its registered members, a trade union may voluntarily dissolve itself, and liquidate its funds by a resolution of its General Assembly.

In such cases the Minister of Labour must be notified within 15 days of the dissolution.[191]

However, the law requires trade unions to have known addresses to which all correspondence and notices are to be addressed, and that any change of address must be notified to the Registrar, who records such changes in his registers.[192]

Every trade union is also required to maintain such registers and books as may be required by the circumstances and by the conditions imposed by the Minister of Labour.[193] Any employee or member of the trade union is permitted by the law to inspect the books of accounts and other books or registers maintained by the trade union, as well as the list of members, during the hours fixed in its regulations. A Labour Inspector may inspect these records at any time at the union's offices without removing them.[194]

Several provisions have been devoted to the handling of the union's funds. Although these provisions are meant to ensure the safe custody and administration of the union's funds, they could be used as a means of governmental interference in and control of the union's finance. Article 88(1), for instance, provides that:

> "Every trade union shall before the first day of April of each year send to the Registrar a copy of its balance sheet in the form prescribed in the regulations, duly audited, and showing its income and expenditure and its assets and liabilities in respect of the last preceding year."[195]

Article 77, provides some examples of the purposes for which the union's funds may be spent."[196]

The most restrictive provision in the Labour Code with regard to the freedom of trade unions to function freely, is the provision of Article 86, under which the Minister of Labour may apply to the Court of First

Instance, to order the dissolution of any trade union in any of the following cases:[197]

> "1. Where a trade union has violated any provisions of the Labour Code, and failed to remove the cause of the violation within one month from its being notified in writing to do so.
>
> 2. Where the trade union has adopted a resolution or performed an act which may result in committing any of the following offences or crimes:
>
> a) Incitement to the 'overthrow or promotion of detestation or contempt of the regime', or the approval or advocacy of subversive doctrines designed to alter the principles of the Constitution or the fundamental system of the society in the Kingdom;
>
> b) Abandonment of or abstention from work, with intention of going on strike or occupation of premises or demonstrating or incitement to commit such acts;
>
> c) Use or incitement to use of force, violence, terrorism, threats or illicit measures for encroachment on the rights of others to:
> — work;
> — employ workers;
> — abstain from employing any person;
> — join any association or union."

Such restrictions are undoubtedly capable of reducing the free function of trade unions to a limited scope or to merely administrative matters. Sub-paragraph (b) could seriously hinder the ability of the trade unions to defend the interests of their members, and therefore defeats the main object of the formation of trade unions.[197a] It is also incompatible with the provision of Article 103 of the Labour Code which guarantees the right to strike. With direct reference to this Article (103), the Jordanian Government has reported to the ECOSOC, that the law of Jordan guarantees "the right to strike provided that they [the workers] give their employer prior notification ... ".[197b] What may mitigate the effects of these restrictions is the fact that their

application is made subject to a court order. Thus, it is the court, not the administration which orders the dissolution of the trade union when it violates the law or abuses the freedom guaranteed thereby. Before ordering the dissolution of the trade union, the court would objectively examine the behaviour of the trade union and interpret the terms of Article 86(1 and 2). Another mitigating factor is the provision of Article 87(a), which entitles the trade union concerned to appeal against the decision of the Court of First Instance.[198]

Thus, despite the ambiguity of the above restrictions, availability of a judicial remedy may prevent the misuse or unfair application of those provisions. What may seem rather unfair and an arbitrary restriction on the freedom of trade unions to function, is the provision of paragraph three of the same Article.[199] The said paragraph entitles the Council of Ministers to dissolve any trade union when it deems it necessary in the interest of national security or public safety. However, as to what may be regarded as a matter of security or public safety, that is left to the discretion of the Council of Ministers. Furthermore, the same paragraph protects the decision of the Council of Ministers from being examined by any court of law. It provides that:

> "The Council of Ministers may, upon the Minister of Labour's recommendation, dissolve any trade union for reasons of security or public safety, and its decision in this matter shall be final and uncontestable."

With such powers at its disposal, one can hardly imagine the Government using the other technique (Court Order). If widely interpreted, the terms 'security and public safety', could absorb any reasons for which the administration is required to obtain an order from the court. Consequently, while the administrative dissolution has been used several times, the judicial order has never been sought. Indeed, the provision of

Article 86(3) does not only violate the Economic Covenant[200] and the ILO Convention,[201] but also the concept of 'free trade unions' provided for in the Jordanian Constitution as well.[202] Such a provision must be abolished if the law and practice of Jordan are to be brought into line with the minimum international standards in this field.

C — THE RIGHT OF TRADE UNIONS TO FORM NATIONAL FEDERATIONS AND TO AFFILIATE WITH INTERNATIONAL TRADE UNIONS ORGANIZATIONS.

This is a right where the provisions of the Economic Covenant have fallen short of the ILO standards. While the Covenant has limited the right to affiliate with international labour unions to the national federations of trade unions, the ILO Convention No 87 has granted this right to individual trade unions as well. The Covenant provides for:
"the right of trade unions to establish national federations or confederations, and the right of the latter to form or join international trade unions organizations."[203]

The ILO Convention explicitly stipulates for the right of national trade unions to join international organizations in their individual capacity. It says: "workers' and employers' organizations shall have the right to establish and join federations and confederations and any such organizations, federation or confederation shall have the right to affiliate with international organizations...".[204]

In Jordan, subject to the same procedures and conditions discussed above with regard to the formation of trade unions, groups of trade unions may apply to the Registrar to be registered as a national federation or union, having one corporate legal personality. A federation of trade unions enjoys all the rights and is subject to all restrictions

conferred or imposed on individual trade unions.[205] Until 1972, all that was required for a trade union to join a federation, was to obtain the consent of the ordinary majority of its General Assembly, and to notify the Registrar thereof. In 1972, Article 78 was amended,[206] whereby two new paragraphs were added, namely paragraphs (b) and (c). Paragraph (b) imposes administrative control on the right of trade unions to establish national federations. It says: "A federation may not be established without a decision by the Council of Ministers acting upon the recommendation of the Minister concerned,[207] and the approval by the Council of Ministers of the internal regulations of such a federation." Paragraph (c) entitles the Council of Ministers to dissolve any such federation or national union, for reasons of security or public safety. Here again, what might be regarded as a matter of security or public safety lies entirely with the Council of Ministers' discretion.

It is needless to repeat the same criticism that we raised earlier with regard to the provision of Article 86(3), concerning the dissolution of trade unions by administrative decisions.[208] However, Article 78 provides that: "labour federations which are duly registered, shall have the right to affiliate with legally recognized international labour organizations." Accordingly, the right to join international organizations of trade unions, under the law of Jordan, is recognized for the national unions and federations only, and not for individual trade unions. Such limitation is a violation of the ILO Convention No. 87, and therefore it is not permissible under the Economic Covenant despite the provision of Article 8(1)(b), which suggests the opposite. That is so, because paragraph (3) of the same Article stipulates that nothing in that Article may authorize states parties to the ILO Convention "to take legislative

measures, which would prejudice or apply the law in such a manner as would prejudice the guarantees provided for in that Convention."(209)

If one is to make an assessment of the effectiveness of the Jordanian trade union movement in general, and the role of the law of Jordan in protecting the freedom of trade unions, certain facts must be borne in mind. First and foremost, one should bear in mind the short history of the said movement, the political situation and the social structure of Jordan. Indeed, individual trade unions do vary in size and effectiveness, ranging from relatively large national unions of workers in trades and industries, with several branches throughout the country, in addition to their headquarters in Amman, to some small or almost unheard of organizations.

The small size, financial and organizational problems, shortage of trained full-time organizers, and the absence of the concept of the 'closed shop' all contribute to the weakness of trade unions and tend to keep them powerless. They hardly have any influence on social and political issues. A growing influence may be noticed over some matters such as the government wage-fixing policy, production methods, vocational training, use of foreign labour, entry of additional manpower into some occupations, and occupational qualifications.

It seems however, safe to say, that over the last 26 years, the trade union movement has grown in size and gradually strengthened its influence, sometimes supported by sympathetic Government policies,(210) and sometimes by compelling political conditions.(211) Reasonable funds are being allocated in the successive annual national budgets, in the form of Government grants and support for trade unions in their lawful activities.

Finally, some may argue that restrictive provisions in the Labour Code of Jordan and administrative practices are not designated to oppress or abolish the freedom of the trade unions, but indeed to prevent the abuse of this freedom. They also enable the government to supervise and direct the activities of such a young movement, and to exclude trade unions from interfering in purely political issues. This might be true and understandable, but nonetheless it is quite clear that these provisions are incompatible with the minimum international standards of this right; and therefore the Jordanian legislature should take this into consideration.

3 — THE RIGHT TO SOCIAL SECURITY.

This is a relatively recent right even among social welfare rights. It has been mentioned in two Articles in the UDHR: namely Article 22 and 25. It says that: "everyone, as a member of society has a right to social security",[212] especially in the event of "unemployment, sickness, disability, widowhood, old-age or other lack of livelihood in circumstances beyond his control."[213]

None of these particular grounds, however, has been mentioned in the Economic Covenant; instead, a general provision has been introduced under Article 9, which states that, " The states parties to the present Covenant recognize the right of everyone to social security and social insurance."[214]

In the case of a developing state party, such as Jordan, this provision implies an obligation to recognize the right of everyone to social security and to take appropriate administrative and legal measures to ensure its progressive implementation with a view to full realization in accordance with established programmes.[215]

Before 1976, the right to social security was not recognized as a human right under the law of Jordan. That is to say, apart from the few provisions in the Labour Code regarding the compensation for workers in an industrial accident or occupational disease,[216] there was not any legal provision in the law of Jordan providing for the right to social security.[217] Immediately after the entry into force of the Economic Covenant in 1976, the Jordanian Government began an intensive effort to draft and implement a special law recognizing the right to social security as a human right.[217a]

In 1978, the law was promulgated and known as the Social Security Law No. 23 of 1978. A special body has been created under the said law (The General Institution of Social Security) and charged with the task of speedy and effective implementation of the right to social security. This is a public institution with total financial and administrative independence and it is run by its executive board which represents the traditional triunal formation (Government, employers and employees all have equal representation).

In the long run, the law intended to establish a national system of social security and to build the so-called 'national umbrella of social insurance' to cover every workman and all members of his family residing in Jordan, regardless of nationality or of any factor other than that of being a working person.[218] Six types of social insurance have thus been provided for by the Law of Social Security of 1978.[219] Those are:

1) Insurance against industrial accidents and occupational disease;
2) Insurance against old-age, disability and death;
3) Insurance against temporary disability due to illness and maternity;
4) Health insurance for the workman and his family;
5) Family allowance and benefits;
6) Insurance against unemployment.

Due to the inadequate economic resources of Jordan, immediate implementation of the whole scheme was impossible.[220] Thus, the Jordanian government has applied and benefitted from the principle of progressive implementation. Accordingly, the Law of Social Security provides that it

should be implemented in several stages and in accordance with established programmes in line with Economic and social Development Planning.(221)

The first stage, however, started on 1st January 1980. It provided every workman with a full cover insurance with regard to the first two types of social security, namely, insurance against industrial accidents and occupational disease; also, old age, disability and bereavement pension.(222)

However, a brief examination of the programmes of the first stage may help to throw light on, or explain the manner in which the principle of progressive implementation has actually been applied in Jordan. A plan of ten consecutive programmes has been designated for the first stage, over a period of six years.(223)

The first programme commenced on 1st January 1980, and covered 19 private companies and public establishments by name, employing a total of seven thousand people.

The second programme commenced on 1st May of the same year and covered all companies and private firms employing more than 50 persons, with an aggregate reaching 30 thousand people.

The third programme commenced on 1st January 1981 and include all companies and enterprises employing 20 workers or more, covering a total of 30 thousand workers.

The fourth programme commenced on 1st November of the same year and included 22 companies by name, all classified civil servants and those employed in accordance with individual employment contracts by any public or governmental establishment or department, as well as those employed on a daily basis. Employees of all public establishments and authorities of administrative and financial independence are also included

in this programme. It covers approximately 65 thousand persons from both private and public sectors.

The fifth programme commenced on 1st January 1982. It covers all the employees of Jordanian Universities, Municipalities, the Municipality of the capital, and Town Councils in all parts of the Kingdom. The number of beneficiaries of this programme is well above 20 thousand people.

The sixth programme commenced on 1st January 1984. It includes all civilians employed by the Royal Armed Forces, General Security, General Intelligence Agency, Civil Defence and the Royal Scientific Association.

The seventh programme commenced on first July 1984 and covers the employees of all firms employing more than 10 persons.

The eighth programme commenced on 1st January 1986. It covers the employees of all firms employing 5 workers or more.(224)

So far as the first stage is concerned, the Social Security Law, No. 23 of 1978, provides those covered by it with, *inter alia*, the following benefits: an insurance against all kinds of occupational diseases and industrial accidents *Howadth al- amal wa al-amrahd al-meha nih*, which includes complete medical cover and daily allowances of not less than 75% of the normal wages for the whole period of medical treatment; permanent income in the case of permanent disability and funeral allowances of 150 JD in the case of death, with a monthly salary of not less than 68% of the normal pay of the month prior to death; insurance against old age, natural death or permanent disability, which may consist of a pension, disability allowance, or what has been called natural bereavement pension salary.(225) The latest available information indicates that nearly half a million people have been covered by the programmes of the first stage.(226)

4 — THE RIGHT TO EDUCATION.

A - EDUCATION AS A HUMAN RIGHT.

We have already seen that some have expressed their doubts about the existence of such a right in the contemporary international law of human rights. It has been argued that the Economic Covenant does not contain any legally enforceable rights and that what is included therein is a number of merely social programmes which are intended to be implemented over a period of time.(227) However as far as the right to education in particular is concerned, Article 13(1) of the Economic Covenant provides that, "The states parties to the present Covenant recognise the right of everyone to education." Under this very paragraph, states parties undertake to recognize a "right" not a "social programme". It is the right of every human being to be educated. The legal background of this provision is the provision of Article 26(1) of the UDHR, which also speaks of a "right" of every human person to be educated. "Everyone has the right to education."

So, the general entitlement to education was first declared by the UDHR and then transformed into a legal obligation by the Economic Covenant. The latter imposes a legal obligation on all states parties thereto, to recognize the right to education as a human right. It might be true that it is not an absolute and immediately applicable right, but the idea of progressive realization also must not lead us to denounce its character as a human right. Indeed, the proclamation of a human right is one thing, its enforceability or methods of enforcement is something else.(228)

Applying another human rights instrument, the ECUT has confirmed the nature of the right to education as a human right. Article 2 of the First Protocol to the EHR, provides that: "No person shall be

denied the right to education...." In the Belgian Linguistic Case, the ECUT stated:

> "In spite of its negative formation, this provision(229) uses the term 'right' and speaks of a right to education. Likewise, the preamble of the protocol specifies that the object of the protocol(230) lies in the collective enforcement of rights and freedoms. There is, therefore, no doubt that Article 2 enshrines a right,... as a right does exist, it is secured by virtue of Article 1 of the Convention to everyone within the jurisdiction of a contracting state."(231)

The text of Article 13,(232) of the Economic Covenant leaves no doubt that each state party is under a legal obligation to recognize the right to education (as a human right) of everyone within its jurisdiction. The difficulty however, is in defining the scope and the limits of such an undertaking. Does the recognition of this right require, for instance, the state party to establish a new educational system different from the one it already has, or simply to enlarge the capacities or multiply the number of the existing educational institutions? Does it compel the state party to provide any kind of education one may desire, or to admit a person to a particular school?

In the above mentioned case, (the Belgian Linguistic Case) the ECUT marked the border line of the right to education as a human right. It says:

> "...to determine the scope of the 'right to education' within the meaning of the first sentence of Article 2 of the protocol, the court must bear in mind the aim of this provision. It notes in this context that all member states of the Council of Europe possessed, at the time of the opening of the protocol to their signature, and still do possess, a general and official educational system. There neither was, nor is now, therefore any question of requiring each state to establish such a system, but merely guaranteeing to persons subject to the jurisdiction of the contracting parties the right in principle to avail themselves of the means of instruction existing at a given time."(233)

According to the ECUT what is guaranteed under the first sentence of Article 2 of the Protocol is the right of access to existing educational institutions, but such access "constitutes only a part of the right to education." In order to be sufficient the latter requires official recognition of some other elements, e.g. "The right to obtain in conformity with the rules in force in each state, and in one form or another, official recognition of the studies which he has completed."(234)

The findings and the conclusion of the ECUT seem to be valid also in the case of the Economic Covenant. It may thus be stated that, within the limits of the available resources, states parties, to the Covenant, are under legal obligation to provide general educational systems with sufficient facilities and an adequate number of educational institutions. The latter must be made available and accessible to anyone who seeks admission; and who is qualified in accordance with pre-established rules.(235) As it stands, the provision of Article 13 of the Economic Covenant, neither compels the government of a state party to establish a particular kind of school nor to admit a beneficiary to a specific school.

Article XXI of the Islamic D.H.R., stipulates that: "Every person is entitled to receive education in accordance with his natural capabilities."(236)

In Jordan, the right to education, was first recognized as a human right, by the Constitution in 1952.(237) It provides that: "The Government shall ensure... education, within the limits of its capacity, and shall ensure a state of tranquility and equal opportunity to all Jordanians."(238) The *qanun* of *al-Tarbiyah wat-Talim* of 1964, (The Law of Education)(239), also provides for the right of every

Jordanian to receive education, as a constitutional right and a national duty to eliminate illiteracy. It regulates the practice of this right and outlines the policy to be followed by the Ministry of Education, in order to ensure the enjoyment of this right.(240)

B - EDUCATIONAL POLICY AND THE EDUCATIONAL SYSTEM.

The obligation of states parties to the Economic Covenant goes beyond mere recognition of the right to education in principle. They undertake to enact laws and to employ practical policies and to maintain constructive educational systems. In the Covenant it says, that they (states parties) agree that education be directed for the development of the human personality and to uphold its sense of dignity, and for the promotion of respect for human rights and fundamental freedoms. They also agreed that education should seek to enable all persons to participate effectively in a free society; and encourage tolerance and understanding among all nations and racial, ethnic or religious groups, in support of the United Nations activities for the maintenance of peace.(241)

As to the educational systems, Article 13(2) stipulates that each party to the Economic Covenant undertakes to ensure that:

> "a) Primary education shall be compulsory and available free to all;
> b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all, by every appropriate means and in particular by the progressive introduction of free education;
> c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
> d) Fundamental education shall be encouraged or intensified as far as possible for the persons who have not received or completed the whole period of their primary education."

It is therefore against these provisions and requirements that we shall assess the educational system and policy of Jordan.

Chapter two of the Law of Education of 1964, defines the principles and the purposes of the educational system of Jordan.[242]

Article 3 enumerates the principles upon which the philosophy of the educational system is based. It provides that the philosophy of education in Jordan stems from the Jordanian Constitution and is based on the following principles:

1 - Encouragement of the physical, intellectual, social and emotional development of the student to enable him to become a responsible and useful member of society.

2 - Social justice, and equal educational opportunities for all Jordanian males and females, within the limits of their personal abilities.

3 - Respect for the dignity and freedom of the individual and the public interest of the society.

4 - Importance of education for the development of Jordanian society in a Pan-Arab perspective.

5 - Respect for the democratic system which enables citizens to govern themselves and to handle their own affairs with knowledge and for their common interests.

6 - International co-operation based on justice, equality and freedom.

7 - Positive participation in international culture, art and literature.[243]

In the light of the principle of education for all, declared by the Constitution, the legislature has defined the following objectives as the general aims of the education system of Jordan.

1 - The provision of education for every individual in the society, according to equal educational opportunities.

2 - Creation of a citizen who believes in the following ideals:

   a) The ideals of the national philosophy of education.

   b) Citizenship rights and duties.

   c) Realization of moral ideals through individual and social conduct.

   d) Democracy in social relations.

3 - Better understanding of the social and cultural environment from the family to the school, the village, the city, the province, Jordan, the Arab World and to the Human Community, as a whole.

4 - Improvement of living standards and to increase the national income, by varying the specialization and expansion of programmes to include evening and part-time studies and programmes for the elimination of illiteracy and other programmes in line with development planning.

In view of the above principles and goals, Jordan has maintained a steady educational policy aimed at the realization of the principle of 'education for all'. It consists of a free and 'compulsory' primary education, a free secondary education, and a higher education which is available to all.

1. Primary Education.

All states parties to the Economic Covenant have pledged themselves to introduce a free and compulsory primary education system. Article 13(2)(a), stipulates that: "primary education shall be compulsory and available to all."(244) It has to be noted thus that this

is an immediately applicable right, to which the principle of 'progressive implementation' does not apply, even in the case of a developing country such as Jordan. In the case of the latter however, this right has been declared under Article 20 of the present Constitution since 1952. It says: "Elementary education shall be compulsory for Jordanians and free of charge in the governmental schools."(245) Nonetheless, it was not until 1964 that this right was first implemented as a constitutional right in Jordan. A complete chapter in the Law of Education (1964) has been devoted to the right to free and compulsory primary education. Article 12 of the said law provides that: "free and compulsory primary education shall be implemented in governmental schools upon the entry into force of this law, in accordance with Article 20 of the Constitution." Article 9, refers to primary education as the most important stage, "a foundation upon which all subsequent education is based." It should thus aim at the physical and emotional development of the pupil and the production of an enlightened and useful member of society.(246)

According to Articles 10 and 13, compulsory education starts at the age of six and continues until the age of sixteen.(247) Nonetheless, Article 10 has cast some doubts on the scope of this constitutional right and the obligation of the government in this regard. It stipulates that: "A student shall be admitted to the compulsory stage, if he has attained six years of age by the beginning of the academic year, within the limits of the possibilities (*Fi Hudood al-emkaniat*)." The last sentence of this Article, i.e., the limits of the possibilities seems to present a rather vague limitation on the scope of this right under the law of Jordan. Indeed, it is not clear

at all, whether the legislature is referring to the financial possibilities or other factors such as classrooms, teachers...etc.

Whatever the case may be, one may argue that this is an unconstitutional limitation, imposed on an absolute right guaranteed by the Constitution. It has already been mentioned that Article 20(3)[248] of the Constitution declares an absolute right without any limitation whatsoever. Even in the law of education itself, it says that compulsory education shall be free in the governmental schools and shall be implemented in accordance with Article 20 of the Constitution.

Obviously, this right is of special importance in the case of Jordan. It also constitutes a heavy financial burden imposed on the Jordanian Government. This is due to the fact that over 51% of the population of Jordan is under 14 years of age; i.e. almost one third of the nation must be provided for because they are of the age requiring free and compulsory education (6-14 years).[249]

In practice however, this stage is divided into two compulsory cycles of free education:

a) The elementary cycle which covers a period of six years, from the age of 6 - 11 years. As it was mentioned above the aim of this cycle is to introduce the pupils to academic life and to prepare them for subsequent stages. On average the rate of enrolment in this stage is 80% of the population in this specified group.[250]

b) The preparatory cycle which covers a period of three years from the age of 11 - 14 years. According to the Ministry of Education the rate of enrolment in this cycle is 91% of the population of the prescribed age group. At this stage students receive thirty lessons per week.[251]

By the end of their primary education (compulsory education), students are required to sit for a general examination for admission to secondary education which is free of charge but not compulsory.

2. Secondary Education.

The Covenant requires that secondary education in its different forms, including technical and vocational secondary education be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.(252) Contrary to the right to primary education which is an immediately applicable and absolute right, the right to secondary education has been made a relative and progressive right. All that is required in this regard therefore, is that secondary education be made available and accessible but not necessarily free. The introduction of free education is one of the recommended means by which to make secondary education accessible to all.

In Jordan however, secondary education is free of charge; and has been made available to all,(253) by the continuous enlargement of the capacity of secondary schools and the numbers of teachers. Over the last thirty years, the number of students enrolled in this stage, has multiplied by more than twenty times, from 6,424 in 1954 to 125,338 students in 1984.

According to the Ministry of Education, 68.2% of the population between 15 - 17 years of age were enrolled in secondary education in 1984.(254) Improvement of secondary education is a standing section in the successive development plans. The aim is to make it available to all citizens in their own residential areas and with the least efforts.

In order to prepare and qualify the student for higher studies or training, secondary education has been made available in various forms and fields. That is to say, after the compulsory stage, there are several types of secondary education from which the student may choose.(255) In most cases his choice defines the type of higher education or training that he is likely to receive. That remains true, although the choice may be limited by the student's performance in primary education. Basically, there are two types of secondary education at this stage, academic and vocational (*al-Ta'leem al-Mehani*) education. If the student is admitted to academic education, he could choose one of the two available sections, Arts or Sciences. Here again the choice is not always free, it is entirely dependent on the performance of the student in the first year of his secondary education.(256) In the case of vocational education, whether freely chosen or otherwise, the student could choose more freely between the various types of vocational secondary education, which includes, *inter alia*, industrial, commercial, agricultural, nursing training...etc.(256a)

Vocational education has become an integral part of secondary education in Jordan.(257) Increasing funds have been allocated to this type of education in the last two development plans, (1981 -1985) and (1985 - 1989).(258)

3 - Higher Education.

Higher education has been recognized as a right of every Jordanian, and is subsidized by the Government, but it is not yet totally free and available to all.(259) Before 1966, there was hardly any higher education available in Jordan.(260)

So far, there have been five universities, in addition to numerous other higher educational institutions, such as polytechnics, and community colleges. The latter have become an increasingly effective factor in the higher educational system of Jordan. Statistics of 1985 indicate that there are 46 public and private community colleges in the country, with a capacity to admit 23 thousand students a year or about 40% of the '*Tawjehy*'(261) graduates.

The universities and the colleges of higher education meet about 75% of the national demand for higher education in Jordan. As regards the remaining 25%, they have to seek higher education in neighbouring Arab countries and throughout the world.(262)

However, enlargement of the capacity of the existing institutions and creation of new ones, has been made one of the principal objectives of the current development plans (1986 - 1990). It is for this task, that the Ministry of Higher Education has been created for the first time in Jordan, and the Minister included in the present cabinet. Reading the manifesto of his cabinet in the parliament, the Prime Minister stated that it is about time that special attention be given to higher education. He also expressed the need for a clear and complete policy, in order to achieve substantial improvements in terms of quality and quantity. Such a policy, must take into consideration the ideals of higher education and the means of its realization, and make higher education correspond to the needs of society, social and economic programmes and national development planning. The manifesto adds that:

> "....the government shall review the previous attitudes towards the foundation of private universities, in the light of a new policy, the aim of which is to provide higher education to all qualified persons and to reduce

the number of students who seek higher education abroad."(263)

4 - Special Programmes.

The Covenant requires states parties to encourage or intensify — as far as possible — fundamental education "for those persons who have not received or completed the whole period of their primary education."(264) It has to be noticed therefore, that on the one hand, the obligation of the state party under this paragraph is restricted to primary education only, and does not include the subsequent stages (secondary and higher education). On the other hand, the phrase 'as far as possible' implies that no specific actions or programmes are required in this regard, and that general encouragement or intensification would be sufficient.

However, as far as Jordan is concerned, there is a wide variety of these programmes, ranging from the programmes of the elimination of illiteracy to evening and private studies for higher education.

a) Illiteracy elimination programmes.

This is a special scheme designated to provide extra educational opportunities for persons who are over ten years of age, and did not avail themselves of the educational system at the prescribed age.(265) The Ministry of Education has implemented this scheme since 1960, with specific plans for the total elimination of illiteracy by the year 2000. In its fifth report to the U.N. Commission on the Elimination of All Forms of Racial Discrimination, for instance, the Government of Jordan has reported that it opens a free centre for the elimination of illiteracy for "every fifteen students in any part of the country, and provides books and stationary free of charge."(266) According to

the data of the Ministry of Education, illiteracy in Jordanian society was as high as the rate of 68% in 1960, but was reduced to 28% by 1984. It is expected to be reduced to 20% by the end of the present development plan (1986 - 1990) and to be entirely eliminated by the turn of the century.(267)

b) Evening and part-time education.

Such programmes are intended to enable those who are for social, economic or any other reasons, unable to pursue regular programmes of higher education. The Yarmuk University has taken the initiative in this direction, by establishing what is called the 'Evening University' in 1980. The latter admits an average of 600 - 700 hundred students every year in various subjects such as economics, literature, public administration...etc.(268)

c) Private studies.

In these programmes students are allowed to stay at home and study in their free time. Nonetheless, they are required to study all the subjects required from regular students, and to sit side by side with them for final examination.

The grading system is the same for both private and regular students.(269) The programme however, seems to provide crucial educational opportunities for Jordanian women especially those who have been deprived of education either as a result of an early marriage or because of social or religious disapproval of participation in the modern educational system outside of the home.(270)

C - AN ASSESSMENT.

Admittedly, it is not an easy task to assess the performance of any third World Country in the field of social welfare rights, mainly because of the lack of data and credible figures.

Nonetheless, an attempt will be made to highlight some of the gaps in the educational system in Jordan, and to assess some of the achievements and the progress made towards the full realization of the right to education.

Having regard to the scope and the legal dimensions of the right to education as a human right as embodied under Article 13 of the Covenant, one has to bear in mind that, except for the right to free and compulsory primary education, the right to education is a 'programmatic right' at least in the case of developing states parties. In other words, a developing state party such as Jordan, is not required to ensure its full realisation immediately. The only immediately applicable aspect of this right is the right to free and compulsory primary education, in regard to which, Jordan seems to be in breach of Article 13(2) of the Economic Covenant. That is to say, both the legislation and the practice of Jordan seem to fall short of the minimum international standards in this regard. As we have already mentioned the inclusion of the qualifying phrase 'within the limits of the possibilities' in Article 10 of the Law of Education, is intended to enable the Ministry of Education to turn down any number of applications on the ground that their admission is beyond the 'possibilities' and therefore it is unable to provide free primary education for them.<271>

In practice, the Government does not seem to take the word 'compulsory' in the absolute sense, which requires parents to enrol their children in primary education, under penalty of law. It is therefore up to the parents to bring their children to school. This was said to be a serious cause of illiteracy among the younger generations, and allowed many parents, especially in rural parts and remote areas, to

bar particularly their female children from educational opportunities.[272] Apart from that, Jordan seems to take the right to education seriously. Taking into consideration the limited economic resources and the demographic explosion,[273] Jordan has achieved encouraging progress towards the full realization of the right to education as a human right.

That is to say, since the recognition of this right, under the present Constitution (1952), increasing attention has been focused on its realization. Despite the above-mentioned drawbacks, there has been considerable enlargement of the educational institutions and constant improvement of the educational standards. The number of schools and teachers has multiplied several times over the last few decades, in line with the increasing number of students.[274] It is important to know that the number of students has been doubling approximately every ten years. From 140,000 in 1951 for instance, to 249,115 in 1955, to 426,000 in 1973 to almost a million in 1986.[275]

The educational policy of Jordan has been orientated around the 'principle of education for all' and pledged itself to make education available and accessible to everyone in any part of the country. Ambitious plans and programmes have been carried out for this purpose.[276] Modernization of the educational standards is indeed an eminent feature of the successive development plans. In his address to the working group on the five-year (1986 - 1990) development plan in the educational sector, H.R.H. the Crown Prince,[277] emphasized the desire for yet more attention to be focused on the principal elements of the educational system, namely, the students, the teachers, the syllabuses, school planning and administration. He also pointed out that Jordan is undergoing rapid developmental, social and economic

changes, which require a parallel review and improvement of the schools' system and variation of specializations in order to meet the new needs brought about by such transition.(278) So far as governmental policies are concerned, education has been treated as a top priority by all successive governments.(279)

In the '*Bayan-wizari*' (ministerial manifesto) upon which the Government has obtained the confidence of the House of Representatives, the present Government (*al-Refa* cabinet), has placed special emphasis on the right to education and on the improvement of the educational system. The importance of this document stems from the fact that it explains the Government's policy in the field of education. It re-confirms the Government's belief in the principle of education for all, and refers to the promotion of educational standards as one of its top priorities. It also reveals clear intention to bring into effect a wider spectrum of programmes for greater variety in secondary and higher education.

The *Bayan* states that:

> "... it is the intention of the Government to carry out a comprehensive review of the existing educational policies, regulations and programmes. It is also the Government's duty to review rules for the admission examination for secondary education in order to maintain a just balance between the individual and the national interests. This is to ensure the freedom of the individual, to choose the type of education that he wishes, and the requirements of the development plans as well as the needs of the society for professional and technical training in all working sectors."(280)

It may thus be concluded that Jordan has taken the implementation of the right to education seriously and has expressed genuine intentions towards its full realization as a human right.

Despite the consistent planning and the relentless effort that has been made, Jordan is still far from achieving this goal. This may be

ascribed in the first place to the financial deficiency caused by meagre economic resources. Such a case raises the question of international aid, and an international effort to help developing countries of such circumstances in order to enable them to achieve the full realization of social welfare rights in general or any right in particular.[281]

Chapter IV. NOTES.

(1) Hereinafter referred to as the Economic Covenant

(2) Hereinafter referred to as the Social Welfare Rights.

(3) See Chapter 1.

(4) See for instance the Constitution of Mexico of 1917, the Declaration of Rights of the Working and Exploited Peoples of 16th January 1918, which was incorporated in the Constitution of the USSR in 1918; the Weimar Constitution of Germany of 1919; the Constitution of Egypt of 1923; the Constitution of the Republic of Spain of 1931; the USSR Constitution of 1937, and the Constitution of Ireland of 1937.

(5) In 1969, the UN Commission on Human Rights noted "The significant political and theoretical contribution of Lenin to the development and realization of economic, social and cultural rights... and the historical influence of his humanistic ideas and activity", in this field (Res. 16 (XXV)); See:
V. Kartashkin, "Economic, Social and Cultural Rights", in The International Dimensions of Human rights, ed. by K. Vasak, Vol. I, p. 111.

(6) Sometimes they were looked at as a by-product of the development of civil and political rights.

(7) Res. 421 (V), December 1950. The question was decided by the Third Committee by 23 votes to 17, with 10 abstentions.
Official records, 5th Session, Report of the Third Committee A/1559, para. 51.

(8) General Assembly Resolution 543 (VI), February 5th 1952. The issue was decided by the Third Committee by 30 votes to 24, with 4 abstentions. See GAOR, 6th Session, Agenda Item 29, Annexes, Report of the Third Committee (A/ 2112, para. 50). The decision was confirmed by the General Assembly in plenary session by 29 votes to 25, with 4 abstentions (A/p.V 375, February 5th 1952).

(9) See David Trubek, "Economic, Social and Cultural Rights in the Third World", in Human Rights in International Law, ed. by T. Meron, Vol. I, p. 211: hereinafter referred to as D. Trubek.

(10) Ibid. See also GAOR Doc. No. A/C3/565 (1952).

(11) A.P. Movchan, 'International Protection of Human Rights', Moscow, 1958, p. 91. Cited in Kartashkin, op. cit., p. 142

(12) A.H. Robertson, Human Rights in the World, Manchester, 1972, p. 35.

(13) I. Brownlie, The Principles, op. cit., p. 572

(14) E.W. Vierdag, "The Legal Nature of Economic, Social and Cultural Rights", IX Netherlands, Y.B.Int.L., 1978, p. 83.

(15) Ibid.

(16) Res. 421(V) Dec. 4th 1950, See: GAOR, 5th Session, Doc. (A/p.V,317) and Res. 543(V), Feb. 5th 1952; See also: GAOR, 6th Session Doc. (A/p.V, 375).

(17) UN Doc. A/2929 (1955), Chapter 2.

(18) 'The states parties to the present covenant undertake to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the present covenant'.

(19) Art. 8(1)(d)

(20) See Art. 13(3). The provision of Article 15(3) is also another example "the states parties undertake to respect the freedom indispensable for scientific research and creative activity." Also Article 10(1) concerning the rule that marriage must be entered into with the free consent of the intending spouses.

(21) Art. 1(3) "The states parties to the present covenant, including those having responsibility for administration of non-self-governing and trust territories shall promote the realization of the right to self-determination, and shall respect that right."

(22) See also Art. 24(1)

(23) Another example is the Convention against Discrimination in Education (1960); see also E. Schwelb, International Conventions on Human Rights", 9 ICLQ (1960), pp. 654 - 675.

(24) Art. 2(1), "States parties to the present covenant undertake to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate measures."

(25) Ibid. Para. (2): "The states parties to the present covenant undertake to guarantee that the rights enumerated in the present covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other statutes."

(26) Ibid. Para. (3): "Developing countries, with due regard to human rights and their national economy, may determine to what

extent they would guarantee the economic rights recognized in the present covenant to non-nationals."

(27) See ECOSOC, Res. No. 5(1) of 16 February 1946 and Res. No. 9(11) of June 1946.

(28) Art. 1 (3).

(29) It reads as follows: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
a) higher standards of living, full employment and conditions of economic and social progress and development;
b) solutions of international economic, social, health and related problems; and international cultural and educational co-operation; and
c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex..."

(30) Art. 56: "All members pledge themselves to take joint and separate action in co-operation with the organization for the achievement of the purposes set forth in Article 55."
Compare the two Articles (55,56) with the provision of Art. 2(1).

(31) Trubek, op. cit., p. 216.

(32) Trubek, op. cit., p. 216

(33) Ibid.

(34) See above p.268.

(35) See Trubek, op. cit., pp. 214-215.

(36) Art. 2(1), quoted above, see p.273.
The legislative history of the Covenant also indicates that international aid should be taken into account. See the Commission on Human Rights (275th mtg), UN Doc. E/CN. 4/5R.275 (1952).

(37) See above p.272.

(38) See Trubek, op. cit., p. 217

(39) M. Ganji, 'The Realization of Economic, Social and Cultural Rights: Problems, Policies, Progress', (UN Sales No. E 75 XIV. 2)

(40) See Trubek, op. cit., p. 217.

(41) See above pp.203, 220 — 227.

(42) Para. (3)

(43) While most of the modern international standards of human rights have been created after the second World War and under the auspices of the United Nations, establishment of international standards of the right to work goes back at least to the era of the League of Nations. In 1919, the ILO was created and its Constitution was adopted as part of the Versailles Peace Treaty of 1919. The ILO has brought about hundreds of international recommendations, decisions and conventions regarding the international standards of the right to work. However, since our study is limited to the UN Covenants on human rights, it is not our intention to study the structure and the work of the ILO in this area, but nonetheless, we shall be referring to the ILO conventions and documents whenever it is necessary and by way of comparison only.

(44) Art. 23(1). See also paras. (2, 3 and 4) and Art. 22, 24.

(45) Art. 6(1).

(46) See Art. 6(2).

(47) Although the previous Constitutions prohibited forced labour, they lacked any provision recognizing the right to work as a human right.

(48) Art. 6(2).

(48a) See the initial report of Jordan under Art. 17 of the Economic Covenant, UN Doc. No. E/1984/6/Add. 15.

(49)

		(Arts.)
Chapter One	- Applicability of the Law and Definition of Terms.	1- 7
Chapter Two	- Administration.	8-12
Chapter Three	- Matters Relating to Service and Employment.	13
Chapter Four	- Apprenticeship.	14
Chapter Five	- Individual Contracts of Employment.	15-20
Chapter Six	- Collective agreements	21-23
Chapter Seven	- Minimum Wages.	24
Chapter Eight	- Protection of Wages.	25-28
Chapter Nine	- Health, Safety and Welfare.	29-36
Chapter Ten	- Working Hours, Holidays and Annual Leave.	37-45
Chapter Eleven	- Employment of Women and Children.	46-53
Chapter Twelve	- Workmen's Compensation.	54-67
Chapter Thirteen	- Labour Unions.	68-89
Chapter Fourteen	- Settlement of Labour Disputes.	90-109
Chapter Fifteen	- Supplementary Provisions.	110-115
Chapter Sixteen	- Repeals.	116-117

(50) It provides for cases of instant termination of employment without a notice or payment of *Mokafah*. (compensation).

(51) Three months; See Art. 16, para. 1(a)

(52) Ibid. (b), "payments due under this Article shall be calculated on the basis of the last monthly salary received by the worker at the time of termination of his employment together with all allowances paid, but excluding wages for any overtime work..."

(53) Ibid. (c).

(54) Case No. 288/70, JBR (1971), p.155.

(55) "1. The following acts shall be deemed as justifiable grounds for the termination of employment by the worker without notice:

a) Employment of the worker in work the nature of which differs distinctly from the work for which he was employed under the employment contract.

b) Employment under such conditions as would require a change of the worker's residence, if such change is not provided for in the contract.

c) Transfer of the worker to work of a lower grade.

d) Beating or humiliating the worker, or committing a moral offence against him or against a member of his family by the employer or by the manager of the establishment.

e) Failure on the part of the employer to carry out the provisions of any section of this law, or of any regulation, or any order issued under Article 4 of this law, after receiving notice to do so from the Director of the Department of Labour or from the Labour Inspector, provided that such notice concerns the workman concerned exclusively."

(56) Case No. 409/75, JBR (1976), p. 1433.
See also case No. 367/77, JBR (1978), p. 189, where it was stated that:

> "...it is the established opinion of the Supreme Court that termination of employment by the worker because of reduction in his pay entitles him to the payment in lieu of notice and the compensation."

Obviously, the court has understood the reduction in pay as an indirect instant termination of employment by the employer, for which the court has always asserted that payment in lieu of notice is required.

(57) Case No. 246/72, JBR (1972), p. 1278.

(58) Case No. 379/72, JBR (1973), p. 104.
In case No. 186/72, the court explicitly stated that:
"unilateral termination of employment for a limited period by the employer, before the fixed time, entitles the worker to a

full payment of his wages for the rest of the agreed period." JBR (1974), p. 1401.

(59) Art. 6(1)

(60) Sub-paragraph (b), provides that the provision of sub-paragraph (a) "shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court."

(61) See Art. 4 and 6 respectively.

(62) Convention No. 29. For the full text of the Convention, see the UN Treaty series, Vol. 39, p. 55, Cf. the ILO Convention for the Abolition of Forced Labour of 1957.

(63) Art. 2(1).

(64) Art. 2(2).

(65) See Brownlie, Basic Documents, op. cit., p. 176.

(66) J. Fawcett, 'The Application of European Convention on Human Rights, Oxford, 1969, p. 48.

(67) Ibid. p. 47.

(68) The applicant was a Norwegian dentist, who was directed to Moskenes district in northern Norway under the Act of 1956, which provided that dentists might be required for a period of up to two years to take a position in public service. Accordingly he was convicted and sentenced under the said Act, and his appeal to the Supreme Court failed. Thus he challenged the Act and the decision of his assignment as being contrary to Art. 4 of the EHR. Although the application was declared inadmissible by a majority of six to four, it is interesting to note, as far as the definition of the term 'forced labour' is concerned, that the majority were divided among themselves. Four of them followed the above-quoted analysis and concluded that the service of Iversen in that district was not forced labour. The other two were of the opinion that it was forced labour. But it was justifiable under Art. 4(3) in view of the emergency threatening the well-being of the community. Y.B. 6, (1963) p. 328.

(69) This is a plain violation of the provision of the ILO Convention - see Art. 2.

(69a) Y.B. 11 (1968) 528, 558.

(70) Exacted work or service without payment.

(71) This however, seems to have been a common practice in the pre-World War I era. The British were reported to have applied a similar system in Egypt. See al-Madi and S. Musa, A History

of Jordan in the Twentieth Century, Amman, 1959, p. 77, hereinafter referred to as Madi and Musa; on the history of forced labour and involuntary servitude, see A. Avins, "Involuntary Servitude in British Commonwealth Law", 16 ICLQ (1967), pp. 29-55.

(72) The Law of the Prohibition of Forced Labour of 1934, published in the (461) JOG on the 8/12/1934, Art. 1, provides that: "this law shall be known as the law of the prohibition of enforced labour of 1934 and shall be effective from the date of its publication in the Official Gazette."

(73) Art. 2(c) added another exception in regard of "work or services exacted in accordance with the law of 'Locusts fighting of 1929' or the law of 'In lieu of the road tax' in places where this law is still in force." Hence, both of these laws have been abolished, this exception has no practical effect in the present.

(74) Art. 3.

(75) See Art. 4(1).

(76) Art. 4.: "Anyone who commits an offence against the provisions of this law shall be sentenced for a term of imprisonment not exceeding six months, or a fine not exceeding 50 JD, or both."

(77) See Art. 16(2), as amended by law No. 2 of 1965, and published in JOG No. 1818, p. 52, on the 18/1/1965.

(78) Art. 18(1), see sub-paragraph (a, b, c).

(78a) See the second supplementary report of Jordan under Art. 40 of the Political Covenant, UN Doc. No. CCPR/C/1/Add. 56, (1982).

(79) Sub-paragraph (a).

(80) See H.R. Hashem, Interpretation of the Labour Law of Jordan, Amman, 1st ed., 1973, p. 156.

(81) Para. (8).

(82) Case No. 69/71, JBR (1971), p. 648.

(83) Case No. 128/64, JBR (1964), p. 637. Almost identical conclusions have been reached in the following Cases: 346/63, JBR (1963), p. 1087; 221/63, JBR (1963), p. 329; 114/63, JBR (1963), p. 192; 173/72, JBR (1972), p.1047.

(84) Art. 24(1).

(85) Ibid. (3).

(86) Ibid. (4).

(87) Ibid.

(88) Ibid. (5).

(89) Art. 25(1)

(90) In all cases "The fine may not be imposed after the lapse of thirty days from the date on which the violation was committed. Fines shall be recorded in a special register, and shall be added to the credit of a common fund for the benefit of the worker." See Art. 25(2).

(91) These are:

a) deductions for the recovery of advances or the adjustment of overpayment;

b) deductions of income tax or social security fees payable by the worker;

c) deductions ordered by a competent court of law or other competent authorities, subject to the provisions of para. (4);

d) deductions of contributions to any provident fund, or for the repayment of any loans taken from such a fund;

e) deductions for housing or other facilities or services provided by the employer at such rates and percentage of wages as may be authorized by the Minister of Labour.

See para. (3)

(92) Art. 26(1).

(93) Art. 26(2)

(94) See Art. 28.

(95) See H.R. Hashem, op. cit., p. 171.
It is also noteworthy that Art. 209 (a,b,c) of the Companies Law (Law No. 12 of 1964) does not give any precedent to wages in the case of bankruptcy.

(96) See Case No. 285/65, JBR (1966), p. 1529.

(97) Human beings by their very nature need rest intervals from work. Over-worked employees are more prone to accidents at work as a result of exhaustion. See H.R. Hashem, op. cit., p. 187

(98) See W.M. Cooper, Outlines of Industrial Law, 7th Ed., (ed.) J.C. Wood, 1962, London, p. 172 et seq.

(99) See also UNHR, Art. 24, ADRD, Art. 15, ESC, Art. 2.

(100) The International Labour Office, Conventions and Recommendations, 1919-1981, Geneva, 1982, hereinafter referred to as ILO Conventions and Recommendations, 1919-1981.

(101) See Art. 427

(102) Convention No. 47.

(103) Reduction of Working Hours Recommendation No. 116, of 1962.

(104) These Arts. provide for the right to the weekly day of rest, and for some exceptions to the principle of the eight-hour day, in some exceptional circumstances.

(105) Art. 37.

(106) op. cit., p. 157

(107) According to Art. 2 of the Labour Code, Regulated Establishment means: "an establishment which employs not less than five workers, or which has employed an average of five workers during the period of the last preceding twelve months; and it includes building workers."

(108) Case No. 141/66, JBR (1966), p. 850; similar decisions have also been reached in Cases No. 116/73, JBR (1973), p. 804; 287/73, JBR (1974), p. 162

(109) See Case No. 410/72, JBR (1972), p. 192.

(110) Case No. 47/82, JBR (1982), p. 403.

(111) See Art. 39.

(112) Arts. 37, 38, 39, and 40 all deal with the limitation of the daily working hours. Art. 41 stipulates for the weekly holiday.

(113) For the lawful application of the exception in any of the above cases, the manager of the establishment is required to notify the Department of Labour (*Dairat al-Amal*) of the occurrence of such an event, and to compensate the workers for the extra work or any holiday which they did not receive.

(114) Art. 43(2).

(115) Ibid. Sub-paragraphs (a and b).

(116) Ibid. (3)

(117) Ibid. (4)

(118) Ibid. (5)

(119) Art. 41.(1)

(120) Some others give 'Saturday' and 'Sunday'.

(121) It was amended by law No. 2 of 1965. Before the amendment the Supreme Court had constantly denied the right to a paid weekly day of rest to anyone who was not employed by a regulated establishment. In case No. 390/65 (only months before the amendment) the court ruled that: "paid weekly day of rest applies only to those employed by regulated establishments." See JBR (1966) p. 88.
Since 1965, the court has modified the previous approach and stated that "Art. 41 (paid weekly day of rest) applies to the workers of land... transportation, even though they are not employed by regulated establishments." See Case No. 47/72, JBR (1972), p. 395

(122) See Art. 41(2): "...annual leave days which are provided for in Art. 43, and official holidays on which the establishment is closed, shall be considered as working days in respect of which a worker is entitled to wages."

(123) See Art. 5(1) as amended by Law No. 2 of 1965, mentioned above.

(124) The ILO has adopted a number of conventions on the weekly day of rest and annual leaves, such as the weekly day of rest in Industrial Enterprises Convention No. 14 of 1921, and the weekly day of rest (Commerce and Offices) Convention No. 106 of 1957.

(125) Art. 7(d)

(126) Note 122 above.

(127) Ibid.

(128) It says: "The state shall safeguard the free exercise of worship and religious rites in accordance with the customs observed in the Kingdom unless such exercise is inconsistent with public order or decorum."

(129) *Diwan Khass*, Decision No. 14 of 1972, published in JOG No. 2383 of 1/10/1972, p. 1856.

(130) Case No. 169/64, JBR (1964) p. 686.

(131) Art. 45, provides that: "Every worker employed in a regulated establishment... shall be entitled to leave with pay in proportion to the period of his employment less the number of public holidays with pay which he was granted during that period."

(132) op. cit., p. 260.

(133) Case No. 463/75, JBR (1976), p. 1478.

(134) Ibid.

(135) Art. 45(1); see also the report of Jordan under Art. 17 of the Economic Covenant, UN Doc. No. E/1984/6/Add. 15,(1986).

(136) Ibid. (3).

(137) Ibid. (5,6).

(138) Ibid. (4).

(139) Art. 5(1) as amended in 1965.

(140) See above pp. 221—226.

(141) See EHR, Art. aa(1) "everyone has the right to freedom of association... including the right to form and to join trade unions..." See also Art. 22(1) of the Political Covenant.

(142) See ESC II,(5) and Art. 8 of the Economic Covenant

(143) See UDHR Art. 23

(144) Especially rights such as, personal liberty, freedom of opinion, expression, assembly, and the right to fair trial.

(145) Trade union rights and their relation to civil liberties, International Labour Conference, 54th Session (1970), report No. VII.

(146) Art. 8 (1)(D)

(147) These are traditional limitations which have been maintained with regard to several rights throughout the two Covenants - we have already discussed some of the legal and technical difficulties that may be caused by such undefinable limitations. see above pp. 221—224.

(148) Art. 8(2).

(149) Art. 8(1)(a).

(150) See General Sir John Glubb, op. cit., p. 8.

(151) Miss S. At'tal, An Introduction to the Problem of Woman and the Women's Movement in Jordan, Amman, 1985, p. 82.

(152) Sir John Glubb, op. cit., p. 8

(153) Miss S. At'tal, op. cit., p. 88

(154) See Ali Khrase and S.A. Sufadi, The Trade Unions Movements in Jordan, Amman, 1979, p. 25; Hereinafter referred to as Khrase and Sufadi.

(155) Law No. 35 of 1953, published in JOG No. 1134 of 16/2/1953, p. 543.

(156) op. cit., p. 89

(157) Total of Nine Trade Unions.

(158) Miss S.At'tal, op. cit., p. 89. See also Khrase and Sufadi, op. cit., p. 45

(159) Chapter 13, (Arts. 68-89)

(160) See Art. 68(1).

(161) Art. 69(2)(a).

(162) Ibid. (b)

(163) Art. 69 (1).

(164) Art. 69 (2).

(165) Art. 70, "No organization shall have the right to register itself as a labour union under this chapter unless its executive committee has been formed in accordance with its provisions..."

(166) Art. 70.

(167) Ibid. (g)

(168) Ibid. (i).

(169) Ibid. (j).

(170) Ibid. (k,l)

(171) See Art. 71(i).

(172) Art. 72.

(173) Case No. 27/61, JBR (1961), p. 261.

(174) Case No. 37/64, JBR (1964), p. 937.

(175) Ibid.

(176) See Art. 69(2)(d); compare with the provision of Art. 2 of the ILO Convention No. 87 of 1948, concerning (Freedom of Association and Protection of the Right to Organize), UN Treaty Series, Vol. 68 p. 17. Hereinafter referred to as ILO Convention No 87 of 1948. It says: "Workers and employers without distinction whatsoever, shall have the right to establish and ...to join organizations of their own choosing without previous authorization." However, it should be noted that the Jordanian legislature uses the term '*Negah*' (Trade Union) in both cases.

(177) The Ministry of Labour, 23 The Labour Review, Amman, 1983.

(178) See Art. 79.

(179) See Art. 1(2).

(180) Art. 8(a): "...the Minister may order that such a decision shall apply to any existing labour unions."

(181) See the JOG No. 2606 of 19/2/1976, p. 242. This decision replaced the decision of 10/1/1971, published in the JOG No.2272 of 10/1/1971, p. 23.

(182) Art. 2: "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization."
Art. 3(2) provides that: "the public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof."

(183) Art. 23(f).

(184) See above p.316, and see also Art. 84(a) of the Labour Code.

(185) See above p.318.

(186) See Art. 83.

(187) Art. 76: "Every trade union shall be a corporate body known by its registered name, having perpetual existence and a common official seal. The trade union shall have the right to own and possess movable and immovable property in accordance with the provisions of the 'Law of Disposal of Immovable Property by Corporate Bodies', to conclude contracts and to institute or defend legal actions in its corporate name."

(188) Art. 81.

(189) Art. 81

(190) Art. 84(c)

(191) Art. 85, as amended in 1972, Law No. 25 of 1972 see the OGJ No. 2357 of 6/5/1972, p. 868.

(192) Art. 75.

(193) Art. 82(1).

(194) Art. 82(2).

(195) See also paragraphs (2,3,4) and Art. 70 (f,g,m,).

(196) See Art. 77.

(197) See Art. 86(1&2)

(197a) See the individual opinion of Professor Higgins and other members of the HRC, in Case No. 118/1982, HRC Report, GAOR, Supplement No. 40(A/41/40) p. 151 (1986).

(197b) See the report of Jordan under Art. 17 of the Economic Covenant UN Doc. No. E/1984/6/Add. 15 (1986).

(198) Paragraph (a) "an appeal against the judgement of the Court of First Instance may be submitted within thirty days from the date on which it is issued if rendered in the presence of the parties, otherwise from the date of service thereof. The decision of the court of Appeal shall be final."

(199) Art. 86(3).

(200) Art. 8(c)

(201) Art. 4: "Workers and employers organizations shall not be liable to be dissolved or suspended by administrative authority."

(202) Art. 23(f).

(203) Art. 8(1)(b).

(204) Art. 5.

(205) Art. 78(1&2) "Applications shall be submitted to the Registrar in the manner prescribed in Section 69, sub-section 2, and the regulations of such federations shall include the provisions prescribed in Section 70 of this law."

(206) Law No. 25 of 1972, see the JOG No. 2357 of 6/5/1972, p. 868.

(207) The Minister concerned, could be the Minister of the Interior or Health or Industry or any Minister as the case may be.

(208) See above p. 321.

(209) See Art. 8(3)

(210) See for instance, King Hussein's public address on the '*Eed al-ummal*' (May Day) on the 1st May 1984. See also Dr. T. Abd al-Jaber, the Minister of Labour, a speech on the same occasion, The Ministry of Labour, 25 Labour Review, Amman, 1984, pp. 2-5.

(211) The political situation in the West Bank and the increasing number of trade unions, especially in the last four years (82-86).

(212) Art. 22.

(213) Art. 25(1).

(214) However, a substantial body of international rules concerning the right to social security has been introduced by the ILO in the form of International Conventions, Declarations and Recommendations. See for example:
- Convention No. 17 of 1925;
- Convention No. 24 of 1927;
- Convention No. 35 of 1933;
- Convention No. 36 of 1933;
- Convention No. 67 of 1944;
- Convention No. 102 of 1952;
- Convention No. 118 of 1962;
- Convention No. 131 of 1967;

All published in the 'International Labour Conventions and Recommendations 1919-1981' by the International Labour Office, Geneva, pp. 515-685.

(215) On the implications of the concept of progressive realization see above p.275.

(216) Art. 54-67

(217) According to Mr. Ali Isa, the Director of Information and Publications of the General Institution of Social Security, Jordan was ready to establish a social security system in the late 60's, if it were not for the social and economic consequences of the war of 1967. See 6 The Labour Review, Amman, 1983, p. 33; hereinafter referred to as Ali Isa.

(217a) See the report of Jordan under Art. 17 of the Economic Covenant, UN Doc. No. E/1984/6/Add. 15,(1986).

(218) See Ali Isa, op. cit., p. 3.

(219) See Art. 3(a)

(220) See H.M. King Hussein (May Day speech), op. cit., p. 3

(221) Arts. 3(b) and 6.

(222) See Art. 3(b)

(223) See Ali Isa, op. cit., p. 34

(224) No available data or information has been published with regard to the last two programmes yet.

(225) See Ali Isa, 'A Note of the Social Security System', in Labour Review, Amman, Vol.8 (1985) No. 29-30, p. 78.

(226) See Dr. M. al-Farhan, "Social Security in Jordan", a lecture delivered at the Yarmuk University, Irbid, 17th of March 1987.

(227) See above pp.265-66.

(228) For the argument concerning the character of the social welfare rights in general and in the legal dimensions of the

obligation of states parties to the Economic Covenant see above pp. 264 — 67.

(229) Art. 2 of the First Protocol.

(230) The First Protocol.

(231) Judgement of 23 of July 1968: 1 EHRR, p. 252, see particularly pp. 280-281. See also: Y.B. 11 (1968) p. 832.

(232) Art. 13 (1+2)

(233) The court added that: "the convention lays down no specific applications concerning the extent of these means and the manner of their organization or subsidization..." see above, note 231, p. 281.

(234) Ibid.

(235) Nonetheless, failure to admit all the qualified applicants to a medical school or a training institution, does not constitute a denial of the right to education for those who have not been admitted. This was the conclusion reached by the German Constitutional Court in 1972. "On the basis of Art. 12(1) of the German Constitution, would-be medical students complained about being excluded from the Hamburg and Munich faculties of medicine on the basis of existing *numerus clausus* regulation... the court noted that in the cases were individuals are entitled to a share of some facility provided by the government, but finances are not sufficient, it is possible to reduce everybody's share proportionally. This is not so with restrictions in admission to education: some are completely admitted, some must be completely excluded... the court reasoned that the crux of the matter was not done justice by either of two views: (i) that the right to education is nothing more than a right to the education that is available; (ii) that the right implies the duty of the authorities to expand facilities to the point where every qualified person can have whatever education he may desire... the court tried to chart a middle-course The essence of its reasoning seems to be its statement that, although the right to a share in the educational facilities is not fundamentally limited to those that are available at a given moment, the right is nevertheless, subject to the "restriction of the possible", that is: what the individual can reasonably require from the society he lives in." Judgement of 18 July 1972. Cited in Vierdag, op. cit., p. 90

(236) See para. (a)

(237) None of the previous constitutions had mentioned the right to education.

(238) Art. 6(1)

(239) Law No. 16 (1964), see JOG. No. 176; 26/5/1964, p. 730. Hereinafter referred to as the Law of Education of 1964.

(240) See Arts. 2 - 8.

(241) Art. 13(1)

(242) Arts. 3 - 4.

(243) Paras. (5 - 11).

(244) Similar provision is also introduced under the UDHR. "...education shall be free, at least in the elementary and fundamental stages". See Art. 26(1). This was the legal background of the provision of Art. 20 of the constitution of Jordan, whilst the provisions of Chapter 2 of the Law of Education (1964) were based on the provisions of the then draft covenant and Art. 20 of the constitution.

(245) See Art. 20.

(246) See paras. 1 - 11.

(247) It says: "No student may be discharged from school before the age of sixteen, except for some special health conditions."

(248) See above p. 336.

(249) See the Ministry of Education report of 1984-1985 (education in figures).

(250) Ibid. In the year 1983-4 for instance the rate of enrolment was 89.3% of all Jordanians between 6 - 11 years of age. See the Ministry of Education annual report 1983/4.

(251) Ibid. See also the Annual Report of 1984/5

(252) Art. 13(2)(b).

(253) That is true, although students from some villages have to travel every day to the nearest town for their secondary education.

(254) The Ministry of Education, "The Educational System of Jordan", a report submitted to the ordinary meeting of the Arab Ministers of Education, Amman, 1985. Hereinafter referred to as (The Educational Systems Report).

(255) Ibid.

(256) Ibid. para. 8.

(256a) See the report of Jordan under Art. 17 of the Economic Covenant, UN Doc. No. E/1984/6/Add. 15, (1986).

(257) See the annual report of the Ministry of Education Amman 1985. According to the statistics of 1983/84 for instance, the number of the students in this section of secondary education was

(25,310) i.e. well above 25% of the total number of students in secondary education in general.

(258) See Muhammad A. Tigani, Social and Economic Development Plan of Jordan (1981-85). Amman, 1981.

(259) According to Prof. A. Bedran the annual cost of each student in Jordanian universities is 850 JD. The student pays only 350 JD and the government pays the rest. Prof. A. Bedran, *al-Dustur* symposium "Higher Education between the Public and Private Sectors", see *al-Dustur* (newspaper) Amman 3/8/85. p. 10.

(260) The first university (University of Jordan) was established in Amman in 1966.

(261) Those are students who have successfully finished the secondary education, and therefore eligible for higher education. In the year 1984/5 the number was 45,000.

(262) A considerable number of Jordanian students leave the country for higher education abroad; most of them receive government grants for specialization or for degrees which are not available in Jordan.

(263) The official manifesto of the Cabinet of Mr. Z. Refa'ay. op. cit.. The idea of the open university is currently under serious consideration in Jordan. See al-Dustur symposium. op. cit., p. 11.

(264) Art. 13(2).

(265) Schools are not allowed to admit as a beginner any person over ten years of age as a regular student.

(266) The fifth report, Ministery of Education, 1984/85.

(267) Report of 1984/85, p. 16.

(268) See Prof. A. Bdran, al-Dustur symposium. op. cit., p. 11.

(269) Report of 1984/85. p.16.

(270) S.S. at-Tal, op. cit., p. 65

(271) See Art. 10.

(272) See S.S. at-Tal, op. cit., p. 52.

(273) In addition to the normal annual growth of about 10%, the population of Jordan has doubled overnight twice in less than a quarter of a century.

(274) See H.M. King Hussain. My Career as a King. op. cit., pp. 253-6

(275) Ibid. See also the ministry of Education's annual report, 1955-56 and 1983/4 and 1984-5. Available figures indicate that the budget of the Ministry of Education has been increased as follows:

1951	87,178 JD
1952	308,198 JD
1955	1,270,817 JD
1973	7,500,000 JD
1983	70,200,000 JD

(276) Ibid. See for instance the development plan (1981-6).

(277) Prince Hassan Bin Tallal, who has personally supervised development planning of Jordan since 1973.

(278) See Al-Ra'i newspaper, No.5626, Vol. 15, Amman, 20/11/85. pp. 1 and 23.

(279) The Ministry of Education, "The Report on the Educational System of Jordan", p. 3.

(280) The Ministry of Information: "*al-Bayan al-Wizari*"; Z. al-Refai Cabinet; Amman, 17/4/1985. See also *Al-Ra'i* Newspaper, Vol. 15, 18/4/85. pp. 1 and 3-5.

(281) See above p. 270.

PART THREE.

LEGAL SAFEGUARDS.

Under the Covenants, States parties undertake to take legislative measures to ensure the practical implementation of the declared rights and freedoms at the domestic level.(1) Such an undertaking means that a specific role has been assigned to the constitution and municipal laws of each state party to play in the process of the implementation of the declared rights and freedoms at the national level.(2) Since the purpose of the Covenants is to secure the actual implementation of those rights, mere introduction of abstract legal provisions declaring equivalent standards at the domestic level will not suffice.

If the constitution and domestic laws are to play their role in full, they must include some legal guarantees to ensure the implementation of those provisions in practice. The question which arises here therefore is: what are these legal safeguards that the national legislator must introduce in order to achieve this purpose? Considering that these legal safeguards are intended for the implementation of some legal provisions, one would firstly look for an independent court, by whom those provisions are to be interpreted and applied. An independent judiciary is a valuable guarantee for the rights and freedoms of the individual. If rendered independent, the judiciary would be able to protect the declared rights from being violated by the government or anybody else. Evidently, the judiciary is the 'weakest' amongst the three branches of government. For it does not possess influence over the sword nor the purse.(3) Its independence and consequently its ability to protect human rights itself needs to be protected. It is thus the duty of national legislators to provide such protection, through the constitution and domestic legislation.

This is a central point in the role of the constitution and domestic law in the implementation of the international standards of human rights at the national level.

However, the judicial independence would lose its significance if the legislature or the executive were free to bar access to the independent courts. The national legislature must guarantee the right of access to court for everyone whose declared rights have been violated by anybody. Special protection is needed against violations by the administration or by individuals acting in their official capacity. Judicial review of administrative action is therefore the second legal safeguard which the constitution and domestic law should seek to establish as a fundamental constitutional right, which cannot be forfeited or abrogated by legislative or executive action.

Thirdly, another important area to be considered in the field of domestic implementation of the international standards of human rights are the emergency powers. Experience tells us that unbridled emergency powers constitute a serious threat to the rights and freedoms of the individual. They are a formidable weapon placed in the hands of the government, who usually tend to abuse them to the furthest possible extent. It is thus a crucial part of the role of the constitution and domestic laws to impose reasonable limits on the extent of and exercise of the emergency powers and to restrict their application to the utmost demanding circumstances, and in the narrowest possible manner.

In this part, we shall be discussing the meaning and the importance of the suggested legal safeguards in the context of the Constitution and the laws of Jordan, in order to assess the value of those safeguards and the role they play in the actual implementation of the

Modern International Standards of Human Rights in that country.

1. The independence of the judiciary;
2. Judicial review of administrative action;
3. Restricted emergency powers.

CHAPTER V.

THE INDEPENDENCE OF THE JUDICIARY.

> "I have always thought, from my earliest youth till now, that the greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people is an ignorant, a corrupt or a dependent Judiciary."(4)

1. THE JUDICIARY AS THE VINDICATOR OF HUMAN RIGHTS.

Traditionally, the functions of government are divided into three major divisions. These are namely, legislative, executive and adjudicative. The legislature should make the laws and the executive should execute them and the judiciary should interpret and apply these laws to individual cases. Long ago, Montesquieu had warned against the concentration of these powers in the hands of one man or a group of men. He argued that if the three functions were to be exercised by the same authority, it would become an absolute and consequently oppressive body.(5)

When it comes to the protection of the rights and freedoms of the individual, we have already maintained that the national constitution should contain provisions recognizing those rights and defining the legitimate restrictions which may be imposed thereon. These constitutional rights undoubtedly form a bind on the powers of both the legislature and the executive. Neither of them may lawfully infringe or disregard the provisions of the constitution. It is always possible that while regulating the practice of those rights, the legislature may penetrate the protective constitutional shield by imposing additional limitations on any of those rights, it is equally possible and even more likely that the executive may also undermine the rights

of the individual especially in cases of conflict between them and the general policies or programmes of the government of the day.

It is thus, the judiciary who may be entrusted with the task of protecting the individual's rights. As a guardian of the constitutional rights, the judiciary itself needs to be protected from outside influences particularly from the influence and pressure exerted by the other two branches (the legislature and the executive). If rendered an independent and co-equal branch of government, the judiciary would certainly be capable of being a trustworthy vindicator of human rights. Accordingly, a substantial part of the role of the national constitutions and domestic laws in the implementation of the international standards of human rights, is to secure the independence of the judiciary *vis à vis* the other arms of the government. Without this, the aforementioned role could hardly be fulfilled.

In the case of Jordan, the Constitution has designated the judiciary as an independent branch of the Government and has devoted several provisions for the preservation of such independence.(6) The third chapter deals with the distribution of powers between the three branches of Government.(7) In addition to an Article declaring the nation as the source of all powers, and that the nation shall exercise its powers in the manner prescribed by the Constitution,(8) the latter contains three separate Articles, each instituting a different branch of Government. Whilst Article 25 provides that the legislative power shall be vested in the National Assembly, and the King,(9) Article 26 vests the executive power in the King who exercises it through his Ministers in accordance with the provision of the Constitution.

Article 26 stipulates that: "the judicial power shall be exercised by the various courts of law, and all judgements shall be given in accordance with the law and pronounced in the name of the King."

Having instituted the judiciary as a separate and co-equal branch of government, the constitutional legislator devoted chapter six to the regulation of the judicial function of the state. It contains the basis of the judicial system and enshrines some constitutional guarantees for the independence of the judiciary.

According to Article 97, judges enjoy full independence "and in the exercise of their judicial function, they are subject to no authority other than that of the law."

Article 101(1) stipulates that: "The courts shall be open to all and are free from any interference in their affairs." It is under these constitutional provisions that the relevant laws relating to the independence of the judiciary have been enacted. Namely, *qanoon tashkeel al-mahakem al-nedhamia* (The Law of the Formation of Regular Courts), Law No. 26 of 1952 and *qanoon esteqlal al-qadha* No. 49 of 1972, (The Law of the Independence of the Judiciary)[10]

There are several aspects to the independence of the judiciary, such as the independent administration of justice and the exclusion of interference or pressure, especially from the other arms of the government. However before discussing any of these aspects, it may be helpful to cast some light on the judicial system in Jordan in general and on the hierarchy of courts thereunder. No reference to the judicial system and the hierarchy of courts in Jordan has been made in any of the Jordanian reports to the HRC so far, though information on this point was required since the initial report in 1978. During the consideration of the latter Sir Vincent Evans (a member of the HRC)

remarked that, with respect to the remedies available within the Jordanian legal system to secure the rights referred to under the Covenant, a general description of the judicial system was required. He wanted to know the types of courts and their jurisdiction, and specifically asked whether there were military courts which might try civilians during the state of emergency.[10a]

2. THE JUDICIAL SYSTEM.

As part of the Islamic Empire, Jordan adhered to the traditional Islamic Judicial system. Under this system, the judiciary was never an independent branch of government. The principle of separation of powers as we understand it today does not seem to have received much attention in early Islamic political thought. In the Islamic Judicial System, the judge is considered to be the agent of the Sultan (the Sovereign), who appoints the judge, and delegates jurisdiction at his own discretion. Judges can also be removed from office at the Sovereign's pleasure.[11]

This tradition had influenced the degree of independence of the judiciary in Jordan, throughout the Ottoman era, and during the earlier years of modern Jordan until the proclamation of the present Constitution in 1952.[12] The latter has established the judiciary as a co-equal branch of government and rendered judges subject to no authority other than that of the law.[13] It provides that: "Judges are independent, and in the exercise of their judicial functions, they are subject to no authority other than that of the law.[14] There is no equivalent provision in any of the previous constitutions (1928 and 1946). Instead, Article 55 of the Constitution of 1946 provided that:

> "Judges of the civil and sharia courts shall be appointed by Royal Decrees, and may not be dismissed except in accordance with ordinances issued by the Council of Ministers and assented to by the King."

In other words, the powers of appointment to and removal from judicial offices were vested exclusively in the executive. As regards the present judicial system, the distinction has been made between three categories of courts.(15)

A — THE RELIGIOUS COURTS.

In this category, there are two types of religious courts:-

1) The *Sharia* Courts.

These are traditional Islamic courts, consisting of Muslim lawyers (*qudha Sharieen*)(16) and scattered in the major towns, with a sharia court of appeal located in Amman. According to Article 105 of the Constitution, their jurisdiction is limited to the matters of personal status of Muslims, to *awqaf* (Islamic trustees) and blood money (*diyeh*), when the parties are Muslims, or when one of the parties is not a Muslim, but all parties agreed upon the jurisdiction of the *Sharia* court. For the administration of the *Sharia courts*, Article 3 of the law of the formation of the *Sharia* courts provides for the establishment of the *Majlis al-Qadha al Shari* (the Sharia Judicial Council). It consists of the *Mudeer al-Sharia* (a government official) and two other sharia judges to be appointed by *qadhi al-qudha* (the *Sharia* Chief Justice) who himself is appointed by the King. The Council is the competent body governing the appointment, promotion, transfer, discipline and dismissal of the Sharia Judges. Its decisions however, are to be submitted by the *qadhi al-qudha* to the King and

they are not executable unless they are assented to and signed by the King.

2) The Non-Muslim Religious Tribunals.

These courts were first established under Ottoman rule and still remain operative in modern Jordan. According to the *Hanafi* School,[17] non-Muslim religious communities must not be subjected to Islamic laws, at least with regard to their personal status--a matter which should be left to their own churches and religious leaders to regulate and deal with in accordance with their religious convictions. In the Constitution, it says:

> "The tribunals of religious communities are the tribunals of the non-Muslim religious communities which were or will be recognized by the Government as being established in the Hashemite Kingdom of Jordan."[18]

It also adds that these tribunals are to be established in accordance with a special law to be enacted concerning them.[19]

Such a law is to define their jurisdiction in matters of personal status and trusts constituted for the benefit of the community concerned. Matters of personal status of such communities are the same matters as apply in the case of Muslims, i.e. those within the jurisdiction of the *Sharia* courts.

Some Jordanian lawyers have criticized the system of the religious courts and have urged the legislature to abolish them. According to Mr. Al-Halasa[20] the historical reasons which justified the existence of such courts have now disappeared. It is thus high time that the legislature should unify the judicial system by transferring the jurisdiction of the religious courts to the regular courts. He

also adds that Egypt had the same system until 1955, when the religious courts were abolished by law No. 642 of 1955.(21)

B — THE SPECIAL COURTS.

The relevant two Articles of the Constitution are 102 and 110. The latter provides that: "Special courts shall exercise jurisdiction in accordance with the provisions of the law constituting them." The significance of these courts can better be appreciated when the above provision is read in conjunction with Article 102, as amended in 1958.(22) It says:

> "Regular courts of the Hashemite Kingdom of Jordan shall have jurisdiction over all persons in all matters... except in matters which, by the provisions of the Constitution, or of any law for the time being in force, fall within the jurisdiction of the religious courts or special courts."

This Article authorizes the legislature to take any matter under the jurisdiction of the regular courts and transfer it to a special court(s), which in most cases lacks the independence and the experience of the regular courts. Within this category, the distinction however may be made between two types of special courts.

1) Special Courts connected with the Ministry of Justice, and are manned by Regular Judges, appointed by the Judicial Council.

These include the Income Tax Court of Appeal, the Court of the Property of the State, the Court of Land and Water Settlement, Customs Courts, (first instance and appeal), and the Courts of the Municipalities. These courts are special in the sense that they have limited jurisdiction to adjudicate in specific types of disputes rather than general jurisdiction similar to that of regular courts.

Apart from that, they are composed of 'independent' judges who are subject to no authority other than that of the law. They could be described as specialized rather than special courts. Establishment of such courts therefore, does not seem to pose a great threat to the independence of the judiciary.

2) Special Courts, outside the Judicial Organization.

These courts are being established by the executive in accordance with special laws enacted for that purpose. They are manned by ordinary administrative or military officers who are subject to their respective superiors, and lack the independence necessary to decide upon disputes themselves. In most cases, there is no appeal against their judgements, and in all cases, their decisions are to be ratified by the Commander-in-Chief of the Armed Forces, or the Minister of the Interior, the Prime Minister or the King, as the case may be.(23)

Among this group come the Military Courts, the Police Courts, the Court of the Security of the State, Martial-Law Courts, and the Administrative Governor's Courts. We have already mentioned that Article 102 of the Constitution as amended in 1958, authorizes the legislature to establish as many of these special courts as it deems necessary. In practice, many issues relating to the constitutional rights are involved within the jurisdiction of these courts, especially civil and political rights such as the right to personal liberty, freedom of thought and expression, freedom of Assembly and Association.(24)

Considering the fact that these courts are formed and controlled by the administration, they cannot be regarded as protectors of the individual's rights against the state.

The most important example in this category is the Martial-Law Court which has been created since 1967 and has vast jurisdiction and powers to try civilians. As will be explained later, the court is composed of military officers and is not required to observe the procedural guarantees provided for under the Criminal Procedure Code.[24a]

C — THE REGULAR COURTS.

The Constitution uses the term '*Nedhmyh*' (regular) to distinguish this category from the religious and special courts.[25] These are the courts of General Jurisdiction in Jordan. According to Article 102 of the Constitution the regular courts of the Hashemite Kingdom of Jordan:

> "have jurisdiction over all persons in all matters, civil and criminal, including cases brought by, and against, the government, except in matters which, by the provision of the constitution, or of any law for the time being in force, fall within the jurisdiction of a religious or a special court."

One of the most fundamental principles of the judicial system of Jordan is that the *Muhakamat* (litigations) are to be conducted in two stages. Consequently, the Law of Formation of the Regular Courts,[26] has divided the pyramid of the courts into two levels.

1) The Lower Courts:

a) *Mahakem al-suleh* (Courts of the Peace).

These are small courts which may be found in all major towns; they consist of one judge known as *qadhi al-suleh* (the judge of the peace).[27] Basically, they have jurisdiction in all civil cases where the value of the claim does not exceed 250 JD's (£500).[28]

Their criminal jurisdiction has been extended to include all criminal offences when the maximum punishment does not exceed two years imprisonment with or without a fine, except those which by virtue of special legal provision, have been transferred to another court other than the court of the peace.(29)

The Judge of the Peace acts upon complaints from private citizens or a report from the *Dhabdha Adliah* (Judicial Police). He is also bound by the Criminal Procedure Code and exercises the powers of the public prosecutor with regard to detention and release on bail. According to Article 136 of the Criminal Procedures Code, the Judge of the Peace may grant or refuse to grant release on bail, when applied for. Yet, in either case, he is always at liberty to revoke or revise his decision if he thinks it is necessary at any time. Such decisions may be appealed against in the Court of Appeal within three days for the public prosecution from the date of the returning of the papers to it, and from the date of notification for the defendant.(30)

However, all the decisions of the Judge of the Peace are appealable to the competent court, the variation is only with regard to the latter. The Court of First Instance is the competent court in any of the following:

1) criminal cases where the imposed punishment does not exceed a fine of 5 JD.

2) civil cases when the value of the claim does not exceed 10 JD. All other decisions are appealable to the Court of Appeal.

b) *Mahakem al-Bedaih* (The Courts of First Instance).

In Jordan, the Court of First Instance is a court of general jurisdiction, i.e. it is the competent court for any claim that

has not been specifically assigned to the jurisdiction of any other court,[31] by virtue of a specific piece of legislation. A court of first instance is usually located in the capital of each province or governorate. It consists of a president and a number of judges as may be necessary.[32]

A session of the Court of First Instance may be composed of one, two or three judges, depending upon the magnitude of the case as follows:

1) It sits as a court with solely one judge in civil cases, where the value of the claim does not exceed 500 JD, and counter claims regardless of the value. Any claim resulting from the original one such as those relating to interest, damages, legal fees, regardless of the value.[33]

- all misdemeanours which fall outside the jurisdiction of the Judge of the Peace.[34]

2) Two Judges Session:

- all other civil cases and when it sits as a Court of Appeal from the decisions of the Judge of the Peace in civil cases.

- all criminal cases where the prescribed punishment is imprisonment or hard labour for less than fifteen years, and when it sits as a Court of Appeal for the decisions of the Judge of the Peace in criminal cases.

In cases of disagreement between the two judges, whether during the session or on the final decision, the President of the court must appoint a third judge to take part in the procedures from that stage, providing that all previous procedures are explained and made available to him.[35]

c) Three Judge Session.

A bench of three judges is to be formed in the most serious of criminal cases, where the prescribed punishment ranges from death to more than fifteen years imprisonment or hard labour.

2) The Upper Courts:

a) *Mahakem al-Estanaf* (The Courts of Appeal).

In the Hashemite Kingdom of Jordan, there are two Courts of Appeal, one in Amman and the other in Jerusalem, each of them consists of a president and a number of judges. A Court of Appeal sits in benches of three judges, and in cases of disagreement among judges, majority vote is required.(36) When its jurisdiction is being invoked, Amman's Court of Appeal may review any judgement issued by any court of first instance or court of the peace in the East Bank of Jordan, and the same is true of Jerusalem's Court, with regard to the West Bank.(37)

b) *Mahkamat al-Tamieez*, (The Supreme Court).

The Supreme Court is located in Amman and represents the highest court of law in Jordan. The court consists of two presidents and a number of judges as may be necessary. It functions as a Court of Cassation (Cour de Cassation), in civil and criminal cases and as a High Court of Justice (HCJ), or *Mahkmat Adel Ullia* in administrative cases. In either case, the bench must consist of a president and four justices, except when reviewing a decision of a court of the peace.(38) A panel session is required when the Court of Appeal insists on its previous decision after being declared void by the Supreme Court.(39) However, all decisions are to be taken by a majority vote.

As a Court of Cassation, it may review the decision of the Courts of Appeal in all criminal cases and in all civil cases where the value of the claim exceeds 100 JD. In this capacity its jurisdiction may be invoked upon a point of law only.[39a] As a High Court of Justice, its jurisdiction is limited to administrative cases.[40]

THE PUBLIC PROSECUTION (al-neyabh al-ammh).

Before concluding this section on the hierarchy of courts in Jordan, it is important to mention the public prosecution, especially with regard to its structure and function. Article 13 of the law of the Formation of the Regular Courts requires that:

1. A *Muwazaf* (Government Official)
   known as the *Raies al-Neabh al-Ammah* (Chief of the Public Prosecution), be appointed in the Supreme Court.[41] The Chief of the Public Prosecution enjoys the same treatment as the justice of the Supreme Court, with regard to his salary, promotions and official status. All members of the Public Prosecution are his subordinates, including his deputy who has the same privileges as defined by the law.
2. In each Court of Appeal, a *Muwazaf known as al-naib al-A'am*
   (The Attorney-General) must be appointed. Attorney-Generals and their deputies exercise all the jurisdictions and powers delegated to him under the Criminal Procedure Code and all other laws.[42]
3. "In each Court of First Instance, there shall be one official or more, known as *al-Mudai al-A'am*"[43] (the Public Prosecutor). A public prosecutor may also be appointed in any court of the peace.

All members of the public prosecution are subject to the administrative superiority rule. Those of the appeal, first instance

courts and the courts of the peace, are directly connected with the Attorney-General and they are bound by his instructions and orders, with regard to the administrative affairs and the initiation of criminal procedures.(44)

They all are supervised by the Chief of the Public Prosecution and directly connected with the Minister of Justice in accordance with the administrative hierarchy.(45)

The Public Prosecution performs many functions as provided for in the various laws. The most important one is the initiation of criminal proceedings on behalf of the community (*Dawa al-Haq al-A'am*) in criminal cases. As far as the preliminary examination of criminal cases is concerned the public prosecutor performs similar function as that of a Magistrate in the English legal system. In civil cases, brought by the Government against individuals, where the law does not allow direct execution, the Attorney-General represents the Government as plaintiff. All claims brought by private individuals against the Government are to be instituted against the Attorney-General. The Chief of Public Prosecution represents the administration before the HCJ in all the cases brought by individuals challenging the legality of administrative actions.

In Jordan, the public prosecution exercises both the power to investigate and the power to prosecute. According to a former Deputy Attorney-General, the latter has managed to perform the two tasks with honesty and impartiality and maintained a just balance between the individual's freedom and public interest.(46)

With regard to their judicial functions, members of the public prosecution enjoy similar privileges and immunities equivalent to those of the judges.(47)

3 — INDEPENDENT ADMINISTRATION OF JUSTICE.

It is doubtful that the independence of the judiciary can be ensured for long if the administration of the judicial organization is left to any authority other than that of the judiciary itself.

A - THE PRINCIPLES UPON WHICH THE JUDICIAL SYSTEM OF JORDAN IS BASED.

a) Nominal fees payable by the Plaintiff:

In modern Jordan, judges do not receive their salary from the litigants.(48) They are public officials, and their salaries are paid by the public treasury of the state. However, in order not to waste the court's time, for claims that are neither serious nor well-founded, the law requires payment of some nominal fees to be paid by the person who brings a claim to the court of law. The final burden of this payment is to be placed on the defeated party at the end of the proceedings. Since it was not intended to prevent people from seeking justice and protection by the courts, the law allows the president of the court or the Judge of the Peace to postpone such payment in a case of a poor person, if the former is satisfied that the latter has reasonable grounds for his allegation.(49)

b) Two Stages of Litigation.

In regular and religious courts, almost all cases may be investigated on two levels. Firstly, cases are to be decided by a lower court, usually the court of the peace or the court of first instance. If either party is not satisfied with the decision of that court, the law permits him to appeal to a higher court which re-examines the facts of the whole case and either upholds the

decision of the lower court or reverses it and issues a new judgement.

c) Single and multi-Judge Hearings:

The Jordanian legislature did not choose to apply any of those two systems on its own, but indeed combined them together. The Lower Courts, the Courts of Peace and sometimes the Court of First Instance are single-judge courts. Higher courts are always multi-judge courts.(50)

d) Public Hearings:

This is an important principle which has been declared and protected by Article 101(2) of the constitution. In accordance with the latter and as a general rule, the sessions of the courts should be open to all, "unless the court considers that it should sit in camera" for the sake of public order and decorum.(51)

e) Independence of Judges:

We have already mentioned that it is a basic requirement for justice to be dispensed even-handedly. This cannot be achieved if the judges are not independent or are subject to any authority other than that of the law. During the consideration of the supplementary report of Jordan in 1981, members of the HRC enquired about the degree of independence enjoyed by the judiciary in Jordan, and wanted to know the system of appointment and dismissal of judges and the role that the executive plays in these processes. Further information on this matter was also asked for by members of the HRC.(51a) Nonetheless, no reference was made to such matters in the second supplementary report.(51b)

However, the Jordanian Constitution declares that: "Judges are independent and in the exercise of their judicial function, they are subject to no authority other than that of the law."[52] Furthermore, Article 101 protects the courts from any outside intervention, in their function. It says: "The courts shall be open to all and are free from any interference in their affairs."[53]

Obviously, neither the judges nor the courts would be independent or free from intervention and outside influence, if the appointment of judges and the tenure of judicial offices are left in the hands of anybody other than the judges themselves. It was in accordance with the above constitutional provisions, that the law of the Independence of the Judiciary was enacted.[54] The latter provides for the establishment of *al-Majlis al-qada'i* (the Judicial Council) as an independent body which consists of senior judges, and is charged with the task of supervising and preserving the independence of the judiciary.

B — THE JUDICIAL COUNCIL

Under Article 4 of the law of the Independence of the Judiciary, of 1972,[55] the Council consists of:

1) The First President of the Supreme Court, as a president.
2) The Second President of the Supreme Court.
3) The Chief of the Public Prosecution.
4) *Waqeel Wazirat al-Adeil* (The Under-Secretary of State for Justice).
5) Presidents of the two Courts of Appeal.
6) An Inspector to be appointed by the Minister of Justice for one year.[56]

The Council is the principal body of the Judicial Organization, and is responsible for the administration of justice and judicial affairs. Its function includes particularly the following:

1) Appointment of Judges.

The Jordanian legislature did not choose the method of election for judicial offices, nor that of direct appointment by the executive. Instead, Article 13(1) of the LIJ provides that: "appointment to judicial offices shall ensue from a recommendation from the Minister of Justice, and a decision by the Judicial Council and a Royal Decree." Although the same Article stipulates that the Minister must nominate more than one person to the post, and the fact that the decision is to be taken by the Judicial Council and not the Minister, some judges have considered the present provision to be an unwelcome development. Under the previous law, (Law No.19 of 1955) appointments take place after a decision from the Judicial Council and a Royal Decree, without any intervention by the executive. Comparing the two provisions, Judge F. Kilany argued that the present law provides less protection for judges by allowing the Minister of Justice to interfere in the process of their appointment.(57)

Less than two years later, Judge Kilany's argument was proved to be correct. Four vacancies were needed to be filled by the Judicial Council from a list of candidates, submitted by the Minister of Justice in accordance with Article 13(1) of the LIJ. In Case No. 77/74, before the HCJ.(58) Mr. A.A. Labeeb and Mr. M.D. Abdulqadir, complained to the Court that they were illegally excluded from nominations by the Minister of Justice to be ap-

pointed as judges. In the complaint, they stated the following facts:

1. They have been working in the Ministry of Justice since 1962, and they are currently on the fifth grade and that their annual reports are constantly of good or very good calibre.
2. Both of them have held their LLB degrees since 1966.
3. Because of the Minister's nomination, the vacancies have been filled by other colleagues who received their degrees in 1966, 1967, 1968 and 1969.
4. The Minister has excluded them from this and all previous nominations despite the fact that they are from among the senior officials in the Ministry of Justice, with regard to their service, ranks and the date of their law degrees, and thus, they deserve to be nominated and appointed before those who actually have been nominated and appointed.

They challenged the decision on the following grounds:

a) It constitutes an abuse of the power vested in the Minister.

b) It violates the doctrine of equality before the law.

In a highly questionable reasoning, the HCJ mentioned that:

> "...in accordance with Article 13, appointments depend upon a decision from the Judicial Council and a Royal Decree, upon the recommendation of the Minister of Justice. In the case of trainee judges, the law does not specify any further procedure as is the case with regard to those who are of the fourth or higher rank, who are required to sit for the competition examination. As far as trainee judges are concerned, all that is required for nomination is the first law degree (LLB) and three years of service in the Ministry of Justice. Providing that these two conditions are fulfilled, the Minister of Justice has an absolute discretion as to who may be nominated, notwithstanding that there may be some other eligible person who may have served longer periods and graduated earlier. So long as those who have actually been nominated are legally qualified, the choice between

> them and other qualified officials is a discretionary matter, ultimately resting with the Minister of Justice."[59]

It is important however, to notice that the court did not address any of the crucial grounds mentioned by the complainants. Instead, the court explained the law as it stands and the requirements for appointments for judicial offices and some other simple and undisputed facts, such as:

> "...it is the right of the Judicial Council to choose the required number from among those nominated by the Minister, and hence the Minister has nominated eight qualified officials after using his discretion, and that the Council has chosen four from among them... and that the Judicial Council has rightfully used its right to choose... thereupon we decided to dismiss the complaint."[60]

Obviously, the key issue in this case was not the validity of the Judicial Council's decision, nor its right to choose the required number from amongst the nominees. It was indeed the decision of the Minister of Justice not to include the complainants on the list of nominees, which, in their opinion amounts to abuse of his discretionary power and violates the doctrine of equality before the law. It is difficult to see why the court ignored the submissions of the applicants, and focused instead on some undisputed procedural aspects.

As far as the substantive conditions for appointments to judicial offices are concerned they are the same as those required for appointment in any other government department,[61] in addition to:

1 - A Jordanian nationality.[62]

2 - A Law Degree from a recognized university or institution.[63]

3 - A minimum age of twenty-five years.[64]

It is important however to note that the Jordanian legislature has disregarded the controversy in Islamic law regarding the appointment

of women to judicial offices.(66) Legally speaking, these conditions apply to all Jordanians, men and women equally. Nonetheless, there has not been a woman judge so far in Jordan, although there are a number of female lawyers practising in the country. Available records do not indicate any rejected applicants.

Apart from the above substantive and procedural requirements all Jordanian judges are required to sit for the competition examination. In order to qualify for this examination one should have a Ph.D. degree in law or a Masters degree with one years service as a trainee judge. Holders of a diploma or first degree should either join the Bar for five years or the service of the Ministry of Justice for three years and serve two years as a trainee judge. Once one has been appointed as a judge, one's initial status and rank are to be defined in accordance with one's qualifications and experience. Following promotions are subject to the normal rules of promotion.

2) Promotions.

Promotion of judges could be abused and therefore provide a wide channel for intervention by the executive to impair the independence of the judiciary. The law thus must provide the necessary guarantees to exclude such a possibility, and they may include the exclusion of intervention by the executive and the introduction of objective basis for promotion.

a) Non-interference by the executive.

The promotion of judges is placed in the hands of the Judicial Council. If all were controlled by the executive then promotion would be granted only to the most obedient of judges and the rest would be ignored. Such a situation could render the judiciary as

a whole merely obedient puppet, whose strings are pulled by the executive. However, placement of the promotion of judges solely in the hands of the Judicial Council, is not enough in itself. The executive still could block the promotion of any undesirable judge by not providing the required funds in the budget or by excluding the higher post itself. As long as the budget of the judiciary forms a part of the national budget, the executive will always be able to control its funds by giving or holding back, as it pleases. Independence of the Judiciary thus, requires a separate budget for the judiciary to be planned and distributed by the Judicial Council free from the control of the executive.(66)

b) Introduction of Objective Rules for Promotion:

Previously adopted objective rules would ensure the judge's right to promotion, regardless of any personal considerations.

— The Rule of Seniority:

Some of the Arab countries have adopted the Rule of Seniority.(67)

According to this rule promotion to the post above takes place every certain number of years, automatically regardless of any other factors. Although it employs a considerable degree of objectivity and eliminates personal considerations, automatic promotions may and usually do result in carelessness and a lack of concern on the part of the judges, since their personal performance, qualifications and conduct do not count.

— The Rule of Efficiency and Competence.

As a basis for promotion to higher judicial offices the doctrine of efficiency encourages the judges to improve their personal performance, by means of legal research accuracy and creativity which are indispensable to successful judgeship.

In the LIJ the Jordanian legislature adopted this rule but without ignoring the element of seniority. Article 19 of the said law provides that:

> "Promotion of judges shall occur upon a decision by the Judicial Council and a Royal Decree on the basis of efficiency and competence derived from the reports about them and the disciplinary actions imposed upon them and their personal performance within the same rank. In the case of equal performance, the senior shall be chosen."

Efficiency is thus a crucial requirement for the promotion of judges. Efficiency is to be judged on the basis of reports received on the judge concerned. Yet the term 'reports' is used in its general sense, and without limiting it to the reports of the Judicial Inspection Commission. These could be the reports of any outside body, especially the executive and its agents. The impact of the fear of such reports could influence the independence of judges who are, according to the Constitution, "subject to no authority other than that of the law." If the independence of judges is to be preserved, the law should protect them against reports from outsiders and should rely only on the report of the Judicial Inspection Commission.

3) Transfer and Assignment of Judges.

Stability and peace of mind is a prime requirement for the independence of the judges. However, that is not to say that a judge should serve in the same court throughout the course of his whole career. Proper administration of justice might necessitate the redistribution and transfer of judges from one place to another. This is a two-edged weapon which may considerably affect the independence of the judge, if he is constantly confronted with the threat of being transferred to another place, each time he gets established in a city,

or even to another department outside the judicial organization. Such an important aspect of the administration of justice must not be placed in the hands of the executive but rather in those of the Judicial Council and should be strictly regulated by law.

In some Arab countries, for instance, judges of certain ranks have the right to object to the transfer, and others even require their written consent.(68) According to Article 91 of the law of the Judicial Authority, in Syria, judges are not transferable as a general rule. Exceptionally, Article 93 stipulates that in cases of extreme necessity, a judge may be transferred providing that he has served for at least three years in the same court.(69)

In Jordan, transfer of judges is within the prerogatives of the Judicial Council, without any intervention by the executive. Article 21 of the LIJ as amended in 1977, provides that judges may be transferred from one post to another impending a decision from the Judicial Council and a Royal Decree, with no further restrictions. Before 1977, the same Article required that judges of certain ranks should be transferred after three years in the same post. Paragraph (b) provided that no public prosecutor, judge of the peace, member of the Court of First Instance or a deputy of the Attorney-General, may serve for more than three consecutive years in the same job, and in the case of transfer to another post, within the same court, the period may not exceed five years 'altogether'. According to paragraph (c) of the same Article, no judge or any of the above persons may be re-transferred to his previous job, before the lapse of a two-year period, except in cases of special circumstances to be mentioned in the same decision.(70)

The law also protects judges from transfer or assignment to non-judicial posts or to any job outside the judicature without the approval of the Judicial Council. Article 24, provides that:
"No judge may be transferred from the judicature or be assigned to extra work or any job unless approved by the Judicial Council."

However, *Fi Halet al-Darorh* (in the case of necessity), Article 23 permits the Minister of Justice to assign a judge to a regular or special court or to exercise any of the duties of the public prosecution, or to the post of the under-Secretary of State for Justice or the Judicial Inspector for a period of up to three months a year.(71) Such a period may be extended upon the approval of the Judicial Council.(72) Yet, under no circumstances may the assignment be to a lower job, or to a post of lower rank than that held by the assigned judge.(73)

4) Discipline of Judges.

As all human beings, judges do have weaknesses and faults, and as public officers, they also may commit offences and make gross professional errors which may justify disciplinary action. Due to the status of judges, and the nature of their task, as well as the consequences of the imposition of disciplinary action on them, the law usually provides them with special guarantees in the event of such actions.

Article 28 of the LIJ provides that:

> "Unless caught in the act, a judge may not be arrested or seized without the permission of the Judicial Council. In such a case, the Attorney-General must notify the Council within twenty-four hours of the arrest. After having heard what the judge has to say for himself, the Council may release him whether or not on bail or may decide to remand him in custody for any period."

In the case of a criminal offence, the Council may suspend the suspected judge pending trial, and may also order the detachment of not more than half of his salary.(74) A disciplinary action is to be brought before the Judicial Council by the Attorney-General upon the request of the Minister of Justice, who should also notify the Council of such a request.(75) The application must indicate the alleged misbehaviour and the supporting evidence and be submitted to the Council which in turn must summon the judge concerned and initiate the proceedings within 15 days.(76) The latter may authorize any relevant enquiry and may delegate one of its members to investigate the allegations. The Council and the delegated member exercise the privileges of regular courts with regard to summoning witnesses.(77) Upon conclusion of the enquiry, if the Council has decided to continue with the proceedings, it should order the judge to appear before the Council within a period of not less than a week. The said order must indicate in detail the allegation and the evidence.(78) The judge may appear in person or be represented by a lawyer.

Disciplinary hearings are to be held in camera unless made public upon the request of the accused judge, who should be the last to speak.(79)

A wide range of disciplinary measures are made available to the Council, by the law, and may include:

1. Warning
2. Attachment of Salary.
3. Demotion.
4. Dismissal.

Under the previous law (1955) the decision of the Council were final and irreversible by any court. The present LIJ (1972) allows judges to appeal against disciplinary decisions to the HCJ.

5. Removal from Office and Retirement of Judges.

Irrevocability of the status of judges is an important guarantee of the independence of the judiciary. A judge can only enjoy independence if his tenure and livelihood is not dependent upon the whims and pleasure of the Executive or the Sovereign. Legal history tells us that in the traditional Islamic State, and in the classical Western monarchies, judges used to hold their offices as long as they continued to evoke the pleasure of the Caliphs and Kings, a situation which led to the total subjugation of the judges to the tyrannical wishes and desires of the rulers. A major rift was brought about by the Act of Settlement of 1700 in England,(80) and by the French Constitution of 1790 following the French Revolution.(81) In modern Western democracies, and in most of the Arab countries, judges hold their offices during 'good behaviour'.(82) Irrevocability of the status of judges, however, does not imply that a judge may not be dismissed when there is a lawful ground for it. It only requires that such a fundamental guarantee must not be dependent upon the desires and inclinations of the executive, but to be entrusted to an independent judicial body (the Judiciary Council), for instance, which may judge the behaviour of the judge and then revoke his status as a judge if deemed appropriate. Two conditions thus may be put forward for the lawful dismissal of judges.

Firstly, sufficient grounds, previously prescribed by the law. Secondly, such punishment must be imposed by a judicial body independent from any other branch of government.

As far as Jordan is concerned, judges are appointed to serve during good behaviour. Unless otherwise decided by the Judicial Council, they hold their offices until the age of sixty-five. Article 98 of the Constitution stipulates that: "judges of the regular and sharia courts shall be appointed and dismissed by a Royal Decree in accordance with the provisions of the law." The relevant law is the LIJ and precisely the provision of Article 25 thereof which provides that: "a judge may not be dismissed, lose his job, or be demoted except by a decision from the Judicial Council, and a Royal Decree."

Accordingly, a Jordanian judge may not be lawfully dismissed by the Council of Ministers or even by the King. That is true, because Article 98 of the Constitution provides that: "judges shall be ...dismissed by a Royal Decree in accordance with the provisions of the law." The latter requires both a decision by the Judicial Council and a subsequent Royal Decree too. Dismissal of judges perpetrated in any other manner could thus be regarded as an arbitrary and an unlawful dismissal.

However, what seems to constitute a threat to the Jordanian judges in this context, is the powers conferred upon the Martial Law Governor-General by the Emergency Law. In practice, when the Government desires the removal of a judge from office, it avoids the provisions of the LIJ and the Judicial Council, by resorting to the powers of the Martial Law Governor-General, who dismisses judges by irreversible administrative decision.

The following case may illustrate this practice. On the second of May 1974, the then judge of the Court of the Municipality of the Capital (Amman), Judge K. Abu-Qurh, sent a telegram of support to President Gaddafi, stating the following:

> "To President Gaddafi and his comrades, members of the Revolutionary Council, Tripoli, Libya.
>
> On the occasion of the false allegations made by those corrupted amongst the Arab leaders, I would like to express my support for your endeavour towards establishing Islam as a religion and a system of government, and to spreading its banner throughout the whole world. Muslims shall support you wherever they are, and you should not be intimidated by those cowards who fear to voice the calling of God, and you will be the victorious. I declare myself a soldier and offer all I possess to the service of goals most noble for which you too have devoted yourselves. I am under your command at any time."(63)

Consequently, Judge Abu-Qurah was dismissed by the Prime Minister acting as the Martial Law Governor-General in accordance with Article 3 of the instructions of the Martial Law Administration for the Government Officials of 1970. When the said judge appealed to the HCJ, the latter rejected the appeal due to lack of jurisdiction, on the grounds that Article 5 of the Instructions of Martial Administration of 1967 prohibits the Court from examining the decisions of Martial Law authorities.(64)

4 — INTERVENTION WITH THE JUDICIAL FUNCTION.

The principle of non-intervention in the judicial function is an essential element of the independence of the judiciary. The role of the independent judiciary would be diminished if the judicial function itself were not protected against invasion from other branches of governzment. Indeed, independence of the judges is not an end, required for itself, but rather a guarantee necessitated by the nature

of the judicial function, and the role judges are to play in the community. Members of both the executive and the legislature lack such a necessary guarantee and therefore they must not be allowed to perform a judicial function.

In this section, we shall briefly discuss some form of intervention in the judicial function by the executive and the legislature in Jordan.

A - INTERVENTION BY THE EXECUTIVE.

There are numerous forms and methods by which the administration can interfere with the judicial function. It may attempt to interfere in the judicial proceedings, or to influence the judges or the parties personally.

1) Interference with Judicial Proceeding.

- Criminal Cases:

It has already been mentioned that the power to investigate criminal cases is vested in the public prosecution.(85) We have also mentioned that members of the latter are subject to the administrative supervision of the Minister of Justice.(86) That is true with regard to the administrative affairs and the power to prosecute (*sultat al-etteiham*), but certainly not the power to investigate (*sultat al-Tahqeeq*), which is a judicial power derived directly from the law.(87) When performing this function, members of the public prosecution form a part of the judiciary, to whom the administration may not issue orders or instructions with regard to their judicial duties. Nonetheless, the executive seems very keen to interfere at this stage. As an example, one may re-

fer to Case No. 1047/73, on the 15th August 1973, the public prosecutor of Amman arrested Mr. X on the charge of defalcation (*E-Khtelass*), contrary to the provision of Article 173(2) of the Criminal Code and Article 202 of the Company Law of 1964. The Court of First Instance refused to release him on bail, when it was applied for on the same day. On the next day (16.8.1973), the *Mudeer al-Am'n al-A'am* (Police Commissioner) ordered his release and let him free. According to Judge Kilany, that was the first time in the legal history of Jordan, that a judicially arrested person was set free by the administration, regardless of all judicial proceedings.(88)

Another form of intervention involving criminal proceedings in Jordan is that when the administration is not satisfied with the findings of the court, the former disregards the judicial decisions and takes the initiative itself by trying the person again. In most cases, this has led to double jeopardy, and resulted in persons being tried twice for the same offence. As examples, we have already mentioned Case No. 74/64, where Mrs. X. was acquitted by the court of Jerusalem, from the alleged charge, but re-tried and convicted by the Administrative Governor.(89)

- Civil Cases.

In civil cases also, the executive may attempt to influence the court during the proceedings, or by partial or non-execution of the court's decision. Despite the explicit constitutional and other provisions forbidding the administration from interfering with the judicial function, the Ministers of Justice in most Arab

countries always tend to interfere in the judicial proceedings of some cases.

As far as Jordan is concerned, the case of Mr. S. Masadeh is an outstanding example of such practices. As a Minister of Justice, Mr. Masadeh wrote to the president of the Court of First Instance of Amman, requesting him to send the file of Case No. 807/73, which was a civil case pending before the court, to him for inspection. The president rejected the request and in his letter to the Minister he explained the seriousness of such practices and the threat it poses to the independence of the judiciary. The letter stated:

> "...inspection of pending cases entails subjection of judicial proceedings and decisions to the supervision of the administration, a situation which cannot be tolerated under any circumstances. Independence of the judiciary is a sacred principle, protected by the Constitution and the LIJ itself. One of the fundamental elements of the principle of the independence of the judiciary is the non-intervention with the judicial proceedings and decisions pending trial, by anybody whatsoever."(90)

Another example, of such practice is, the letter of the Jordanian Minister of Justice to the president of the Court of Appeal in Amman, requesting the acceptance of some enclosed documents, as evidence for the benefit of one of the parties in an appeal pending before the court.(91)

The court, however, blocked the intervention and rejected the Minister's request.(92) It is needless to say that the above practices do not only violate the Constitution but also the LIJ and the law of the inspection of the regular courts which stipulates that:

> "The Inspector (the Judicial Inspector) may scrutinize the decided cases to examine the manner in which the provisions of the laws are being applied thereto; especially the Criminal and Civil Procedure Codes and specifically the provisions of Article 237 of the former

> and 186 of the latter which regulate the conditions, and the contents and reasonings of judicial decisions."[93]

Obviously, the power to inspect the courts is vested in the Judicial Inspector alone, and not in the Minister or anybody else. It applies to the decided cases only and for specified purposes. Pending cases, therefore, must not be inspected, scrutinized or interfered with in any form.

Administrative Cases.

The area of administrative cases is a fertile field for interference from the executive and is an area where the individual comes to the court to challenge an administrative action which has unlawfully and detrimentally affected his rights and freedoms. In some Third World countries, and in Arab countries in particular, the administration has proved to be highly sensitive to this type of judicial proceedings. For it has not yet been used to witness the reversal of its decision by an impartial body. It is not surprising thus to observe the administration seeking every possible way to influence the administrative courts or to intervene in their proceedings.

Besides, intervention in the proceedings before administrative courts, the administration has shown some reluctance in executing some of the unfavourable decisions. This may take the form of delayed or even non-execution of the court's judgement at all.

A few examples may illustrate such reluctance: In Case No. 77/66., the HCJ denounced the decision of the Council of Ministers, by which the latter dismissed Mr. M.S. Safwan from his job as an engineer working for the Ministry of Public Works.

The Minister refused to reinstate the said engineer in accordance with the court's decision.(94)

In another case on 3.7.1973, the Martial Law Governor-General ordered the closure of all snooker and amusement halls in Jordan, revocation of their licenses, expropriation and destruction of all the machines. The owners of the said places complained before the HCJ which readily denounced the order and described it as an arbitrary measure.(95) The Administration refused to execute the court's judgement and ordered the destruction of the said machines. As a result, the owners complained to the ordinary courts which were powerless to protect their right to continue with what had been their legally licensed businesses. In its judgement, the Supreme Court stated that the Administration had committed a gross violation of the law by refusing to execute a final judicial decision, yet it could do no more than order the payment of compensation.(96)

In other cases, the administration just defers the execution of the judgement until it is too late, without declaring its intention of non-execution. In the Mango Company Case, the company filed a complaint with the HCJ against the Minister of the Economy and the Director of Supplies (*Modeer al-Tamween*) for refusal to issue a license to the said company to import *Nasser* cars from *Al-Nasser* Car Manufacturing, Egypt, in accordance with a contract signed by the two companies on the 13th May, 1971. Although the court had declared the administrative decision void, the Administration did not issue the license until several months later when it was certain that the contract had run out and the license was thus useless.(97)

2) Exertion of Influence on the Judges.

Another form of intervention by the executive in the judicial function which may pose a considerable threat to the independence of the judiciary is the exertion of pressure on the judges themselves in order to make them more obedient and malleable instruments in the hands of the executive. In order to enable them to protect the rights and freedoms of the individual, the law should protect the judges from being abused.

However, it seems certain that despite all guarantees that may be provided for by law, the Administration will always be capable of coercing the judges to make them adopt a given point of view or to perform a desirable role.

As far as Jordan is concerned, the following examples may explain some of these practices.

In 1974, The Minister of Justice requested the Judicial Council to remove the president of the Court of First Instance of Amman, and described him as being a danger to public security. He also threatened that the Government would invoke the Martial Law Regulations if the Minister's wishes were not granted. In 1975, the Minister of Justice threatened to pension the Chief of Public Prosecution and the Attorney-General if they did not withdraw the protest which they had submitted to the Government concerning the arrest of a lawyer by the traffic police. Furthermore, the same Minister sent a letter implying some threat to the president of the HCJ because the court had previously revised a decision by the Council of Ministers.(98)

According to a senior Jordanian judge, the letter aroused a great deal of displeasure and anger among judges and lawyers in general because it constituted a gross violation of the independence of the

judiciary. The crisis was solved by the resignation of the Minister who had to leave his office upon the request of the Prime Minister. The first thing the new Minister did was to apologize for the deeds of his predecessor.

B. INTERVENTION BY THE LEGISLATURE.

It has already been mentioned that the Doctrine of Separation of Powers requires the distribution of function between the main three branches of government and that each branch should exercise its function independently without invading the jurisdiction of other branches of the government. It was also made clear that independence of the judiciary requires the latter to stand on an equal footing with the other two branches and that they must not interfere with the judicial function. Yet, as far as the legislature is concerned, experience tells us that in many countries, the legislative body sometimes assumes a superior position to the other two branches, and seeks to intervene with them in many ways. There are various ways in which the legislature can intervene, all of which could effect the degree of independence that the judiciary enjoys and consequently, impairs its ability to be a vindicator of the individual's rights and freedoms.

It is true that the parliament as a political body lacks the privileges and the independence which the judiciary enjoys. As politicians, members of parliament cannot judge controversial issues without including political considerations. Thus, if members of parliament are to exercise any judicial function, this would simply mean the deprivation of those tried by them from the right to be tried by an impartial and an independent body. One may argue therefore, that parliament should not be allowed to exercise any judicial power, even

if it is restricted to the trial of its members and Ministers or any other specific group of people.

In Jordan, the Constitution does allow the Parliament to exercise a judicial function, though it is a limited one. The House of Representatives impeaches Ministers by a two-thirds majority vote and the Senate tries them under Article 58.(99)

Another form of intervention is when the legislature intervenes with the handling of cases by the courts, whether by discussing those cases in the Parliament or when the latter introduces a new law or amended an existing law solely to influence the outcome of a case still pending before a court. Parliament thus must abstain from discussing cases which for the time being are still being examined by a court of law. It also should not change the law in order to influence the court's decision in any particular case.

A few examples may explain the point in this argument with regard to the Jordanian practice. In Case No. 1563/73, before the Court of First Instance of Amman, Mr. Mahadeen claimed the right of pre-emption with regard to a piece of land in Amman, from the new owner Mr. Z. Kamal, to whom the land had been signed over by a society relating to the Armed Forces. In order to prevent this, the legislature amended the Law of Immovable Property by Law No.31 of 1974, Article 2, of which prohibits the exercise of the right of pre-emption when the property is being transferred from a housing society to one of its members, and specifically, stated that this provision applies to all pending cases "and those that have not received final judgements."

Again, in 1975, the Jordanian legislature amended the Labour Code, (Law No. 21 of 1960) by Law No. 71/75, which provides that, claims relating to the wages of overtime work and the time of leave and offi-

cial holidays shall be inadmissible after three months from the date they become due, and that this provision shall apply to all claims submitted to courts before the publication of this law and have not yet been decided by a final judgement. Obviously, the purpose of this amendment was to destroy several claims brought to courts by workers of the Natural Resources Authority, seeking payment of overtime wages, in lieu of leave and official holidays.

Another example is Case No. 48/61, before the HCJ, where the latter has declared the decision of the Council of Ministers void hence it does not comply with the requirements of Article 9(b) of the law of Civil Aviation.(100) The said Article requires among other things, the Council of Minsters to state the specific reasons for its decision when terminating the registration of any Airline Company. In this case, the Council of Ministers terminated the registration of the Jordanian International Airlines Company, and disallowed it to carry on with commercial transportation under the Jordanian Flag, and other privileges.

When the decision of the Council was declared void for the above reason, the legislature intervened and amended the law to allow the Council of Ministers to terminate the registration without stating any reasons for its decision, in order to make the court ruling useless.(101)

Establishment of special courts or tribunals is another serious form of intervention with the judicial function by the legislature. By doing so, the legislature minimizes the effectiveness of the independence of the judiciary to a considerable extent. If the legislature is at liberty to establish special tribunals to try particular types of cases, or individuals, independent courts (regular) would

lose a great deal of their general jurisdiction to those tribunals; and become powerless to protect the rights and freedoms of the individual from the unlawful actions of the State. This seems to be the case for most of the Arab countries, where a substantial part of the jurisdiction of the 'independent' courts has been transferred to special courts and tribunals. Indeed, the latter lack any form of independence and in most cases, they are constituted of army personnel or government officials who lack independence not to mention legal qualifications and training.

Special courts are usually not required to observe the procedural rules observed by ordinary courts, and their decisions are to be submitted to an administrative authority who may accept it as it comes, amend or denounce it.

As a senior judge once remarked: "it is because of the spread of these courts in the Arab World, that the judiciary has failed to perform its role as a vindicator of individual rights and freedoms." He added that these courts have executed many political thinkers simply because they could not agree with the rulers, and have imprisoned far many more innocent people because of their beliefs. If freedom and rights were ever to be restored in practice, such courts should be eliminated.

In Jordan, we have already mentioned that the Constitution permits the establishment of special courts and tribunals, and that there are several types of special courts in existence in Jordan. It is also true that their jurisdiction includes some issues relating to human rights and fundamental freedoms.[102]

— Reorganization of the Judiciary.

As any other branch of government, the judiciary needs to be updated and reorganized every so often, whenever the need arises. In some Arab countries, this fact has been abused and made into a traditional excuse for intervention with the judicial branch. What usually happens in practice is that a new piece of legislation is introduced by the legislature providing the executive with temporary powers to dismiss all undesirable judges, in the name of reorganization and updating of the judiciary. This task (reorganising and updating) should neither be entrusted to the legislature nor the executive but indeed should be left to an independent body within the Judiciary itself.

Such interventions have proved to pose a serious threat to the independence of the judiciary, and in many cases have resulted in what is so-called 'massacre of judges'.(103) One can of course imagine the degree of independence that a threatened judge would enjoy.

In Jordan, four of these reform laws have been introduced so far under the present Constitution. The first was, Law No. 19 of 1955, Article 46 of which provided for the establishment of special committee under the chairmanship of the Minister of Justice. The Committee was charged with the task of reforming the judicial organization within six months of its appointments, and was provided with absolute powers regardless of any other legislation. Its decisions were made final and unchangeable before any court of law.(104) Seven years later, the law of the Reformation of the Machinery of the Government (which includes the judiciary) was introduced and empowered the Council of Ministers to dismiss any public officer or government employee if the Council was satisfied that he was no longer desirable or

suitable for the post. Decisions taken under this law were also made final and irreversible in any sense whatsoever.(105)

Again, in 1970, a provisional law was issued by the Council of Ministers for the reformation of the judiciary. Articles 3 and 4 guaranteed the Council of Ministers absolute powers to dismiss within four months any 'unsuitable judge' and as usual it declared the Council's decisions to be final and irreversible.

Finally, and within less than two years the present LIJ,(106) was introduced. Article 44 thereof provides that:

> "Despite the provisions of this law or any other legislation, and regardless of the provisions relating to the appointment, dismissal discipline and transfer of judges, the Council of Ministers shall upon the recommendation of the Minister (Minister of Justice), dismiss any judge or transfer him to another department within one month of the entry into force of this law."(107)

According to a senior Jordanian judge, the aim of the above provision was to dismiss a large number of independent judges — an action which has profoundly shaken the image of justice in the public consciousness, and reduced the confidence of the people in the judiciary.(108) He also added that; "it has to be explicitly admitted that the oppression which the judiciary has experienced over such a short period of time has entailed more internal complications in the judiciary, and this has been reflected in its performance in the administration of justice. It has also jeopardized the independence of the judiciary, by making the executive appear as a mere instrument of oppression of the Judiciary, to the extent that it threatens justice itself with the most devastating danger.(109)

NOTES. (V.)

(1) See Art. 2 of both Covenants

(2) Ibid.

(3) See the works of Alexander Hamilton, The Federalist. No. 78, cited in "The Right to Access to Court", F. At'tar, op. cit., p. 625

(4) John Marshall, from "An Address to the Virginia State Convention of 1929-30", quoted in O'Donaghue V. United States, 289 U.S. 516, 532 (1932).

(5) See *De l'Esprit des lois*, op. cit., Book XI, Chapter 6

(6) Arts. 97-110.

(7) Arts. 24-27, Titled: 'Powers of the State-General Provisions'.

(8) Art. 24.

(9) The National Assembly consists of The House of Representatives and the Senates.

(10) Published in JOG No. 2383 of 1/10/1972, p. 1827. This Law has replaced the previous Law No. 19 of 1955, published in JOG No. 1224 of 16/4/55, p. 341

(10a) See UN Doc. No. CCPR/C/SR.103, p.9, (1978).

(11) See Al-Suyuti, The History of the Caliphs, Cairo, 1958, p. 266;
- Ibn Qudamah, al-Mughni on Hanbali Jurisprudence, Cairo, 2nd. ed., vol. 9, p. 45;
- Al-Mawardi, A Treatise on Islamic Jurisprudence, ed. by M.H. al-Sarhan, Baghdad, 1971, p. 145; and Constitutional Rules, ed. by Maximilian Enger, 1853, p. 133.

(12) the Ottoman judicial system was based on the traditional Islamic system, the former remained effective in Jordan until it was gradually replaced by the modern Judicial System.

(13) Art. 27.

(14) Art. 97.

(15) Art.99, The Courts shall be divided into three categories:
1 - Regular Courts
2 - Religious Courts
3 - Special Courts

(16) These are graduates of Sharia Schools (Islamic Law Schools) selected by the Sharia Judicial council and trained under the supervision of the *qadi al-qudha* (the Sharia Chief Justice).

(17) Which is the established school of Islamic Jurisprudence in Jordan.

(18) Art. 108. Among the recognized religious communities are:
- Roman Orthodox
- Roman Catholic
- The Armenians
- Latins
- Anglicans

(19) See the Law of the Religious Communities Law No. 2 of 1938

(20) A former Deputy Attorney-General of Jordan 1969-1973

(21) See A. Al-Halasa, The Basis of the Legislation and the Judicial System in Jordan, Arab League, Cairo, 1971, pp. 121-4, hereinafter referred to as Halasa.

(22) See JOG No. 1396 of 1/9/1958, p.722.

(23) The supervising authority may sanction, alter, amend or disregard the judgement of the court, as may be deemed appropriate.

(24) For a full study of these courts and their role in Jordan see Judge F. Kilany, Special Courts, op. cit., pp. 70-133.

(24a) See below Chapter VII.

(25) In the official translation the word '*nedhmyh*', translated as 'civil courts'. This is a manifestly incorrect and misleading translation and therefore, we prefer to use the term 'regular' instead.

(26) Law No. 26 of 1952, published in JOG No. 1105, 16/4/1952.

(27) although the title seems to have been adopted from the British System, the function and the status of the Jordanian Judges are substantially different from that of the Justices of Peace in England.

(28) See Art. 3 of of the Law of the Courts of the Peace, Law No. 15 of 1952, as amended by Law No. 33 of 1968.

(29) Art. 5 of the Law of the Courts of the Peace as amended by Law No. 23 of 1960.

(30) Art. 136(3)

(31) See Art. 4 of the Law of the Formation of the Regular Courts.

(32) Ibid.

(33) Ibid. Art.5.

(34) Ibid. para. (2).

(35) Ibid. para. (5).

(36) See the Law of the Formation of the Regular Courts, Art. 6, 7, and 8.

(37) Civil Procedure Code, Arts. 205-232.

(38) In this case it consists of a President and two Justices only.

(39) The Law of the Formation of the Regular Courts, Art. 9(1).

(39a) Above Note 37, see Art. 215-220.

(40) See below p. 442.

(41) para. (1).

(42) para. (2).

(43) para. (3).

(44) Art. 15 of the Law of the Formation of the Regular Courts.

(45) Ibid.

(46) Halasa, op. cit., p. 96.

(47) According to Art. 3 of the Law of the Independence of the Judiciary, the terms 'judiciary', 'judge', 'judges', includes the President and the Justices of the Supreme Court, the chief and members of the Public Prosecution.

(48) In the past, *Ashaire qadhies* (tribal judges) used to charge *'Rezga'* (fees) to be paid by the convicted party. The amount of the *rezga* was decided by the judge himself, according to the importance of the case.

(49) See Art. 15 of the Court Fees Regulations, Regulation No. 4 of 1952, as amended by Regulation No. 3 of 1985.

(50) See above pp. 379-381.

(51) See above, The Right to Public Trial, p. 322.

(51a) See in particular the remarks of Mr. Tarnopolsky, UN Doc. No. CCPR/C/SR.332, p. 12 (1981).

(51b) See UN Doc. No. CCPR/C/1/Add.56, (1982).

(52) Art. 97.

(53) See para. (1).

(54) Law No. 19 of 1955, published in JOG No. 1224 of 16/4/1955, which has been replaced by the present law of the Independence

of the Judiciary, Law No. 49 of 1972, published in the JOG. No. 2383, of 1.10. 1972.

(55) Hereinafter referred to as LIJ.

(56) Under the previous law, this seat was occupied by the senior member of the Supreme Court. According to some Jordanian lawyers this amendment is intended to give the Minister of Justice a say in the formation of the Judicial Council, and to enable him to appoint a member who is most likely to obey his instruction.
See F. Kilany, Independence, op. cit., p. 116.

(57) Ibid. p. 149

(58) Case No. 77/74, JBR (1974), pp. 1157-63.

(59) Ibid. p. 1155.

(60) Ibid. p. 1162.

(61) See Art. 10 of the LIJ.

(62) LIJ, Art. 1.

(63) LIJ, Art. 6. Whereas there was no Law School in Jordan before 1976, most of the Jordanian judges have received their law degrees from other Arab countries, mainly Egypt, Syria and Iraq. Few Jordanian judges have received law degrees or legal training in the West, and even less in the East. Apparently this has influenced the legal thinking and affected their performance to the extent that it is not unusual for a Jordanian court to follow the track of an Egyptian one or almost to copy its judgement. Quotations from Egyptian legal textbooks are quite common in the rulings of the Jordanian court. In fact, the majority of the Jordanian judges and lawyers in general have graduated from Egyptian law schools. Over the years, this has resulted into a distinctive Egyptian colouring of the Jordanian legal system.

(64) Para. (2).

(65) Three of the four principle schools of Islamic jurisprudence are of the opinion that women should not assume the position of a judge in an Islamic society. Abu Hanifa, the fourth school, dissented and submitted that a woman could lawfully be appointed as a judge but with limited jurisdiction. According to this opinion, her jurisdiction is limited to those matters in which the testimony of a female witness is acceptable. In other words, she may not assume criminal jurisdiction (Howdood).

(66) In Jordan, the judiciary is funded from the national budget via the Ministry of Justice.

(67) Syria for instance, see Art. 97 of the Law of Judicial Authority of 1961.

(68) Egypt, The Law of the Judicial Authority of 1969. See also: Lebanon, The Judiciary Act of 1973.

(69) The Law of the Judicial Authority of 1972.

(70) In 1977, Art.21 was amended by Law No. 14 of 1977, published in the JOG. No.2695 of 16/4/1977, p. 40. Paras. (b and c) were abolished, and the said Art. was rearranged to read as follows:
"Judges shall be transferred from one post to another, by a decision from the Judicial Council and a Royal Decree."

(71) Art. 23, para. (1)

(72) Ibid. para. (2)

(73) Ibid. para. (3)

(74) Art. 29, "...if not convicted, the judge shall be paid back all the deducted amounts."

(75) "...if no action has been brought before the Council within 15 days of the Minister's request, the council itself may decide to initiate the proceedings by a reasoned decision."
See Art. 30.

(76) Art. 31.

(77) Art. 32.

(78) Art. 33.

(79) Art. 36.

(80) "Since the Act of Settlement, 1700, judges of the Superior English Courts have held ..... during good behaviour, and not at the pleasure of the Executive." See Wade and Phillips, Constitutional and Administrative Law, 9th ed., by A.W. Bradley, 1977. p. 50.

(81) See Chapter 2.

(82) See the Constitution of Egypt of 1971, Art.168, and the Law of the Judicial Authority of 1972, Art. 67.
- Syria, the Constitution of 1973, Art. 136; and the Law of the Judicial Authority of 1974, Art. 92
- Kuwait, the Constitution of 1962, Art. 163.

(83) As quoted by Judge Kilany, Independence, op. cit., p. 139. Translated by the present author.

(84) Case No. 41/74, JBR (1974) p. 748.

(85) See above p.383.

(86) See above p.382.

(87) The Criminal Procedures Code, Art. 59-69.

(88) Independence, op. cit., p. 81.

(89) See above p.152 and Cases No. 12/55 and 81/69 on p.153.

(90) Letter No. (B/A/5/1325) dated 19/7/1973, as quoted by Judge F. Kilany, Independence, op. cit., p. 91 (Translated from Arabic by the present writer).

(91) Letter No. (7/12/6439) dated 10/11/1974.

(92) In his reply, the President of the Court of Appeal stated: "...regarding your letter No. 7/12/6439, dated 10/11/1974, ... Your Excellency knows that the court cannot consider any evidence in a pending trial unless submitted by the party thereto. Thus, ...hereby send the enclosed evidence to you."

(93) Art. 3(c) of the Law of Inspection of the Regular Courts. Law No.105 of 1965.

(94) Case No. 77/66, JBR (1966), p. 387. Consequently the engineer sued the Ministry for damages in Civil Courts and submitted application No. 269/68 to the Court of First Instance in Amman. The latter ordered the full payment of all due salaries and bonuses from the date of his dismissal, but the decision of the HCJ was never been executed.

(95) Case No. 78/73, JBR (1973), p. 147.

(96) Case No. 304/73, JBR (1974), p. 212.

(97) Case No. 81/71, JBR (1971), p. 543.

(98) Letter No. (7/12/2446), dated 23/5/1976.

(99) "Ministers shall be tried by a High Council for offences which may be attributed to them in the course of the performance of their duties." Art.57 provides that: "the High Council for the trial of Ministers shall consist of the Speaker of the Senate as President and eight members, three of whom shall be selected by ballot by the Senate from among its members..."

(100) Law No. 11 of 1959.

(101) Case No. 46/61, JBR. (1961) p. 455.

(102) See above p.377.

(103) In 1969, the Egyptian Legislature introduced Laws No. 81, 82, 83, and 84 of 1969, known as the Judicial Reform Laws, under

which 189 Judges were dismissed amongst whom was the President of the Highest Court in Egypt and fourteen other Justices of the Court of Cassation.

(104) See Art. 46.

(105) Law No. 4 of 1962, Art. 8 of the same law gave a period of three months for the Council of Ministers to use those powers.

(106) Law No. 49 of 1972.

(107) Art. 44(1).

(108) See F. Kilany, Independence, op. cit., p. 307

(109) Ibid.

CHAPTER VI.

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION.

Speaking of protection and legal safeguards for human rights implies that a threat to these rights exists. Indeed, human rights are always in danger of being violated, and upon closer investigation it immediately becomes apparent that the challenge comes from two main sources. The individual's rights may be violated by fellow private individuals in the course of their normal daily life on the one hand and by the public administration in its official capacity on the other.

Protection against the first type of violation does not usually raise great difficulties, for a man may always have recourse to a court to prevent his fellow private individual from violating his rights or otherwise to compel him to make reparation. Effective judicial protection should be made available with regard to the second type of violations, i.e. violations of the individual's rights by the public administration. It is thus within the role of the constitution and the domestic legislature to provide such protection by enabling the private individual to seek protection by the courts when his rights are being violated by public authorities. It is to this very safeguard that we intend to address ourselves in this chapter so that we may be able to assess the performance of the Jordanian legislature in providing such a protection. Several questions may thus be put forward, such as: under the present law of Jordan do Jordanian courts have the jurisdiction to review the validity of administrative action? Could the private citizen, who claims that his declared rights and

freedoms are being or about to be violated by the public authorities, resort to the courts to prevent or to remedy such violations? If not, would Jordan be in breach of its legal obligations under the Covenants?

In order to answer the above questions, the following points ought to be considered:

1 - Judicial review of administrative action as a legal safeguard.

2 - Judicial review of administrative action under the law of Jordan (its availability and scope)

3 - Restrictions on the right to judicial review of administrative action in Jordan.

4 - Constitutionality of the laws abridging judicial review of administrative actions.

- Attitude of the Judiciary
- Attitude of Jordanian lawyers.

5 - Assessment.

1. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION AS A LEGAL SAFEGUARD.

In regulated modern society, man is not allowed to take the law into his own hands and to defend his rights and freedom by physical force.(1) One of the striking features of our contemporary society is the formidable and complicated network of administrative departments, agencies and enterprises; and the ever expanding playground for administrative action. The administration appears to be capable of monitoring almost every movement of the individual's conduct, and of interfering even with the most intimate aspects of his life. Modern administration is a monstrous creature,(2) who may be inclined to

encroach upon the individual's rights and freedoms, should they be an obstacle to the official views or public policies. It would be unwise and unfair to free its hands to do what it deems necessary, without being accountable to an independent court of law, empowered to assess the legality of its actions.

One may agree with S.A. de Smith, that judicial review of administrative action is 'sporadic' and 'peripheral' and that the task of the administration is a cumbersome one.(3) Nonetheless, one may argue against the presumption that:

> "...if their every act or decision were to be reviewable on unrestricted grounds by an independent judicial body the business of administration could be brought to a standstill";

and also against the conclusion based thereupon, i.e.

> "the prospect of judicial relief cannot be held out to every person whose interests may be adversely affected by administrative action."(4)

If the writer was objecting to judicial review being on 'unrestricted grounds', the presumption goes too far, because nobody has argued that judicial review should be freed of boundaries. Indeed, judicial review is circumscribed by the boundaries of the principle of legality, within which the court could not reverse the action of the administration.(5) When the latter steps out of these boundaries the court may and indeed should review the administrative action.(6) To insist that, in order not to bring the business of administration to a 'standstill', the latter should be allowed to step outside the boundaries of legality whenever administrative convenience so requires, is to deny the rule of law and the fundamentals of lawful government.(7) It is essential thus, that personal liberty and administrative convenience must not be weighed on the scale against each other. If the

objection were directed against the review being by an 'independent judicial body', the presumption would be far more extreme. It would be the equivalent of saying that, in order to enable the administration to function, the judiciary must be made dependent upon and subjugated to it. In this case, judicial review would become merely a hopeless ritual,[8] which could not impair the continuity of the administrative function. Encroachment upon the independence of the judiciary means, firstly the destruction of the doctrine of separation of powers, and secondly the revocation of the role of the judiciary as the vindicator of human rights.[9]

The conclusion, that in order not to bring the business of the administration to a 'standstill', judicial relief cannot be guaranteed to every person whose interests may be adversely affected by an administrative action,[10] seems hard to justify because judicial review only blocks unlawful actions, and presumably not all administrative businesses are unlawful. Thus, as far as lawful actions are concerned, the administration need not fear judicial review, even though when those actions may adversely affect the rights and freedoms of somebody. One should always bear in mind that the role of the courts in this respect is to serve only as a check on the legality of the actions of the administrative organs of government to guard against unlawful actions which violate the recognized rights of the individual. The role of the judge is to confine the administrator within the boundaries of legality, not to determine for himself the wisdom of the administrative action in question. The judicial function is thus one of mere control. Judicial review is not designated to impede the administration from performing its lawful activities. It serves as a safety-catch on extension of the

administrative arm beyond its lawfully granted authority and on the excessive assumption of power by the executive. In the words of Prof. L.L. Jaffe:

> "only the frightened, timid, unenterprising administrator may hide behind judicial negative. But the positive and conscientious administrator will be freed from an obsessive preoccupation with the limits of his power. And, since there is a form in which his alleged excesses may be adjudicated, he has a ready and persuasive answer to claims of usurpation."<11>

Prof. L.L. Jaffe does not seem to agree that judicial review could be prejudicial to the lawful discharge of administrative activities. On the contrary he stated that:

> "...its availability is a constant reminder to the administrator and a constant source of assurance and security to the citizen."<12>

He concluded that an individual whose interest is acutely and immediately affected by an administrative action has a right to secure a judicial determination of its validity.<13>

Lord Denning also does not seem to follow the other line of thinking. In his opinion, when a private individual claims that his private rights have been interfered with, he is entitled to

> "come to the court and ask that his private right be protected... If the law is to be obeyed — and justice be done - the court must allow a private individual himself to bring an action against the offender in those cases where his private rights and interests are specially affected by the breach."<14>

Judicial review of administrative action is an essential safeguard for the practical enjoyment of the modern international standards of human rights at the domestic level. Without this basic element, national government and administrations would be free to violate the minimum international standards, though they are enacted into municipal laws, since the compatibility of their actions with the

municipal laws, could never be examined by the courts. If the declared rights are to be respected, national constitutions and laws must enable the person whose rights and freedoms have been adversely affected by an administrative action, to challenge the legality of that action before an independent court of law, and not merely to register a complaint with the department concerned. Article 2(3) of the Political Covenant stipulates that:

> "each state party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial administrative or legislative authorities, or by any other competent authority provided by the legal system of the state, and to develop possibilities of judicial remedy."

The text of this paragraph may give rise to the question as to whether states parties are really under legal obligation to provide judicial review of administrative action or not. Some may argue that there is no such obligation and that if there is, it would be a general one and would not necessarily include judicial review of administrative action, because sub-paragraph (b) speaks of:

> "competent judicial, administrative or legislative authorities, or any competent authority provided by the legal system of the state."

In other words, review by an administrative body (government department) would suffice. Although this argument seems correct on the surface, it does not withstand critical legal analysis. First of all, it should be remembered that the 'loose wording' and the evasion of direct reference to judicial review of administrative action, was a technique intended to encourage states to sign and ratify the Cov-

enant. (However, one should credit the drafters for reaching the same end indirectly.)

Secondly, the placement of the judicial remedy on the top of the remedies which may be introduced, and the emphasis in the same paragraph on the development of the possibilities of judicial remedy ("Each state party.. undertakes..to develop the possibilities of judicial remedy.") leaves little doubt that states are under legal obligation to provide judicial protection to the recognized rights.

As to judicial review of administrative action, sub-paragraph (a) explicitly included administrative action among those for which an effective remedy should be made available; "to ensure that any person whose rights ...are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

Thirdly, the Covenant requires the introduction of an 'effective remedy' and the most lawful and effective way to challenge illegal administrative actions is through judicial scrutiny by an independent court of law.

Finally and most importantly, the second sentence of paragraph (1) of Article 14 provides that:

> "In 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."

Although Article 14, deals with proceedural guarantees in criminal cases, the provision of this sentence is clearly of wider application and could be interpreted as guaranteeing a right to judicial review of administrative action. It refers to "a suit at law" in general which

undoubtedly includes suits brought by individuals against the official authorities.

Having agreed that states are under legal obligation to introduce a system of judicial review of administrative actions, we shall now turn to investigating the availability of such a remedy in the legal system of Jordan. We shall be focusing on the relevant constitutional and statutory provisions, followed by an analysis of the case law.

2. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION UNDER THE LAW OF JORDAN.

This is an area in the law of Jordan which clearly reflects the contrast in its legal background; (the Islamic tradition, the English legal system and the French law). As far as the availability and the scope of judicial review of administrative action is concerned, the distinction must be drawn between two stages.

The first era covers the period from 1922 until 1951/2. The second era covers the developments under the present Constitution since the reforms of 1951/2.

A - JUDICIAL REVIEW OF ADMINISTRATIVE ACTION BEFORE 1951/2.

Until the end of the First World War, both Trans-Jordan and the West Bank formed part of the Ottoman empire; and consequently the Ottoman judicial system was implemented in the two provinces. With some minor exceptions the Ottoman system was based on the traditional Islamic legal theory.(15) Under the latter the administration and the sovereign in person are answerable to the ordinary courts.(16) Islamic law does not recognise the notion of 'immunity of the Crown' or of 'the sovereign' as understood and implemented in the West, especially in England and the United States.(17) The Caliph personally, his officials and the administration in general may sue and be sued in ordinary courts just like ordinary individuals.(18) Regular courts were thus empowered to pronounce upon all cases brought by or against the government,(19) except for those by virtue of special law made the jurisdiction of a special court.(20)

The same judicial system was retained after the establishment of Trans-Jordan under the British mandate. The laws of the formation of the regular courts of 1922 and of 1928 provided that:

"the jurisdiction of the Court of Appeal and the Courts of First Instance shall be defined by the law in force at the time this law comes into force" i.e., the old Ottoman law of the formation of the regular courts; and therefore the courts continued to entertain all cases brought by and against the Administration. Actions were to be filed against the head of the department concerned, who may be represented by one of the solicitors of the Public Treasury in accordance with the Ottoman law of 1884 as amended in 1904.

An attempt to create a separate administrative court in Jordan was short-lived. In 1923 the *Majlis al-Shoora* (the Consultation Council) which was a mixed judicial and administrative body chaired by the Chief Justice was established. It consisted of some judges and high-ranking administrative officers. Its principal jurisdiction was to review the legality of the decisions of the local administrative councils, and other supervisory jurisdictions. Local administrative councils were never established and the council itself was eventually abolished in 1926.(21)

When the first Constitution of Jordan was enacted in 1928, it followed the same rule as in the Islamic tradition and the Ottoman law and subjected the Administration and private individuals to the same law as applied by the regular courts. It stipulated that: "Civil courts shall have jurisdiction over all persons in Trans-Jordan... including civil cases brought by or against the government."(22) The same Article was also re-introduced in the Constitution of 1946.(23) The only change was thus that the courts derived their jurisdiction

directly from the Constitution and not from the Ottoman law or a statute .

The major development at this stage was brought about by the Law of the Government Proceedings of 1935 (*Qanoon Da'awa al-Huokomh*) which was based on the British practice.[24] Notwithstanding the provisions of the Constitution of 1928, this law had severely restricted the accountability of the Government to the courts.

Article 3 of the law of 1935 provided that:

> "The courts shall not entertain any action against the Government except in the following cases;
> a - claims for the recovery of movable property (*amwal-mangolh*) or the payment of its values,
> b - claims relating to ownership, recovery or position of immovable property (*amwal-gharman goalh*) or the compensation in lieu thereof,
> c - claims relating to the payment of money or damages resulting from lawfully concluded contracts with the Government."

Furthermore, paragraph (3) of the same Article introduced a form of *fiat justitia* for the first time in Jordan.[25] It stated that:

> "None of the above mentioned claims shall be admissible unless the plaintiff has previously obtained written permission from the Prime Minister allowing him to bring such an action."

The law also provided that the Attorney-General shall represent the government in all the above cases.[26]

The central feature of the law in Jordan at this stage (1922-1951) was that the courts construed their jurisdiction in a rather restricted manner.

1.- Despite the explicit provision of Article 47 of the Constitution of 1928, the courts abstained from pronouncing upon the constitutionality of Article 3 of the law of the Law of the Government Proceedings of 1935. Adopting a narrow interpretation of the doctrine of separation of powers, the Court of Appeal decided in Case No.59/35, that

the courts lack jurisdiction to examine the constitutionality of laws. It ruled that:

> "The court is to apply the laws and regulations enacted by the legislature; it [the court] has no right to review or disregard them."(27)

It seems that the Jordanian courts had adopted the tradition of the English courts in abstaining from reviewing the constitutionality of Acts of Parliament. It might be justifiable for the English courts to take such a view under the principle of 'Sovereignty of Parliament', and the fact that there is no written constitution to limit the powers of Parliament, and against which the validity of English statutes may be judged. The view of the Jordanian courts is difficult to understand, because there was a written Constitution, which had allocated specific jurisdiction to each branch of government. No such branch may expand upon its jurisdiction or take any action which is contrary to the provision of the Constitution, without being in breach of the Constitution.

2.- Even prior to the law of 1935 (which ousted the jurisdiction of the courts and violated the Constitution) the Court of Appeal decided that the courts had no jurisdiction to quash illegal administrative decisions, to issue an order to the administration to perform a duty owed to the public (*mandamus*), or to prevent a public authority from carrying out an erroneous measure (prohibition). In Case No.39/35, the Court of Appeal interpreted the phrase 'civil cases brought by or against the Government' used in Article 47 of the Constitution to mean "only contractual liability and claims relating to the payment of damages or recovery of movable and immovable property unlawfully obtained by the administration."(28)

The most illustrative and frequently quoted example of the judicial practice at that time was The Case of Mr. T. Abu al-Huoda ,decided by the Court of Appeal in 1935. Mr. Abu al-Huoda, who was the director of the Agricultural Bank, was instantly dismissed by the Council of Ministers allegedly for being incompetent and unfit for the post.(29) He sued the Government for damages on the grounds that his dismissal was unlawful. In his submissions he argued that he:

> "Understands that the court lacks the jurisdiction to abrogate the decision of the administrative authority... and that it is not for the court to decide upon his competence or fitness for the post... but he believes that it is for the court to decide whether the administration has observed the procedural requirements for the dismissal of public servants, as defined by the law and the regulations of the civil service or not; and thereupon the court may decide upon entitlement to damages ...."(30)

In dismissing the application, the Court of Appeal again relied on the narrow interpretation of the doctrine of separation of powers; and decided that the courts may not extend their jurisdiction to review the validity of individual administrative decisions (*al-qarart al-Fardieh*). It says:

> "Since the relevant regulation has granted to the administrative authority, the power to assess the competence of the public servant and to dismiss him if deemed necessary for the public interest, the courts must not question its performance in order not to violate the doctrine of separation of powers... if the courts were to have the power to review the validity of the administrative actions, it has to be provided for by the law and there is no such a provision in the present law of Jordan."(31)

As for Article 47 of the Constitution, the court upheld its previous restrictive interpretation(32) and ruled that:

> "...it is true that as a general rule, the jurisdiction of the judiciary includes all civil cases, except for those by law made the jurisdiction of a special court, but this rule does not include actions brought to challenge the validity of administrative measures applied by the Executive Council, for instance, acting within its lawful

> jurisdiction as defined by the law...it only includes civil controversies which can be adjudicated in accordance with enacted laws and regulations and which have not been made the jurisdiction of a special court... freedom of the administration in implementing the laws and regulations which it is empowered to implement is a requirement of the principle of separation of powers."[33]

Obviously, the court had misconceived three basic issues. Firstly, the court failed to notice that the applicant was not asking the court to invalidate the administrative action; he was merely seeking payment for damages for failure to observe prescribed procedural requirements on behalf of the administration. Secondly, the court misconstrued the legal nature of the administrative action by implying that it was not a controversy which can be adjudicated in accordance with previously enacted laws and regulations. Finally, it misapprehended the doctrine of separation of powers itself by deciding that it guarantees absolute freedom for the administration in interpreting and applying the laws relating to administrative activities.

Thus, the position in Trans-Jordan with regard to judicial review of administrative action, in the period between 1922 and 1951 could be summed up as follows: the legislation did not explicitly authorize the courts to review the legality of the acts of the administration. The courts, led by the Court of Appeal, denied themselves the right to control the constitutionality of laws, and consequently jurisdiction to review the legality of administrative actions.

In Palestine (West-Bank) the position was somewhat different. Whereas the British ruled Trans-Jordan indirectly through H.R.H. The Amir and the local administration, they ruled Palestine directly during the mandate. A new judicial system akin to the British system was therefore developed. Before the mandate Ottoman regular courts of

Palestine had jurisdiction to entertain any civil case brought by or against the Government without a prior *fiat* by the administration.

Under the British administration, Article 50 of the Palestine Order in Council of 1922 (sometimes referred to as the Constitution of Palestine)[34] provided that:

> "No action shall be brought against the Government of Palestine or any department thereof unless with the written consent of the High Commissioner previously obtained."[35]

Under the courts ordinance of 1924,[36] the hierarchy of courts consisted of the Magistrate Courts, District and Land Courts, the Court of Criminal Assize and a Supreme Court which functioned as a Court of Appeal and as a High Court of Justice. The existence and the jurisdiction of the latter court constituted one of the principal differences between the legal systems of Trans-Jordan and Palestine at that time. It has also made a noticeable impact upon the present judicial and legal system of Jordan.

Article 5 of the aforesaid ordinance provided that the Supreme Court sitting as a High Court of Justice shall consist of not less than two judges of whom one shall be a British judge. According to Article 43 of the Constitution of Palestine,[37] the Supreme Court sitting as a High Court of Justice had jurisdiction to:

> "hear and determine such matters as are not, causes or trials, but petitions or applications not within the jurisdiction of any other court and necessary to be decided for the administration of justice.[38]

Under Article 6 of the courts ordinance, however, the High Court was accorded exclusive jurisdiction with regard to the following matters:

a) applications (in the nature of *habeas corpus* proceedings) for orders of release of persons unlawfully detained in custody;

b) orders directed to public officers or public bodies in regard to the performance of their public duties and requiring them to do or refrain from certain acts;

c) questions concerning change of venue of actions in the Court of Criminal Assize, District Courts and Land Courts.(39)

Another element of the British practice introduced into the laws of Palestine was the requirement of prior consent of the administration before a private individual could bring an action against the government.(40)

The same Article also excluded the High Commissioner, the Residence, their officials and their properties from the jurisdiction of the civil courts.

Further restrictions were also imposed on the jurisdiction of the courts to review administrative actions by the Crown Action Ordinance of 1926. (41) The ordinance categorically defined the types of action which may be brought against the Government of Palestine (the Crown), and the procedure to be followed therein. Under Article 3, no claim whatsoever, against the Government or any department thereof may be considered in any court unless it be a claim for obtaining relief, other than that in the nature of specific performance or injunction against the Government or a government department in respect of:(42)

1 - the restitution of any movable property or the compensation to the value thereof;

2 - the payment of money or damages in respect of any contract lawfully entered into on behalf of the Government;

3 - the possession or restitution of any immovable property or compensation to the value thereof.(43)

Actions by the Government against private individuals were to be brought by the Attorney-General or on his behalf or by any officer authorized by law to take such action on behalf of the Government.(44) Actions by private individuals against the Government were to be brought against the Attorney-General as a defendant or "such other officers as the High Commissioner may from time to time designate for that purpose."(45) The action commences by the filing of a petition at the District Court or Land Court, as the case may be, and the delivery of a copy thereof at the office of the Attorney-General or the specified officer as mentioned above. No court fee is payable at this stage.(46) The Chief Clerk of the court transmits the petition to the Chief Secretary and then it is laid before the High Commissioner. When the consent of the latter is granted, the petition should be returned to the court with the *fiat* endorsed thereupon, and the claim is then to be prosecuted upon payment of the prescribed fees.(47) No execution or attachment or process of that nature may be issued. Instead the party seeking to enforce the judgement must transmit a copy thereof to the High Commissioner who, if the judgement is for payment of money, by warrant under his hand, directs the amount to be paid. In the case of another judgement, he may take such measures as may be necessary to cause the judgement to be carried into effect.(48)

Apart from these provisions, Article 8 of the Crown Action Ordinance provided that:

> "Safe as provided in this ordinance, all provisions contained in the Ottoman Code of Civil Procedure or in any enactment amending such Code and the practice and the course of procedure in the civil courts shall extend and apply to all actions and proceedings brought by or against the Government of Palestine and, in all such actions, costs may be awarded in such manner as in actions between private individuals.(49)

It is important to notice that the British laws did not immediately abrogate all the previous Ottoman laws although most of them were repealed or emptied of their substance to fit the new legal system and status of Palestine. Article 46 of Palestine Order in Council of 1922, provided that:

> "The jurisdiction of the civil courts shall be exercised in conformity with the Ottoman law in force in Palestine on 1st November 1914, and such later Ottoman laws as have been or may be declared to be in force by public notice, and such orders in council, ordinances and regulations as are in force in Palestine at the date of the commencement of this order,"(50)

Their application was only conditional upon conformity with substance of the Common Law and the doctrines of equity in force in England, as well as powers vested in, and according to the procedure and practice observed by or before courts of justice and justices of the peace in England.(51)

With regard to judicial review of administrative actions, the civil courts were prohibited from admitting direct actions to challenge the legality of any administrative measure by the Crown Action Ordinance.(52) Nonetheless, they acknowledge to themselves the right to examine the validity of the administrative decision in the course of a civil action before the court when, one of the parties relies upon such action for his claim. Should the administrative decision be found to be *ultra vires* or contrary to the law or to the Palestine Order in Council, the civil court could not abrogate or cancel it, but only put it aside and not apply it in the pending case.(53) Thus, the same decision may be applied by another court or even the same court in a later case if none of the parties had impugned its validity. Regular courts of Trans-Jordan had followed suit, and the same practice has been upheld by the present regular courts of Jordan.(54)

As far as the High Court of Justice is concerned, it has already been mentioned that Article 43 of Palestine Order in Council of 1922 had clearly stated that the court's jurisdiction was to hear and determine:

> "such matters as are not cases or trials, but petitions or applications not within the jurisdiction of any other court and necessary to be decided for the administration of justice."

The court had therefore constantly held that its jurisdiction was of a discretionary and residual nature i.e., it only entertained applications when there was no other competent court to deal with the application, and when the court was convinced that its determination was necessary for the administration of justice. In Case No. 13/42, Soloman Horowitz v. Assessing Officer, Jerusalem District, for instance, the court decided not to intervene and stated:

> "...that the intervention of the High Court was not necessary for the administration of justice, as the Income Tax Ordinance contained ample and sufficient remedy for the petitioner."(55)

In Case No. 1/39also ,the court ruled that:

> "...and whereas the jurisdiction of the High Court was discretionary and the remedies which it could grant were not given unless they were necessary in the interests of justice, it was unnecessary to make any order."(56)

The most illustrative example of the practice of the High Court of Palestine and of the manner in which it had excercised its jurisdiction was Case No. 147/42, where the court plainly stated that:

> "(1)...before it [the High Court] decides to exercise its discretionary powers it must be satisfied that its intervention is necessary for the proper administration of justice and, in deciding this question it will consider whether the normal channels of justice can reasonably and substantially dispose of the matters at issue between the parties.

> (2) that a mere allegation of a technical violation of a right was not sufficient to move it (the High court) to exercise its discretionary powers."[57]

However, despite the nature of its jurisdiction and the restrictive provisions of the Crown Actions Ordinance[58] and the Palestine Order in Council of 1922;[59] the latter and the Courts Ordinance as amended in 1935 and 1940,[60] did guarantee some, though limited, jurisdiction for the court to receive 'directly', and entertain applications and petitions relating to the validity of some administrative actions. As far as those specified types of actions were concerned, the court was empowered to review the legality of the administrative action and to reverse it, if it was an unwarranted measure. Indeed the court displayed a great deal of jealousy of its limited jurisdiction and when it decided to intervene it made the most of it, through a broad construction of the provisions defining its jurisdiction.

Under Article 8(a) for instance, the court was empowered to issue orders "in the form of *habeas corpus*" for the release of unlawfully detained persons. The court did not, however, limit itself to these cases where an unlawful administrative decision was issued detaining a person in custody only, but rather extended its jurisdiction to include those detained by virtue of invalid judicial orders, or even to a private individual who unlawfully kept a person in his custody.

In Case No. 89/27, the High Court ordered the release of the detainee who was detained following an invalid warrant issued for his extradition to Syria. It was held that :

> "A writ of the nature of *habeas corpus* must issue to set aside the order of the president of the District Court, Haifa, for the extradition of the accused."[61]

and accordingly issued the following order:

"Following the judgement of this court in..., the court holds that the legality of the petitioner's detention on a warrant which does not set out the name of the alleged victim of the offence of 'assassination' cannot be supported. The writ must therefore issue and the prisoner must be discharged."[62]

In another case the court issued a writ against a private individual (a husband) who was married to an under-aged girl, to bring the wife before the High Court of Justice.[63]

As to the prohibition writs, (orders against administrative officers and administrative bodies to prevent them from carrying out an unlawful action), the court also adopted a wide interpretation of the term 'public officers or bodies' to include the Chief Executive Officers of the Courts; and therefore the court issued orders to prevent them from executing judgement of the courts.[64] Furthermore, the court considered the chiefs of religious communities as 'public officers or bodies'; and ruled that every person who has a duty, to act or to refrain from acting, under the law is a 'public officer or body' for the purpose of the writs of prohibition under Article 6(6) of the courts Ordinance.[65]

Finally, a noteworthy element of the work of the High Court of Palestine, for which the court adopted the traditional practice of the English courts, was the court recognized the right of the legislature to oust or suspend the jurisdiction of the court to review the legality of certain administrative actions when it so desired.[66] In England where there is no written constitution defining the jurisdiction of the English courts, the latter have traditionally upheld the view that they are bound by the provision of the statutes when the Parliament makes clear its intention to prevent the courts from reviewing the legality of any administrative action.[67]

B - JUDICIAL REVIEW OF ADMINISTRATIVE ACTION AFTER THE LEGAL REFORMS OF 1951/2. (THE PRESENT SYSTEM)

Following the withdrawal of the British and the establishment of the state of Israel in the greater part of Palestine, the remnant (known as the West-Bank), merged with the East Bank to form a part of the Hashemite Kingdom of Jordan.(68) Nonetheless, each part of the newly unified Kingdom retained its previous legal system. During this period several options were open to the Jordanian legislature for a unified judicial system for the two parts of the country. One of the options was the re-institution of the traditional Islamic legal system where both the administration and the private individual would be subject to the same court and the same law with no privileges conferred on the government. Another was to follow the English system where the administration and the private individual are also subject to the same court and law, but with special privileges and immunities for the administration (the Crown). The third option was to follow the French tradition as implemented in Egypt, and to create separate administrative courts to adjudicate upon legal disputes involving the administration.(69)

The Provisional Law of the Formation of the Regular Courts of 1951,(70) favoured the English tradition and introduced a system similar to the one that the British had previously established in Palestine; that is to say, a system of civil courts of general jurisdiction with a Supreme Court sitting as a High Court of Justice with limited jurisdiction to review some administrative decisions. Under Article 11(3) of the provisional law of 1951, the same powers of the British High Court of Palestine were transferred to the new High Court of Jordan i.e.

> "to hear and determine such matters which are not cause or trials, but petitions or applications not within the jurisdiction of any other court and necessary to be decided for the proper administration of justice",

such as:

a) Application (in the nature of *habeas corpus* proceedings) for orders of release of persons unlawfully detained in custody.

b) Orders directed to public officers or public bodies requiring them to refrain from doing certain acts.

c) Orders directed to public officers or public bodies requiring them to act in execution of their public duties.

By the time the provisional law of 1951 was laid before the Parliament for approval and remitted to the legislative committee in accordance with the regulations of the House of Representatives, the Constitution of 1952 had already been proclaimed. The latter contains several provisions relating to judicial review of administrative action. It provides that judicial power shall be exercised by the various courts of law,(71) and that the courts shall be open to all, and free from any interference in their affairs; and that,(72) the regular courts of the H.K. of Jordan shall have jurisdiction over all persons in all matters including cases brought by or against the Government.(73)

Article 100 specifically stipulates that:

> "the establishment of the various courts, the definition of their categories and their divisions, the limitation of their jurisdiction shall be determined by a special law which shall provide for the establishment of a High Court of Justice."(74)

Consequently, the special law referred to under Article 100 of the Constitution was enacted and known as the Law of the Formation of the Regular Courts of 1952.(75) As far as the structural aspects are

concerned the new law followed its predecessor in echoing the British system in Palestine. It establishes a pyramid of regular courts of general jurisdiction with the highest court sitting as a Supreme Court of Appeal to review the decisions of the lower courts and as a High Court of Justice to review the legality of certain kinds administrative actions. The difference thus, resides in the nature of the jurisdiction of each branch of the Supreme Court. While the British Supreme Court of Palestine was a traditional court of appeal, with powers to re-open the whole case and re-examine the facts all over again,<76> the present Supreme Court of Jordan is a '*cour de cassation*', i.e. a court of law not of facts.<77> The facts are to be investigated on two levels by the courts of first instance and the courts of appeal. The jurisdiction of the Supreme Court of Jordan may thus be invoked only upon a point of law.<78>

A substantial change has also been brought about by the Law of Formation of the Regular Courts with regard to the jurisdiction of the Supreme Court as a High Court of Justice. It has already been mentioned that the provisional law of 1951, established a High Court of Justice that was similar to the British one of Palestine, with identical jurisdiction. In 1952, the Jordanian legislature eliminated all the jurisdiction of the British High Court provided for by the law of 1951, except for the provision of Paragraph (a) of Article 6,<79> relating to "applications (in the nature of *habeas corpus* proceedings) for orders of release of persons unlawfully detained in custody." Instead the legislature has borrowed some of the jurisdiction of the '*council d'état*' of France, as introduced in the law of the '*council d'état*' of Egypt of 1946.<80>

Article 10(3) of the Law of Formation of the Regular Courts of 1952 defines the jurisdiction of the High Court of Justice as follows:

a - Application relating to the election of local administrative councils.

b - Disputes relating to the pensions of public officers or their heirs.

c - Actions brought by those adversely affected by final administrative decisions relating to appointments to public offices, promotions and bonuses.

d - Applications by public officers to impugn the validity of the final decisions of the disciplinary authorities.

e - Applications by public officers to nullify final administrative decisions dismissing them in a way other than that prescribed by the law.

f - Applications by societies and private individuals to nullify final administrative decisions affecting their interests.[81]

g - Applications brought by an injured person to impugn the validity of any administrative measure taken in accordance with regulations which violate the Constitution or a statute.

h - applications for *awamer al-efrag*, (orders in the nature of *habeas corpus* to release unlawfully detained persons).

Evidently, the Jordanian legislator has borrowed the first six paragraphs (a-f) from Article 8 of the law of the '*council d'état*' of Egypt of 1946; and sub-paragraph (h) from the jurisdiction of the British High Court of Palestine; and added only one new sub-paragraph as (g). Assessing the jurisdiction of the HCJ, one would easily realize that the court has very limited powers to review the legality of administrative action. Its jurisdiction is strictly limited to the

points enumerated under Article 10(3) of the Law of the Formation of Regular courts, and yet sub-paragraph (i) of the same paragraph explicitly provides that the "applications concerning decisions relating to *A'amal al-Seydh* (act of state), shall not be admissible."

Accordingly, it might be stated that the present HCJ of Jordan enjoys only a limited jurisdiction and therefore it might not be in a position to provide effective protection for most of those who may claim that the minimum international standards of their rights, which have been or may be provided for by the Constitution and the laws, have been violated by the administration.

Some may, however, argue that protection does not have to emanate from the HCJ; and that all that is required is a protection by an independent court of any name. The fact that the HCJ is a court of relatively limited jurisdiction does not necessarily entail a lack of protection for the said persons whom the HCJ could not protect because of lack of jurisdiction. Ordinary courts would intervene in such a situation and provide judicial protection in the form of judicial review of administrative action, especially when we know that the Constitution of 1952 has made them courts of general jurisdiction and specifically provides that:

> "The regular courts... shall have jurisdiction over all persons in all matters... including cases brought by or against the Government... except in matters which, by the provisions of the Constitution, or of any law for the time being in force, fall within the jurisdiction of religious courts or special courts."(82)

i.e. unless it has been made by virtue of a special statute, a jurisdiction of a religious or a special court, any justiciable legal dispute must fall within the jurisdiction of the regular courts, whether it be the HCJ or any other regular court. In other words,

under Article 102 of the Constitution nobody with a legal claim, would find himself without a competent court to decide his claim and in due course provide judicial protection against abusive administrative action.

Although this is a well-founded and logical argument, neither the Supreme Court nor the Jordanian legislature views this matter accordingly. Both the Supreme Court and the legislature have failed to discern the difference between Article 102 of the present Constitution and its predecessors in the two previous Constitutions. Whereas Articles 47 and 60 of the Constitutions of 1928 and 1946 respectively provided that: "...regular courts shall have jurisdiction...including civil cases brought by or against the Government...", Article 102 of the present Constitution provides that: "....regular courts...shall have jurisdiction in all cases... including cases brought by or against the Government..." The normal meaning of the words suggests that ordinary courts (regular courts excluding the High Court of Justice) do have jurisdiction to receive and entertain actions against unlawful administrative activities which fall outside the jurisdiction of the HCJ, and are not made the jurisdiction of a religious or special court by virtue of a duly enacted statute.

As far as the Supreme Court is concerned it repeatedly stressed the view that ordinary courts lack jurisdiction to entertain direct applications for judicial review of administrative action.

The leading case in this regard is Case No. 248/67, where the Supreme Court in a plenary session decided that:

> "...ordinary courts do not have jurisdiction to examine the validity of administrative decisions in order to award compensation...and, even those within the jurisdiction of the High Court of Justice but have not been

> nullified within the time limit (60 days) become immune from any kind of judicial review whatsoever..."[83]

The legislature also does not seem to have noticed the full extent of the constitutional changes under the present Constitution. That is to say, although the previous law,[84] which required one to obtain written permission from the Prime Minister in order to bring an action against the Government, was abolished in 1953,[85] both the Law of Government Proceedings of 1953 and 1958, defined exclusively the types of actions that may be brought against the Government into ordinary courts. They are almost identical to those referred to under Article 3 of the law of 1935 discussed above,[86] i.e. cases relating to payment of money or compensation or to the recovery of property unlawfully seized by the Government.[87]

Article 5 of the Law of Government Proceedings imposes an undue and unconstitutional restriction on the right of individuals to bring direct actions against the Government. It infringes Article 102 of the Constitution which provides for the right of the courts to receive and entertain all sorts of direct actions against the Government, whether it be civil or administrative action. Since Article 5 of the law of 1958 has not only reduced the jurisdiction of the ordinary courts to civil actions alone, but to a specified type of civil actions only, reconciliation with Article 102 of the Constitution would be quite impossible.

Furthermore, despite the limited opportunities of judicial review of administrative actions in Jordan, and the fact that the jurisdiction of the courts to review the validity of administrative actions is severely restricted; the Jordanian legislature has adopted a special legislative technique, which in effect has made the chances of

reviewing the lawfulness of the administration's activities, by the courts very rare. When the executive wishes to protect any administrative action from being examined by the courts, it adds a provision in the relevant statute stating that the administrative decision made under that particular statute shall be final and may not be called into question in any court of law.(ee) The frequent usage of this practice has created a substantial number of irreviewable administrative decisions, known as the immunized decisions (*al-qararat al-mohassnh*).

3 - STATUTORY RESTRICTIONS ON THE RIGHT TO JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN JORDAN:

We do not intend to discuss the legislative provisions where the legislator uses such apt and malleable language which indirectly makes it impossible for the court to assess or decide upon the legality of the administrative action. Nor are we able to discuss all the statutory provisions which explicitly excluded judicial review of administrative action by providing that the said action shall not be questioned by any court of law, since this practice has become increasingly far too frequent. Alternatively, we shall confine ourselves to some illustrative examples from the contemporary legislative practice under the present Constitution (1952), and only to the cases where it is explicitly provided that the validity of the administrative action shall not be examined by any court of law.

1.- The first instance in this trend was the provision of Article 29 of the Law of Trade Unions of 1953, which prohibited all courts from entertaining any action, brought against a registered trade

union, its members or employees, personally or on behalf of the members of the trade union, with regard to a violation which might facilitate or incite an industrial or labour dispute.(89)

2.- Article 13(2) of the Law of Charitable Societies of 1956, bestowed upon the Council of Ministers an unfettered power to refuse, or to allow any foreign society to function in Jordan or to impose any conditions on it or to revoke its licence; and provided that: "the decision of the Council of Ministers may not be reviewed by any court in any sense."(90)

3.- Article 8 of the Municipalities Law, as amended by Law No. 5 of 1963, provides that the term of the Municipal Council shall run for four years; and empowered the Council of Ministers — upon the recommendation of the Minister of the Interior — to dissolve the Council and appoint a committee to take its place for a period not exceeding one year, during which a new Council must be elected. The same Article provides that:

"the decisions of the Council of Ministers shall not be subject to any review."

4.- The Law of Political Parties of 1955, made the Council of Ministers the sole and final judge on all issues concerning political parties such as licencing, revocation of licences, dissolution and banning. Article 11 thereof provides that:

"the decision of the Council of Ministers under this law shall be final and may not be examined by any other authority."(91)

5.- Article 16(2) of the Law of Print and Publication of 1973, has accorded an absolute discretion to the Council of Ministers acting upon the recommendation of the Minister of Information to grant,

refuse or withdraw the licence of any publication or newspaper without laying down any reason.(92) Yet, it provides that: "the decisions of the Council of Ministers... shall be final and may not be reviewed by any court whatsoever... ."(93)

6.- Article 89(3) of the Labour Code also provides that: "the Council of Ministers may, upon the Minister's recommendation [the Minister of Labour], dissolve any trade union for reasons of security or public safety, and its decision in the matter shall be final and incontestable."(94)

7.- Article 15 of the Law of Civil Pensions No. 24 of 1959 as amended by the provisional Law No. 51 of 1976, provides that the decision of the Council of Ministers to force retirement upon public servants "shall be final and may not be challenged before any administrative or judicial body."(95)

8.- The most serious example in his list is the provision of Article 20 of the Instructions of Martial Law Administration of 1967, which has paralyzed the High Court of Justice by ousting almost all its jurisdiction. It reads as follows:

> "From the date these instructions become operative, and until they are abrogated or replaced by another, all sub-paragraphs of paragraph (3) of Article 10 of the Law of Formation of Regular Courts of 1952, shall be suspended except sub-paragraphs a. and b. No contrary laws, regulations, or order may apply as long as it contradicts these instructions, or any order issued by the Martial Law Governor-General thereunder."

4 - CONSTITUTIONALITY OF THE LAWS ABRIDGING JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS.

A.- ATTITUDE OF THE JUDICIARY.

Normally one would presume that the courts would adopt a hostile attitude towards such legislative practice, and would expect the judiciary to stand up to its role as the vindicator of human rights or at least to defend its own constitutional jurisdiction. Nevertheless, the case law indicates the opposite and clearly reveals that the Jordanian courts (led by the Supreme Court and the High Court of Justice) have explicitly approved of the above legislative practice and therefore by doing so have indirectly encouraged it.

It has already been mentioned that the Supreme Court has accepted the limitation imposed on the jurisdiction of the ordinary courts to entertain direct actions against the administration by the law of Government Proceedings of 1958, except for the limited cases referred to under Article 5 of the same Law.(96) Even in the case of an admissible action the ordinary courts denied themselves the right to examine the legality of the administrative action and to award compensation if deemed necessary. In Case No. 24/68, where the applicant sued the administration for compensation for arbitrary dismissal from public service; the Supreme Court ruled that:

> "...the established view of this court which has been determined in several plenary sessions, is that ordinary courts may not question the validity of the administrative decision which may be raised during proceeding, unless it is a total nullity to the extent that it loses its capacity as an administrative decision. Thus, since the administrative decision of 4/7/59 dismissing the applicant from public service from the 9/5/59, is an existing decision which has not been abrogated by the High Court of Justice, ordinary courts must not pronounce upon its validity in order to award compensation."(97)

In Case No. 230/74, before the Court of First Instance of Amman, a number of applicants submitted application No. 230/74 demanding payment of 165,300 JD in damages for the destruction of pin-ball machines and the closing of recreation and amusement arcades owned by them, which had been ordered by the Prime Minister and carried out by the police. The Attorney-General, on behalf of the government, requested the court to dismiss the case for lack of jurisdiction on several grounds:

1) that Article 2 of the Defence Regulations No. 2 of 1939 (under which the decision was taken) has placed the power to award any compensation in this case exclusively in the hands of the Prime Minister, and therefore ordinary courts may not entertain such applications.

Speaking for the court the president delivered the following judgement:(98)

> "Firstly, Article 2 of the Defence Regulations does not limit the power to award compensation for property seized by the Government to secure public safety, exclusively to the Prime Minister alone, and does not oust the jurisdiction of the regular courts in this regard. It provides that, the Prime Minister may, if he deems it appropriate, decide the payment of damages for anything done under this Article, and in such an event he may decide the amount of damages payable. This provision, meant only to define the administrative authority which may decide upon the amount of the compensation if any at all but, it does not in any sense exclude the jurisdiction of the regular courts to decide upon applications for damages under the provisions of that regulation...
>
> One must not confer upon this provision a meaning wider than it really has, by assuming that it has granted an exclusive jurisdiction to the Prime Minister in this matter and that it has ousted the jurisdiction of the regular courts, for in fact it does not go that far. Since the said Article does not prohibit the courts from deciding upon these cases, it would be incorrect to say that the courts lack jurisdiction in this matter.
>
> Secondly, the judiciary has a general constitutional jurisdiction to decide upon all legal disputes,

> and thus, neither the legislature by virtue of a statute, nor the Executive by virtue of an ordinance, may abridge this jurisdiction or any part of it. Since the courts derive their jurisdiction directly from the Constitution, exclusion of the judiciary would thus represent aggression on the Constitution itself,.. and consequently Article 2 of the said Defence Regulations would be unconstitutional.
>
> Thirdly...the rule that '*al-qadha yatakhassass fe al-zaman wa al-makan wa estethna baiz al-khusuomat*<99> (the judge is confined by place and time, with the possibility to exclude certain disputes) is a rule derived from the Islamic tradition, and does not conform with modern constitutional principles. Modern judiciary is an independent branch of government, driving its jurisdiction directly from the constitution. The judge does not owe allegiance to or receive his authority from the legislature, the Executive or anybody else."<100>

The court thus dismissed the request of the Attorney-General and declared the case admissible.<101>

Eventually, the Supreme Court seems to have been convinced by the view of the Court of First Instance. In Case No. 295/77, the court stated the following: Article 2 of the Defence Regulations No. 2 of 1939:

> "...grants the Prime Minister the power to award compensation if he deems it appropriate. When he does not wish to exercise this power, the ordinary courts regain their powers in this matter by virtue of their general jurisdiction."<102>

The court construed the term 'if he deems it appropriate' not as a choice between payment and non-payment of compensation, but rather, permission for the Prime Minister to act if he thinks fit.<103>

In another case, the court held that, the standing view of the Supreme Court is, that Article 2 of the Defence Regulation No. 2 of 1939, "does not oust the jurisdiction of the courts to decide upon the amount of compensation, should the Prime Minister not wish to decide it himself."<104>

However, it is not yet clear, whether or not the courts would still have their jurisdiction to act, if the Prime Minister did exercise his power, but decided to award unfair compensation.

As for the jurisprudence of the HCJ, it has constantly upheld the constitutionality of the laws abridging the judicial review of administrative actions.

The first recorded case in this regard was Case No. 41/55, concerning the constitutionality of Article 46 of the Law of the Independence of the Judiciary No. 19 of 1955, which provided for the establishment of an administrative committee, headed by the Minister of Justice for the reformation of the judiciary and which also provided that the decisions of the said committee, should not be challenged before any judicial body. The court unconvincingly argued that the Constitution does not define the jurisdiction of the courts and delegated this power to the legislature to exercise it by a statute.

> "there is nothing in the Constitution to prevent the legislature from increasing or decreasing the jurisdiction of the courts at any time by a later statute. This was exactly the case of Article 46 in question, which has excluded the jurisdiction of the courts by a constitutional instrument."(105)

Ever since this judgement, the legislature has made more frequent usage of this method, and the court has always upheld the constitutionality of this legislative practice.(106)

In Case No. 34/77, the constitutionality of Article 2 of the provisional law No. 51 of 1976,(107) was challenged before the court (High Court of Justice). The latter held that:

> "The view of this court which has been established and confirmed in many previous decisions is, that such a provision is a constitutional measure and does not infringe any Article of the constitution."(108)

One of the most debated questions in this context was the constitutionality of Article 20 of the Instructions of the Martial Law Administration of 1957, which in 1967 became Article 20 of the Instructions of the Martial Law Administration of 1967. As has already been mentioned,(109) this provision has deprived the HCJ of almost all its jurisdiction and prevented the court from reviewing any administrative decision issued by the said administration.

Until 1967, the court upheld the constitutionality of this provision and considered it to be an absolute ousting of its jurisdiction in this regard.

Consequently, it abstained from reviewing any of the Martial Law Administration's decisions, and rejected all such applications on the grounds of lack of jurisdiction.(110)

An attempt to attenuate the impact of the sweeping generalization of this provision was made by the HCJ, when these Instructions were re-introduced in 1967. The court, led by the President of the Supreme Court, held that Article 20 of the Instructions (as it stands) was unconstitutional and contrary even to Article 125 of the Constitution which authorizes the King to issue such Instructions. In Case No. 44/67, the court distinguished between decisions which are *prima facie* relating to the defence of the realm and those which are not; and stated that: "immunity from judicial review may be granted to the former only"; and then added that:

> "....since Article 20 has prohibited the review of all kinds of decisions issued by the Martial Law Administration, notwithstanding whether they are related to the defence of the realm and public safety or not, it is thus an unconstitutional provision, and does not apply unless the court is satisfied that the decision was issued for the purposes of the defence and public safety."(111)

Shortly after, the court altered its views on the issue of constitutionality and considered Article 20 to be a constitutional provision; but upheld the distinction between the decisions relating to defence and public safety and those which do not; as explained in the above case.(112) In a series of cases, the court repeatedly ascertained that; Article 20 of the Instructions of the Martial Law Administration of 1967 is a constitutional provision, but it applies only to the decisions relating to the defence of the realm and public safety. Nonetheless, in practice the court retained the general sense of this provision by adopting a wide interpretation of the phrase 'defence of the realm and public safety', to the extent that it covers almost all the decisions of the Martial Law Administration. Accordingly, it has become powerless to review such decisions.(113)

In 1979, when the university of Jordan dismissed a group of lecturers upon the recommendation of the Director of the General Intelligence, the lecturers concerned submitted application No.108/79, challenging the validity of the decision of the Council of the Trustees (No.24/79 dated 30/8/79) before the HCJ.(114) On behalf of the university the defence raised the point that the jurisdiction of the court to entertain such an application was ousted by Article 20 of the Instructions of the Martial Law Administration of 1967, especially when the Prime Minister had testified that the decision was taken for security reasons, as mentioned in the recommendation of the Director of the General Intelligence, and that the disclosure of the reasons could be prejudicial to the public interest. The court upheld the constitutionality of Article 20. The majority of the court confirmed the right of the legislature to oust the jurisdiction of the courts at any time and with regard to any matter. It stated that:

> "...the court agrees that judicial review of administrative action is an essential guarantee for the protection of the rights of the individual against excesses of legality by the administration. This however, applies only when there is no statutory provision ousting the jurisdiction of the High Court of Justice to review the administrative decision; and Article 20 of the Instructions of the Martial Law Administration has ousted the jurisdiction of the High Court of Justice except for the provisions of subparagraph (a) and (b).
> ...The established view of this court as has been confirmed in several previous plenary sessions (44/67, 96/56, 26/67, 4/69 and 81/69) is that Article 20 is applicable and does exclude the jurisdiction of the court to entertain applications challenging the validity of administrative decisions issued for the purposes of the defence of the realm as provided for by Article 125 of the Constitution."(115)

Accordingly, the majority declared the application inadmissible, for lack of jurisdiction.

In their dissenting opinion, Justices N. Rshadan and A. Mo'ath, disputed the conclusion and the reasoning of the majority. They argued that Martial Law Instructions were intended to apply to matters of national defence and not to ordinary crimes.(116) They added that what was decided by the HCJ in 44/67 and the decisions to follow was:

> "that Article 125(2) of the Constitution grants to the legislator (The King) precise and limited legislative power to secure the defence of the realm, and does not confer on him absolute power to prevent the courts from reviewing decisions which do not relate to the defence of the realm... the court has (in Case No. 44/67) limited the apparent generalization of Article 20, so it does not exclude the jurisdiction of the court in all cases, but only those which without any doubt, relate to the defence of the realm."(117)

In their view, the decision of the university was not relating to the defence of the realm or the public safety within the meaning of Article 125 of the Constitution and therefore, the application was admissible.(118)

However, there are two important points in this rule-making judgement:

a) The court has emphasized the constitutionality of Article 20 of the Instructions of the Martial Law Administration, and confirmed that this provision applies to prevent the court from reviewing the decisions relating to public safety and the defence of the realm. Nonetheless, the court did not provide us with a specific definition of what might be considered as relating to defence and public safety. As it will be explained in the next chapter, the court has adopted a rather broad interpretation of the phrase 'defence of the realm and public safety', to the extent that in effect it has embraced almost all the decisions of the Martial Law Administration and rendered them unreviewable by the courts.

b) As a general rule, the court (the majority) has recognized the right of the legislature to oust the jurisdiction of the courts in any matter, and to prevent them from reviewing the validity of administrative actions, including those violating the rights guaranteed by the Constitution.

B.- THE ATTITUDE OF JORDANIAN LAWYERS

Jordanian lawyers seem unanimous in their condemnation of the above legislative practice, and voice similar disapproval of the established view of the HCJ. They agree that the statutory provisions purported to exclude judicial review of administrative actions by the courts are unconstitutional. However, we shall choose a few representative examples.(119) This shall include senior judges, practising advocates and academic lawyers.

a) According to Judge F. Kilany,[120] the former President of the Court of First Instance of Amman, the Constitution has granted Jordanian courts general jurisdiction over all persons and in all matters, and therefore the legislature may not suppress part of this jurisdiction by preventing the courts from exercising their jurisdiction under the Constitution.[121]

b) S. Rshadat, the Secretary-General of the Arab lawyers League, starts from the point that the Constitution guarantees the rights of the individual, as well as the right of the courts to exercise their jurisdiction. The legislature thus must not encroach upon these rights or prevent the courts from exercising their jurisdiction by providing that actions or decisions of one or another administrative authority may not be reviewed by any court of law.[122]

c) Dr. H. Naddah, a practising advocate, also criticised the policy of the HCJ and stated that a distinction should be made between the absolute rights guaranteed by the Constitution, within which the legislature may not interfere in any way, and the relative rights which may be regulated by the legislature. He argued that if a given matter is within the jurisdiction of the courts by virtue of the Constitution, then the legislature may not exclude it by a later statute, without violating the Constitution itself.[123]

d) Another practising advocate is Mr. I. Beker,[124] who has criticised the established view of the HCJ, and the broad interpretation of the phrase 'security and public safety' employed by the court so far.

He also added that the statutory provisions abridging the right of the HCJ to review the validity of administrative action are contrary to the Constitution.(125)

e) In the words of Prof. A. AL-Hiari,

> "In our opinion the provisions which prevent the courts from adjudicating upon administrative disputes are unconstitutional, and the courts must disregard them unless such actions are protected from judicial review by the provisions of the Constitution itself."(126)

In his view the legislature should not deprive the courts of their jurisdiction, because it is for the Constitution to define the jurisdiction of each branch of the Government. The role of the legislature is only to provide rules describing the manner in which such jurisdiction may be exercised without reducing or increasing the constitutional share of any branch. He also criticized the established opinion of the HCJ and state that: "the court seems to have misconceived and distorted the principle of legality as a whole."(127)

f) Similar conclusions were also reached by Prof. M. Al-Ghazwy. Although he did not criticise the HCJ directly, he submitted that the above legislative practice which has been approved by the courts, has done a great deal of damage to the rights and freedoms declared by the Constitution.(128)

As far as judicial review of administrative action is concerned, the present writer shares the view that both the legislative practice and the attitude of the courts are unconstitutional.

It has already been mentioned that before 1951/52, there was no HCJ to review the validity of the actions of the administration.

Nonetheless, the courts were empowered by Article 47 and 60 of the Constitution of 1928 and of 1946 respectively, to entertain all civil cases brought by or against the government.(129) It was also stressed that a major change was brought about by Articles 27, 100, 101 and 102 of the present Constitution. What both the HCJ and the legislature seem to have failed to notice is that Article 102 of the present Constitution provides for the jurisdiction of the regular courts with regard to all cases brought by or against the government and not only "civil cases" as was the position under the previous two Constitutions. To quote the provisions of Article 102 again, it says:

> "The regular courts in the Hashemite Kingdom of Jordan shall have jurisdiction over all persons in all matters... including cases brought by or against the Government, excepting matters which, by the provisions of the Constitution or of any law for the time being in force, fall within the jurisdiction of religious courts or special courts."

It is difficult to understand how such plain language could lead to such confusion. This Article is quite clear in stating that all legal disputes which arise in Jordan fall within the jurisdiction of the regular courts, except for those transferred by law to a religious or a special court. If the legislature is to remove any matter out of the jurisdiction of the regular courts (The High Court of Justice and the ordinary courts) without transferring it to a religious or a special court, but excludes the jurisdiction of all courts, it would be in plain violation of this Article (Art. 102).

Indeed, Article 100 of the Constitution has delegated to the legislature the power to define the jurisdiction of the courts, but it is merely a power to distribute the jurisdiction between the various regular courts, the religious courts and the special courts.

Distributing the jurisdiction does not include the power to exclude a given matter from the jurisdiction of all courts.

It is also true that Article 100 empowers the legislature to establish the HCJ and to define its jurisdiction by a special law, and thus it may increase or limit its jurisdiction by a subsequent statute. When the legislature exercises its powers to exclude any matter from the jurisdiction of the HCJ such a matter must come under the general jurisdiction of the ordinary regular courts in accordance with Article 102 of the Constitution.

5 — ASSESSMENT:

It has already been mentioned that judicial review of administrative action did not exist in Jordan before 1951. Civil actions which were allowed to be brought against the government were limited by the law of Government Proceedings of 1935, to a few types of civil cases and for which previous written permission from the Prime Minister was required.

The provisional law of 1951, provided for the establishment of the first Jordanian HCJ, similar to its British counterpart in Palestine, and conferred on it powers and jurisdiction identical to those of the former British court. This court was short-lived and was replaced by the present Jordanian HCJ. The latter has been vested with limited powers and jurisdiction to review specific types of administrative actions. Some of its jurisdiction was part of the jurisdiction of the British High Court of Justice, and the rest was borrowed from the jurisdiction of the '*council d'etat*' of Egypt.

Despite the fact that the jurisdiction of the HCJ is confined (by Article 10(3) of the Law of the Formation of the Regular Courts of

1952) to a limited number of administrative actions. Regardless of the broad provision of Article 102 of the present constitution, the regular courts of Jordan declared that they lack jurisdiction to examine the validity of administrative actions. They repeatedly ascertained that their jurisdiction in this regard is limited to specific types of civil cases as defined by the Laws of the Government Proceedings of 1953 and 1958.

Contrary to the practice of the British High Court of Palestine the present HCJ of Jordan has adopted a policy of rather narrow interpretation of its already limited jurisdiction. Some illustrative examples may reflect such a restrictive policy. As far as *awamer al-efraj (habeas corpus)* are concerned, we have already mentioned that the High Court of Justice of Palestine had applied a broad meaning to the phrase 'illegally detained persons' to include any one who had been held in custody contrary to the law. The present Jordanian HCJ has limited the application of this remedy to those who have been detained by the administration and by virtue of administrative decision i.e., those who have been detained by the security forces, General Intelligence Agency, the Armed Forces..., without a formal administrative decision having been passed, could not apply to the court for *awamer al-efraj (habeas corpus)*.(130)

Another point is the definition of a 'public officer', whose action and decision may be reviewed by the court. Whilst the High Court of Justice of Palestine had applied this term to any person who had a duty under the law to carry out or to refrain from carrying out certain actions, to the extent that it included the Chief Executive Officers of the courts and the Chiefs of Religious Communities, the Jordanian HCJ has restricted this definition to apply to members of

Official Government Departments only. Even within this limited scope, the court has ruled that it has no jurisdiction to review the decisions of the inferior courts, tribunals, judicial committees, nor the orders or the decisions of the Chief Executive Officers.(131)

In addition to the narrow interpretation of its already limited powers, the Jordanian HCJ has expressed less jealousy towards its jurisdiction. Indeed it has recognized the right of the legislature to oust its jurisdiction at any time and with regard to any matter. Such a policy has encouraged the legislature to suppress almost all the jurisdiction of the court. According to a leading Jordanian lawyer the legislative practice has rendered the HCJ a 'hopeless temple'.

No reference to the above legislative and judicial practices has been made in any of the Jordanian reports to the HRC, although the latter has constantly asked for information with regard to the availabilities of judicial remedies to persons whose declared rights and freedoms have been violated by the official authorities.(132) On the contrary, when questioned specifically about this aspect of the law of Jordan, the Jordanian representative categorically stated that, "...there was nothing to prevent any Jordanian citizen from gaining access to the courts, from the Magistrate's Court up to the Court of Cassation".(133)

Such an unequivocal assertion does not take account of the above-mentioned examples where judicial remedies have been totally excluded; nor of the manner in which the Jordanian courts have interpreted the provisions restricting their jurisdiction and the constitutional provisions (Articles 100-102) guaranteeing the right to access to court.

Another inaccurate statement by the representation of Jordan was also made in 1982 when he was questioned by a member of the HRC (P. Vallejo) on the availability of judicial remedies to those unjustly treated under emergency powers. He stated that:

> "In any case very few persons had been subjected to harsh measures under the emergency regulations and any person who considered himself wronged was entitled to appeal to the Court of Cassation against his conviction and sentence or against any administrative order made. If the Court were to find in his favour the conviction would be questioned or the order rescinded".(134)

Indeed, it is difficult to believe that the representative of Jordan (Mr. Khouri) who was a judicial inspector in the Ministry of Justice, was not aware of the provision of Article 20 of the instructions of the Martial-Law Administration, which has ousted the jurisdiction of the courts and prevented them from reviewing the validity of the decisions of the Martial-Law authorities. It is also equally difficult to believe that Mr. Khouri was not aware of the fact that offences against these instructions were under the jurisdiction of the Martial-Law Court whose decisions may not be appealed against to any court, including the Court of Cassation.

Based on the above analysis of the legislation and the practice of Jordan, one could legitimately conclude that judicial review of administrative action is almost absent or at best unsatisfactorily limited.

Because of the said legislative practice and the attitude of the courts, it is not rare to find a person whose declared rights and freedoms have been seriously violated, without a competent court to turn to for justice. This does not only minimise the value of the Jordanian laws providing for those rights and freedoms, but indeed

violates the minimum international standards of human rights, and places Jordan in breach of its legal obligation under the Covenants. One would have thus expected that the Jordanian legislature and the courts would have given up such practices, at least after 1976. The legislature and the courts should respect the right to access to court, and the legislature must provide a judicial remedy to anyone who may claim that his declared rights and freedoms have been violated by anyone especially by official authorities.

NOTES (VI.)

(1) In the state of nature and primitive societies where there was no official authority , each man had to protect his rights by himself using his physical power. See T. Hobbes, op. cit., Chapters 15 and 17.

(2) Created by law and operated by a person or a political party or group of people.

(3) S.A. de Smith, Judicial Review of Administrative Action, 4th (ed.), J.M. Evans, London, 1980, p. 1; hereinafter referred to as de Smith.

(4) Ibid.

(5) See T.C. Hartley and J.A.G. Griffith, Government and Law, London, 1975, p. 317, hereinafter referred to as Hartley and Griffith.

(6) Ibid. Some however, have discredited the principle of legality as the boundary between just and illegal. They argued that the essence of this principle is ...

> "legal authority and legal form for the acts of government. In a system in which the cabinet is supported by a majority in the commons, political decisions may readily be clothed with legality... In South Africa, government may be conducted according to law: but a political detainee's right to have recourse to a court for a ruling on the legality of his detention is of little value if the government has taken good care to ensure that the detention order is within its statutory powers."

As far as the first example is concerned, obviously the writers have the British example in mind. The British case is an exception, where there is no written constitution and the leader of the cabinet is the leader of the majority of the Commons and therefore his (her) political wishes could easily be translated into binding laws. In most countries of the world there are 'democratically' enacted written constitutions, which bind both the legislature and the administration to the boundaries of legality. As to the South African example, the defect is not in the principle of legality, it is in the South African political and legal system.
Wade and Phillips, Constitutional and Administrative Law, 9th ed. by A.W. Bradley, London, 1977, p. 92.

(7) See A.V. Dicey, Introduction to the Study of the Law of the Constitution, 10th (ed.) E.C.S. Wade, 1959, pp. 188-196; hereinafter referred to as Dicey.
cf. Jennings, The Law and the Constitution, 5th ed., London 1959, pp. 48-49.

cf. D.C.M. Yardley, Introduction to British Constitutional Law, 6th ed., London, 1984, pp. 69-74.

(8) See J. Jackson, dissenting opinion in: Security and Exchange Commission v. Chanery Corp., U.S. 194,210 (1947).

(9) See above Chapter V. p.370.

(10) de Smith, op. cit., p. 1.

(11) L.L. Jaffe, " The Right to Judicial Review", 71 Harv. L. Rev., 401, 407 (1958).

(12) Ibid. p. 408.

(13) Ibid. p. 420.

(14) Lord Denning, The Discipline of Law, London, 1979, pp. 135-6; See also J. Donnelly, The Concept of Human Rights, London & Sidney, 1985, p. 45.

(15) S. Mahmassani, Basic Concepts, op. cit., p. 30.

(16) Al-Kuothary, The Philosophy of Adjudication, Cairo, 1948, p. 53.

(17) See de Smith, Constitutional and Administrative Law, 5th ed., by H. Street and R. Brazier, Dungay, Suffolk, 1985, pp. 123-163.

(18) Al-Kuothary, op. cit., p. 53. See also Al-Suyuti, The History of Caliphs, op. cit., p. 266, Al-Mawardi, op. cit., p. 145-149.

(19) See Art. 7 of the Law of Formation of the Ottoman Courts of 1884. See also H. Nddha, op. cit., p. 85.

(20) Special administrative councils were established in the provinces to deal with complaints brought by private individuals against government officials with regard to their official duties. Nonetheless, these tribunals were composed of administrative personnel and could not be classified as administrative courts within the technical meaning of this term. See Baz, The Law of Civil Procedures, pp. 141-143, cited in H. Nddha, op. cit., p. 86.

(21) There are many references to the administrative councils in the law of Jordan, but they never existed on the ground.

(22) Art. 47

(23) Art. 60

(24) It is the counterpart of the Crown Proceedings Act of 1947 in England. The year 1935 is a very important year in the legal history of Jordan. It witnessed the introduction of a

substantial body of laws drafted by British lawyers and based on the relevant English laws; among them was the law of the Government Proceedings and the Defence Law and Regulations.

(25) On the British practice in this regard see Wade and Phillips, op. cit., p. 624. This was a new development in the law of Jordan, for as mentioned earlier, in Islamic law, the administration and the sovereign personally as well as private individuals are subject to the courts of law without any such requirement.

(26) Art. 4

(27) Case No. 59/35, The Judicial Journal, Vol. 1, p. 305. The Judicial Journal was the reporter of the decision of the Jordanian courts at that time; hereinafter referred to as J.J.

(28) Case No. 39/35, J.J. (1935), Vol. 1, p. 315.

(29) Later on he was to become the Prime Minister for five times.

(30) Case No. 59/35, J.J. (1935), pp. 305-308.

(31) Ibid.

(32) See above p.428. See also Case No. 160/32 and No. 3/30, J.J., (1935), pp. 218-224.

(33) Case no. 59/35, above note 28, p. 302

(34) Palestine Order in Council No. 1282 of 1922. See The Laws of Palestine, (in force on the 31st day of December, 1933), revised ed. by Robert Harry Drayton, London, 1934, vol. 3, p. 2569; hereinafter referred to as The Laws of Palestine.

(35) Thirteen years later the same provision was transferred to Trans-Jordan as Art. 3 of the Law of Government Proceedings of 1935.

(36) An Ordinance relating to the constitution and jurisdiction of certain courts in Palestine known as the Courts Ordinance. See The Law of Palestine, vol. 1, p. 398.

(37) See Palestine Order in Council, The Laws of Palestine, Vol. 3, p. 2569.

(38) See Art. 43.

(39) In 1935 and again in 1940, this Article was amended by some alteration in para. (c) and the addition of a new para. as (d) so it reads as follows:

(c) questions of change of venue in the trial of civil actions in District Courts and Land Courts;

(d) application for orders directed to a Magistrate in regard to the conduct of any preliminary enquiry held under the

provisions of the Criminal Procedure (trial upon information) Ordinance. See supplement No. 1 to the Palestine Gazette extraordinary No. 600 of 22nd January 1937; and supplement to Palestine Gazette 1940, No. II.

(40) See Art. 50, quoted above p. 407.

(41) An ordinance to make provisions relating to actions by and against the government (1st September 1926), See the The Law of Palestine, op. cit., vol 1, p. 502.

(42) Obviously, Art. 3 was designed to inhibit the courts from entertaining any claim against the government or any department thereof except for the cases specified therein. In order to eliminate the contradiction between this provision and the provision of Art, 6 of the Courts' Ordinance, the Crown Actions Ordinance provided that: "Nothing in this ordinance shall affect any application made to the High Court in accordance with the provision of section 6 of the Courts Ordinance.

(43) Para. (2) of the same Art. re-introduced the provision of Art. 50 of the Order in Council of 1922, "No claim which lawfully be made against the government shall be entertained in any court unless the claimant shall have obtained the written consent of the High Commissioner authorizing him to bring an action."

(44) Art. 2.

(45) Art. 3(3), compare this with Art. 3(3) of the Government Proceedings of 1935 in Trans-Jordan.

(46) Art. 4(1).

(47) Ibid. (2).

(48) See Art. 6.

(49) In Case No. 154/42 for instance, the High Court decided that: "Before a notarial deed could be executed a notarial notice as required by the Ottoman Notary Public Law claiming payment must be served on the debtor."

(50) Art. 46.

(51) "Provided always that the said Common Law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limit of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary." Ibid.

(52) See Art. 3.

(53) See for example Case No. 200/38, Palestine Law Reports, 1938, p.510; hereinafter referred to as PLR. See also Case No. 191/40, PLR. 1940, p. 511.

(54) See Case No. 59/35, J.J., 1935, p. 305; 160/32, J.J., 1935, p. 579; and 3/30, Ibid. p. 13. See also the present Supreme Court in the following examples: Case No. 325/59, JBR, 1959, p. 371; 196/62. JBR, 1962, p. 790; 63/64, JBR, 1964, p. 395; and 1288/67, JBR, 1967, p. 1183.

(55) Case No. 13.42, PLR, 1942, p. 98.

(56) Case No. 1/39, PLR, 1939, p. 86.

(57) Case No. 147/42, PLR., 1943, p. 8.

(58) op. cit., Art. 3(1&2).

(59) op. cit., Art. 50.

(60) op. cit., Art. 6.

(61) Case No. 89/27, PLR., 1920-33, p. 240.

(62) Ibid.

(63) Case No. 117/44, cited in Nddha, op. cit., p. 104.

(64) Case No. 89/1927, PLR., 1922-33, p. 240.

(65) Case No. 14/44, PLR., 1944, p. 191.

(66) In case No. 102/43, the court decided that, whereas Art. 10(2) of the Land Settlement provides, that the orders of the Governor of the province are final and unappealable, applications against such orders would be contrary to the said provision and therefore they are inadmissible.

(67) See de Smith, Constitutional Law, op. cit., p. 364-75.

(68) See Madi and Al-Musa, op. cit., p. 533-46.

(69) See H. Nddha, op. cit., p. 115.

(70) Provisional Law No. 71 of 1951.

(71) Art. 27.

(72) Art, 101.

(73) Art. 102. Compare the provision with the provision of Art. 60 of the Constitution of 1946, and Art. 47 of the constitution of 1928.

(74) Art. 100. It was the first time that the constitutional legislature provided for the establishment of the High Court

of Justice in Jordan; but it did not define the jurisdiction of the court and left it to a special law yet to be enacted.

(75) Law No. 26 of 1952.

(76) The decisions of the Supreme Court of Palestine were to be appealed on a point of law to the Privy Council in England.

(77) See Art. 10(2).

(78) See above p.381.

(79) See the amended courts ordinance of 1926.

(80) See particularly Art. 8(1-6); it reads as follows:
"The *conceil d'Etat* alone shall have the jurisdiction with regard to the following:
1 - Application relating to the election of local and municipal councils.
2 - Disputes related to the pensions of public officers or their heirs.
3 - Actions brought by those adversely affected by final administrative decisions relating to appointments to public offices, promotions and bonuses.
4 - Applications by public officers to impugn the validity of the final decisions of the disciplinary authorities.
5 - Applications by public officers to impugn the validity of final administrative decisions remitting them to pension in a way other than that of a disciplinary action.
6 - Applications by societies and private individuals to impugn the validity of final administrative decisions".

(81) Sub-para.(f) requires that this and all applications under the previous sub-paras. should be based on want or excess of jurisdiction on the part of the issuing authority, violation or wrongful application of the laws and regulations, or abuse of power.

(82) Art. 102.

(83) Case No. 248/67, JBR, 1968, p. 159. See also Case No. 85/68, JBR., 1968, p. 398.

(84) The Law of Government Proceedings 1935.

(85) Art. 3(3), see above p.428.

(86) See above p.428.

(87) See Art. 5 of the Law of Government Proceedings of 1958. It provides that:
"No direct or counter-action (*assleih aw mutaqabelah*) against the Government shall be admissible unless it is for the purpose of:
a) recovery of movable property or payment of compensation not exceeding its value;

b) ownership, possession or recovery of immovable property or payment of compensation not exceeding its value or payment of rent thereof.
c) payment of money or compensation resulting from a contract to which the government is a party
d) non-prosecution, on the condition that the plaintiff pays the sum (sums of money which the Government is demanding from the plaintiff) or presents a guarantor."

(88) In the circumstances of Jordan this is quite easily attainable by the Executive:
a) because throughout the history of modern Jordan the times when there was an elected Parliament were by and large much shorter than those when there was not. During such periods the Executive assumed the legislative power and legislated what was conventionally called 'provisional law'. See Art. 94 of the constitution of 1952. See above p. 69.
b) Even in times when there is an elected Parliament, the Executive has the right to propose the draft bills and statutes (Art. 91 of the constitution) and, due to the lack of organized opposition in the House of Representatives, its role has in practice been reduced to ratifying bills and statutes drafted and suggested by the Executive.

(89) Law No. 35 of 1953.

(90) Law no. 12 of 1956.

(91) Art. 11 of the Political Parties Law, Law no. 15 of 1955.

(92) Law No. 33 of 1973.

(93) See Art. 16(1&2).

(94) See above p. 321.

(95) See the amended Art. 15.

(96) See above p. 444~445.

(97) Case No.24/68, JBR., 1968, p. 259. See also Case no.85/68, the same Vol., p.398

(98) the judgement is published in the JBR., 1974, pp. 625-32

(99) See Art. 1801 of the Ottoman Civil Code (*Majalat al-Ahkam al-Adleyah*) of 1923.

(100) See p. 630.

(101) p. 632.

(102) See Case No. 295/77, JBR., 1978, p. 85. See also Case No. 246/77, JBR., 1977, p. 1497.

(103) Ibid.

(104) Case No. 132/78, JBR. (1978) p. 1007. See also Case No. 138/78, Ibid. p. 1012.

(105) Case No. 41/55, JBR. (1955) p. 492. This was the first in a long list of judgement which have encouraged the legislature to make more encroachments on the jurisdiction of the courts to review the validity of the administrative actions.
See for instance:
1 - Case No. 37/63, JBR., (1964) p. 538
2 - Case No. 47/65, JBR., (1965) p. 1438
3 - Case No. 111/66, JBR., (1966) p. 991
4 - Case No. 12/67, JBR., (1967) p. 1096
5 - Case No. 101/71, JBR., (1971) p. 1201

(106) for some examples see above p. 421-422.

(107) See above p. 448.

(108) Case No. 34/77, JBR., (1977) p. 977.

(109) See the full text of this Art. above p. 448.

(110) See for instance, Case No. 52/59, JBR., (1959) p. 114 and Case No. 30/63, JBR., (1963) p. 485.

(111) Case No. 44/67, JBR., (1967) p. 47.

(112) Ibid.

(113) See Case No. 76/72, JBR., (1972) p. 1182.
Case No. 41/74, JBR., (1974) p. 748.
Case No. 108/79, JBR., below Note 114 and the cases cited therein. See also No. 91/80, JBR., (1980) p. 1350; No. 74/85, JBR., (1986) p. 30.

(114) Case No. 108/79, JBR., (1980) pp. 1330-46.

(115) Ibid.

(116) Ibid.

(117) Ibid.

(118) Ibid.

(119) The present writer has failed to find a single Article or book written by an academic or a practising lawyer, who is in favour of the legislative practice in question or who agrees with the established view of the High Court of Justice. This also applies to many interviews conducted by the author for the purpose of this chapter.

(120) Judge F. Kilany, was an outstanding member of the Judicial Organization, and an outspoken critic of the present state of

laws of Jordan and has written several books; most of them have been cited in this thesis.

(121) F. Kilany, Independence, op. cit., p. 262.

(122) Human Rights and the Law, op. cit., p. 790.

(123) H. Nddah, op. cit., pp. 249-53.

(124) Former President of the Jordanian Bar Association.

(125) I. Baker, Human Rights, op. cit., pp. 44-49.

(126) Al-Hiari, "Constitutionality of the Laws Immunizing Administrative Decisions". JBR, 1978, p. 112; See also The Constitutional Law, op. cit., p. 654.

(127) Ibid.

(128) M. Al-Ghazwy, "Some Thoughts (*Nazaratt*) about Human Rights and Fundamental freedoms in the Constitution of Jordan", I Derasat Ryeiw, Amman, 1984, p. 174
See also: The Manual of the Political System and the Constitution of Jordan, Amman, 1985, p. 74.

(129) See above p. 426.

(130) See Case No. 30/70, JBR (1970), p. 217; and 168/65, JBR ,(1966), p. 538; see also Case No. 41/54 (unreported).

(131) See for instance, 87/68, JBR, (1969), p. 99 and 102/69, JBR., (1969) p. 922

(132) See UN Doc. Nos.CCPR/C/SR.103 (1978); CCPR/C/SR.332 (1981); CPR/C/SR.361 and 362 (1982).

(133) See UN Doc.No. CCPR/C/SR.332 (1981).

(134) See UN Doc. No. CCPR/C/SR.361 (1982).

CHAPTER VII.

RESTRICTIONS ON EMERGENCY POWERS.

Ordinary rules are designed to be applied in ordinary circumstances whereas extraordinary circumstances justify the introduction and application of a set of extraordinary laws. At any time in its history, a country might face exceptional circumstances, whereby ordinary laws would become manifestly insufficient to preserve public order and to secure the survival of the nation. In such circumstances the public authority (the Government) may legitimately assume some exceptional powers to do whatever is possible and necessary to ensure the survival of the nation regardless of the traditional limitations of the ordinary laws. Like any other organized group confronted with a threatening danger, the nation must submit to a strict form of discipline, which might even amount to a dictatorship. Individual freedoms and rights should give way to the rights of the community to protect itself and to exist. A democracy threatened with annihilation by totalitarian aggression is the supreme paradigm of an organized group passing through a crisis on which life and death may depend. The nation must submit to a temporary 'dictatorship-of-the-occasion'.(1) This, however, must not be interpreted as giving licence to a permanent and culturally destructive totalitarian method of Government, but rather as a necessary evil in time of serious crisis.

It is interesting to notice the distinction drawn by Prof. B. Malinowski between discipline as an inevitable quality of behaviour in crisis, and that pervasive discipline which prevents carrying out of independent activities, and the enjoyment of rights and freedoms. The coefficient of freedom as against bondage, he says:

> "...depends upon the aims for which power is being mobilized. It also depends upon the circumstances under which discipline occurs. When discipline is brought into being by a temporary inevitable crisis it must be accepted or else the group may perish. When discipline is imposed upon a community and the culture as a whole, transforming thus the whole group into a passive instrument of power politics, it destroys the very core of civilization."(2)

It was also added that the fundamental difference separating a democracy in an emergency on the one hand from a totalitarian dictatorship on the other, resides in the fact that to the former discipline is a means to an end whilst to the latter it is an end in itself.

The severity of emergency powers may be justified in consideration of their purported aims, presumably the target is to bring the crisis under control as much as is humanly possible. When those powers, however, are mobilized solely to protect a dictatorial regime or are being applied in a manner likely to hasten rather than to prevent disaster, they become the vanguard of oppression. If emergency powers were perpetuated or applied for purposes other than those prescribed by the law, they would constitute a formidable threat to the rights and freedoms of the individual, and might even threaten the organized existence of the community itself. In such instances the community would need to protect itself from those claiming to guard it. Experience tells us that unbridled and unrestricted emergency powers are far more dangerous than natural catastrophes or other man-made upheavals. They are probably more liable to abuse and misuse than any other legal regime.

Provision of reasonable restrictions on the emergency powers is thus an integral part of the role of the Constitution and domestic law in the implementation of the minimum international standards of human rights. It falls in the first place to the Constitution to strike the

dividing line between the right of the community to protect its existence and to ensure its survival on the one hand and the declared rights of the individual on the other. The Constitution must contain certain legal safeguards in order to prevent the abuse of the rights of either side. The legislature should then maintain the balance between the right of the authorities to enhance public safety and national defence, and the right of the individual to enjoy the guaranteed minimum standards of rights and freedoms. The latter may not be made subordinate to the former unless it is strictly required by the exigencies of the situation.

In this Chapter the intention is to examine the emergency powers provided for under the Constitution and laws of Jordan. we shall be assessing the manner in which they are being applied and measuring their impacts on the guaranteed minimum standards of human rights in practice, with special reference to administrative detention and other issues. An attempt shall also be made to question the constitutionality of those powers under the existing constitutional provisions, followed by some proposals to bring the law and practice of Jordan into line with the practice of civilized nations and the legal obligations assumed by Jordan as a state party of the Political Covenant.

Before this, however, we shall be dealing briefly with the question of derogation from the modern international standards of human rights under Article 4 of the Political Covenant.

Accordingly, the subject may be divided into four sections as follows:

1 - Derogation under Article 4 of the Political Covenant

2 - Emergency powers under the law of Jordan

3 - Abuse of emergency powers in Jordan in terms of administrative detention and other issues

4 - An Assessment.

1 - DEROGATION UNDER ARTICLE 4 OF THE POLITICAL COVENANT.

Derogation from treaty obligations, under exceptional circumstances, seems to be generally recognized practice in public international law and relations.(3) There is no bar in international law against contracting parties including a provision delineating those circumstances as under which they may suspend their obligations under the treaty, and the procedures to be followed thereto. Although some may argue that "any form of derogation, reservation or qualification is inappropriate in conventions for the promotion of human rights",(4) all general human rights conventions have contained provisions relating to derogation under special circumstances.(5) The exception in this regard is the Economic Covenant. This, however, must not be interpreted in support of the argument that social welfare rights are not legal rights at all, but mere social and economic programmes, nor should it lead us to conclude that these rights are unenforceable or that derogation therefrom is impossible.

As far as the Political Covenant is concerned, Article 4 thereof provides that:

> "(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the state parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
> (2) No derogation from Article 6, 7, 8 (paragraphs 1

> and 9), 11, 15, 16, and 18 may be made under this provision.
>
> (3) Any state party to the present Covenant availing itself to the right of derogation shall immediately inform the other states parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

This is a general provision permitting any state party (providing that the required conditions have been fulfilled) to suspend the application of many of the rights recognized in the Covenant for any period of time as may be deemed necessary in the case of a public emergency. This provision is different from other general qualification provisions included in most of the major international human rights instruments which stipulate that nothing in the document may be interpreted as implying for any state, group or person any right to engage in an activity or perform any act aimed at the destruction of any of the rights and freedoms recognized therein or at their limitation, to a greater extent than is provided for in the said instrument.(6) It may thus be viewed as an exception to the general provision of Article 5(1) of the Political Covenant. It is justifiable upon the existence of such exceptional circumstances and the compliance with the prescribed conditions. A distinction should also be drawn between the general provision of Article 4 and the qualification clause with regard to the exercise of some specific right.

Several Articles in the Political Covenant permit the imposition of limitations on some of the civil and political rights in the interests of national security, 'order public', public safety, health and morals or the protection of the rights and freedoms of others.(7)

As far as the requirements of lawful derogation are concerned, distinction may be made under Article 4 between the substantive and the procedural conditions.

A - THE SUBSTANTIVE CONDITIONS.

These are conditions relating to the gravity of the emergency situation, the nature of the measures taken to rectify the situation and the duties and obligations of the states parties under international law and other instruments.

1) Public Emergency which Threatens the Life of the Nation.

The phrase 'threatening the life of the nation' may cause some confusion as to the scope of the exceptional circumstances in the geographical sense; and may give rise to question as to whether or not a public emergency in a part of the territory of the state party could justify derogation under Article 4. An incident of public disturbance, a natural disaster or even civil war in a remote part of the country would not threaten the life of the entire nation. Nonetheless, the national or the local government needs exceptional powers to deal swiftly with the situation in order to bring it under control and to restore peace and public order. It would be unwise to tie the hands of the municipal authorities with the normal bonds of the ordinary laws on the ground that the crisis is limited to that part only and therefore it does not threaten the life of the nation.

Obviously the phrase was borrowed from Article 15 of the EHR, "In time of war or... threatening the life of the nation..." where in earlier cases both the EUCM and the EUCT seemed to take the phrase, 'threatening the life of the nation' literally. In the case of Lawless v. Ireland, for instance, the EUCT stated that the natural

customary meaning of these words is sufficiently clear, it refers to "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed."(8) The same criterion was also followed by the EUCM in Denmark and others v. Greece. It was stated that the public emergency must be:

(1) actual and imminent;

(2) its effects must involve the whole nation;

(3) the continuance of the organized life of the community must be threatened;

(4) the crisis or danger must be exceptional in that the normal measures or restrictions permitted by the EHR for maintenance of public safety, health, and order are plainly inadequate.(9)

In a later case, namely Ireland v. United Kingdom, the requirements of the involvement of the whole nation seems to have been qualified. In this case the British Government argued that the exceptional measures introduced in Northern Ireland were justifiable under Article 15 of the EHR.(10) The significance of this case stems from the fact that the right of the United Kingdom to derogate under Article 15, was never disputed on the ground that Northern Ireland was only a part of the British nation and the life of the whole nation was not threatened as the said Article seems to require. It might be true that Northern Ireland is an 'integral' part of the United Kingdom, but, it is equally difficult to believe that the situation in Northern Ireland constitutes a real threat to the life of the British nation as a whole.

Explaining the position, Prof. R. Higgins state that: "the reality seems to be that for purposes of Article 15 the whole nation is

simply Northern Ireland."[11] As far as this presumption is concerned it might be argued that Northern Ireland was not a nation in its own right and nor did it claim to be, and even if it did so, it was not the 'nation' of Northern Ireland which was derogating from the EHR, it was the British (the U.K. Government), which was not threatened in its entirety.

As for Article 4 of the Political Covenant, neither the preparatory works nor the jurisprudence of the HRC provides a clear cut answer to this question. In its general comment on Article 4,[12] the HRC described the obligations of the states parties under this Article in some general terms, and did not address itself to the above question or discuss the circumstances or the grounds upon which derogation might be permissible. Instead it was stated:

> "Article 4 of the Covenant has posed a number of problems for the Committee when considering reports from some states parties. When a public emergency which threatens the life of a nation arises and it is officially proclaimed, a states party may derogate from a number of rights to the extent strictly required by the situation... The Committee holds the view that measures taken under Article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened and that in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogation can be made."[13]

Until now, a number of states parties, including the United Kingdom have derogated under Article 4. Yet, when discussing reports of those countries, the HRC never seemed to have shown a great concern for the legitimacy or justifiability of the derogation as a starting point. The focus seems to have been always on the need for and the justifiability of the measures taken thereunder.[14]

When considering the report of the United Kingdom, the HRC did ask for further information about the situation in Northern Ireland, but it did not examine the legitimacy of the derogation itself,[15] although, as mentioned above, Northern Ireland is only a part of the state party and the danger does not threaten the life of the entire nation; the comments of the HRC on the said reports lack any disapproving remarks.[16]

Even the few academic lawyers who have addressed themselves directly to this question have found themselves trapped by the wording of this phrase which explicitly requires involvement of the whole nation. Prof. Joan F. Hartman, for instance, who after stating in the text that:

> "The 'life of the nation' clause signifies that the entire state rather than a discrete segment of the population must be menaced and that some fundamental element of statehood such as the functioning of the judiciary or legislature or the flow of crucial supplies, must be seriously endangered."

found it necessary to qualify this statement by adding (as a footnote):

> "However, when there is a substantial threat of detachment or loss of control over an important region, with a significant impact on central institutions, this criterion may be satisfied."[17]

Another inaccurate term is the word 'life' of the nation. Nations and states do not have life in a sense analogous to that of an ordinary person. It is therefore difficult to envisage anything less than a nuclear war that might literally "threaten the life of the nation", but this implication was certainly not the intention of the drafters. What was more likely to be threatened in a case of public emergency is the normal and organized function of the state rather than the physical life of the nation.

Considering this, it would have been much more clear and less problematic if Article 4(1) were worded to read:

> "In time of public emergency which threatens the organized function of the state or any part of it..., the state party may take measures derogating from..."

What might constitute a threat to the organized life of the nation or any part thereof, is a matter which falls, in the first place, to the state party to decide, in the light of the exigencies of the situation and past experience. The state's appreciation is not final. It is subject to scrutiny by international institutions which may decide the opposite i.e. that there is not a public emergency nor at least, one which threatens the organized life of the community or any part thereof, and therefore the derogation is unjustifiable. Practically speaking and due to the present state of international law, international institutions cannot prevent a state party from declaring an unjustifiable state of emergency or from effecting an unjustified derogation. The sole recourse would be to pronounce the state to be in breach of its legal obligations under the relevant instrument.(18)

Accordingly, it may be stated that despite the present text of Article 4(1), international practice(19) and the jurisprudence of the HRC, indicate that a state party to the Political Covenant may legitimately derogate from some of its obligations under the said Covenant whenever the organized life of the community or part of it is seriously threatened. A serious threat means something plainly beyond the day to day difficulties i.e. a situation where the normal measure available under the ordinary law are *prima faciae* inadequate in restoring peace and securing the normal function of the official institutions or the regular flow of supplies. This may include, for

example, political instability, war, civil disobedience or a natural disaster.

However, when the exceptional circumstances are limited to one part of the country, the derogatory measures must be limited to that part only, unless of course there is a reasonable possibility that it might affect some other parts of the nation. In such a case these parts may be included as well.

Application of the derogatory measures to some other parts of the country, would constitute a violation of another element of the same paragraph. Namely that the derogatory measures should be "to the extent strictly required by the exigencies of the situation".

2) "To the extent strictly required by the exigencies of the situation."

This is a crucial shackle placed upon the freedom of the government of a state party derogating under Article 4 of the Covenant. The existence of an emergency and the right to derogate, does not mean that the state party is free to take any measure where and when it deems convenient. It was perceived from the very beginning that an authoritarian government would use the state of emergency as a pretext to fulfil purposes which could not be legally achieved under normal circumstances.[20] The phrase 'to the extent strictly required' imposes restrictions on the power of the state to take derogatory measures in more than one sense. In the geographical sense these measures should be limited to the areas where there is a genuine need for them. In the sense of the number and the kind of rights from which a state party may derogate it means that the number of those rights should be as limited as is reasonably possible. A public emergency resulting from a natural catastrophe may not require the

banning of political parties and associations or the right to a fair trial for instance. Proportionality between the scale of the public emergency and the derogatory measures must be taken into consideration. In other words the government must not overact in a case of a public emergency.

An incident of civil uprising, *coup d'etat*, natural disaster or even a war may not justify for instance administrative detention on a massive scale and for unlimited periods of time with no guarantees against abuse. In the sense of duration, it requires that the derogatory measures should be limited to the time of emergency. It should always be borne in mind that the derogatory measures are allowed as an exceptional system in order to enable the state party to bring the situation under control and to return to normality once the emergency is over. It is an exception and must remain as such. A government may be tempted by the conveniences of emergency powers and tends to perpetuate the state of emergency even after the exceptional circumstances ceased to exist.[21] In many cases this has resulted in an extraordinary position where the exception has become the rule.[22]

As to what might be strictly required by the exigence of the situation is a matter for the government of the state party to decide in good faith. International instruments leave 'a margin of appreciation' for the government concerned to judge the situation and to choose the more suitable measures to deal with it. This choice, however, is subject to international scrutiny by the international organs of control.[23] The notion of 'margin of appreciation' is an important concept in modern international law of human rights. It is applicable in cases where the international instrument permits the imposition of certain restrictions by the state party on the rights

and freedoms enumerated therein in favour of given values. It basically confers a degree of freedom upon the government of the state party to take the measures which it deems necessary to bring the situation under control in the light of the domestic factors. In two 'rule-making' precedents the European institutions (the ECUM and ECUT) have defined the elements of this concept and illuminated its broader lines.(24) In both cases the states concerned were found to have exercised the margin of appreciation reasonably, and the measures introduced were therefore said to be justifiable under Article 15 of the EHR.

As far as Article 4 of the Political Covenant is concerned, the HRC's scrutiny of the manner in which states parties exercise the 'margin of appreciation' and the ensuing measures taken thereby, seems less than effective. That is so because in most cases the information available to the HRC is limited to what is mentioned in the report submitted by the government concerned, or the answers provided by its representative if any at all.(25) In some cases the reports neither reflect the true factual situation nor indicate all the derogatory measures taken by the state party. In other instances the representative of the government (who is usually a diplomat or government official) may give misleading answers when questioned about specific measures, without the HRC being in a position to verify such information.

3) No Discriminatory Measures.

Article 4(1) stipulates that derogatory measures must not involve discrimination based solely on the ground of race, colour, sex, language, religion or social origin. This is an important limitation on the concept of the 'margin of appreciation' and the freedom of the

derogating state. Nonetheless, some may view this condition as contrary to the notion of derogation itself, and ask the following question: would not a derogating state faced with a public emergency caused by a group belonging to a certain religion or political party, be allowed to take discriminatory measures against this particular group? The answer is affirmative, and the crucial word is 'solely' because in this case the discriminatory measures would not be based solely on the mere belonging to that religion or political party.(26)

4) No Inconsistency with other Obligations under International Law.(27)

In order to be justifiable under Article 4 of the Political Covenant, derogatory measures must not be inconsistent with other obligations owed by the state concerned under international law. This, however, does not mean that a state party faced with a crisis can not take measures that are contrary to its obligations under customary or conventional international law. In such a case the state party would have to seek justification for its action on other grounds either under the Vienna Convention on the Law of Treaties of 1969 or under the general principles of law.

5) Non-derogateable Rights.

There are a number of fundamental rights from which no lawful derogation may be made. These are considered so precious and fundamental that they should always be made available under any circumstances. Moreover, implementation of and respect for these rights could not be seen as a real obstacle preventing the state party from dealing swiftly and effectively with the crisis situation.

As far as the Political Covenant is concerned, the list includes: the right to life (Article 6), the prohibition of torture (Article 7),

prohibition of slavery (Article 8(1&2)), prohibition of imprisonment for civil debt (Article 11), prohibition of retroactive penal laws (Article 15), the right to recognition of legal personality (Article 16) and the right to freedom of conscience and religion (Article 18).(28)

With some variation, a similar list has been include in almost all 'standard-setting' general international human rights instruments.(29) The idea of non-derogateable rights or the principle of inalienability of certain fundamental human rights could be regarded as one of the general principles which has been generally recognized in practice by the international community and has been provided for in several international instruments. According to the Special Reporter of the United Nations Sub-commission on Prevention of Discrimination and Protection of Minorities, it could be regarded as:

> "A peremptory norm of international law within the meaning of Article 53 of the 1969 Vienna Convention on the law of treaties, whereby.. a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted... It therefore seems to us that the peremptory nature of the principle of non-derogation should be binding on every state, whether or not it is a party and irrespective of the gravity of the circumstances."(30)

B - THE PROCEDURAL REQUIREMENT.

Beside the above substantive conditions, lawful derogation requires the derogating state to notify the other state parties through the Secretary-General of the United Nations of the nature of the exceptional circumstances and the rights from which it has derogated. Article 4(3) provides that:

> "any state party to the present Covenant availing itself to the right of derogation shall immediately

> inform the other state parties ... through the intermediary of the Secretary-General of the United Nations of the provisions from which it has derogated and the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

Accordingly, a derogating state is not under legal obligation to inform all other states parties directly. The notice must be addressed to the Secretary-General who in his turn must notify the other states parties. The derogation notice must be forwarded 'immediately' to the Secretary-General. Undue delay in this regard could render the derogatory measures invalid and put the state party in breach of its obligations not only under Article 4(3) but also under any other Articles from which an unnotified derogation has taken place. However, there is no time limit within which the derogation must be notified, but the natural meaning of the word 'immediately' does not allow for extended periods of delay. The promptness of the notification procedures should thus be judged in every individual case on its own merits. It has to be admitted nonetheless, that in no circumstances could this period endure for as long as ten years. In the case of Jordan, for instance, the Covenant entered into force in 1976 and the government is said to have been studying the possibility of forwarding a derogation notice ever since.[91] Furthermore, the notice must precisely indicate the provisions from which the state party has derogated and provide a full account of the reasons for such action.[92] Under Article 4(3) the powers of the Secretary-General are limited to receiving the notification and transmitting it to the other states parties. It has been suggested therefore that this provision should be interpreted in such a way as to empower the Secretary-General, when suspecting the regularity of the derogation or

the validity of the grounds thereof, to inform the derogating state accordingly, and in case of a divergent reply, to bring to the knowledge of the states parties not only the derogation but also the arguments exchanged on the subject of the regularity or the validity thereof. According to N. Questiaux, this

> "would make the notification procedure a more effective element of international surveillance while respecting the principle of the sovereignty of states, since the depositary would have no other power than to bring his request for supplementary information and the reply, to the attention of the other state parties."(33)

Finally, it has to be noted that a derogating state party must also notify the other states parties through the Secretary-General, of the date on which it terminates its derogation.

In conclusion, and based on what has been said so far, it may be stated that, it has been commonly acknowledged that every country is liable to face an emergency situation at one time or another. It has also been acknowledged that in a time of emergency, the survival of the country and the continuation of the organized function of the community become the highest priority. That is to say, when the choice is between the organized existence of the community as a whole, on the one hand and the rights and freedoms of the individual on the other, the latter must give way to the former. The drafters of the Political Covenant have envisaged the possibility of a crisis and therefore acknowledged the right of the states parties to suspend or disregard the implementation of most of the rights referred to therein, in times of public emergency. States parties could therefore, legitimately, take derogatory measures contrary to their obligations in normal circumstances. What states parties should bear in mind is that, this permission is provided for only as an exception to the normal rule,

for the sake of public interests in time of crisis and therefore it should be confined to the most critical and demanding situations.

Unfortunately, experience tells us that national government, especially the Executive branch, is most likely to yield to the temptations offered by the convenience of the exceptional measures, by prolonging the state of siege or emergency. These exceptional powers have often been abused, and gross violations of human rights usually accompany the state of public emergency.

National constitutions and domestic laws could therefore play a crucial role in safeguarding the implementation of the modern international standards of human rights, during the state of public emergency. The national legislature should always sustain the balance between the right of the community to survive and the right of the individual citizens to enjoy their personal rights and freedoms.(34) That is to say, to enable the government to assume emergency powers to deal with the crisis situation, and at the same time, to impose some restrictions on those powers in order to prevent abuse and to confine them to the extent strictly required by the exigencies of the situation. Such restrictions may include the following:(35)

1 - The Constitution must clearly define the situations which may justify the declaration of the state of emergency.

2 - The authority and procedures for declaring a state of emergency should be defined by the Constitution.

3 - The ultimate decision to impose an emergency must be entrusted to the body which normally best represents the interests of all segments of the national population namely the legislature.

4 - The effects of the emergency powers on the rights of the individual and the powers of various branches of government should be clearly determined.

5 - The Constitution must specify the duration of the state of emergency, by defining the maximum period of a state of emergency or by providing for regular review of the need for the emergency powers by the legislature.

6 - The Constitution must prohibit the dissolution of parliament during a state of emergency.

7 - The Constitution or the legislature should establish a list of fundamental rights which may not be suspended during a state of emergency.

8 - Ordinary courts should continue to function in order to try those charged with ordinary crimes, and to provide judicial remedies for violations of the rights which are not suspended by the emergency legislation.

9 - Emergency powers must not be used to remove judges, or to interfere with the independence of the judiciary.

10- Special safeguards must be introduced to prevent the extension of emergency to spheres other than those defined by relevant legislation.

11- Grounds for permissible administrative detention should be clearly defined by the Constitution or legislation, and should not be allowed unless it is absolutely necessary for the protection of national defence and public safety.

12- The law should stipulate that administrative detention orders must contain the grounds upon which they are based and a statement of the facts and circumstances justifying them.

Having mentioned this, we shall now turn to the law of Jordan, in order to assess the emergency powers provided thereunder and the extent to which the above restrictions have been introduced in the law of Jordan.

2 - EMERGENCY POWERS UNDER THE LAW OF JORDAN.

A - THE CONSTITUTION.

Two Articles in the present Constitution (Constitution of 1952) have been devoted to emergency powers. Article 124 provides that:

> "In the event of an emergency necessitating the defence of the realm, a law which shall be cited as the Defence Law, shall be enacted giving powers to any person, specified therein; to take such actions and measures, as may be necessary, including the suspension of the operation of the ordinary laws of the state. The Defence Law shall come into force upon its proclamation by a Royal Decree based on a decision of the Council of Ministers."

Despite the generous wording and the sweeping generalization of the clauses of this Article, the legislator added yet another Article (Art.125) conferring even wider discretion on the administration to take any measures deemed expedient under such circumstances and freeing its hands from any legal bonds. Article 125 stipulates that:

> "(I) In the event of an emergency of a serious nature to the extent that action under the preceding Article of this Constitution would be considered insufficient for the defence of the Kingdom, the King may, by a Royal Decree, based on a decision of the Council of Ministers, declare Martial Law in all or any part of the Kingdom.
>
> (II) When martial law has been declared, the King may, by a Royal Decree, issue such instruction as may be necessary for the defence of the Kingdom, notwithstanding the provisions of any law in force. Persons acting under such instructions shall not incur any liability for all acts done by them under the provisions of any law such until they are released from that responsibility by a special law to be enacted for the purpose."

Obviously, the Constitution distinguishes between two types of emergency powers, the Defence Law referred to under Article 124 and the Martial Law Instructions referred to under Article 125.

B - THE DEFENCE LAW AND REGULATIONS:

The Defence Law of Trans-Jordan was enacted in 1935,(36) declared operative in 1939 and has continued until the present time.(37) In 1948 it was extended to the lands occupied by the Jordanian army in Palestine(38) and is still applied by the Israelis in the West Bank. In reality it is an Arabic translation of the British-Palestinian (Defence) Order-in-Council of 1931.(39)

Article 2 provides that, in a case of public emergency necessitating the defence of Jordan or 'affecting the public security' or the safety of the Armed Forces of His Britannic Majesty stationed in Jordan,(40) the King may declare this law to be in force, and shall remain as such until "His Majesty declares by a high order that it has ceased to be in operation."(41) According to Article 3, the term 'enemy' includes all armed mutineers and armed rebels, armed rioters and pirates. The most important and permissive provision of this law is the provision of Article 4. It has vested the Administration with absolute powers to take any measure, when and where it deems necessary for securing the public safety and the defence of the realm. So long as this law is in force and regardless of any ordinary law in force during that time, Article 4 empowers the Administration to introduce special emergency (defence) regulations which may regulate a wide range of activities granting extensive powers to any officer or any other person in service of the Government of Jordan including the Arab Legion. By such regulations the Administration may make provisions

with regard to any of the matters falling under the subjects enumerated in Article 4.[42]

Subjects referred to under this Article include:[43]

a) censorship and control and suppression of publications, writings, maps, plans, photographs, communications and means of communication including 'radio sets';

b) arrest, detention, exclusion, deportation of persons whose acts may be considered harmful to the safety of Jordan and search of persons and of their premises;

c) control of harbours, ports, territorial waters of Jordan and the movement of vessels.

d) transportation by land, air or water and the control of transport of persons and objects.

e) appropriation, control, forfeiture and dispossession of property, and the use thereof.

f) each defence regulation may provide for special penalties for offences or attempted offences against its provision and the procedure to be followed thereto.[44]

The same Article also authorizes the Administration to establish special courts to try offenders against the defence law and regulations, which may impose punishment ranging from small fines to the death penalty. Most importantly, paragraph (g) stipulates that any provision of any law or regulation of Jordan, which may be inconsistent with any regulation made under this Article "shall be suspended and become ineffective so long as the said regulation is still in force. Legally speaking, this means that ever since the introduction of this paragraph Jordan has been governed by unrestricted emergency powers.[45]

Furthermore, another set of strict emergency powers have also been granted under Article 5. It says that: "when this law is declared to be in force the following provisions shall have effect:"

1) H.M. The King may order any person(s) to quit Jordan or any part of or place in Jordan as may be specified by such order, and if the person refuses the order, H.M. The King may cause him to be arrested and removed from Jordan or from any such part thereof or place therein and for that purpose to be placed on board of any ship or boat or of any vehicle for transport by land or air.(46)

2) H.M. The King may require any person to do any work or render any personal service which he may think necessary to order in aid of or in connection with the defence of Jordan.

3) H.M. The King may require any person to supply any animals, vehicles, ships, boats, aircraft or other personal property belonging to or under the control of such person to the Government when considered necessary for the defence purposes, and in default of the person supplying the same, may seize and take possession of and retain any such property.

4) Any person who was required to render personal services or whose property or goods were taken into possession (whether temporarily or otherwise), removed or destroyed by virtue of a defence order may not be compensated from any public funds except for such sums as may be determined in the Defence Regulation itself.(47)

5) Any person authorized by H.M. The King in writing may enter upon and into any ship or vessel, land, house, or other building in Jordan, and examine and inspect such ship or vessel, or such land or building and any part thereof, and in case of opposition or obstruction, may use force to effect such entry, "and shall not be

liable for any damage directly or indirectly occasioned by such action."

6) H.M. The King may suspend the execution of any judgement of any civil court for any period of time if he believes that the execution of that judgement could prejudice the defence of Jordan.[48]

- The Defence Regulations:

It has already been mentioned that Article 4 of the Defence Law authorizes the Administration to introduce Defence Regulations with regard to a wide variety of subjects.[49] So far too many regulations have been introduced under this Article[50] Only two examples will be examined in this sub-section. Namely, Defence Regulations No.(1) of 1939 and Defence Regulations No. 2 of 1939.

a) Defence Regulations No. 1 of 1939:

Article 1 of these Defence Regulations stipulates that it "shall be cited as the Defence Regulation relating to jurisdiction and procedure, and shall become operative upon publication in the Official Gazette." It was published and accordingly entered into force on 2/9/1939,[51] and has remained as such until the present time. Most of its 14 Articles deal with summary procedures to be followed by the courts when trying offenders under the Defence Law and Regulations. The most important provision thereunder is the provision of Article 11. It provides that:

1 - Any member of the Arab Legion or any guard may arrest without a warrant any person who behaves in a manner which may endanger public safety, or who commits or who is suspected of committing an offence against any Defence Regulation.

2 - Any officer of the Arab Legion or any policeman, who has been delegated in writing by the Commander of the Arab Legion or any of

his deputies, may enter by force if necessary any premises or places suspected of being used for any purposes that may expose public safety to danger, and may search such places or any part(s) thereof and seize anything found therein, if he believes that it could be used for the above purposes or in a manner to commit an offence against any Defence Regulations.

3 - Any member of the Arab Legion may search any person who he may think to be in possession of or using or carrying any material, the position, usage or carry of which by such person is an offence against any Defence Regulation, and may seize the persons and any such material found on him.

4 - Any member of the Arab Legion may stop and search any vehicle if he has reasons to suspect that it is being used for purposes harmful to public safety or in violation of any Defence Regulation, or that it is carrying any material the possession, usage or carry of which is an offence against any Defence Regulations. He may confiscate the said vehicle and the material found therein and keep it (*wa an yahtafiz be'ha*).

b) Defence Regulations No. 2 of 1939:

This is considered the most serious and the most frequently applied of all other Defence Regulations. Article 1 thereof stipulates that it "shall be cited as the General Defence Regulation and shall become operative upon publication in the Official Gazette." It was duly published and became effective on 2/9/1939[52] and like the previously mentioned Regulation, has remained in force ever since. In accordance with Article 2 and when there is a compelling need to secure the defence of Jordan, the Prime Minister may take such measures as to;

1) acquire any land and roads and may remove any trees, fences and hedges therefrom in order to support military purposes;
2) acquisition of any building or other estates including the water and electricity lines, and any other water resources;
3) order the destruction of any buildings or establishments or the transfer of any property from one place to another or its destruction;
4) take any measures to interfere with the personal rights relating to the aforementioned property and rights.

It has already been mentioned that the Prime Minister may, if he thinks fit, authorize the payment of compensation for any action carried out under this Article and in such a case he may also decide upon the amount payable.(53)

The regulations authorize the Prime Minister to order all the inhabitants of any area or any part thereof as may be defined by such an order to evacuate the specified area if their evacuation is considered a necessity for public security or the defence of Jordan.(54) He (the Prime Minister) is also empowered to issue orders to prevent any gathering for *'sebaq al-khial'* (horse-racing) or any other sport, celebration or procession of any kind, and to order its termination if it is already under way, if he is of the opinion that such action is in the interest of public safety or the defence of Jordan.(55)

However, the most extreme provision is the provision of Article 9A, which authorizes the Prime Minister to order the detention of any person for an indefinite period of time without stating any reasons for such an order, save that, in his opinion the detention is in the interest of public safety or the defence of Jordan. It reads as follows:

> "The Prime Minister may order the detention of any person, and may also direct that such a person be remanded in custody or be released upon conditions relating to his place of residence or requiring his regular appearance in the police station to prove his presence every day, or upon any other conditions as may be decided."[56]

Finally, Article 18 allows the Prime Minister, upon the approval of the King, to delegate his powers under these Regulations to any Minister, civil servant or any officer of the Arab Legion. It has to be mentioned that the Prime Minister has in fact delegated these serious powers to some army officers, security authorities and particularly to the Minister of the Interior and the Administrative Governors.[57]

-Defence Orders:

All the powers granted under the Defence Law and Regulation are being exercised through Defence Orders. Thousands of these Defence Orders have been issued by various competent authorities since 1939. As an example we shall translate two Defence Orders issued by the *Muttasarref* of *lew'a Madaba* (the Administrative Governor of the Province of Madaba) during the Months of August and September, 1984.[58]

1. Defence Order No. 30 of 1984:

> "A Defence Order issued in accordance with the provisions of Defence Regulations No. 2 of 1939.
>
> In accordance with the powers invested in me by his Excellency the Prime Minister, by virtue of Defence Order No. 7 of 1971, and in accordance with Article 9A of the Defence Regulation No. 2 of 1939, and for the preservation of peace and public safety, I have decided the following:
>
> 1 - detention of *al-madaw* (the so-called), ... in the prison of Madaba until further notice.
>
> Dated 4th of august, 1984
>
> The *Muttasarref* of *lewa'a Madaba*
>
> A'Al-Awa'ad"

2. Defence Order No. 42 of 1984; dated 30/9/1984 whereby the *Muttasarref* of *lewa'a Madaba* ordered the detention of the Mayor of *Ma'in* and 19 other notable personalities including all the members of the Municipal Council. It reads as follows:

> "In accordance with the powers vested in me by his Excellency the Prime Minister *al-afkham* (the right Honourable); by virtue of the Defence Order No. 7 of 1971, and in accordance with Article 9A of Defence Regulation No. 2 of 1939 and for the preservation of security and public safety I have decided the detention of *al-mathkuureen be adnah* (those named below) in the prison of Madaba until further notice.
> 1- H. Hadadeen.....20- A. al-Khaleel
> issued on 30/9/84
> signed
> A. Al-Awa'ad
> The *Muttasarref* of *lewa'a Madaba*[59]

C - MARTIAL LAW:

In a case of a serious public emergency Article 125 of the Constitution authorizes H.M. The King to declare Martial Law by a Royal Decree based on a decision of the Council of Ministers.[60] In practice Jordan has experienced Martial Law twice so far. The first occasion was in 1957/8 due to some internal disorder and the second was occasioned by the Arab-Israeli War of 1967. On the 5th of June 1967 Martial Law was declared in Jordan and remained in force until the present time.[61] The instructions of the Martial Law Administration were introduced, published and became operative on the same day.[62] Wide powers have been granted to the Martial Law Governor-General and the Martial Law Administration as a whole by these instructions. Article 2 provides that a Martial Law Governor-General shall be appointed by a decision of the Council of Ministers and the approval of the King. In order to secure the safety of the Kingdom and its defence, he shall exercise all the powers granted to

the King and the Prime Minister under the Defence Law and all other regulations and orders issued thereunder. The Martial Law Governor-General may appoint any person to be his deputy or a local Martial Law Governor in any district or province as may be determined regardless of the contemporary system of administrative structure.(63)

The most permissive clauses are included in Article 4, it says:

> "a) Notwithstanding any other law or regulation the Martial Law Governor-General or the local Martial Law Governor may order the arrest, search, detention and remand in custody of any person for any period of time, in any place in the Kingdom and authorize entry of houses and other premises and their inspection and search at any time, be it day or night.
>
> b) Any person whose arrest, detention or seizure has been ordered by the local Martial Law Governor must be referred to the competent Martial Court within a period not exceeding 15 days from the date of such order if a specific charge has been attributed to him. If the said order was issued for the preservation of security and public safety, it must be presented to the Martial Law Governor-General within a period not exceeding 7 days for his approval."(64)

Orders issued by the Martial Law Governor-General or the local Martial Law Governors are final and immediately executable and are immune from judicial review or any form of judicial examination by any court whatsoever including the HCJ.(65)

Special Martial-Law Courts are also provided for in these instructions.(66) It says that "Each Martial-Law Court shall consist of a president and two other officer all being members of the Army of a rank not less than captain.(67)

Article 8 stipulates that Martial-Law Courts shall have jurisdiction over all persons with regard to the following offences:

a) offences against the internal or external security of the state provided for under Articles 107-117 of the Penal Code of 1960;

b) offences against the law of the state official secrets (law No. 50 of 1971) or any other law which may replace it;[68]

c) offences against the internal security of the state provided for under Articles 135-149 of the Penal Code of 1960;

d) offences against public safety provided for under Articles 157-168 of the Penal Code of 1960;

e) offences against Article 195 of the Penal Code of 1960;

f) offences against the Law of Firearms and ammunitions, Law No. 34 of 1952;

g) offences against the Law of Explosions, Law No. 13 of 1953;

h) offences against the Anti-Communism Law, Law No. 91 of 1953;

i) membership of any banned or unlicensed political party;

j) offences against the Defence Law or any regulations or orders issued thereunder;

k) communication or dealing with the enemy and acts of smuggling;

l) insults against Government Officials, members of the Arab Legion or the Police, or obstruction of the 'execution of their official duties';

m) offences against the orders of the Martial Law Governor-General or the local Martial Law Governors;

n) any other matter which the Martial Law Governor-General may add to this by a proclamation to be published in the Official Gazette.

Regardless of the provisions of any laws or regulations to the contrary, the Martial Law Governor-General may prescribe the effective punishment for any of the above offences.[69]

A Martial-Law Court, it has been stipulated, is not bound by the procedural guarantees and requirements provided for by the Criminal Procedure Code or the Law of Evidence, and may hold its hearings at

any place and any time as may be decided by its president.(70) In other words, should the president so decide, a hearing may be held in a tent in the middle of the desert and well after midnight. Furthermore, the court may disregard the right of the accused to be defended by a lawyer or to have sufficient time to prepare his defence. According to Article 12, the hearings should be public unless the court decides that they be held in camera for any reason.(71)

No further appeal whatsoever may lie against the Martial-Law Court's decisions. They are final and executable upon approval by the Martial Law Governor-General except the death penalty which requires the approval of the King upon a recommendation by the Council of Ministers.(72)

Finally, Article 20 has ousted the jurisdiction of the HCJ to review the validity of the administrative orders issued under these instructions as long as the said instructions shall remain in force.(73)

3 - ABUSE OF EMERGENCY POWERS IN TERMS OF ADMINISTRATIVE DETENTION AND OTHER ISSUES:

Articles 124 and 125 of the present Constitution explicitly authorize the Administration to resort to emergency powers in times of public emergency. Although the Constitution has granted wide powers to the Administration and conferred on it wide discretion to introduce measures and Regulations, the Constitution nevertheless requires that these powers be limited to matters involving public safety, and defence of the realm. In practice the Administration has frequently disregarded this, and applied emergency powers to situations and cases which have no connection at all with public safety or the defence of the realm. In many cases these powers are used to carry out actions

which cannot otherwise be lawfully carried out under ordinary law, though the subject matter bears no relation to the public safety or the national defence.

The best examples of such practices may be the cases where a person is accused of an offence, tried and sentenced for his offence by a competent court, and on the day he completes his sentence and is due to be released, a Defence Order is issued whereby he may be detained for an unlimited period of time for the same offence.(74) Under ordinary law such detention would be illegal or even a crime. Emergency powers have also been used by the Prime Minister to dismiss undesirable judges, whereas ordinary law does not permit such an action.(75)

Indeed, one may wonder in what sense individual disputes between a man and his wife or a landlord and a tenant or any other two private individuals, could be considered a serious threat to public safety and national defence, to the extent that it justifies the application of emergency powers. In illustrating these practices, the writer shall refrain from citing any case which he has learned from personal experience or personal interviews. Instead we shall confine ourselves to cases which have reached the courts and therefore have been made public and to those presented to the writer by the administrative authorities themselves.

In Case No. 91/80, for instance, where there was a dispute between two private individuals, the Governor of *Irbid*(76) interfered in an attempt to settle the difference. As the injured party demanded payment of what was regarded as exceptionally high compensation, the Governor issued a Defence Order ordering his indefinite detention,

allegedly to secure the public safety and the national defence in accordance with Article 9A of Defence Regulations No. 2 of 1939.
When the detainee applied to the HCJ for a writ of *habeas corpus*, on the grounds that his detention was not related to public safety, but merely a private matter and therefore the Governor had abused his powers under the said Defence Regulations, the court rejected the application, stating that the Order was a legal measure and was necessary for the preservation of public safety.(77)

In 1977, emergency powers were also invoked to resolve a dispute between a man and his wife. As a result of the said dispute, Mr. A. Al-Hendy divorced his wife but refused to pay her the 200 JD decided by the arbitrators. Consequently, the Deputy Governor of the Capital issued a Defence Order, ordering his detention until further notice, in accordance with Article 9A of Defence Regulations No 2 of 1939.
When the detainee challenged the validity of his detention before the HCJ, the court pronounced the Defence Order null and void and considered it to be an abuse of power.

> "The power delegated by the Prime Minister to the Administrative Governors by virtue of Defence Order No. 7 of 1971, was intended for the preservation of public safety and not to resolve disputes relating to personal rights between private individuals, a power which was reserved to the courts by the Constitution.
>
> The order of the Deputy Governor of the Capital detaining the applicant for non-payment of a sum of money to his wife is beyond the purposes of Article 9A of Defence Regulation No. 2 of 1939."(78)

On the 28th of June, 1975, the Governor of the Capital issued a Defence Order detaining Mr. S.E. Sarreeh (a private individual) in connection with a dispute between him and a private company (*Wafa'a Dajany*). A case was therefore brought before the HCJ, who declared the Defence Order null and ordered the release of the detainee.(79)

Another interesting case of obvious abuse of emergency powers with regard to administrative detention was the case of Mr. X, decided by the HCJ in 1977. Mr. X was a young man who was flirting with a girl in Amman and teasing her by tailing her car and flashing the lights of his car behind hers.[80] The girl was annoyed with him and complained to the police who arrested him and referred him to the Deputy Governor of the Capital. In his turn, the latter invoked emergency powers and issued a Defence Order under Article 9A of the Defence Regulations No. 2 of 1939, ordering his detention until further notice. An application was therefore brought before the HCJ, challenging the validity of the Defence Order, and the right of the Administration to apply the defence powers to ordinary offences. Mr. X's council argued that:

> "..even if the alleged charges against his client were to be proved true, they would remain ordinary charges punishable under the Penal Code and triable by the ordinary courts rather than Administrative Governor, who lacks jurisdiction to act in this respect... When he does act on such cases his action must be declared void."[81]

In its decision dated 18th of October, 1977, the court unanimously decided that the Deputy Governor of the Capital had abused the defence powers and therefore his decision was totally void. It was stated that it was apparent from the facts of the case that the Deputy Governor of the Capital, had ordered the detention of Mr. X on the grounds that he had threatened the safety of the Kingdom by flirting with and teasing Miss X. Indeed Administrative Governors are empowered to invoke the emergency powers provided for under Defence Regulation No. 2 of 1939 against any person who commits an action threatening the safety of the Kingdom. As to the action of Mr. X, i.e.

> "flirting with or teasing of Miss X, even if proven true the danger would be limited to her and would not extend to the safety of the Kingdom... Actions causing harm to individuals in their personal capacity, could

not be considered threatening to the said safety (safety of the Kingdom) within the meaning of Article 9A of Defence Regulations No. 2 of 1939."

Martial Law instructions were also invoked to resolve a private dispute between a landlord and a tenant. As landlord a retired General Mr. T. Hussain, applied to the Governor of the Capital to order the eviction of the tenant Mr. H.H. Attameni, from the store owned by the General, on the grounds that the said store was about to collapse and that it was being used for storing papers without proper licence. In his capacity as the Local Martial Law Governor, the Governor of the Capital invoked his emergency powers under Article 6(1) of the Martial Law Instructions and ordered the immediate closure of the store. Consequently the tenant applied to the competent authorities (the Municipality of the Capital) and obtained a valid licence to re-open and engage the place by storing waste papers.

Accordingly, the Local Martial Law Governor issued a new order on the 13/4/1975, stating that the tenant may re-open his store, but must not use it to store paper or any inflammable material, on the grounds that this would be hazardous and a threat to the safety of the public. When the tenant challenged the validity of this order before the HCJ, the court stated that:

1 - It was apparent from the letter of the Director of the Metropolitan Police (No. 21/85/11731 dated 11/3/75) that the police had no objection to a licence being issued to the applicant to use the place for storing papers and that there was no danger in that respect; and therefore a proper licence was issued to him.

2 - The Martial Law Governor had based his order on the alleged ground that the said usage was hazardous to public safety, whereas the dispute originated from the landlord's application for

eviction. In view of the fact that there was no danger to the safety of the public.

> "The Governor of the Capital in his capacity as the Local Martial Law Governor had exceeded his powers and jurisdiction under the Instruction of Martial Law Administration, and therefore his order was null and must be abrogated and therefore we pronounce it abrogated."[81a]

In the Defence Order No. 47, issued by the *muttasarrif* of *Madaba*, translated above[82] the *muttasarrif* ordered the detention of the twenty most notable personalities from the town of *Ma'in* in the prison of *Madaba* until further notice. Among the detainees was the Mayor and all the elected members of the Municipal Council and most of the potential candidates for the new term. Although it was stated that the reason for such a vigorous action was to enhance public safety and the defence of the realm, the actual reason was an allegation that a stone was thrown at the balcony of one of the potential candidates. As unofficially admitted by the *muttasarrif*, the real purpose was to terrorize everybody and to prevent any assault on individuals during the election campaign.

This may be a good reason for the Administration to take preventive measures under any of the various powers available to the Administrative Governors and the police, especially under the Law of the Prevention of Crime,[82a] when such assaults are most likely to take place, but on no account could it justify the resort to emergency powers. By doing so, the *muttasarrif* had seriously abused the emergency powers and had diverted them from the purpose to which they were originally intended to apply, simply because they are more convenient and freed him from observing any other procedural requirements or legal justification for his arbitrary action.

4 - AN ASSESSMENT OF EMERGENCY POWERS IN JORDAN.

As mentioned earlier every country is liable to face a state of emergency at any given time in its history,(83) but Jordan is a peculiar case in this regard. It is a country which has lived almost all of its life under a perpetuated state of emergency. The country has undergone rapid and remarkable developments, Kings and Governments have come and gone, many laws have been repealed or introduced, even the size of the country has been expanded and reduced again, but the state of emergency has outlasted them all and remains an unchanged feature of modern Jordan. It is almost fifty years old and there is no sign of its coming to an end. The state of emergency was declared in 1939, and the Defence Law and Regulations were put into effect and have remained until the very present time. During this period, Martial Law has also been introduced twice, once for a relatively short period in 1957/8 and again in 1967 and it remains effective until now. This has resulted in a situation where two types of emergency powers are applicable at the present time in Jordan.

In assessing these powers we shall be focusing on the question of constitutionality and compatibility with the obligations of Jordan under the Political Covenant.

The Constitution deals with emergency situations in two separate Articles. Article 124, which authorizes the Government to declare public emergency and introduce the Defence Law, and Article 125, dealing with Martial Law and the Instructions of Martial Law Administration.(84) This itself makes the Constitution of Jordan so rare among other Arab constitutions,(85) and reveals much about its legal backgrounds. It has been reported that, the method of the Defence Law and Regulations to deal with emergency situations is a British design

which could be found in the English system and in most of the British colonies and systems influenced thereby; while Martial Law was originally a French theory adopted by France and most of its ex-colonies and other legal systems.(86) Obviously, Jordan has adopted both theories and implemented them side by side. The Defence Law of Jordan was introduced in 1935, during the British mandate on Jordan, and as already been mentioned, was merely an Arabic translation of the British 'Palestine Defence Order-in-Council of 1931'. On the other hand, it seems that Jordan has adopted the theory of Martial Law from the Ottoman or neighbouring Arab constitutions, especially the Constitution of Egypt of 1923.

Considering the provisions of Articles 124 and 125 of the present Constitution, the following observations may be made:

1 - Both Articles refer to the event of emergency and measures to overcome the crisis. While Article 124 provides for an unequivocal authorization to the executive to take whatever actions and measures are deemed necessary to secure the defence of the realm, including the suspension of the ordinary laws of the state, Article 125 speaks of a situation where measures taken under the previous Article "would be considered insufficient for the defence of the realm". Such a contradiction may not be understood unless one remembers that the two Articles have descended from two alien theories, each of which was intended to operate sufficiently on its own. The Jordanian legislature tried to employ both of them but failed to qualify either to fit the other. The Constitution should have stipulated at least that when Martial Law is declared, the Defence Law and Regulations should cease to operate. Members of the HRC seemed confused by this dual system, and wanted to know which of the two sets of emergency powers was

currently applicable in Jordan.[86a] Since 1967, the two systems have been operating simultaneously imposing further restrictions on the rights and freedoms of the individual and opening yet wider margins for abuse and arbitrary actions.

2 - The Constitution grants an unqualified authorization to the executive to take any necessary measures and to introduce legislation providing them with emergency powers of their own choice without any safeguards to prevent abuse of these powers or to limit them to what is really necessary in the exigencies of the situation. This, of course, has resulted in extraordinarily severe emergency powers which are widely abused in practice.

3 - Parliament has been totally excluded from the whole process; it has no role to play at all in the declaration, approval or termination of emergency powers. The consequence has been a permanent state of emergency and an ever-increasing emergency powers.

4 - Despite the fact that emergency powers are subject to no control whatsoever, the Constitution stipulates that they may suspend the operation of the ordinary laws and may supersede them in case of conflict. In other words the country has been primarily governed by these emergency laws ever since they have been introduced, regardless of any legislation introduced by Parliament. Emergency laws have ousted most of the jurisdiction of the regular courts and rendered it the jurisdiction of no court, or of special courts.[87]

These two constitutional Articles have created chaos in the legal system of Jordan. To remedy the situation, the best solution appears to be a marriage between or abolition of the two Articles and the introduction of a new provision, with a view to establishing a fair balance between the right of the community to act swiftly and effectively

in a case of public emergency and the due respect for the minimum standards of the rights and freedoms of the individual as defined by the U.N. Covenants. Most of the modern constitutions of the world contain reasonable provisions dealing with the state of emergency and emergency powers, so why should Jordan be an exception? The Jordanian Constitution is extremely irregular in this respect.

Article 16 of the French Constitution of 1958 for instance provides that:

> "When the institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfilment of its international commitments are threatened in a grave and immediate manner and when the regular functioning of the constitutional governmental authorities is interrupted, the President of the Republic shall take measures commanded by these circumstances, after official consultation with the Prime Minister, the Presidents of the Assemblies and the Constitutional Council.
>
> He shall inform the nation of these measures in a message. These measures must be prompted by the desire to ensure to the constitutional governmental authorities, in the shortest possible time, the means of fulfilling their assigned functions. The constitutional council shall be consulted with regard to such measures. Parliament shall meet by right. The national Assembly may not be dissolved during the exercise of emergency powers by the President."(88)

A closer example is Article 74 of the Egyptian Constitution of 1971, which reads as follows:

> "If any danger threatens the national unity or the safety of the motherland or obstructs the constitutional role of the state institutions, the President of the Republic shall take urgent measures to face the danger, direct a statement to the people and conduct a referendum on these measures within sixty days of its adoption."(89)

Although less sophisticated than the French, the Egyptian approach is far more reasonable than that of the Jordanian.

Accordingly, a new draft Article may be proposed to replace both Articles 124 and 125 of the Jordanian Constitution; it reads as follows:

> "1) In the case of an actual or imminent danger threatening the national unity or the safety of Jordanian soil or the normal functioning of the constitutional institutions of the state, His Majesty the King may declare, by a Royal Decree based on a decision of the Council of Ministers, Martial Law in Jordan or in any part thereof for a period not exceeding 60 days renewable for similar or shorter periods by Parliament.
> 2) When such declaration is made and after consultation with the President of the Supreme Court and the Attorney-General, the King shall issue such instructions as may be deemed strictly necessary to enhance national defence and the normal functions of the constitutional institutions of the Kingdom, regardless of the provisions of any law in force, and he shall address a message to the nation.
> 3) Both the declaration and the said instructions shall be placed before Parliament for approval within two weeks of their proclamation. They shall cease to have any legal effect if they are not submitted to or not approved by Parliament during the two week time limit.
> 4) Parliament shall not be dissolved during the Martial Law period, and shall be informed weekly on all the measures taken thereunder and supplemented with complete lists of detained persons and their whereabouts."

As far as the Defence Law and Regulations are concerned, the criticisms have been centred upon their constitutionality, the lack of safeguards, and indeed, on the need for such laws in the first place.

A great controversy has been made about the constitutionality of the Defence Law, especially after the proclamation of the Constitution of 1952. There was no provision in the Constitution of 1928 nor in the Constitution of 1946, authorizing the introduction of such a law. When the present Constitution (1952) referred to it in Article 124 it referred to it in the future sense, "In the event of an emergency necessitating the defence of the realm, a law which shall be cited as

the Defence Law shall be enacted...." i.e. a Defence Law which may be enacted in the future not the existing one which is unconstitutional from the beginning. Accordingly, Jordanian constitutional lawyers are almost unanimously of the opinion that the present Defence Law (the law of 1935) is unconstitutional.[90] They still hold this opinion despite the fact that the Supreme Court has repeatedly confirmed its constitutionality,[91] on the grounds that Article 128 of the present Constitution states that:

> "All laws and regulations and other existing legislation in force in the Hashemite Kingdom of Jordan at the date of the enforcement of the Constitution shall continue to be in force until they are repealed or amended by legislation."

Furthermore, the court has recognized a superior status to the Defence Law and Regulations with regard to the ordinary laws of the state; and ruled that in a case of conflict the former should supersede the latter.[92]

When the battle over the constitutionality was lost, the struggle against the Defence Law continued in and outside the parliament. According to I. Bakr,[93] lawyers have attempted to attenuate the harshness of the Defence Law by subjugating all the decisions and measures taken thereunder to the control of the HCJ. Here again the attitude of the HCJ has been very disappointing. As determined in a series of cases, the established view of the court has been the following: The Defence Law does not require the administrative authority to state the reasons for the detention of any person. All that is required is to state that the detention was for the sake of the public safety.[94] Nothing in the said law or any of the regulations issued thereunder requires the competent authority, when applying Defence Regulation No. 2 of 1939, to conduct any enquiry about alleged of-

fences and it may rely upon a letter from the police authorities to punish the person concerned, if it be deemed satisfactory.(95) The Prime Minister (or any person delegated by him) has absolute discretion in deciding upon what may justify the application of the Defence Powers and upon what may come under the subject of public safety and the defence of the realm.(96) The HCJ has no right to examine his discretion;(97) and the term 'public safety' should be interpreted in its widest meaning in order to include all matters relating to public security.(98)

However, in more recent cases the court seems to have adopted a more sympathetic and realistic approach, and assumed the power to control the discretion of the administrative authorities in this regard. In Case No. 45/71, the court ruled that the Defence Order No. 10 of 1971 prohibiting the sale of fruit and vegetables in the old market of the city of *Irbid*, was not issued for the sake of the public safety or the defence of the realm, but rather introduced to limit the sales to the new market only. In using its discretion the administration must confine itself to the purpose for which the defence powers were originally intended to be applied. Merely stating in the Defence Order that it was issued for the sake of public safety and public security may not suffice, especially when it is inconsistent with the real purposes which can be derived from the order itself. The Defence Order was therefore void and accordingly nullified by the court.(99)

In 1986, the court explicitly recognized its right to control the discretion of the administrative authority in applying the Defence Powers, and adopted a narrow definition of the term 'public safety'. In Case No. 107/85, the court ruled that:

> "Although the defendant was lawfully delegated by the Prime Minister to apply the defence powers... provided

> for under Defence Regulation No. 2 of 1939, against any person who has committed an offence against the public safety and the defence of the realm, the measure he takes under these powers is subject to the control of this court, especially with regard to the grounds upon which it is based... The phrase 'public security' which may justify the application of these powers must be limited to material actions injurious to public interests and which may adversely affect the safety of the public in general. Actions which may affect specific persons in their personal capacity are not contained within the meaning of the safety of the Kingdom referred to by the said regulations."(100)

Whether this is a new policy meant to be observed in future cases or merely one of those occasional impulses, no definite answer can be given at the present time.

Inside the Parliament, the Defence Law and Regulations have always provoked heated arguments. On several occasions the representatives of the nation have debated with discontent and disapproval the harshness and the abuses and indeed the need for the defence powers.

It has been reported that in 1950, the legislative committee of the House of Representatives had inserted in the draft Constitution (the present Constitution) an Article stating that "the administrative authority may not order the detention of any person except during Martial Law and in accordance with the provision of a law enacted by Parliament." The draft Article was attacked by the Government and eventually withdrawn. During the discussion of this Article Mr. T. Abu-Al-Huda, the then Prime Minister of Jordan made the following statement in the House of Representatives:

> "I can assure you that the Government is very much inclined to preserve the freedom of the individual and the communities; and to enable them to express their opinions and wishes verbally and in writing; and agrees with you that the exceptional laws are far too many and that they have been brought about by circumstances which now have disappeared... Indeed this should be taken into consideration and these laws must be thoroughly examined in order to abolish the perpetuated exceptional legislation, and to keep only

> what may be necessary to preserve law and order in a case of extraordinary circumstances... from my own experience I would like to admit to my brothers the Representatives that, most of the time, exceptional laws have been applied in a manner which is unfair, unjust and contrary to the public interest.
>
> As an example, I recall a case which was brought to my attention recently. A man was detained and when I inquired about the reason for his detention, I was told that he was a communist and propagating communism and was found in possession of a communist pamphlet and other papers. When I received his file, the said pamphlet was nothing more than an ordinary political pamphlet similar to any pamphlet which could be found in the pocket of any person at any time... I had to 'beg' the Minister concerned to release him... and I only blame the person who did not understand the meaning of those papers. Experience, therefore, makes me believe with you that there is an urgent need to abolish most of these laws and to retain only what is strictly necessary."(101)

Thirty-seven years have lapsed since this statement, and the Defence Law and Regulations are still very much in operation; on the contrary, they have been increased and strengthened on several occasions ever since.

Another attempt to pressurize the Government into abolishing the Defence Law and Regulations was made in the Senate House in 1951. the same Prime Minister stated that:

> " I did not refuse to abolish those laws in the past, but as I said the matter needs more study and consideration, and that there is an intention to abolish all the perpetuated exceptional laws."(102)

As far as Martial Law is concerned, the principal criticism is not the constitutionality or the harshness of the powers provide thereunder, but rather the permanent status which it has acquired over the years since 1967. One may agree that the Constitution does authorize the Administration to take all the necessary measures to deal with a situation as serious as a war. Perhaps one may also agree that all the powers guaranteed under The Martial Law Instructions of 1967 were

justifiable during the war and were strictly required by the exigencies of the situation at that time. What is indeed difficult to justify or even to understand is the continuous enforcement of these instructions after the war actually ceased to exist. The war lasted for less than a week during 1967, after that or at least since 1970 military operations have completely stopped. Not even a single shot has been fired across the Jordanian-Israeli borders since 1970. In Israel itself Martial Law was lifted long ago, despite the hostile operations on their other borders.

Some, however, may argue that, from a legal point of view Jordan is still at war with Israel, and therefore that the state of war has not yet ended. This might be true, but still does not justify the continuation of Martial Law, because emergency powers are not connected with the mere legal existence of a state of war; they are exceptional measures intended to enable the government to face practical difficulties resulting from an overwhelming crisis, and not from a theoretical situation.

Others may say that, the situation in the Middle East in general and the political instability of the area is a valid reason in favour of the continuation of the state of emergency.[103] This is a highly unconvincing justification, because the stability of the area is not the concern of any individual state on its own, and every individual state should consider its respective circumstances. Of course, every state in the region is entitled to impose Martial Law within its respective borders when there is a threat to its territorial safety or to law and order, but it must consider its own circumstances only. None of the Western European countries has imposed Martial Law on its

own citizens because of the situation in Greece, Cyprus or Turkey or any other country.

Accordingly, it could be concluded, that the provisions of the present Constitution of Jordan, have created chaos in the legal system of Jordan, and that the present emergency legislation is beyond justification. The laws of Jordan provide the Administration with vast, and sweeping emergency powers, which go far beyond what is strictly required by the exigencies of the situation or even beyond what would be reasonably required under the most demanding and critical situation. As the Prime Minister of Jordan himself has admitted, these powers are arbitrary, unjust and unfair, and above all out of date and not required. As he also has admitted they are widely abused, misinterpreted and misapplied.

Emergency powers, especially the Defence Law and Regulations and the Instructions of the Martial Law Administration, could be held responsible for most of human rights violations in Jordan. They are also one of the principal reasons for the failure of Jordan to fulfil its obligations under the United Nations Covenants with regard to the minimum standards of human rights.

Clearly, Jordan is in breach of its international obligations under the Political Covenant. Filing of a notice of derogation under Article 4(3) thereof as was promised by the representative of Jordan and accepted by the HRC would not remedy the situation,[104] since the existing emergency powers in Jordan are indeed not limited to the "extent strictly required by the exigencies of the situation" as required by Article 4 of the Political Covenant.

If the laws and practices of Jordan were ever to be made consistent with its legal obligations with regard to the minimum internation-

al standards of human rights and be brought into line with the provisions of the Political Covenant, the present state of emergency must be brought to an end. That is to say the following steps must be considered:

1 - The present state of Martial Law should be lifted in order to put an end to abuse of power and all other arbitrary practices.

2 - The long-lived, unconstitutional and unneeded Defence Law and Regulations must be abolished immediately.

3 - The provisions of Articles 124 and 125 of the constitution ought to be amended as suggested above in order to provide some restrictions on emergency powers should the need for them arise in the future.

REFERENCES (VII)

(1) See Malinowski, Freedom and Civilization, London, 1947, p. 199.

(2) Ibid.

(3) See Art. 57 & 62 of The Vienna Convention on the Law of Treaties, of 1969. The full text is published in I. Brownlie, Basic Documents in International Law, 3rd ed., Oxford, 1983, p. 349. For the commentary on the Arts. of the Convention see 61 AJIL, (1967), 285.

(4) Prof. R. Higgins rejected this argument and stated that she "shares the view that derogations to human rights obligations are acceptable only if events make them necessary and if they are proportional to the dangers that those events represent." Prof. R. Higgins, "Derogation under Human Rights Treaties" 48 BYIL, (1976/7), 281, 282-83; hereinafter referred to as R. Higgins.

(5) See EHR, Art. 15; AMR, Art. 27; and the Political Covenant, Art. 4.

(6) See: The Economic Covenant Art. 5(1);
The Political Covenant Art.5(1);
UDHR Art. 30;
EHR Art. 17;
AMR Art. 29.

(7) See for example Arts. 12, 14(1), 18(3), 19(3), 21 and 22(2).

(8) Application No. (322/57), see 1 EHRR, 25; see also judgement of 1 July 1961 ser. A., Vol. 3, p. 56.

(9) Applications No. (3321-3 and 3344/67), see the report of the commission, Y.B. 12, (1969) p. 72.

(10) It was argued that derogation from the requirement of Art. 5 of EHR was permissible in consideration of the security situation in Northern Ireland at that time. See report of the Commission of 25 January 1976, p. 60; Y.B. 19 (1976) p. 512; See also judgement of the court, ser. A. Vol. 25.

(11) R. Higgins, op. cit., p. 302.

(12) See the HRC Report, GAOR., Supplement No. 40(A/36/40) p. 110. (1981).

(13) Ibid.

(14) See for instance the discussions of and the comments made by the Committee with regard to the reports of Syria, Jordan, Chile and the U.K., see UN DOC. No. CCPR/C/1/ Add. 24 (1978); UN DOC. No. CCPR/C/1/ Add. 40 (1979); UN DOC. No. CCPR/C/1/ Add. 17 (1977); UN DOC. No. CCPR/C/1/ Add. 35 (1978). For the discussions see the HRC's meetings No. 127, 128, 129, 130,

147, 148, 149. For the report of Jordan see UN DOC. No. CCPR/C/1/ Add. 55 (1981), for the discussion thereof see UN DOC. Nos. CCPR/C/SR. 331-332 (1981), for the comment see the HRC report, GAOR, Supplement No. 40. (A/37/40) (1982).

(15) See UN DOC. No. CCPR/C/1/ Add. 35 (1978) and UN DOC. Nos. CCPR/C/SR. 127-30, 147-9 (1979).

(16) In 1976 the U.K. derogated under Art. 4 and made it clear that the measures were not territorially limited to Northern Ireland, which made the legitimacy of the derogation even more questionable. See UN DOC. Nos. CCPR/C/2, 11-12 (1977).

(17) Joan F. Hartman, "Derogation from Human Rights Treaties in Public Emergencies", 22 Harv. I.L.J (1981) 1, 16; hereinafter referred to as Joan Hartman.

(18) Further pressure might result in the denunciation of the International instrument or even withdrawal from the whole organization which usually leads to further violation or even total departure from the declared rights by the state concerned.

(19) See the International Commission of Jurists, States of Emergency, their Impact on Human Rights, Geneva, 1983; hereinafter referred to as The I.C. of Jurists.

(20) See below p.505-507.

(21) I.C. of Jurists, op. cit., p. 240.

(22) See the report of N. Questiaux, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, titled as 'Study of the Implications For Human Rights of Recent Developments Concerning situations known as States of Siege or Emergency', UN DOC. No. E/CN4/sub2/1982/15, p. 28; hereinafter referred to as Questiaux Report.

(23) The HRC in the case of the Political Covenant and the ECUM and ECUT for the European Convention on Human Rights.

(24) Lawless and the Irish cases, see above note No. 8 and 9.

(25) States parties usually send representatives to attend the discussion of their reports by the Committee and to provide answers to the questions raised by the members of the Committee. There is no legal obligation on the state party to send a representative nor that the representative should not give misleading answers.

(26) See R. Higgins, op. cit., p. 285.

(27) Art. 4(1).

(28) Art. 4(2).

(29) See EHR, Art. 15(2) and AMR, Art. 27(2).

(30) Questiaux Reports, op. cit., p. 19.

(31) See the comments of the HRC on the second supplementary report of Jordan, UN DOC No. CCPR/C/SR. 361, (1982), p. 38.

(32) Contrary to the provision of Art. 15(3) of the EHR, Art. 4(3) of the Political Covenant does not require the notice to include the derogatory measures.

(33) Questiaux Reports, op. cit., p. 14.

(34) See I.C. of Jurists, op. cit., p. 432.

(35) These restrictions are based on an extended list of restrictions recommended by the International Commission of Jurists, Ibid. pp. 459-63.

(36) The Defence Law of Trans-Jordan of 1935, published in the JOG No. 473 of 19/3/1935, p. 158.

(37) Declared in force by the Royal Decree of 29/8/1939, see JOG No. 644 of 29/8/1939, p. 514.

(38) See Defence Law Supplement, No. 20 of 1948.

(39) For comparison see the full text of this 'Order-in-Council' in the Palestine Gazette, No. 1440 of 30 October, 1933, p. 1508.

(40) In 1948, the law was amended and all the exemptions of the British forces and the High Commissioner and his officials were cancelled. See the JOG No. 918, p. 9.

(41) In 1946 the law was amended to alter the word Trans-Jordan to The Hashemite Kingdom of Jordan, and the title His Royal Highness the Amir to that of His Majesty the King. See JOG No. 861 of 25/5/1946.

(42) See Art. 4.

(43) For a complete list of those subjects see Art. 4(a)(1-12).

(44) See sub-paragraph 12.

(45) This paragraph was added by law No. 37 of 1947, see the JOG No. 931 of 16/12/1947, p. 1055.

(46) Art.5(1).

(47) See paragraph (10).

(48) For a complete list of these exceptional powers see Art. 5, paragraphes 1-13.

(49) See above p. 495.

(50) It is too difficult to know precisely how many, but nonetheless, about a hundred of these have been cited in The Encyclopedia of Jordanian Legislation, Vol.II, under *Defa'a* (Defence).

(51) See JOG. No.646 of 2/9/1939.

(52) See the JOG. No. 646 of 2/9/1939.

(53) See above p.450.

(54) Art. 5.

(55) Art. 6.

(56) This Art. was added after two weeks of the introduction of the original regulation, and inserted between the original Art. 9 and 10 and numbered as Art. 9A. See JOG No. 646 of 19/9/1939, p. 603.

(57) See Defence Order No. 7 of 1971.

(58) The period of our field-work.

(59) See below p.509.

(60) The previous Jordanian constitutions had also contained provisions to that effect. Art. 69 of the Constitution of 1928, stated that, in the event of internal disorder or an eminent danger from a hostile attack on any part of Trans-Jordan, the Amir may declare Martial Law. Art. 78 of the Constitution of 1946 also provided for the right of the King to declare Martial Law in Jordan or any part thereof by a Royal decree, based on a recommendation by the Council of Ministers.

(61) See the Royal Decree declaring Martial Law in Jordan, and the decision of the Council of Ministers upon which it was based, JOG No. 2010, of 5/6/1967, p. 858.

(62) Ibid. p. 859.

(63) Art. 3(1).

(64) Art. 4(a&b).

(65) See Art. 5.

(66) Art. 6.

(67) Art. 7(1).

(68) As amended in 1971.

(69) See Art. 9(1).

(70) See Arts. 10 & 15.

(71) See Art. 12.

(72) See Arts. 17-19.

(73) The text of this Article and its effects on human rights in general and on the right to judicial review of administrative actions, as well as its constitutionality and the attitude of Jordanian courts thereof were discussed elsewhere in this work. See above pp.453 and respectively.

(74) See above pp.151-152.

(75) See above p.397.

(76) A city in north Jordan.

(77) See Case No.91/80, JBR (1980) p. 1350

(78) Case No. 97/77, JBR (1977) p. 302.

(79) Case no.70/75, JBR (1975) p. 144. It was stated, "whereas the Governor of the Capital has based the order detaining the applicant on the grounds of the commercial transaction between the applicant and the *Wafa'a Dajany* Company, and there is no relation between this and the public safety, we therefore declare the order null and the detainee must be released."

(80) A common way of teasing girls in the Middle East during the '70's.

(81) Case No. 58/72 JBR (1972), see the argument of the defence, p. 29.

(81a) Case No. 49/75, JBR (1976), p. 108.

(82) See p.501.

(82a) Law No. 7 of 1954.

(83) See above p.474.

(84) See above p .493.

(85) If not the constitutions of the world.

(86) A. Al-Hiari, Constitutional Law, op. cit., p. 648.

(86a) See UN DOC No. CCPR/C/SR. 331, (1981), p. 6.

(87) See above p.448.

(88) As translated by G.H. Flanz and A. Almany, The constitutions of the world, op. cit., Vol. V.

(89) As translated by G.H. Flanz and Fouad Shafik, the constitutions of the world, op. cit., Vol. IV.

(90) See for instance:
- A. Al-Hiari, Constitutional Law, op. cit., p. 640;
- S. Keswani, op. cit., p. 250-4;
- H. Nddah, op. cit., p. 78-9;
- I. Bakr, op. cit., pp. 23-30.

(91) Among the early Cases see for instance Cases No. 39/52, JBR (1953), p. 283; No. 43/52, JBR (1953) p. 54; No. 51/54, JBR (1954), p. 726; No. 102/64, JBR (1966) p. 558.

(92) See Case No. 51/54, ibid, p. 726, where it was stated that "... Exceptional legislation supersedes ordinary legislation and accordingly the law of Print and Publication which is an ordinary law may not affect the enforceability of any provision of the Defence Law which is an exceptional legislation." Twenty years later the court also insisted on the same conclusion in a similar case, Case No. 76/72, JBR (1972) pp. 1182-83.

(93) See above note No. 90.

(94) See Case No. 96/56, JBR (1956), p. 739.

(95) Ibid. See also Case No. 40/66, JBR (1966), p. 736.

(96) Case No. 91/67, JBR (1968), p. 31.

(97) Ibid. See also case No. 39/51, JBR (1952) p. 283.

(98) Case No. 91/67, JBR (1968), p. 31.

(99) Case No. 45/71, JBR (1971), p. 905.

(100) Case No. 107/85, JBR (1986), p. 35.

(101) As quoted by Judge F. Kilany, The Special Tribunals, op. cit., p. 300; and translated by present writer.

(102) Ibid. The row was occasioned by the discussion of the manifesto of the Cabinet of Mr. T. Abu-Al-Huada in 1951. Senator A. Sallah attacked the Government policy in this regard and stated the following: "...exceptional laws are inconsistent with the doctrine of separation of powers, and violate the rule that the plaintiff must not be a judge in his case (no man may be a judge in his cause). It is the government who declares these laws, also who applies and judges in accordance with them and who executes judgement and orders under these laws. We do not need the exceptional laws and what might be considered an offence is punishable under the Penal Code and therefore nobody should be held responsible for an action which is not an offence under the Penal Code." Ibid.

(103) This was the reason given by the representative of Syria to the HRC, when members of the committee had questioned him about the existence of a state of emergency in Syria. See the I.C. of Jurist's Study, op. cit., pp. 277-289. See also UN. DOC. CCPR/C/1 Add. 25 (1978).

(104) See the Report of the HRC, GAOR, Supplement No. 40 (A/37/40) p. 41, (1982).

CHAPTER VIII.

GENERAL CONCLUSIONS.

This chapter is called 'General Conclusions' because most of what is usually included in the concluding chapter has already been mentioned somewhere else in this work, and therefore there is no need for repetition. It has been the policy throughout our work to include the conclusion of each topic in its relevant place within that particular chapter or section. Nonetheless, there are some important points which need to be specially stressed and some conclusionary remarks and observations to be made here.

In this chapter, we shall confine ourselves to a general assessment of the role of the constitution and domestic laws in the implementation of the modern international standards of human rights, and the present system of international scrutiny of the domestic legislative measures; a general assessment of the legal system of Jordan and of its performance as a state party.

1 — AN ASSESSMENT OF THE ROLE OF THE CONSTITUTION DOMESTIC LAWS:

As far as the undertaking to take legislative measures is concerned, we have mentioned from the very beginning that the role of the constitution and the domestic laws, in this regard, consists of two main parts:[1]

a) Adoption of equivalent standards at the domestic level. This requires the inclusion of special legal provisions providing for the same rights and freedoms in the Constitution and the statutory law of each state party. Such legal provisions should declare the rights re-

ferred to in the Covenants as human rights, and also provide the necessary rules for their exercise and enjoyment at the domestic level by those who are subject to its jurisdiction. In addition to the general provisions relating to the general framework of the legal system of the state party, each substantive right requires special legal provisions intended for that particular right. The right to equality before the law requires different legal provisions from those required for the right to life for instance. Accordingly four substantive rights have been chosen from each Covenant in order to explain the role of the constitution and the domestic laws in the implementation of each of them and to define the legislative measures required for that purpose.(2)

However, two basic facts must be kept in mind, firstly, that at the entry into force of the Covenants in 1976, all states parties possessed their own respective legal systems which, with marginal variations, provide for almost similar rights and freedoms as those included in the Covenants. Secondly, what is guaranteed under the Covenants are only the minimum international standards of rights and freedoms which states parties are under legal obligation to ensure or seek to ensure as the case may be. There is, therefore, no penalty on states parties whose constitutions and domestic laws stipulate for a larger number of rights or higher standards than those guaranteed under the Covenants.(3) Every state party should thus carry out a comprehensive survey of its Constitution, laws, and legal practices, and measure them against the provision of the Covenants. If they fall short of the requirements of the latter, the state party should introduce the necessary legislative provisions in order to meet at least the minimum standards as designated under the Covenants.

In the present work we have conducted a model assessment in the case of Jordan with regard to some selected rights. In some cases the Jordanian legislation exceeded the minimum international standards, (the right to life), in many others it fell seriously short of those minimum standards. In such cases we have highlighted the gaps between the two systems and have also suggested the required legislative measures in order to bridge those gaps.[4]

b) Introduction of sufficient domestic legal standards:[5]

Whereas the aim is to ensure the enjoyment of the declared rights and freedoms at the domestic level, mere introduction of domestic legal provisions stipulating for equivalent standards would not realize that aim in practice. It is therefore a substantial part of the role of the constitution and domestic law to provide effective legal safeguards in order to ensure the exercise of those rights and freedoms by individuals. Such legal safeguards may vary in kind and quantity from one state party to another according to its respective legal system and domestic circumstances. However, there are some fundamental legal safeguards which have to be introduced in every state party irrespective of its own circumstances and the nature of its legal system, if the practical implementation of the modern international standards of human rights is ever to be secured on the ground. The first and foremost legal safeguard is the independence of the judiciary.[6] Without an independent and enlightened court to which the individual may complain when his declared rights and freedoms are violated, these rights and freedoms cannot be protected. An ignorant or corrupt court or one which could easily be influenced from outside could cause harm to, rather than, protecting human rights. It is therefore for the national legislator to establish the

judiciary as an independent branch of government and to protect its independence from violation and outside influence.

Furthermore, an independent judiciary cannot perform its role if the individual, who claims that his rights and freedoms have been violated by the official authority, is denied access to court. The second fundamental legal safeguard would thus be the right to judicial review of administrative action.(7) Without this guarantee the declared rights and freedoms cannot be ensured for long. They will be implemented or denied at the pleasure of the administrative authorities.

The third fundamental legal safeguard, is the imposition of restrictions on emergency powers.(8) There are some states parties who have lived almost all their life under continuous state of siege or public emergency, where the ordinary rules of legitimacy disappear or at least take second place after the emergency legislation. In a case of public emergency, protection of human rights becomes of extreme importance. Experience of many countries shows that human rights suffer from the detrimental effects of unrestricted emergency powers. Emergency powers are open to abuse and the state of emergency may be used as a pretext for violating human rights. Every country is liable to face a state of public emergency at a given time of its life. In such circumstances the public authorities must be provided with special powers to enable them to bring the situation under control again. A fair balance must thus be maintained between the rights of the individual and the right of community to defend itself against destruction. It is, therefore, the role of the constitution and domestic laws to protect the rights of the individual in the case of a public emergency by imposing reasonable restrictions on the right of

the Administration to declare a public emergency and on the emergency powers when they are actually put into action in order to prevent them from being abused by the public authorities.

We have investigated the extent to which the Constitution and the laws of Jordan have provided such legal safeguards and found them to be almost absent or very limited to the extent that they are unable to perform their role. As far as the independence of the judiciary is concerned, it has already been mentioned that although the Constitution has instituted the judiciary as an independent branch of government, and stipulated that the judges shall be subject to no authority other than that of the law, independence of the judiciary has frequently been interfered with by the Executive and the Legislature as well. The constitutional and statutory guarantees for the independence of the judiciary have been undermined by exceptional legislation which has been used against judges to threaten their tenure of office.

One's right to one's natural jurisdiction is not provided for by the Constitution of Jordan as a constitutional right. The right to judicial review of administrative action has been seriously restricted under various pieces of legislation and entirely eliminated by Article 20 of the Martial-Law Instructions of 1967 contrary to the explicit provisions of Article 102 of the Constitution. Despite the restrictive interpretation of this Article by the HCJ, most of illegal administrative actions which violate the rights and freedoms of the individual are considered final and unchallengeable before any court of law.(9) Consequently, it is not surprising at all, in Jordan, to find a person whose constitutional rights and freedoms have been violated by an illegal administrative action, but nonetheless he is

unable to seek justice by a court of law because all the courts have been excluded either by a special law or by special provisions in the ordinary laws. As far as emergency powers are concerned, there are no limitations or restrictions of any kind whatsoever. Declaration and termination of a public emergency and the emergency powers themselves are all matters of absolute discretion by the Executive. As long as the state of emergency remains the Executive is a 'self-empowering machine'. That is to say it can invest itself with unlimited powers and an unfettered discretion. This has resulted in sweeping powers being enacted and implemented without any restrictions.

It is the inadequacy of the fundamental safeguards in the legal system of Jordan which can be held responsible for most of the violations of human rights, rather than the lack of legal provisions providing for these rights.

2 — AN ASSESSMENT OF THE PRESENT SYSTEM OF INTERNATIONAL SCRUTINY OF THE DOMESTIC LEGISLATIVE MEASURES.

As mentioned earlier, every state party has pledged itself to take legislative measures for the implementation of the rights and freedoms referred to under Covenants. This has raised, almost from the very beginning, the question of international scrutiny and supervision of these legislative measures. At least with regard to the Political Covenant, this task has been assigned to the HRC. However, the present method of international scrutiny by the HRC seems less than effective; consequently it could not have much impact on the role of the constitution and domestic laws at the domestic level. It is so, because in most cases the information available to the HRC is limited to what is included in the official report of the state party and the

answers provided by its representative if any at all. There is no guarantee that the report would reflect the true situation of human rights in that particular country and its legal system. Nor is there any guarantee that the representative of the state party would give genuine answers to the questions posed by members of the Committee, or at least that he would not be 'economical with the truth' about human rights in his country.

Reviewing the reports and the answers provided by the representatives of some states parties, one would immediately realise, that neither the reports nor the answers provided by the representatives, presents a clear picture of the legal systems or the whole truth about the human rights situation in those countries. A comparison between the laws and actual situations of human rights in some countries on the one hand and the information made available to HRC and the latter's comments on the other would show that the HRC has sometimes been grossly misled. One cannot, of course expect members of the HRC to be experts on the domestic legal systems of every state party. Methods such as *ad-hoc* and fact-finding bodies may be used to gather information and facts about the legal system and the situation of human rights in some countries, but nonetheless, there is no guarantee that the state party concerned would co-operate or provide them with correct information, if any at all. The case of Chile is a good example in this regard.[110] Other sources of information such as the NGO's reports, private individuals or privately obtained information, can serve only as a general and unreliable background and therefore cannot be treated as hard evidence. It is, thus, important that the HRC seeks the assistance of an independent expert on the legal system of the state party whose report is under consideration. The expert

should cross-examine the representative of the state party and discuss the answers with him before the HRC. The independent expert could be an academic or a practising lawyer who may be, but not necessarily, a citizen of the state concerned.

3 — THE LEGAL SYSTEM OF JORDAN: A GENERAL ASSESSMENT

Although almost all the major areas of the contemporary law of Jordan have been codified in large modern codes after the independence such as the Civil Code, the Penal Code, the Labour Code, Civil Procedure Code, the Criminal Procedure Code, ... etc., the previous political and historical developments have influenced the law of Jordan and left clear marks upon the whole legal system as it stands today. Contemplating the whole body of laws, one could discover astonishing contrasts and inconsistency between various aspects of the legislation as well as the other legal practices. Upon a closer look however, it becomes clear that these laws were derived from irreconcilably divergent legal systems and traditions, and that in many cases the Jordanian legislator did not even take the trouble to reconcile or co-ordinate the adopted laws. To mention only a few examples from the general framework of the law of Jordan one may refer to the following:

While the Constitution stipulates that "Islam is the religion of the state... (Article 2), the Jordanian legislature has issued a law regulating the sale of alcohol without prohibiting its sale to Muslims as required by Islam. Furthermore, the Jordanian legislation permits and regulates the payment of interest on financial loans even by or for the Government. The Penal Code and the Criminal Procedures Code are based on Western theories rather than Islamic jurisprudence.

However, the new Civil Code 1976, which replaced *Majalet al-Ahkam al-Adleyh* (the Ottoman Civil Code of 1876), is a French-styled Civil Code, similar to those of Syria and Egypt,[11] but nonetheless is based on the *Shari'a* as interpreted by the *Hanafi* school.[12] The Jordanian Civil Code is said to have combined the spirit of the *Shari'a* and modern terminology in a sophisticated Civil Code and therefore was recommended by the Legislative Committee of the Arab League to be developed as a unified Arab Civil Code.[13]

Accordingly, in the contemporary legal system of Jordan, pure Islamic law is now reduced to the law of personal status of Muslims and with regard to the matters within the jurisdiction of the *Shari'a* courts such as marriage, divorce, inheritance....etc. In these matters the *Shari'a* courts apply the provision of the Qur'an and the Shari'a directly without reference to statutes.

The Judiciary is an area where the legal and historical legacies of Jordan have clearly manifested themselves. Whereas the Shari'a courts are traditional Islamic courts, identical to those of the earlier stages of the Islamic State and the Ottoman Shari'a courts, the regular courts are based on the Western legal tradition, at least with regard to their structure and jurisdiction. The Jordanian Magistrates, for instance, differ from their British and Islamic counterparts. They are different from the British Magistrates because they are professional judges, appointed by the Judicial Council, and like all other judges, are appointed for life and are eligible for promotion to higher judicial offices subject to seniority and competence. Although they are called *qadi al suleh* (Justice of Peace), they differ

from their Islamic predecessors because they are members of an independent branch of government, and legally speaking, they do not hold their offices at the sovereign's pleasure, nor are they his agents as was the case with regard to the traditional Islamic *qadis*.[14] Their status and jurisdiction is comparable to that of the French County Judges. Contrary to the position in England, the preliminary examination of criminal cases in Jordan is the function of the Public Prosecutor whose role is, to a certain extent, comparable to that of the Investigating Judge in France.

The idea of a Supreme Court which sits as a Court of Appeal and also as a High Court of Justice, was adopted from the English legal system, especially the British Supreme Court of Palestine during the Mandate. Nonetheless, the present Supreme Court of Jordan, as the highest Court of Appeal, differs from the old Palestine Supreme Court and also from the Appeal Court of England. It is modelled on the French *Cour de Cassation* and performs similar function as that of the House of Lords. As a High Court of Justice it has borrowed from the British Court the title and only one element of its jurisdiction, namely, the power to issue writs of *habeas corpus*. The rest of its jurisdiction was borrowed from the jurisdiction of the *Conseils d'Etat* of France and Egypt. Consequently the present Jordanian High Court of Justice turned out to be a somewhat strange creature. It is not a special court, because according to the law of the Formation of the Regular Courts of 1952,[15] it is a regular court. Yet, it is not an ordinary regular court, because of the nature of and the limits on its jurisdiction.[16] It is meant to be *Mahkamat al-quaza'a al-edari*[17] (the adjudicator of the administrative cases) but it is different from the Egyptian and the French *Conseils d'Etat* with regard to its

composition and jurisdiction. It differs from the English High Court of Justice especially with regard to its jurisdiction.

As the highest court in the country, the Jordanian Supreme Court is modelled on the Egyptian and the French *cours de cassation*. It sits on the top of the pyramid of the regular courts and is staffed with the most senior judges, who usually have long experience and have served in several lower courts before. As far as appeals from the decisions of the Court of Appeal and the other lower courts are concerned it possesses final authority, and one may appeal to it on a point of law only. In this respect, its role is comparable with the role of the House of Lords in England. The crucial differences however, is that the role the Jordanian Supreme Court is merely interpretive. It does not create the law, it only interprets the law as it stands and sets an example to the lower court, demonstrating how it should have been applied in the pending case. Due to the doctrine of judicial precedent, the decisions of the House of Lords are binding on all lower courts. A judicial precedent is considered a binding law until it is changed by a later decision by the House of Lords or by a statute. In Jordan, the doctrine of the judicial precedent is not applicable and therefore decisions of the Supreme court are not binding on the lower courts in subsequent cases. Although the lower courts usually tend to follow the directions of the Supreme Court they may (as they sometimes do) disregard the opinion of the Supreme Court and run the risk of having their decisions overruled by the latter if it disagrees with the way they have interpreted the law.

However, it is extremely difficult sometimes to deduce firm principles from the decisions of the Supreme Court of Jordan. Hesitation and lack of courage to formulate clear views on many important issues,

are prominent characteristics of its work, and thus, it befits the description "confused and confusing". It is so, because of the frequent inconsistent decisions on the same issues without much justification or convincing reasoning. The court does not seem to follow a clear path and therefore, the task of the lower courts has been made much more difficult. We have already referred to the contradictory views of the Supreme Court on the right to public trial for instance.(18) When the Court of First Instance decided that the right to public trial was a constitutional right which could not be restricted by a statute, it held the trial in public, contrary to Article 10 of the Juveniles Law. The Court of Appeal overruled the decision and decided that the trial should have been held in camera. The Supreme Court overruled the Court of Appeal and supported the Court of First Instance. A few months later, and in a similar case, the Court of Appeal followed the decision of the Supreme Court on the previous case and upheld the decision of the Court of First Instance. The Supreme Court again overruled the Court of Appeal and departed from its previous decision. Similar criticism may be raised with regard to the views of the Supreme Court on the right to the presumption of innocence, the right to freedom from double jeopardy, the right to judicial review of administrative actions, definition of the term public safety and public security...etc.

The Jordanian legislature seems to have adopted the notion of the "Immunity of the Crown" or of the "Sovereign" from the Western legal systems especially the British. Islamic law does not confer any immunity on the Sovereign or on the Government from the jurisdiction of the courts of law. According to Islam both the Sovereign and the Government are accountable to the courts, just like any private indiv-

idual. The Caliph personally is subject to all kinds of judicial proceedings including criminal proceedings. He is required to appear in person in the court if necessary, and always on an equal footing with private individuals. Nevertheless, Article 30 of the present Constitution of Jordan stipulates that: "The King is the Head of the State and is immune from any liability or responsibility". Despite the fact that Article 47 of the Constitution of 1928, which was derived from the previous Ottoman laws and the Egyptian Constitution of 1923, did not confer any immunity on the Government, but indeed provided that "The courts shall entertain all civil cases brought by or against the Government", the law of the Government Proceedings of 1935 introduced for the first time in Jordan the concept of the "Immunity of the Crown" and the concept of *'fiat judicia'*(19)

The Jordanian law of 1935 was an almost word for word translation of the British "Palestine Crown Proceedings Act of 1931". As has already been mentioned,(20) the courts were forbidden by this law from entertaining any action against the Government or any department thereof, except in a few cases specified in Article 3 of the same law. Although this alien concept was introduced during the Mandate, it is still very much alive and applicable in Jordan at the present time. It is quite paradoxical to observe that, there has been a noticeable trend amongst Western legal systems (even in England) to relax the concept of the Immunity of the Crown, to enable individuals to bring actions for tort and damages against the government, whilst the Jordanian legislature is still loyal to this concept and has become even more orthodox than the Western legislatures themselves. Jordan is not only still holding on the rigid concept of the Immunity of the

Crown, but also has supported and strengthened it on several occasions in 1953 and 1958.[21]

Another important aspect of the Jordanian legal system is the emergency legislation. It has already been mentioned that the Jordanian legislature has adopted the British practice of introducing a Defence Law and Regulations in order to provide the Administration with exceptional powers to deal with emergency situations.[22] The Jordanian Defence Law and most of the present Defence Regulations were adopted during the British Mandate of Trans-Jordan and were based on the British Defence Law and Regulations of Palestine. The Defence Law and Regulations were declared operative in 1939 and have continued until the present time.[23] Jordan has also adopted the French concept of Martial Law as implemented in the earlier constitutions of Syria and Egypt. Since the imposition of Martial Law in Jordan in 1967, the two systems have been operating simultaneously.

Despite the fact that at the present time there is no real emergency to justify the existence of either of them, Jordan possesses two different sets of rules which were derived from two different sources to deal with the same issue. The result has thus been, conflicting jurisdictions and powers and ever increasing legal complications. It is too difficult, or even impossible, for any legal expert to define precisely the limits of the emergency powers in Jordan or who may exercise them or the issues that may come under the emergency powers. Consequently, the state of emergency has become permanent and the emergency powers have gone beyond any control or limitation; especially since 1967.

These are some of the principal elements of the general framework of the present legal system of Jordan. They bear great relevance to

our subject because they present a picture of the legal environment within which the modern international standards of human rights are to be enforced.

As for the performance of Jordan as a state party to the U.N. Covenants and its obligation to take legislative measure giving effect to the rights and freedoms declared thereby, the distinction should be made between: The Economic, Social and Cultural Rights (The Social Welfare Rights) on the one hand, and the Civil and Political Rights on the other. Considering the fact that Jordan is a developing country with exceptionally limited economic resources, it qualifies to benefit from the principle of progressive realization. Under the Economic Covenant a state party of such circumstances is not required to guarantee the immediate and full realization of all the rights listed therein. Its obligation consists of seeking international assistance and co-operation with international efforts especially in the economic and technical spheres, as well as the initiation of domestic programmes and plans, the adoption of legislative measures and the taking of steps, to the maximum of its available resources with a view of achieving the full realization of the social welfare rights. As far as the latter are concerned, the examples studied in chapter IV above suggest that the performance of Jordan in this field seems, so far, satisfactory. That is to say that, although not all the social welfare rights are fully implemented at the present time, Jordan seems to have complied with the above requirements and that there has been a noticeable progress towards the full realization of these rights. Available records, researches, statistics, and figures,[24] indicate that there has been continuous development planning and programming and that massive resources have been committed to social welfare

rights. Jordan has fully co-operated with the international efforts, and has sought every possible international assistance and benefitted from it through intelligent development planning and social programming.(25) A series of ambitious development plans have been executed and have achieved remarkable rates of economic growth, social and cultural development.(26) Health care, social security and education are being given top priority in the successive development plans.(27) Important steps and legislative measures have been taken, some before and some after 1976. Some minor gaps between the Jordanian legislation and the provisions of the Economic Covenant have been indicated in the relevant places in this work, and thus is no need to mention them again here.(28)

However, the records are not as glamorous and the picture is not as bright when it comes to civil and political rights. The selected examples studied in chapter three revealed some serious gaps between law of Jordan and the minimum international standards of human rights as defined by the Political Covenant. Under the latter, a state party is under legal obligation to guarantee the immediate and full realization of the civil and political rights and where not already provided for by existing laws, to take all the necessary legislative measures to give effect to these right at the domestic level. In the case of Jordan the entry into force of the Covenant in 1976 passed almost unnoticed, and without any substantial changes in the existing laws nor in the legislative, administrative or judicial practices.

As far as the Constitution is concerned, it was mentioned(29) that the second chapter of the Constitution of 1928 which provided for the rights of the people, was re-introduced in the Constitution of 1946 under the same number (chapter 2). With limited adjustments and

expansions inspired by the adoption of the UNDR in 1948, the same chapter has been re-introduced again in the present Constitution (1952). It was also observed that despite the frequent amendments to the various Articles of the Constitution since 1952, chapter two has remained untouched, even after 1976. The question raised then was whether this means that the provisions of this chapter are in perfect harmony with international standards or mere carelessness on behalf of the Jordanian legislature?<30> As we were unable to answer the question at such an early stage, we postponed the answer to this place. Upon a critical legal analysis of the relevant provisions of chapter two of the present Constitution they fell short of the requirements of the modern international standards of human rights, and therefore the Jordanian legislature should have ameliorated these provisions to meet at least those minimum standards provided for by the Covenants. However, it is not only the Constitution which should have been revised in 1976, for our comprehensive survey of the existing (and of some of those previously repealed) laws has uncovered many gaps and defects in the whole body of Jordanian law. It could thus be concluded that, as far as the undertaking to take legislative measures is concerned, Jordan is in plain violation of its obligation under the political Covenant, and that the role of the Constitution and domestic law of Jordan is yet to be fulfilled.

Before addressing any specific recommendations or proposals to the Jordanian legislature in order to remedy the situation, some general observations on the present situation of human rights in Jordan and on some of the practices and policies which have crucial impact on the exercise and enjoyment of human rights, may be pointed out:

1 - A study of the types and the nature of human rights violations in Jordan would suggest that there is not an official general anti-human rights policy there. Upon further analysis it becomes quite evident that there is no systematic pattern of human rights violations, and that the surrounding circumstances do vary considerably from one case to another. In most cases these violations could be attributed to the unwarranted individual behaviour of some government officials acting against the law or even sometimes against the instructions of their superiors. In many other cases they could be attributed to confusing and out-dated legislation, as well as judicial and administrative methods of thinking, and above all general ignorance of the modern concepts of human rights.

2 - The degree of ignorance of the very basic concepts of human rights in Jordan is a shocking reality to any human rights researcher. The element of ignorance is not limited to the general public and layman only, but is also found among lawyers and judges not to mention the other law-enforcement officers. Reviewing the cases decided by the Supreme Court and some other Jordanian courts since 1952, the present writer has failed to find a single case where an international instrument of human rights has been cited by the courts or even referred to or invoked by the lawyers. Cases where the provisions of the Jordanian Constitution and other laws relating to human rights were invoked are truly few and far between. This shows the degree of importance attached to these provisions by the Jordanian lawyers.

Amongst other law-enforcement officers such as the Police, and General Intelligence Officers and the Administrative Governors, ignorance of human rights seems commonplace. It is so because most of them do not hold law degrees, and those who do, graduated during the fifties and

the sixties when human rights were not taught at all or at the most taught as an optional subject. Even today, in the law school of the university of Jordan, human rights are still an optional subject. In other words the majority of our future judges, lawyers, and law-enforcement officers graduate from the law school without even a basic knowledge of the legal system of human rights.

From among the various interviews conducted by the present writer in Jordan, one example may be mentioned here. We have already referred to some of the Defence Orders issued by the *Muttasarife* of *Lewa'a Madaba* by means of which, the personal liberty of a number of Jordanian citizens was unlawfully violated.(31) In an interview with the *Muttasarife* and his deputy, in September 1986, the present writer asked them whether they have a list of the international instruments of human rights to which Jordan was a party: the answer was negative. We asked whether they had received special instructions from the Ministry of Justice or the Ministry of Interior with regard to the implementation of any international human rights instruments at all: the answer was again negative. Another question was whether they had received any instructions from the King, the Prime Minister, the Minister of Interior or any higher authority, to be oppressive or to disrespect the rights and the freedoms of the individual: the answer was also negative. When we asked them, how they handled day to day issues involving the fundamental rights and freedom of the individual, the answer was:

> "As an Administrative Governor, one usually exercises his own judgement in accordance with the laws under his hand... and does what he thinks necessary for the preservation of peace and law and order."

An Administrative Governor of the rank of a *Muttasarife* enjoys enormous power and almost unfettered discretion in accordance with those "laws under his hand". He is empowered to order administrative detention of any person indefinitely and without trial. All that is required is that he mentions that he believes that it is in the interest of public safety and public order. He may also issue orders to stop and search any person or any vehicle at any time or place and orders to enter and search any place at any time, day or night, and order the closing of any public or private place or any part thereof; and above all he is empowered to conduct summary trials and to pass sentence at his own discretion. In most cases his discretion is final and unchallengeable before any court of law. When we asked a person who enjoys all these powers, and who is indeed in direct daily contact with the public, about his conception and understanding of the minimum international standards of human rights which ought to be guaranteed to every individual, he stated that:

> "These are matters relating to maternity and child care, care for elderly, widows, handicapped and mentally ill and homeless people."(32)

3 - Jordan has signed and ratified the Covenants without any reservation whatsoever. It is important to observe, that there are some legal provisions in the law of Jordan which are irreconcilable with the provisions of the Covenants. In this we are referring to the provisions relating to the statutes of women in the *Shari'a* law which are applicable in Jordan, particularly the Qura'nic verse relating to the distribution of inheritance. It grants the male brother twice as much as the share of his female sister. In an Islamic society this may be regarded as a justifiable distinction or even a required measure in order to maintain equality between men and women. This how-

ever, would not eliminate the apparent contradiction between this provision and the explicit provisions of the Covenant, and therefore, at least at the international level it could be regarded as a discriminatory legislation and a gross violation especially of Article 3 of both Covenants. Considering the fact that this is a Qura'nic provision which the Jordanian legislature cannot review or repeal, Jordan should have reserved the right to interpret the provisions of the Covenants in the light of the provisions of the Qura'n and the principles of Islamic jurisprudence.

4 - In Jordan, H.M. The King and H.R.H. The Crown Prince play a prominent role in the redressing of human rights violations, whether committed by the various governmental agencies or by private individuals. This has been an established Hashemite tradition, based on the traditional practice of the head of the Islamic state making himself accessible to private individuals and to receive even the most humble member of the public to hear any complaints he might have.
This practice goes back to the days of the Prophet and has always been observed by the Hashemite Monarchs. In Jordan any private individual may present his case before the King or the Crown Prince and have it settled once and for all.(39) Many human rights violations resulting from a defect in the law or a wrongful action by the administration are being redressed in this way. This practice has made quite an impact on the situation of human rights in practice and on the overall record of Jordan in this field, despite the numerous defects in the laws and the sometimes arbitrary administrative actions. Of course this is a most welcome practice and something Jordan would always be proud of, but nonetheless it is not a legal remedy and therefore does

not release the Jordanian legislature from its duty to provide sufficient legal remedies. Given the ever-increasing number of human rights violations and the increase of the duties and and responsibilities of the head of the modern state, one cannot expect the King and the Crown Prince to receive every single member of the public and listen to his complaint in person.

It is therefore the legislature's role to adjust the laws and to establish sufficient legal safeguards to prevent human rights violations in the first place and to provide legal remedies to deal with them when they actually occur.

5 - Reviewing the legislation and the practices of Jordan in the field of human rights, one observes the paradoxical contrast between a commendable record in the field of social welfare rights, and a defective legislation and disturbing practices in the area of civil and political rights. Whereas the implementation of social welfare rights requires huge funds and money to be spent, implementation of the civil and political rights is less costly and mainly requires the introduction of legislation and respect for the law and human rights in practice. In a country of exceptionally limited economic resources one would normally expect the opposite i.e. better performance of the less costly rights.

We have already concluded that Jordan is in breach of its obligation under the Political Covenant, and that upon comparison between the existing laws in Jordan and the provisions of the Covenant one sees that the former has fallen seriously short of the latter. It could thus be confirmed that the role of the Constitution and the domestic laws of Jordan in the domestic implementation of the modern

international standards of human rights is yet to be fulfilled. Most of the gaps between the two systems have already been highlighted and remedies were also suggested in the relevant places in this work. However, in order to improve upon the situation of human rights in general and to bring the laws and the practices of Jordan into line with the provisions of the Covenants the following actions and measures must be considered:

1 - A comprehensive review of the whole body of the laws currently in force is urgently needed in order to co-ordinate those laws and to alter those which are inconsistent with the provisions of the Covenants, and to introduce equivalent standards at the domestic level. Special attention should be given to the following parts:

a) Chapters two and six of the present Constitution;

b) The Criminal Procedure Code of 1961, especially Articles 44-269.

c) The Law of Print and Publication, Law No. 33 of 1973.

d) The Labour Code of 1961 especially Articles 68-89.

e) The Law of the Independence of the Judiciary, Law No. 49 of 1972

f) The Law of the Formation of the Regular Courts, Law No. 26 of 1952

g) The Law of the Government Proceedings, Law No. 18 of 1958.

h) The Law of the General Elections, Law No. 26 of 1986.

2 - A new provision must be added to the Constitution, providing for the right of everyone to his natural jurisdiction and to have his complaint decided by a competent , impartial and previously

established court and that Parliament may not sanction any law abridging this right.

3 - Independence of the judiciary must be protected from outside influence, perhaps by inserting a special provision in the Penal Code stipulating that interference with the independence of the judiciary shall be a criminal offence punishable on conviction by imprisonment.

4 - The Defence Law and all the Defence Regulations made thereunder, which are unconstitutional and unnecessary and above all widely abused in practice, as was admitted by the Jordanian Prime Minister himself in 1958,[94] must be repealed.

5 - Martial Law which has been imposed since 1967, and the Instructions of the Martial Law Administration of 1967 may be terminated in order to enable the Ordinary law and the Regular Courts to function freely.

6 - Article 124 and 125 of the present Constitution, relating to the declaration of the state of public emergency and the emergency powers, should be replaced by the draft Article suggested above, in order to prevent the abuse of the emergency powers and to provide the administration with sufficient emergency powers should there be a genuine need for them in the future.

7 - The jurisdiction of the HCJ to issue writs of *habeas corpus* must not be suspended under any circumstances.

8 - Article 5 of the Law of the Government Proceedings of 1958 may be amended, not only because the notion of the 'immunity of the Crown' is an alien concept to the law of Jordan, but also in order to enable the individual to sue the Government for damages and to seek justice by the courts.

9 - In order to overcome the apparent contradiction between some of the applicable *Shari'a* Laws and other provisions based thereupon such as Article 28 of the Constitution on the one hand and the provisions of the Covenants relating to equality between the sexes on the other, Jordan should file a reservation stating that it shall interpret these provisions in accordance with Quranic Law and the general principles of Islamic jurisprudence.

10 - These legislative measures should be supported by some practical measures in order to promote awareness of and respect for human rights in practice. Without the latter the former cannot have much impact on the actual situation of human rights and on the day to day enjoyment of these rights. Such practical measures may include the following:

a) Strict administrative instructions to all government officials and to the law-enforcement officers, especially the Police and the Administrative Governors to respect the declared rights and freedoms of the individual and to avoid arbitrary actions which may infringe these rights.

b) More space and time in the mass media in order to educate the public about human rights and to publicize them through special programmes, articles, symposiums and documentaries.

c) Inclusion of a course on the modern international standards of human rights in the curriculum of the high schools and universities.

d) Human rights must be made a compulsory subject in all the law schools in the universities of Jordan.

e) Special courses must be arranged and made available to all Jordanian lawyers, and made mandatory for all administrative

governors, police officers and all other law-enforcement officers.

These are some of the legislative and practical measures which the present writer thinks might help to bridge the gap between the existing laws of Jordan and the modern international standards of human rights as embodied in the United Nations Covenants on human rights of 1966.

Whether the Jordanian legislature will take any action which corresponds to the measures suggested remains to be seen. However what must be emphasised here is that the law of Jordan as it stands at present falls short of the standards required under the United Nations Covenants and that the Jordanian legislature should carry out a comprehensive review of the existing laws and practices in order to bring them in line with the United Nations Covenants.

NOTES (VIII.)

(1) The Introduction p. 3.

(2) See Chapter III, and IV, Sections 1, 2, 3, 4.

(3) As was the case in the laws of Jordan with regard to the right to life for instance, see p. 85.

(4) See above note No. 2.

(5) See Part Three, Chapters V, VI, and VII.

(6) See Chapter V.

(7) See Chapter VI.

(8) See Chapter VII.

(9) See Chapter VI, p. 147.

(10) This method was employed in the case of Chile, ECOSOC decision 233 (LXIII) of 13 May 1977 and also in the case of South Africa with regard to many issues. See 19 Bulletin of Human Rights Jan.-March 1978, pp. 25-38.

(11) For the debates in the House of Representatives concerning the new Civil Code and the views of those who were in favour of the old pure Islamic Civil Code, see The Official Records of the House of Representatives. Vol. 8, pp. 757-769, debate of 1/3/1964; see Al-Halasa, op. cit., p. 65, and the other references cited in the same page under note 2.

(12) In Islamic Law there are four major schools, namely, the *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali*.

(13) The Sixth Meeting, Cairo, April 1977.

(14) See above p. 370 and 378.

(15) See Arts. 1 and 10.

(16) Ibid.

(17) See above Chapter VI.

(18) See above p. 126-28.

(19) See Chapter VI.

(20) Ibid.

(21) See H. Nadah, op. cit., pp. 128-132.

(22) See Chapter VII.

(23) Ibid.

(24) See Chapter IV.

(25) Numerous agreements and accords have been conducted between Jordan and the United Nations, Specialized Agencies and other international, Western and Arab financial institutions to finance development projects and to help build up the national economy - see the International Monetary Fund's Annual Reports especially the reports of 1982, 1983, and 1985. A new law has been adopted in April 1987, known as the Law of the Encouragement of Foreign Investments. It gives important concessions and guarantees to foreign and Arab investors in order to encourage them to invest in the national development projects.

(26) Ibid.

(27) See the last three Five-Year Plans of 1976-80, 1981-1986, 1986-90.

(28) See for example the right to free and compulsory primary education.

(29) See Chapter I, p.17.

(30) Ibid.

(31) See Chapter VII., pp.501.

(32) Personal interviews in Jordan in September 1986.

(33) Both the King and the Crown Prince have taken great interest in the welfare of Jordanians to the extent that they quite often visit them in their private houses and inquire about their problems.

(34) See above p.517.

A LIST OF SELECTED BIBLIOGRAPHY.

1. Books, Articles and Documents

A.

A'adial, A.; A Series of Lectures on Human Rights, delivered at the University of Mohammed V., Rabat, 1977, 'unpublished'.

Abraham, K.; "Human Relations and Human Rights in Judaism", in The Philosophy of Human Right.(International Perspectives) ed. by Alan S. Rosenbaum, Connecticut, 1980.

Acton, Lord; Essay on Freedom and Power, Boston, 1948.

Akehurst, M.; A Modern Introduction to International Law. 5th ed., London, 1984.

Al-An'ani, I; Humanitarian International Law, a series of lectures delivered at Ain Shams University, Cairo, 1979.

Al-Farhan, M.; Social Security in Jordan, Yarmuk University, Irbid, 1987.

Al-Ghazwy, M.; "Some Thought (*Nazaratt*) about Human Rights and Fundamental Freedoms in the Constitution of Jordan", I Derasat Review, Amman, 1984.

Al-Ghazwy, M.; The Manual of the Political System and the Constitution of Jordan, Amman, 1985.

Al-Ghunaimi, M.T.; General Principles of the Law of Nations Alexandria, Egypt, 1970.

Al-Hakeemi; A.A.; The Mission of the Free Men, Suna'a, 1981.

Al-Halasa, A.; The Basis of the Legislation and the Judicial System in Jordan, Arab League, Cairo, 1971.

Al-Hiari, A; Constitutional Law and the Constitutional System of Jordan, 1st. ed.,Amman, 1972.

Al-Hiari, A; "Constitutionality of the Laws Immunizing Administrative Decisions", JBR, Amman, (1978) pp.45-169.

Ali Isa, "A Note on the Social Security System", 8 Labour Review, Amman, (1985) pp.5-17.

Al-Kuothary; The Philosophy of Adjudication, Cairo, 1948.

Al-Madi and S. Musa, A History of Jordan in the Twentieth Century, Amman, 1959.

Al-Majid, Abu; Review of the Constitutionality of Laws in the USA and Egypt, Cairo, 1958.

Al-Mawardi; A Treatise on Islamic Jurisprudence, ed. by M.H. Al-Sarhan, Baghdad, 1971.

Al-Mawardi; Constitutional Rules ed. by Maximilian Enger, 1853.

Al-Sa'idi, H.; Crimes against Persons, Baghdad, 1964.

Al-Suyuti, The History of the Caliphs, Cairo, 1958.

Al-Tabri; The Analyses, Vol.II, 1879.

Alwan, M.; "International Treaties in the Legal System of Jordan", JBR, Amman, (1976) pp.340-373.

Amir Sulaiman; The Laws of Ancient Iraq, Baghdad, 1977.

Amnesty International; The Human Rights Story, ed. Power, Oxford, 1981.

Amnesty International; The Death Penalty: a Survey by Country, I.A. Publications, 1984.

Ash-Sha'ir, R.; Responsibility of the State with Regard to Non-Contractual Relations, Cairo, 1978.

Assa'eed, K.; "The Crime of Abortion: A Comparative Study", Derasat Review, Jordan, Amman, (1984) pp.171-219.

At'tal, S.; An Introduction to the Problem of Woman and the Women Movement in Jordan, Amman, 1985.

Attar, F.; Constitutional Law and Political Systems, Cairo, 1978.

Attar, F.; "The Right to Access to Court", II Revue des Sciences Jurisdiques et Economiques, Cairo, (1959) pp.603-652.

Avins, A.; "Involuntary Servitude in British Commonwealth Law", 16 ICLQ, (1967) pp.29-55.

B.

Bakr, I.; "Human Rights", JBR, Amman, (1981) pp.8-65.

Barker, E.; Essays on Government, Oxford, 2nd ed. 1951.

Blaustein, A.P. and Flanz, G.H.; (Ed.) Constitutions of the Countries of the World, New York, 1973.

Boyle, C.K.; "The Concept of Arbitrary Deprivation of Life", in The Right to life in International Law, ed. by B.G. Ramcharan, Dordrecht, Boston, Lancaster, 1985.

Brownlie, I.; Basic Documents on Human Rights 2nd ed. 1981.

Brownlie, I.; Principles of Public International Law; 3rd. ed. Oxford, 1979.

Brownlie, I.; Basic Documents in International Law, 3rd ed., Oxford, 1983.

Bullinger, M.; "Freedom of Expression and Information: an essential element of democracy", 6 HRLR (1985) pp.339-411.

C.

Claude, R.P.C.; Comparative Human Rights. Baltimore and London, 1976.

Cooper, W.M.; Outlines of Industrial Law, 7th Ed., ed. by J.C. Wood, London, 1962.

Corwin, E.S.; The Constitution and What it Means Today. Revised by H.W. Chase and C.R Ducat, 14th ed., Princeton, 1978.

Costin, W.C. and J. Steven Watson; 'The Law and Working of the Constitution: Documents (1660-1914. Volume I (1660-1914), London, 1952.

D.

Denning, (Lord); The Discipline of Law, London, 1979.

Denning; (Lord); The Due Process of Law, London, 1980.

de Smith, S.A.; Judicial Review of Administrative Action, 4th ed., by J.M. Evans, London, 1980.

de Smith, S.A.; Constitutional and Administrative Law, 5th ed., by H. Street and R. Brazier, Dungay, Suffolk, 1985.

Dicey, A.V.: Introduction to the Study of the Law of the Constitution, 10th ed. by E.C.S. Wade.

Dinstein, Y.; "The Right to Life, Physical Integrity, and Liberty", in The International Bill of Rights ed. by L. Henkin, New York, 1981.

Dowrick, F.E.; Human Rights (Problems, Perspectives and Texts). Durham, 1979.

Drayton, R.B.; (Ed.) The Laws of Palestine in force on the 31st day of December, 1933, revised ed., London, 1934.

Driver and Miles; The Babylonian Law, vol. 1 & 2, Oxford, 1952.

Duchacek, I.D.; Right and Liberties in the World today, Constitutional Promise and Reality. Santa Barbara, California; Oxford, England, 1973.

E.

Ezejiofor, G.; Protection of Human Rights under the Law, London, 1964.

F.

Fawcett, J.; The Application of European Convention on Human Rights, Oxford, 1987.

G.

Ganji, M.; The Realization of Economic, Social and Cultural Rights: Problems, Policies, Progress', (UN Sales No. E 75 XIV. 2).

Ghanim, M.H.; Principles of Public International Law,

Cairo, 1968.

Glubb, General Sir John; My Years with the Arabs, Kent, England, 1971.

Gough, J.W.; John Locke's Political Philosophy, Oxford, 2nd ed., 1973.

Greig, W.; International Law, 2nd ed., London, 1976.

H.

Harris, D.J.; Cases and Materials on International Law, 3rd ed., London, 1983.

Harris, D.J.; "The Right to Fair Trial as a Human Right", 16 ICLQ (1967) pp.353-378.

Hartley, T.C. and Griffith, J.A.G.; Government and Law, London, 1975

Hartman, Joan F.; "Derogation from Human Rights Treaties in Public Emergencies", 22 Harv. I.L.J (1981) pp.1-52.

Hashem, H.R.; Interpretation of the Labour Law of Jordan, Amman, 1st ed., 1973.

Hassan, P.; "The Word 'Arbitrary' as used in the Universal Declaration of Human Rights: 'Illegal' or 'Unjust'?", 10 Harv. I.L.J. (1969) pp.225-262.

Hassan, P.; "The International Covenant on Human Rights: An Approach to Interpretation", 19 Buffalo, L.Rev. (1969) pp.35-50.

Henkin, L.; (Ed) The International Bill of Rights, New York, 1981.

Henle, R.J.; "A Catholic View of Human Rights, 'A Thomistic Reflection' ", in The Philosophy of Human Rights, ed. by A.S. Rosenbaum, Connecticut, 1980.

Higgins, R.; "Derogation under Human Rights Treaties", 48 BYIL (1976/7) pp.281-320.

Hobbes, T.; Leviathan, ed. by C.B. Macpherson, London, 1968.

Ho Chich-Cheng; The Fourth Constitution of Communist China. World Anti-Communist League, 1983.

Humphrey, J.; "Political and Related Rights", in Human Rights in International Law, ed. by T. Meron, Vol. I, Oxford, 1984.

Hussain, King of Jordan; My Career as a King, the Arabic version, translated to Arabic by G.A. Tocan, Amman, 1978.

Hussain, King of Jordan; Public Address on the '*Eed al-ummal*' (May Day) on the 1st May 1984, Amman, 1984.

I.

Ibn Qudamah, al-Mughni on Hanbali Jurisprudence, Cairo, 2nd. ed., vol. 9.

International Commission of Jurists; States of Emergency, their Impact on Human Rights, Geneva, 1983.

International Labour Office; Conventions and Recommendations, 1919-1981, Geneva, 1982.

J.

Jaffe, L.L.; "The Right to Judicial Review", 71 Harv. L. Rev. (1958) pp.401-437.

Jennings, W.I. The Law and the Constitution, 5th ed., London, 1959.

K.

Kabaalioglu, A.G.; "The Obligation to 'Respect' and Ensure' the Right to Life" in The Right to Life in International Law, ed. by B.G. Ramcharan, Dordrecht/Boston/Lancaster, 1985.

Kartashkin, V. "Economic, Social and Cultural Rights", in The International Dimensions of Human rights, ed. by K. Vasik, UNESCO, Paris, 1982, Vol. I.

Kelsen, H.; The General Theory of Law and the State, translated by A. Wedberg/ New York, 1973.

Kelsen, H.; What is Justice, Berkeley, Los Angeles, London, 1971.

Keswany, S.; Principles of the Constitutional Law, 1st ed., Amman, 1983.

Khalil, M.; Political Systems, and the Constitution of Lebanon, Beirut, 1967, vol. 2.

Khrase, Ali and Sufadi, S.A.; The Trade Unions Movements in Jordan, Amman, 1979.

Kilany, F.; The Law of Criminal Procedures, Amman, 1981, Vol. I.

Kilany, F.; The Special Tribunals in Jordan, Beirut, 1969.

Kilany, F.; Independence of the Judiciary, 1st ed. Amman, 1977.

Kiss, A. C.; "Permissible Limitations on Rights", in The International Bill of Rights, ed. by L. Henkin, New York, 1981.

L.

Lahud, Abd Allah; Human Rights, Civil and Political, in Lebanese Law, Beirut, 1972.

Lasok, D.; "The Right of the Unborn", in Fundamental Rights: a volume of Essays, ed. by D. Lasok & Others, London, 1973.

Lauterpacht, H.; International Law and Human Rights London, 1950.

Lillich, R.B; "Civil Rights", in Human Rights in International Law, ed. by T.Meron, Oxford, 1984, Vol. I.

Locke, J.; Two Treatises on Civil Government. Revised ed. by P. Laslet, London, 1965.

M.

Mahfzh, Dr. Ali; British Jordanian Relation between 1921-1957; Beirut, 1973.

Mahmassani, S.; Basic Concepts of Human Rights, Beirut, 1977.

Mahmassani, S.; The Legislative System of the Arab States. 3rd ed. Beirut, 1965.

Malinowski, B.; Freedom and Civilization, London, 1947.

Marcoux, L.; "Protection from Arbitrary Arrest and Detention under International Law", 5 Boston Coll. Int & Comp. L.R. (1982) pp.345-376.

Mawdudi, A.; Human Rights in Islam, 2nd ed., London, 1980.

McIlwain, C.H.; The Growth of Political Thought in the West: From the Greeks to the end of the Middle Ages, New York, 1968.

Meron, T.; (Ed) Human Rights in International Law, (two Volumes) Oxford, 1984.

Ministry of Education, (Jordan); The Educational System of Jordan, Annual Report, Amman, 1985.

Mohibal Hassan; (Ed.) Messages of Freedom from the Magna Carta to the Lahore Pledge, London, 1963.

Montesquieu; De l'Esprit des Lois. ed. by David Wallace Carrithers, Berkely, Los Angeles, London, 1977.

Movchan, A.P.; International Protection of Human Rights, Moscow, 1958.

N.

Nddah, H.; The Administrative Courts in Jordan, Amman, 1972.

Nicholas, B.; An Introduction to Roman Law, Oxford, 1961.

Nserenko, D.D.; "Arbitrary Deprivation of Life: Controls on Permissible Deprivation", in The Right to Life in International Law, ed. by B.G. Ramcharan, Boston, Lancaster, 1985.

O.

O'Boyle, M.; "Torture and Emergency Power under the European Convention of Human Rights", 71 AJIL, (1977) pp.674-706.

O'Connell, D.P.; International Law. 2nd ed., Vol. I, London, 1970.

O'Higgins, P.; Cases and Materials on Civil Liberties, London, 1980.

P.

Parveen, S.; Status of Women in the Muslim World, London, 1975.

Pavithran, A.K.; Substance of Public International Law Western and Eastern, Bombay, 1963.

Peaslee, A.J.; The Constitutions of Nations, 4th ed., revised by Dorathe Peaslee, The Hague, 1974 Vol.I (Africa).

Q.

Questiaux, N.; "Study of the Implications For Human Rights of Recent Developments Concerning situations known as States of Siege or Emergency", UN DOC. E/CN4/sub.2/1982/15.

R.

Ramcharan, B.G.; "Equality and Non-Discrimination", in The International Bill of Rights, ed. by L. Henkin, New York, 1981.

Rees, J.; Equality, Pall Mall, London, 1st ed., 1971.

Rshadat, S.; "Freedoms and the Law", JBR, Amman, (1975) pp.765-811.

Robertson, A.H.; Human Rights in the World, Manchester, 1972.

Romahi, S.A.; Studies in International Law and Diplomatic Practice. Tokyo, 1980.

Rousseau, Ch.; Droit International Public. Paris, 1971.

Rousseau, J.; Du Contract Social aux principes du Droit Politique, ed. by Vaughan, Manchester, 1918.

S.

Schwarzenberger and Brown; A Manual of International Law, 6th ed. (revised second impression), London, 1976.

Schwelb, E.; "International Conventions on Human Rights", 9 ICLQ (1960) pp.654-675.

Shaltoot, M.; Islamic Faith and Law, Beirut, undated.

Shrame, O.B.; The Jordanian Press, between 1922-1983, Amman, 1984.

Sieghart, P.; The International Law of Human Rights, Oxford, 1983.

Stark, J.G.; Introduction to International Law, 9th ed. London, 1984.

Stevens, I.N.; Constitutional and Administrative Law, Plymouth, 1982.

Swarup, J.; Human Rights and Fundamental Freedom, Bombay, 1975.

T.

Tigani, M.A. Social and Economic Development Plan of Jordan (1981-85), Amman, 1981.

Triska, J.F.; The Constitutions of The Communist Party States, Stanford, 1968.

Trubek, D.M.; "Economic, Social and Cultural Rights in the Third World", in Human Rights in International Law, ed. by T. Meron, Vol.I.

V.

Vasak, K.; (Ed) The International Dimenssions of Human Rights, UNESCO, Paris, 1982.

Vierdag, E.W.; "The Legal Nature of Economic, Social and Cultural Rights", IX Netherlands Y.B.Int.L. (1978) pp.67-105.

W.

Wade and Phillips, Constitutional and Administrative Law, 9th ed. by A. W. Bradley, London 1977.

Wandieen, A.M.; Legal Protection for Public Liberties: a Comparative Study, (unpublished dissertation at the Faculty of Laws, Ain Shems University), Cairo, 1978.

Wood, Ellen and Neil; Class Ideology and Ancient Political, Theory, Oxford, 1978.

Y.

Yardley, D.C.M.; Introduction to British Constitutional Law, 6th ed., London, 1984

2. JORDANIAN CONSTITUTIONS AND SELECTED STATUTES AND ORDINANCES

1. The Constitution of 1928 (The Organic Law of Trans-Jordan.

2. The Constitution of 1946.

3. The Constitution of 1952.

4. *Majalat al-ahkam al-Adleeh* (The Ottoman Civil Code) of 1876.

5. The Law of the Ottoman Regular Courts of 1884.

6. The Law of the Prohibition of Forced Labour. Law No. 12 of 1934.

7. The Defence Law of 1935.

8. The Law of the Government Proceedings of 1935.

9. The Law of the Religious Communities, Law No. 2 of 1938.

10. The Defence Regulations, No. 1 of 1939.

11 The Defence Regulations, No. 2 of 1939.

12 The Defence Regulations for the Censorship of Print and Publications, No. 5 of 1948.

13 The Provisional Law of the Formation of the Regular Courts, Law No. 71 of 1951.

14 The Courts Fees Regulations, No. 4 of 1952.

15 The Law of the Formation of the Regular Courts, Law No. 16 of 1952.

16 The Law of Firearms and Ammunition, Law No. 34 of 1952.

17. The Civil Service Law, Law No. 41 of 1952.

18. The Law of the Explosive, Law No. 13 of 1953.

19. The Law of Copyrights and Registered Trade Marks, Law No. 22 Of 1953.

20. The Law of Trade Unions, Law No. 35 of 1953.

21. The Anti-Communism Law, Law No. 91 of 1953.

22. The Law of Prevention of Crime, Law No. 7 of 1954.

23. The Law of the Political Parties, Law No. 15 of 1955.
The Law of Print and Publications, Law No. 16 of 1955.

24. The Law of the Independence of the Judiciary, Law No. 19 of 1955.

25. The Charitable Societies Law, Law No. 12 of 1956.

26. The Civil Aviation Law, Law No. 11 of 1959.

27. The Civil Pension Law, Law No. 24 of 1959.

28. The Penal Code, Law No. 16 of 1960.

29. The Labour Code, Law No. 21 of 1960.

30. The Law of the Courts of the Peace, Law No. 23 of 1960.

31. The Criminal Procedure Code, Law No. 9 of 1961.

32. The Law of the Reformation of the Machinery of the Government, Law No. 4 of 1964.

33. The Law amending the Law of the Municipalities, Law No. 5 of 1963.

34. The Companies Law, Law No. 12 of 1964.

35. The Law of Education, Law No. 16 of 1964.

36. The Law of the Universities of Jordan, Law No. 36 of 1965.

37. The Instructions of the Martial Law Administration of 1967.

38. The Medical Constitution, Law No. 45 of 1970.

39. The Law of Public Health, Law No. 20 of 1971.

40. The Law of the States Official Secrets, Law No. 50 of 1971.

41. The Law of the Independence of the Judiciary, Law No.49 of 1972.

42. The Law of Print and Publication, Law No. 33 of 1973.

43. The Law of Immovable Property, Law No. 9 of 1974.

44. The Law Amending the Labour Code, Law No. 71 of 1975.

45. The National Service Law, Law No. 10 of 1976.

46. The Law Amending the Civil Pension Law, Law No. 15 of 1976.

47. The Law of the Court of Capital Felonies, Law No. 33 of 1976.

48. The Civil Code, Law No. 43 of 1976.

49. The Social Security Law, Law No. 30 of 1978.

50. The Draft Labour Code of 1987.

3. ARAB CONSTITUTIONS.

The Constitution of Algeria of 1976.

The Constitution of Bahrain of 1973.

The Constitution of Egypt of 1923.

The Constitution of Egypt of 1971.

The Constitution of Iraq of 1970.

The Constitution of Kuwait of 1962.

The Constitution of Lebanon of 1926 (1947).

The Constitution of Mauritania of 1961.

The Constitution of Morocco of 1972.

The Constitution of P.D.R. of Yemen of 1971.

The Constitution of Qatar of 1970.

The Constitution of Sudan of 1971.

The Constitution of Syria of 1973.

The Constitution of The Arab Republic of Yemen of 1974.

The Constitution of The United Arab Emirates of 1971.

The Constitution of Tunisia of 1971.

4. FOREIGN CONSTITUTIONS.

The Constitution of Austria of 1929.

The Constitution of Dahomey of 1970.

The Constitution of France of 1789.

The Constitution of France of 1799.

The Constitution of France of 1814.

The Constitution of France of 1946.

The Constitution of France of 1958.

The Constitution of Germany (Weimar) of 1919.

The Constitution of Germany of 1949.

The Constitution of Ireland of 1937.

The Constitution of Italy of 1947.

The Constitution of Mexico of 1919.

The Constitution of Netherlands of 1798.

The Constitution of Norway of 1812.

The Constitution of Prussia of 1850.

The Constitution of USSR of 1918.

The Constitution of USSR of 1936.

The Constitution of USSR of 1972.

The Constitution of Spain of 1812.

The Constitution of Spain of 1931.

The Constitution of Sweden of 1809.

The Constitution of Switzerland of 1874.

The Constitution of Turkey of 1876.

The Constitution of Turkey of 1928.

The Constitution of United States of 1777.

TABLE OF CASES

page

1 - JORDANIAN CASES

page

Case No.	285/65	JBR	(1966) p.1529	297
Case No.	40/66	JBR	(1966) p.716	158,515
Case No.	77/66	JBR	(1966) p.387	402
Case No.	101/66	JBR	(1966) p.1092	117
Case No.	111/66	JBR	(1966) p.991	452
Case No.	310/66	JBR	(1966) p.1149	42
Case No.	12/67	JBR	(1967) p.1096	452
Case No.	15/67	JBR	(1967) p.734	212,215
Case No.	44/67	JBR	(1967) p.47	453
Case No.	85/67	JBR	(1967) p.1318	136
Case No.	91/67	JBR	(1968) p.31	516
Case No.	166/67	JBR	(1967) p.893	158
Case No.	248/67	JBR	(1968) p.159	444
Case No.	24/68	JBR	(1968) p.259	449
Case No.	85/68	JBR	(1968) p.398	449
Case No.	87/68	JBR	(1969) p.99	462
Case No.	248/68	JBR	(1968) p.39	158
Case No.	67/69	JBR	(1969) p.137	212,216
CAse No.	81/69	JBR	(1969) p.908	153,400
Case No.	102/69	JBR	(1969) p.922	462
Case No.	12/70	JBR	(1970) p.222	43
Case No.	30/70	JBR	(1970) p.217	461
Case No.	59/70	JBR	(1971) p.146	85
Case No.	288/70	JBR	(1971) p.155	283
Case No.	45/71	JBR	(1971) p.905	516
Case No.	69/71	JBR	(1971) p.648	292

				page
Case No.	81/71	JBR	(1971) p.543	403
Case No.	101/71	JBR	(1971) p.1201	194,452
Case No.	76/72	JBR	(1972) p.1182	184,189,452,515
Case No.	95/72	JBR	(1972) p.1318	137
Case No.	173/72	JBR	(1972) p.1047	293
Case No.	182/72	JBR	(1972) p.318	80
Case No.	186/72	JBR	(1974) p.1401	284
Case No.	246/72	JBR	(1972) p.1278	283
Case No.	379/72	JBR	(1972) p.104	284
Case No.	410/72	JBR	(1972) p.192	299
Case No.	56/73	JBR	(1973) p.1305	134
Case No.	58/73	JBR	(1973) p.848	133
Case No.	78/73	JBR	(1973) p.147	403
Case No.	66/73	JBR	(1973) p.125	105
Case No.	119/73	JBR	(1973) p.330	29
Case No.	304/73	JBR	(1974) p.212	403
Case No.	807/73	JBR	(1974) p.213	400
Case No.	1047/73	JBR	(1975) p.748	400
Case No.	18/74	JBR	(1974) p.699	143
Case No.	29/74	JBR	(1974) p.944	66
Case No.	41/74	JBR	(1974) p.748	398,452
Case No.	77/74	JBR	(1974) p.1155	387
Case No.	236/74	JBR	(1974) p.625	450
Case No.	49/75	JBR	(1975) p.108	508
Case No.	65/75	JBR	(1975) p.1331	147
Case No.	67/75	JBR	(1975) p.962	99,143

				page
Case No.	70/75	JBR	(1975) p.144	506
Case No.	86/75	JBR	(1976) p.638	106
Case No.	93/75	JBR	(1975) p.1112	105
Case No.	135/75	JBR	(1976) p.85	137
Case No.	409/75	JBR	(1976) p.1433	283
Case No.	463/75	JBR	(1976) p.1478	306
Case No.	1/76	JBR	(1976) p.972	115
Case No.	54/76	JBR	(1976) p.1011	82,99
Case No.	68/76	JBR	(1976) p.1648	82
Case No.	72/76	JBR	(1976) p.1929	137
Case No.	15/77	JBR	(1977) p.553	133,145
Case No.	24/77	JBR	(1977) p.217	115
Case No.	34/77	JBR	(1977) p.977	217,452
Case No.	58/77	JBR	(1977) p.25	507
Case No.	97/77	JBR	(1977) p.302	506
Case No.	119/77	JBR	(1977) p.1310	135
Case No.	241/77	JBR	(1977) p.217	115
Case No.	246/77	JBR	(1977) p.1497	451
Case No.	295/77	JBR	(1978) p.85	451
Case No.	367/77	JBR	(1978) p.189	283
Case No.	25/78	JBR	(1978) p.95	66,80
Case No.	132/78	JBR	(1978) p.1007	451
Case No.	138/78	JBR	(1978) p.1012	451
Case No.	11/79	JBR	(1979) p.452	133
Case No.	108/79	JBR	(1980) p.1330	452,454
Case No.	91/80	JBR	(1980) p.1350	452,505

2 - CASES FROM OTHER JURISDICTIONS page

PALESTINE UNDER THE MANDATE

EGYPT

U.S.A.

U.K.

ICJ CASES

EUROPEAN CASES OF HUMAN RIGHTS.

HRC CASES

page