Jurisprudence

In the Application of Human Rights Standards In Arab Courts

ALGERIA | IRAQ | JORDAN | MOROCCO | PALESTINE

Samia Bourouba
Associate Professor at the Higher School of Magistracy in Algeria

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OF HUMAN RIGHTS AND HUMANITARIAN LAW

Stora Gråbrödersgatan 17 B | P.O. Box 1155 SE-221 05 Lund, Sweden | Phone +46 46 222 12 00 | www.rwi.lu.se

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Executed in cooperation with:

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Prepared by:

Samia Bourouba
Associate Professor at the Higher School of Magistracy in Algeria

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Samia Bourouba

Algeria on September 2, 2012

Preamble

The Raoul Wallenberg Institute, Sweden, represented by its regional program in the Middle East and North Africa, is pleased to present "**Jurisprudence and Human Rights Standards in Arab Courts**", a specialized study that resulted from the fruitful cooperation between a number of Arab judicial institutes in the MENA region from several countries namely, Algeria, Morocco, Jordan, Iraq, and Palestine.

This study aims at developing capacities, know-how and skills in the field of teaching and implementing the Human Rights Law as well as promoting the exchange and the sharing of expertise, taking into account the importance of teaching human rights within the different courses of the Law relevant to the domestic law such as: the Penal Code, the Family Law, Procedural Law, etc. – and not only within the scope of the International Law course. The study also sought to shed light on the modalities and mechanisms upon which the judges relied in the application of human rights norms in the surveyed countries, as from the constructive role played by the Judiciary as pillar of the State of Law and the firm foundation to ensuring the rights of individuals and to safeguarding their freedoms. The Judiciary is the resort of citizens whose rights are robbed; in it they find their way to achieve justice and attain their rights.

The study covered a number of cases related to issues such as: the right to obtain and retain a nationality, the right to freedom of movement and travel, non-discrimination of minorities, freedom of expression, right to resort to the Judiciary, principle of equality between spouses, right to child custody, right of the wife to petition for divorce, etc. All of these are legal actions the local courts referred to human rights in the motives of the judgments they issued thereon.

The Institute is pleased to put the results of this study in the hands of jurists: from judges, to lawyers to public prosecutors, as well as defendants and researchers so they may benefit from it and obtain guidance therefrom; thus, we take out the legal texts relating to human rights from a theoretical realm to wide practical horizons, the practical aspect being an important substitute to the theoretical one.

It is important to highlight that the completion of this project and study wouldn't have been possible without the fruitful cooperation of the Swedish International Development Cooperation Agency (Sida) through its financial support for the regional program "Laying the foundations of knowledge of human rights and their sources in the Middle East and North Africa". Therefore, we extend our sincere thanks and gratitude to this agency for its precious support.

We also extend our deepest thanks to Mrs. Samia Bourouba, Associate Professor at the Higher School of Magistracy in Algeria, for her efficient and valuable contribution in the completion of this work, as well as to all those who contributed in this study, which we hope would achieve all of its desired objectives.

Marie Tuma
Director of Raoul Wallenberg Institute

List of Abbreviations

AFDI: Annuaire Français de droit international (French journal of International Law)

CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women

JDI: Journal de droit international (International Law journal or Clunet)

RCDIP: Revue critique de droit international privé (Journal for Private International Law)

RGDIP: Revue générale de droit international public (Journal for Public International Law)

ICTY: International Criminal Tribunal for the former Yugoslavia

Abstract

This manual falls within the framework of the regional program undertaken by Raoul Wallenberg Institute and the Arab judicial institutes in the MENA region from 2009 to 2012.

The countries' orientation to commit to human rights standards did not always follow the same pace or the same unified and comprehensive manner. Perhaps the Arab countries did not depart from this pattern as their commitment to and ratification of the human rights conventions, whether international or regional, were only made in a recent period of time, since most of these countries did not achieve their independence until recently and have been busy since then working on stabilizing their political and economic conditions.

The changes the world has known at the beginning of the nineties, which witnessed calls for the respect of human rights and highlights of the need for the rule of law, were a factor that contributed strongly to the promotion of the respect of human rights as well as to the spread of a culture of human rights among citizens, including the Arab population. This is what made the Arab States' international commitments find their way towards effective consolidation.

In this regard, it is important to emphasize the role played by the Judiciary in the application process since it is the pillar of the State of Law and a solid foundation to ensuring the respect of the rights of the individuals and to safeguarding their freedoms. Their theoretical enshrinement in legal texts would be meaningless unless accompanied by mechanisms that activate such theoretical texts and translate them into practical applications. Thus, they become instruments with an essence upon which citizens whose rights have been stolen can rely to get justice, and attain their rights.

This manual sheds the light, in two chapters, on the modalities and mechanisms that provided the basis for the judges' implementation of human rights norms in the surveyed countries, namely: Algeria, Iraq, Jordan, Morocco, and the Palestinian Authority.

Chapter One was meant to provide an overview of the positions held by Arab States constitutions towards human rights conventions. Most of these constitutions enshrined the principle of supremacy of treaties over domestic law, what gives the human rights conventions ratified by these states a higher status than their domestic laws and precedence to be applied whenever a conflict arises between them. These constitutions involved the Parliament as well in the ratification process along with the head of the Executive Authority thus conferring legitimacy to the State's commitment to human rights conventions since it approves the treaty by virtue of a law before the actual ratification. The constitutions' upholding of the supremacy of treaties over domestic law contributed to promoting the judicial applications, though the lack of supremacy enshrinement in some constitutions did not prevent the Judiciary from the application of human rights standards what confirms the important role played by this authority in implementing such standards.

Indeed, these bodies have contributed to ensuring the respect of human rights, and to confirming the supremacy of the Constitution, which is inspired in the majority of its provisions by the universal standards that enshrine the fundamental human rights.

In this context, we highlighted certain trends that may affect the effectiveness of the supremacy of human rights conventions such as the reservations and interpretative declarations that often accompany these states' ratification of or accession to human rights conventions. The Judiciary has always tried, through its applications, to reduce the intensity of these trends and to overcome their effects, as much as possible, in order to contribute to achieving the optimal effectiveness of the texts.

In Chapter Two, we demonstrated the efficient role played by the Arab Judiciary through its various and rich jurisprudence in translating the states' commitments into practical applications. The judgments therein were directly inspired by international and regional human rights conventions as these applications comprised different rights including several that fall under civil and political rights such as: the right to a nationality, the freedom of movement, and economic, social and cultural rights such as: the right to a property, and the right to work. All these rights fall under the "International Bill of Human Rights". We also listed applications relating to the rights of groups endowed with a protection by virtue of conventions especially drafted for them. An example for that would be women's rights, whether married, divorced or active in the society, as jurisprudence came to confirm the equality between spouses, what showcases a progress in the approaches and an activation of principles that had remained purely theoretical. They also tackled the rights of the child, considered among the groups endowed with a special protection by virtue of international conventions. The most important applications might very well be related to the best interest of the child; these applications also comprised the rights of the persons with disabilities, which received a wide and comprehensive protection.

As enjoying rights is not merely achieved by the simple acknowledgement thereof but by ensuring effective means that enable individuals who appear before the Judiciary, whether as plaintiffs or defendants, accused or victims, to get a fair trial consistent with the principles provided for in this concern under international texts and that are related to the Court itself, as well as to the trial and the accused. The jurisprudences related to this matter were extensively tackled in this study that comprised decisions that applied human rights standards in a new and efficient manner.

This manual is addressed to different groups of different orientations so they can draw what they need therefrom and use it as a guide where necessary. It provides a preliminary overview that comprises domestic laws, including constitutional provisions as well as the standards provided for under human rights conventions through a constructive and interactive dialogue. The Judiciary alone, with the independence it enjoys and its eagerness to consolidate the State of Law in our Arab nations, can draw its significance and grounds while working provided it contributes to the respect of these rights to which the States committed themselves and which the individual tries to enjoy and seeks the Judiciary's protection in case they are violated.

Introduction

The International Human Rights Law is considered one of the important legal branches of International Law; it includes a set of instruments comprising the universally recognized human rights, namely: civil rights, political rights, economic rights, social rights, cultural rights, in addition to the recently raised solidarity rights and development rights[1].

The international instruments on human rights are numerous and diverse in terms of their implementation and their binding force. The United Nations Charter comes in the forefront with some basic principles that it comprises as stated in its preamble:

> *"We… reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small"*

Paragraph 3 of article 1 of the Charter also stipulated the following:

> *"The Purposes of the United Nations are: (…)*
>
> *3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."*

The Charter also comprised other articles on human rights such as article 13, paragraph 1, b; article 55, c; article 62, paragraph 2; article 67/c; and article 68.

The international treaties ratified by the United Nations and that constitute the International Bill of Human Rights are considered the most important enshrinement of these rights. These instruments are: the International Covenant on Economic, Social and Cultural Rights and its protocol, and the International Covenant on Civil and Political Rights and its first protocol, adopted by the United Nations General Assembly on December 16, 1966; in addition to the Second Protocol to the International Covenant on Civil and Political Rights adopted on December 15, 1989[2]; and the Universal Declaration of Human Rights proclaimed by the UN General Assembly on December 11, 1948 and that even without having the status of International Treaty, contains principles currently considered legally binding for the countries as a Customary International Law[3].

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1 See Dr. Omar Saadallah, Introduction to International Human Rights Law (مدخل في القانون الدولي لحقوق الإنسان), University Publications Office, 2009, p. 9.

2 This protocol is related to abolition of death penalty.

3 See Human Rights in the Administration of Justice. A Manual on Human Rights for Judges,

Moreover, we cannot overlook the regional instruments that contributed significantly in promoting human rights[4] such as: The European Convention on Human Rights (ECHR) (formerly the Convention for the Protection of Human Rights and Fundamental Freedoms) adopted in November 4, 1950; the American Convention on Human Rights, adopted in November 22, 1969; the African Charter on Human and Peoples' Rights, adopted on June 27, 1981; and the Arab Charter on Human Rights, adopted in May 2004. These instruments included mechanisms aimed at protecting the rights stipulated therein, although their effectiveness varies from one instrument to another.

Represented by the International Court of Justice (ICJ), the International Judiciary had a clear contribution in tackling human rights cases even though it is specialized in examining the cases brought forward by countries. It issued a number of decisions in which it tackled this issue, the most important of which is the Barcelona Traction case in which the Court considered that human rights give rise to *erga omnes* obligations.

The states' constitutions and domestic laws also provided for the most important fundamental human rights[5] through enshrining them and ensuring they are respected.

However, the effectiveness of the texts remains limited if they do not have the protection needed to prevent their violation; the human being would be denied then his right to justice and equity. This is a role that cannot be ensured by an authority other than the Judiciary that has competence in securing the sovereignty of the rule of Just Law[6]; this presumes its positive contribution in the application of the international legal texts on human rights. In this context, we had the opportunity of undertaking a project based on the role of the Judiciary in several Arab countries in enshrining the human rights treaties, and that in the framework of the High Level Regional Meeting on Common Judicial Standards and Judicial Cooperation held in Amman on the 23rd and the 24th of May 2011 and organized by the Judicial Institute of Jordan and Raoul Wallenberg Institute for Human Rights and Humanitarian Law. I participated in the said meeting along with Mr. Mabrouk Hussein, Director of the Higher School of Magistracy in Algeria, and I was entrusted with the work on this manual by the officers of Raoul Wallenberg Institute.

The judicial institutes in Jordan, Iraq, Morocco, the Palestinian Authority, and

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Prosecutors and Lawyers (في مجال إقامة العدل. دليل بشأن حقوق الإنسان خاصّ بالقضاة والمُدعين العامين والمحامين), Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, United Nations, New York and Geneva, 2003, p. 3.

4 See Dr. Mohammad Youssef Alwan and Dr. Mohammad Khalil Al-Moussa, International Human Rights Law, Sources and Means of Control (القانون الدولي لحقوق الإنسان، المصادر و وسائل الرقابة), Part 1, Al-Thaqafa publishing house,, 2008, pp. 5, 158 et seq.

5 See Dr. Omar Saadallah, Human Rights and Peoples' Rights, University Publications Office, 2005, p. 11.

6 See Human Rights in the Administration of Justice. A Manual on Human Rights for Judges, Prosecutors and Lawyers, op. cit., p. 22.

of course Algeria in which I teach as Associate Professor, played an important part in the completion of this project. They spent valuable efforts in providing me with jurisprudence that constitute the core of the study as well as with constitutional reports that enrich it and without which this modest study couldn't have been completed. I consider this study as one of the simple fruits of teaching at the Higher School of Magistracy, in which I had the honor of counting myself part of the team of Dr. Ahmad Laraba, who has the credit of introducing the course on the relation of International Law with Domestic Law since the year 2000, and which he developed into the relation of the local judge with international treaties; an effort that was carried on by other professors. The Higher School of Magistracy, represented by its director, received many thanks and appreciation from international bodies for including this course in the curriculum.

For the purposes of this study, we dedicated Chapter One for the status of international human rights treaties in Arab Constitutions. We then moved to the different judicial applications of these treaties in the courts of the Arab countries, which signed the memorandum of understanding during the above-mentioned regional meeting, and finally we dedicated the last chapter to publishing the jurisprudence provided by the judicial institutes which deserve our deep gratitude for the efforts spent in this regard.

Chapter One: Status of International Human Rights Treaties in Arab Constitutions

The issue of the relation of International Law with Domestic Law is considered one of the concepts that have been enshrined since a considerable time in the contemporary international law. The international jurisprudence tackled it and enshrined it in two theories: the monist theory and the dualist theory.

The dualist theory is an extension to the school of thought contingent on the will in the interpretation of the basis of the binding force of International Law; it is based on the difference between the sources of both the International Law and Domestic Law, as well as the difference in the legal nature and structure of both legal systems, in addition to the difference in the subject and the individuals addressed by the legal rule in both systems[7].

The adoption of this theory entails a complete independence between the two systems and the abstention of the domestic Judiciary from applying the international legal norms unless they are translated into domestic legal norms through the so-called reception.

As for the monist theory, it is an extension of the contemporary positivistic school and considers that international law and domestic law constitute one legal system. In case of conflict between these two laws, proponents of monism are divided between those who adopt monism and give supremacy to international law and they are the majority, and those who call for this theory but give precedence to the domestic law[8].

Despite the academic value of these two theories, they currently became of no importance since countries today adopt practical positions[9], through their constitutions, where the same constitution is found now to adopt monist tendencies

7 See Dr. Abulkheir Ahmad Attia Omar, The Implementation of International Treaties in the Domestic Legal System (نفاذ المعاهدات الدوليّة في النظام القانوني الداخلي), Dar-Annahda Al-Arabia, First Issue, 2003, pp. 13 to 15. And COMBACAU(J), SUR(S), Public International Law (Droit international public), Editions ALPHA, MONTCHRESTIEN, 2009, p. 183.

8 See Dr. Abulkheir Ahmad Attia Omar, op. cit, pp. 31-32.

9 DAILLIER, (P), Monism and Dualism: An Outdated Debate? (Monisme et dualisme : un débat dépassé?) in BEN ACHOUR, (Rafaa), LAGHMANI, International Law and Domestic Laws, Recent developments (Droit international et droits internes, développements récents) symposium on April 16, 17, 18, 1998, PEDONE, pp. 9-10. DHOMMEAUX, (J), Monism and Dualism in Human Rights International Law (Monismes et dualismes en droit international des droits de l'homme), A.F.D.I, 1995, pp. 450-451.

along with some aspects of dualism at the same time. The international Judiciary: Judicial and Arbitral, also tackled the relation between international law and domestic law on many occasions.

The international conventions gave this relation great importance. In this context, we make reference to the Vienna Convention on the Law of Treaties signed on May 23, 1969 and which enshrined in its article 27 the principle of supremacy of international treaties over domestic law stipulating that:

> *"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."*

It pointed however to an exception to the principle of supremacy and which consists in the incomplete ratification; this is shown in the article 46 thereof, which stipulates that:

> *"1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.*
>
> *2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."*

Most recent and contemporary constitutions now tackle the status (hierarchy) of international law within the domestic legal system with each of them adopting different statuses for these international rules. Many constitutions enshrined the international treaties as sole international legal source, as is the case of the Arab States' constitutions.

However, what distinguishes these constitutions is that they are not all similar; despite their enshrinement of the international treaties the difference between them is apparent. What also distinguishes these constitutions is that they divided the competence to ratify treaties between both the executive and the legislative powers, as we will later explain.

We note initially that the MENA region includes the following countries: Algeria, Saudi Arabia, Bahrain, the National Palestinian Authority, Djibouti, Egypt, UAE, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Syria, Tunisia, and Yemen[10].

We will only tackle though in detail the constitutions of some of these countries, namely: Algeria, Iraq, Jordan, Morocco, and Palestine. These are the countries covered in the regional program "Building Knowledge on Human Rights and Resources in the Middle East and North Africa", launched by Raoul Wallenberg Institute in 2010 in cooperation with Arab judicial training academies, and which culminated in the signing of a memorandum of understanding between them on

10 Both Iran and Malta were not mentioned in this list for not being Arab countries.

May 24, 2011. Tunisia had been postponed even though it signed the memorandum, same as Lebanon since this country did not sign the complementary version.

Whereas we find that some constitutions expressly enshrined the principle of supremacy of treaties over domestic law, others provided for treaties without determining their status; a matter that we will look into country by country.

1) Monist Constitutions Enshrining Expressly the Principle of Supremacy of Treaties

The constitutions of both Algeria and Morocco provided for the status or hierarchy of treaties; however we find some differences between the two constitutions and we will indicate them in their relevant parts.

1. Algerian Constitution

a- Constitutional Provisions

The first Algerian Constitution promulgated on September 10, 1963 provided for international treaties without determining their hierarchy within the domestic legal system. As for the Constitution of November 22, 1976, it placed international treaties at the same level with the domestic law; thus, in the event of a conflict between them, the subsequent text would annul the previous one.

The constitutional writer changed position after Algeria's accession to the Vienna Convention on the Law of Treaties and thus the Constitution of February 28, 1989 gave treaties precedence over domestic laws under article 123 thereof[11], which stipulated the following:

> *"Treaties ratified by the President of the Republic in accordance with the conditions provided for by the Constitution are superior to the law."*

Constitution of November 28, 1996 also enshrined the same principle under article 132 thereof which used the exact same wording of article 123 of the 1989 Constitution.

We notice that the Algerian Constitution provided for the supremacy of treaties on the sole condition they are ratified, what makes it oriented towards monist.

We notice as well that, similarly to the other Arab Constitutions, the Algerian Constitution did not expressly provide for human rights treaties but referred thereto implicitly as we will showcase in the following point.

In the framework of confirming the principle of supremacy of international treaties over domestic law, the Algerian legislator incorporated an important legal text in the new Code of Civil and Administrative Procedure issued in 2008. Paragraph 7 of article 358 of the said law provided for the following:

11 Ahmad LARABA, Chronics of Algerian Conventional Law (Chronique de droit conventionel algérien) 1989-1994, IDARA, 1994, p.61.

> *"Appeal in cassation can only be built upon one aspect or more of the following aspects: 7- Violation of international treaties."*

Hence, the Supreme Court can now apply the principle of supremacy by considering it an aspect of appeal, which wasn't provided for under the previous law.

In this context, it is important to point to another category of laws adopted by the Constitution of 1996, called Organic Laws. There has been debate on whether international treaties have precedence over such laws. Some jurists considered that the Organic Law has supremacy over treaties whereas others abided by the supremacy of treaties over both normal and organic laws. Debate remained until January 12, 2012, date of the issuance of the Organic Law, which determines the methods of increasing women representation chances in the elected councils. The law mentioned in the references, after the constitution, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on Women's Political Rights, what constitutes a proof that treaties have precedence over domestic laws.

However, the Constitution remains at the top of the legal hierarchy as the principle of supremacy provided for under article 132 does not mention it.

b- Conclusion and Ratification Steps

The present Constitution – similarly to the previous constitutions of 1963, 1976, and 1989 – divided the competence to ratify treaties between the President of the Republic and the Parliament; article 131 thereof stipulates the following:

> *"Armistice agreements, peace, alliance and union treaties, treaties related to State borders, treaties related to the law of individuals, as well as treaties involving expenses not provided for in the State budget are ratified by the President of the Republic following an explicit approval by each of the chambers of the Parliament."*

The wording of the article specifies and limits the scopes of competence, and if we look into the expression "treaties related to the law of individuals" mentioned therein, we notice that it refers to treaties related to human rights, what means that this type of treaties requires two processes: the Parliament's approval by virtue of a law and then the ratification of the President of the Republic. This is the case of all the treaties mentioned in this article. We can thus conclude that all other treaties not comprised in this article require one process only: ratification.

The Constitution also involved the Constitutional Council (established for the first time by virtue of the 1989 Constitution) in some cases. Article 97 thereof provided for the following:

> *"The President of the Republic signs armistice agreements and peace treaties. He receives the opinion of the Constitutional Council on the relevant agreements. He submits the latter immediately to be approved explicitly by each of the two chambers of the Parliament."*

Article 168 of the Constitution also gave it an important competence in the framework of its monitoring of the constitutionality of treaties; it stipulated the following:

> *"When the Constitutional Council considers that a treaty, an agreement or a convention is not constitutional, its ratification cannot take place."*

c- Judicial Applications of the Principle of Supremacy

In its first decision dated August 20, 1989 related to the elections law, the Algerian Constitutional Council tackled the principle of supremacy even though it wasn't required to do so as we will demonstrate in what follows[12].

- Summary of Facts (Decision No. 1)

After the adoption of the 1989 Constitution which enshrined the multiplicity of parties for the first time in Algeria, the Parliament adopted a new elections law on August 7, 1989. Moreover, as it included some unconstitutional provisions, the President of the Republic notified the Constitutional Council that issued its first decision to annul some of its articles.

- Legal Issue

The 1989 Constitution gave the Constitutional Council the competence of constitutional control as article 155 (which became in the 1996 Constitution article 165) stipulated the following:

> *"In addition to the prerogatives explicitly bestowed upon it by other provisions of the Constitution, the Constitutional Council pronounces on the constitutionality of treaties, laws and regulations, either through an opinion if these are not enforced or, otherwise, through a decision."*

We can make the two following observations on this text:

The Constitution gave the Constitutional Council the prerogative of control over three types of legal rules, namely: treaties, laws and regulations. It is the sole Arab Constitution that provided for the control of the constitutionality of treaties.

It also adopted the system of constitutionality control, previous and subsequent, which is a system that hadn't been adopted by any other Arab Constitutions.

In this concern, it examined the articles that were pointed to it as unconstitutional, but it didn't stop at the principle of constitutionality but also applied the principle of control of conventionality of the law that we will tackle in what follows.

12 Please refer to the observations mentioned in Chapter Two.

- Comment

The grounds of the decision mention the following[13]:

> *"As any treaty after ratification and publication is incorporated in national laws, and as it takes precedence over laws by virtue of article 123 of the Constitution and enables any Algerian citizen to invoke it before the Judiciary - which is especially the case of the Charter of the United Nations for year 1966 ratified by virtue of law no. 08/89 dated Ramadan 19, 1409 corresponding to April 25, 1989, to which Algeria acceded by virtue of presidential decree no. 67/89 dated Shawwal 11, 1409 corresponding to May 16, 1989, and the African Charter on Human and Peoples' Rights ratified by decree no. 37/87 dated Jumada Al-Thani 4, 1407 corresponding to February 3, 1987- then all these legal tools expressly prohibit any form of discrimination.[14]"*

The said grounds show that the Constitutional Council had added a condition inexistent in the Constitution and that is the publication[15] condition. The importance of this decision however lies in encouraging citizens to hold on to and invoke ratified treaties before the Judiciary, what activates the latter's positive role in enforcing treaties in general and human rights treaties in particular.

It also expanded the constitutionality structure by including treaties within the rules of reference for control of constitutionality, and concluded that the clause in the elections law that requires the Algerian nationality by origin for both the candidate for the elections and his/her spouse is not in conformity with the Constitution; its decision stated:

> *"And since voters have the right to assess each candidate's merits to undertake public functions. Thus, the Constitutional Council declares that the requirement of a nationality by origin for the candidate for the legislative elections is not in conformity with the Constitution."*

It also states that paragraph 3 of article 86, which stipulates that the candidate's spouse should have Algerian nationality by origin, as well as the last paragraph of the same article, are not consistent with the Constitution as they impose a condition is not relevant to the candidate person or capacity and that is of a discriminatory nature.

We can thus conclude that the Constitutional Council confirmed outstandingly the principle of supremacy.

13 See excerpts of the Decision in Appendix 1, pp. 162-164.

14 See excerpts of the Decision in Appendix 1, pp. 162-164.

15 See Ahmad LARABA, Chronics of Algerian Conventional Law…, op. cit., p. 81.

2. Moroccan Constitution

a- Constitutional Provisions

The previous Moroccan Constitution promulgated in 1996 provided for international treaties under article 31 thereof as follows:

> *"…The King shall sign and ratify treaties. However, treaties committing State finances shall not be ratified without having been approved under the law.*
> *Treaties likely to affect the constitutional provisions shall be approved in accordance with the procedures prescribed for the modification of the Constitution."*

This text did not clarify – expressly – the status of treaties within the domestic system. However, we notice through the examination of the judicial trend in what concerns the relation of international treaties with the domestic law that it leans towards favoring the provisions of international treaties, whether bilateral or multilateral.

As for the new Constitution of 2011, it resolved the issue and enshrined expressly the principle of supremacy in the preamble that stated:

> *"… The kingdom of Morocco…reaffirms and vows to work for the following:*
> *Grant international conventions duly ratified by the Kingdom supremacy over domestic laws - within the framework of the provisions of the Constitution, the laws of the Kingdom, and respect for its immutable national identity, and as soon as these conventions are published - and bring the national legislative provisions concerned in line with the above conventions."*

The new Constitution provided for the publication condition, in addition to the ratification, for the supremacy of international treaties thus earning the capacity of monist Constitution.

b- Conclusion and Ratification Steps

The Moroccan constitution – similar to the other constitutions – divided the competence to conclude and ratify treaties between the two powers: executive and legislative.

With the promulgation of the new Constitution, we find that article 55 thereof replaced the previously mentioned article 31 with an amendment thereto. The previous text allowed the Parliament to approve strictly one type of treaties - which are the treaties committing State finances - whereas the present Constitution expanded the types of treaties subject to the prior approval of the Parliament. Paragraph 2 of article 55 now reads as follows:

> *"The King shall sign and ratify treaties. However, treaties relating to peace, union with other states, border demarcation, trade agreements*

and treaties committing state finances or whose implementation requires legislation, as well as treaties relating to the individual and collective rights and freedoms of citizens, shall be ratified only after having been approved by law."

Thus, treaties became strictly limited to: treaties relating to peace, union with other states, border demarcation, trade agreements and treaties committing state finances or whose implementation requires legislation, as well as treaties relating to the individual and collective rights and freedoms of citizens.

Hence, in light of the previously listed treaties, we can make the following two remarks:

The first remark is related to the treaties, the enforcement of which requires legislative actions: which side is charged with determining this type of treaties then?

The second remark is related to the authority granted to the king to propose any treaty other than those listed in the mentioned paragraph 1, what is considered an expansion in the scope of the area of intervention of the Parliament.

This article refers to treaties relating to the individual and collective rights and freedoms of citizens. We can understand therefrom that human rights treaties require two actions:

The parliament's approval thereof by virtue of a law and then the king's ratification, in addition to the publication condition provided for in the preamble. As for the treaties that do not fall within the strictly limited list determined in this article, they only require ratification and then publication.

c- Judicial Applications of the Principle of Supremacy

The Moroccan Judiciary leaned towards the practical enshrinement of the principle of supremacy of treaties - even though the previous Constitution did not indicate clearly the status of treaties – what was applied in two decisions, the texts of which we could not get in their entirety:

- Decision of the Personal Status Chamber

The Sharia Chamber of Casablanca Court of Appeal examining personal status cases stated the following in its decision no. 1413 issued on 05/23/2007:

"Whereas the international treaty is a special law having precedence over national law, being in this case Personal Status Law and Family Law, which are public laws, and that according to the principle of supremacy of these treaties over the national law confirmed by the Supreme Council in its Decision No. 754 dated 05/19/1999 in the commercial file no. 4356/1990 published in the Supreme Court Council Magazine Issue no. 56.[16]*"*

16 See grounds of the decision in the excerpts in Appendix 4, pp. 343-344.

- Decision of Morocco Supreme Court Council

The principle of supremacy has also been applied in Morocco Supreme Court Council decision no. 61 dated 02/13/1992. Indeed, it was stated in the grounds which were made available to us that:

> *"The Administrative Chamber considered international treaties legal sources that should be respected and therefore no administrative decisions can be rendered in violation of the provisions of an international treaty; this entails the necessity of their cancellation for being illegitimate.*[17]*"*

This indicates that international treaties are placed at the top of the legal hierarchy and have precedence over laws before the Moroccan Judiciary.

However, after the explicit adoption of the principle of supremacy in the new Constitution, judges can now refer thereto directly and exclude any law in violation of treaties.

2) Constitutions Enshrining the Treaties without Determining their Status (Dominant Dualist Trend with Monist Tendency)

Other Arab constitutions took other directions; they provided for treaties without determining their status within the domestic legal system, which we will tackle as follows:

1. Jordanian Constitution

a- Constitutional Provisions

The Constitution provided for the treaties without expressly determining their status. The latest constitutional amendments failed as well to refer to their status, a matter regretted by some jurists as there was opportunity to fill this vacuum by adopting a legal text that determines such status[18].

The Jordanian Constitution granted the king the authority to conclude international treaties, which was always his inherent jurisdiction[19], by virtue of paragraph 1 of article 33 of the Constitution promulgated on January 8, 1952 and amended on May 4, 1958 and on September 1, 1958 as follows:

> *"The King... and ratifies treaties and agreements."*

17 See grounds of the decision in the excerpts in Appendix 4, p. 343-344.

18 See Professor Mohammad Youssef Alwan, The Relation Between International Law and Domestic Law: The Situation in Jordan (2012 ,العلاقة ما بين القانون الدولي و القانون الداخلي: الوضع في الأردن), p. 3.

19 Ibid, p. 1.

b- Conclusion and Ratification Steps

The Constitution divided the ratification competence of certain treaties between the king and the legislative power; paragraph 2 of article 33 provided for the following:

> *"Treaties and agreements which involve financial commitments to the Treasury or affect the public or private rights of Jordanians shall not be valid unless approved by the National Assembly. In no circumstances shall any secret terms contained in any treaty or agreement be contrary to their overt terms."*

The Constitution also strictly limited these treaties.

We highlight here that during the previous amendment to the Constitution, paragraph 2 of this article was amended to read as follows:

> *"Peace, alliance, trade and maritime treaties and other treaties which entail modification in the territory of the State, impinge on its sovereignty rights, involve financial commitments on the Treasury or affect the public or private rights of Jordanians shall not be valid unless approved by the National Assembly. In no circumstances shall any secret terms contained in any treaty or agreement be contrary to their overt terms."*

Thus, the types of treaties subject to the Parliament's approval have been expanded to comprise all those related to financial and political matters, as did the Constitutions of the developed countries since a while.

We notice that the limited list of treaties referred to in article 33 and that require the Parliament's approval include treaties that affect the public and private rights of the Jordanians, human rights treaties, and we referred thereto in the previous Constitutions that we mentioned earlier. The word "affect" – in Arabic "Masas" – was given two interpretations though: the first considered them treaties diminishing the rights of the Jordanians and the second considered them treaties related to rights. The latter interpretation seems the one that is most probable[20].

We can conclude from this article that treaties – being general rules – are applied in the Jordanian system by virtue of the mere ratification of the king or the approval thereof by the Assembly Council followed by the king's ratification for human rights treaties and treaties strictly limited under article 33; this makes the Jordanian Constitution come close to the monist system.

It is important to highlight as well that the constitutional amendment included the establishment of a Constitutional Court under article 58 of the Constitution that provided for the following:

> *"A Constitutional Court shall be established by a law based in the capital. It shall be an independent and separate judicial body, and shall consist of nine members, including the president, appointed by the King."*

20 Ibid, p. 2.

Article 59 of the amended Constitution determined its prerogatives and stipulated the following:

> *"1- The Constitutional Court shall monitor the constitutionality of laws and regulations in force and issue its judgments in the name of the King. Its rulings are final and binding on all authorities and all. Its rulings will take effect immediately unless another date is specified by the ruling. The Constitutional Court's rulings will be published in the Official Gazette within fifteen days from the date of issuance."*
>
> *2- The Constitutional Court has the right to interpret the provisions of the Constitution if so requested either by virtue of a decision of the Council of Ministers or by a resolution taken by the Senate or the Chamber of Deputies passed by an absolute majority. Such interpretations shall be effective upon publication in the Official Gazette."*

Thus, the competence to interpret the Constitution is granted to the Constitutional Court after it was the responsibility of the Supreme Council before the amendment. This is considered a positive development as this competence is now given to a judicial body after the interpretation was performed by a political body.

Even though this text deserves praise, it came missing as it did not entrust this Court with the competence to monitor the constitutionality of treaties as did the Moroccan Constitution that provided expressly for this competence, and hence its role remains unclear in this regard. We will make some observations relevant to this body in what follows:

c- Judicial Applications of the Principle of Supremacy

The jurisprudence leaned towards enshrining the supremacy of treaties over domestic law[21]; a matter that we will tackle hereafter.

- Decision of the Jordanian Court of Cassation No. 2353 (Case of the company "A.D.L.M.G" against the owners of the ship "H" and the lessee of the ship)

- Summary of Facts

The company "A.D.L.M.G" filed a lawsuit against the owners of the ship "H" and the lessee of the ship before the Court of First Instance in Amman for receiving merchandise through the port that turned out, after inspection, to be damaged and incomplete. The company claimed the sum of 95,414 US Dollars and the execution of the arbitration clause mentioned in the bill of lading between the shipper and carrier (owner of the ship) and the consignee (plaintiff). The Court issued a judgment rejecting the execution of the arbitration clause con-

21 Ibid, p. 3.

sidering it invalid and therefore the plaintiff filed an appeal in cassation and the Court of Cassation issued a judgment annulling the ruling of the Court.

- Legal Issue

We previously mentioned that the Jordanian Constitution does not determine the status (hierarchy) of treaties; this matter is brought before the Judiciary in the event of a conflict between a legal text and the provisions of an international treaty ratified by Jordan. In this case, this issue was put on the table as Jordan acceded to the United Nations Convention on the Carriage of Goods by Sea of 1978 known as the Hamburg Rules in 2001, which allows the parties to the bill of lading to refer any arising conflict in connection with the carriage of goods to any agreed upon destination, whereas the Jordanian Maritime Trade Law in its article 215 gives the exclusive competence to look into a similar conflict to the Jordanian Courts, and this is the matter upon which the judges ruled.

- Comment

In the framework of the response to the issue of conflict of the domestic law with the United Nations Convention, the decision[22] mentioned the following:

> *"Jurists and judges were unanimous in agreeing to the supremacy of international treaties concluded between States over those States' domestic laws; they also agreed on the fact that such treaties have precedence to be applied even if they are conflicting with the domestic law and that the implementation of international treaties and laws fall within the competence of the Judiciary without giving the litigating parties the opportunity to choose the treaty or law they want as this is relevant to public order."*

This position is one adopted usually by the Judiciary in countries, the Constitutions of which did not expressly include a text on the status of treaties[23].

This decision also went farther in granting the Judiciary the competence to monitor the validity of the procedures relevant to the conclusion of treaties, called in the comparative jurisprudence "quasi-constitutional control" performed by ordinary courts on international treaties; it said:

> *"It shall be on the condition that international treaties and conventions had passed by all constitutional phases in the country that is looking in the matter of dispute. Should be demonstrated as well if the United Nations Convention on the Carriage of Goods by Sea - to which Jordan*

22 - The entire text of the decision is shown in Appendix 3, pp. 281-289.

23 - This is the case in Belgium, which Constitution does not provide for the status of treaties; however, the Belgian Judiciary acknowledged the principle of supremacy of treaties over the law in a famous tentative decision on "Fromagerie Le Ski" case issued by the Belgian Court of Cassation on May 27, 1971.

acceded by virtue of a decision by the Cabinet published in the Official Gazette, issue no. /4484/ dated 04/16/2001 and which allowed the parties to agree on referring any dispute relating to the carriage of goods to any destination chosen for this purpose – had passed through all due constitutional phases, and if the execution thereof requires approval by the National Assembly as well as ratification.[24]"

This is considered a development in the Jordanian Judiciary position toward the issue of control over the validity of the procedures relevant to the conclusion of treaties compared to comparative jurisprudence. The Jordanian Judiciary also refused to implement a convention, which constitutional phase of pre-approval by the Chamber of Deputies has not been completed yet. The decision of the Jordanian Court of Cassation no. 755/2006 issued on 07/17/2006 stated the following:

"The Convention on Extradition concluded between the government of the Hashemite Kingdom of Jordan and the United States government did not undergo its constitutional phases and was not ratified by the National Assembly as conventions on extradition are considered conventions affecting the public and private rights of the Jordanians, and thus are not effective unless approved by the National Assembly in compliance with article 33 of the Constitution and as decided by the Court of Cassation in many of its judgments.[25]"

It is the same position adopted by the Jordanian Court of Cassation in its decision no. 2174/2011 dated 01/12/ 2012, which stated the following[26]:

"And whereas the Convention on Extradition concluded between the government of the Hashemite Kingdom of Jordan and the United States government did not undergo its constitutional phases and was not ratified by the National Assembly as conventions on extradition are considered conventions affecting the public and private rights of the Jordanians, and thus are not effective unless approved by the National Assembly in compliance with article 33 of the Constitution and as decided by the Court of Cassation in many of its judgments."

We find that many countries granted constitutional control to ordinary judges, which was the case of Jordan prior to the constitutional amendment of 2011. We will tackle this matter through two decisions: the first issued by Amman Court of Appeal no. 36823/2010 on 10/19/2010 and the second issued by the Magistrate Court no. 7658/1999 on 12/26/1999.

24 See excerpts of the decision in Appendix 3, pp. 281-288.

25 See the entire text of the Decision in Appendix 3, pp. 258-260.

26 See grounds of the Decision in Appendix 3, pp. 311-313.

- Decision of Amman Court of Appeal No. 36823/2010 (Case of "S." Against "A.")

- Summary of Facts

We could not get the facts of the case but it seems that the legislative authority issued a law in violation of the Constitution and a dispute was brought before the court pleading unconstitutionality of the said law; the court ruled on the unconstitutionality of the law.

- Legal Issue

The Jordanian Constitution did not include any provision with regards to the party competent to monitor the constitutionality of the laws. However, as it enshrines the principle of separation of powers, ordinary courts (justice) leaned towards performing this control in order to ensure the respect of supreme rule being the Constitution; and this is what the judges confirmed in this decision.

- Comment

The principle of separation of powers is considered the pillar of the State of Law, and the basis for powers working in harmony without assaulting one another; this is confirmed by decision no. 36823/2010 in one of its grounds:

> *"And whereas the judicial authority is independent as well as equal to the other authorities as all authorities derive from the Constitution that established them without any one of these authorities rising over the others; this incurs that neither the legislative authority nor the executive authority can issue a law violating the Constitution and force the judicial authority to implement it. Not only that, but the failure of courts to abstain from implementing such law that is in conflict with the Constitution, is considered as participation in the violation of the Constitution and an impediment to its provisions.[27]"*

It also confirmed that constitutional control is a competence inherent to the Judiciary stating:

> *"Jurisprudence agrees on that the Judiciary's control of the constitutionality of laws is an inevitable result of the Constitution's supremacy and rigidity. The Jordanian Constitution has precedence over the other laws that have to abide by the Constitution and its provisions, be in line with the same and never fall outside its limits; otherwise, the legislation issued in conflict therewith shall be considered unconstitutional, the penalty determined shall be inflicted and it shall not be implemented."*

27 See excerpts from the Decision in Appendix 3, pp. 308-309.

The decision also considered that:

> *"Courts, in most of the countries of the world, in which the constitutional control has not been regulated by virtue of express legal texts, performed the control on the constitutionality of the laws without effective legal or constitutional texts giving them this competence considering this is part of the general principles that should be adopted in any country with a rigid Constitution, the amendment of which requires procedures different from the ones the Constitution sets for the amendment of ordinary laws."*

It also confirmed that:

> *"the right of the Judiciary to control the constitutionality of the laws as the harmony and compliance of the laws with the provisions of the Constitution is the forefront of the cases that are of interest to the judges since the monitoring of the constitutionality of the laws is necessary and important to ensure the protection and safeguarding of fundamental human rights."*

- Decision of the Magistrate Court No. 7658/1999

- Summary of the Facts

We could not get the facts of the case but it seems that a lawsuit was filed against a Jordanian citizen by virtue of the Penal Code for his being in a certain place; and so he resorted to the Magistrate Court to get justice.

- Legal Issue

The Jordanian Penal Code included in paragraph 5 of article 389 the following:

> *"Whoever is found traipsing in any property or nearby to a property, in any public street or a nearby place, or in any other public place at a time and under conditions from which one can conclude that he is there for an illegal or improper purpose."*

Judges compared between this text and the wording of article 7 of the Constitution and concluded it is in contradiction therewith.

- Comment

The decision stated the following[28]:

> *"And whereas the wording of paragraph 5 of article 389 of the Penal Code limits the personal liberty of the person, hinders his movement, and*

28 See the entire grounds in Appendix 3, pp. 310-311.

subjects him to be called to account for the mere suspicion of his presence in any public place or property for an illegal or improper purpose and obliges him to declare the reason for his presence or wandering in any public road or street to avoid being pursued in justice in the event he was found a suspect."

The decision considered that:

"Looking into the extent of constitutionality of the law is part of the public order and the Court may perform it by its own initiative implementing the higher legal rule when it is in conflict with a lower legal rule."

In the implementation of all the previous considerations, the Magistrate Court judges concluded that:

"Paragraph 5 of article 389 of the Penal Code is in contradiction with the provisions of article 7 of the Constitution:"

"And whereas the expression 'personal liberty is respected' is mentioned in article 7 of the Constitution absolute and without any exception thereto, then any legal rule that impedes personal liberty or limits it shall be considered unconstitutional and should not be implemented."

Considering that the recent constitutional amendment included the establishment of a constitutional council, it is then probable that it would incur withdrawing this competence from the ordinary Judiciary, and the latter would only have the role of referring the pleading in connection with the unconstitutionality brought forward by the litigants in compliance with paragraph 2 of article 60 of the Constitution, and the wording of the private law on the regulation of the constitutional court, what raises many problematic issues.

2. Iraqi Constitution

a- Constitutional Provisions

The Iraqi Constitution adopted in 2005 provided for international treaties without determining their status (hierarchy); paragraph 2 of article 70 thereof stipulated the following:

"The President of the Republic shall assume the following powers: 2. To ratify international treaties and agreements after the approval by the Council of Representatives. Such international treaties and agreements are considered ratified after fifteen days from the date of receipt."

Article 58 thereof determined the method of approval stipulating in its fourth paragraph:

> *"The Council of Representatives specializes in the following:*
> *Fourth: A law shall regulate the ratification of international treaties and agreements by a two-thirds majority of the members of the Council of Representatives."*

For implementing treaties, the Constitution only determined – according to these articles – the condition that they be ratified provided a law is issued in this regard by the Council of Representatives; thus, it draws from the dualist doctrine whereas the jurisprudence leaned toward the monist trend.

b- Conclusion and Ratification Steps

Like most constitutions in such matter, the Iraqi Constitution, promulgated on October 15, 2005, stipulated that the competence to conclude treaties be shared between both the executive and the legislative authorities, in conformity with the provisions of the above-mentioned article 58.

The wording of the article indicates that, unlike the other constitutions we tackled, the Iraqi Constitution grants the competence to the Council of Representatives to conclude all of the treaties and not just some of them.

Moreover, it appears that the legislative authority plays a significant role in the treaty ratification process as the Constitution stipulates that the ratification be approved expressly beforehand and by a qualified majority.

Work is underway for the ratification of each treaty by a law published in the Iraqi Official Gazette ("Alwaqai Aliraqiya") and accompanied with the full texts of the treaty. The treaty shall thus come into force on the Iraqi territory and shall have equal force therein to the rest of the domestic laws. However, as we will show in what follows, the judiciary often tends to apply ratified agreements and even to give them priority.

Such law that the constitutional text refers to has not been passed yet what lead the Federal Supreme Court to issue its decision no. 42/Federal/2008, on 11/24/2008, stipulating the following:

> *"The Council of Representatives may approve international agreements and treaties in accordance with the Law of Conclusion of Treaties no. 111 for 1979."*

The said law shall be the law in force until a new law is enacted; this means that the provisions of the aforementioned law shall be observed upon ratification of treaties until a law is passed by a two-thirds majority of the members of the Council of Representatives[29].

Such law no. 111 defines treaty ratification in its article 3, paragraph 2, as follows:

> *"Ratification – The legal procedures by virtue of which the Revolutionary Command Council in the Republic of Iraq confirms, at the international*

29 Dr. Ali Fawzi Al-Mousawi, Notes on the Enforcement of Human Rights Treaties in Iraq (ملاحظات عن نفاذ معاهدات حقوق الإنسان في العراق), 2011, p. 1.

level, its final consent to commit to a previously signed treaty on behalf of the Iraqi republic or Government, or to a treaty that had already been issued by an international organization or by an international conference."

As for article 19 of the aforementioned law, it indicates the treaties subject to ratification stipulating the following:

"The commitment of the Iraqi Republic to the treaties, the provisions of which tackle one of the issues mentioned in the paragraphs of this article, shall be subject first to the requirement of ratification in accordance with the procedures stipulated in this law.

1- Border treaties and territorial integrity treaties.
2- Peace treaties.
3- Treaties related to the establishment of international organizations."

These articles indicate that the ratification of treaties falls under the competence of the legislative authority represented by the defunct Revolutionary Command Council presided by the head of the State. Moreover, according to article 30, ratification procedures consist of both the submission of the ratification documents by the Iraqi Ministry of Foreign Affairs to the Administration of the Iraqi Presidency Council to study the approval of the treaty by the President of the Republic, and of the ratification of the said documents by the legislative authority (previously represented by the defunct Revolutionary Command Council)[30].

We also understand that the constitutional status of treaty ratification in Iraq is based on the ratification of the treaty by virtue of a law that shall be applied internally similar to the rest of the laws[31].

The aforementioned decision of the Federal Supreme Court indicates that the conclusion of treaties under the new 2005 Constitution is still subject to the provisions of law no.111 until a new law is enacted.

c- Judicial Applications of the Principle of Supremacy

Although the Constitution did not provide for the supremacy of treaties, the judiciary recognized this principle on several occasions and applied it in the Iraqi Federal Court of Cassation in case no. 268 dated 11/24/2009.

- Summary of Facts (Case of "A. H. A." vs. "F. A. J.")

A divorce was reached between the plaintiff and the defendant before the Sharjah Sharia Court in the United Arab Emirates on 02/02/2009. The plaintiff filed a lawsuit before the Court of Personal Status in Karrada to ratify the divorce. The latter Court dismissed the case on 08/09/2012. The plaintiff then appealed before the Federal Court of Cassation that accepted his appeal and decided to revoke the ruling.

30 Ibid, pp. 1-2.

31 Ibid, p. 2.

- Legal Issue

In view of promoting judicial cooperation and heading towards unifying Arab laws, the Arab States concluded the Riyadh Agreement for Judicial Cooperation in 1983. The chapter five of the said agreement included special provisions for the recognition and execution of judgments issued in civil, commercial, administrative and personal status cases; article 25 thereof stipulates the following:

> *"a- In view of executing this chapter, a judgment shall be defined as every decision – regardless of its designation – issued according to judicial or state procedures by courts or by any competent body in any of the States.*
>
> *b- Subject to the provisions of article 30 of the present agreement, each contracting party shall recognize the judgments made by the courts of any other contracting party in civil cases -including judgments related to civil rights issued by penal courts and in commercial, administrative and personal status judgments having the force of res adjudicate and shall implement them in its territory in accordance with the procedures related to the application of the provisions stipulated for in this chapter, and that if the contracting party's courts that issued the said judgments are competent under the provisions of the rules of international judicial competence that are approved by the contracting party that is asked to recognize or execute the judgment or if they are competent by virtue of the provisions of this chapter, and provided that the legal system of the contracting party that is asked to recognize or execute the judgment does not retain for its courts or the courts of another party the exclusive competence to make such judgments."*

Clause "a" of article 30 on one of the cases of rejection of recognition, stipulates the following:

> *" a- If recognition would be in contradiction with the stipulations of the Islamic Sharia, the provisions of the Constitution, public order, or the rules of conduct of the requested party."*

Iraq ratified this agreement on 03/16/1984 by virtue of law no. 110, what commits the country to observe the provisions thereof applied by the judges of the Court of Cassation.

- Comment

We note that, upon receiving the request filed by the plaintiff for the ratification of the divorce, the Court of Personal Status in Karrada dismissed the request based on the following:

> *"The submitted document issued by the Sharjah Sharia Court, observes all formal requirements of ratification by the Iraqi Embassy in Dubai as well as and by the relevant authorities in accordance with the provisions*

of the law for ratification of signatures on Iraqi and foreign documents and instruments no. 52 for 1970.[32]*"*

Therefore, the Court considered there is no need to ratify the said document since the procedure has been accomplished by the Iraqi Embassy in Dubai. However, the judges of the Court of Cassation decided otherwise and considered that the ratification request is a substantive issue falling under the competence of the Court of Merits and that the authentication by the embassy is merely a formal procedure, basing its judgment in this regard on the Riyadh Convention as it mentions in its decision the following:

"Article 30 of the Riyadh Arab Agreement for Judicial Cooperation ratified by Iraq by virtue of Law no. 110 for 1983, gave judgments (which are every decision, or however it is designated, that is issued according to legal or state procedures by courts of any competent body in the country of one of the signatories (article 25) of the aforementioned agreement) issued in personal status cases, as it stipulates that (the recognition of a judgment is rejected in the following situations: if it contradicts the provisions of the Islamic Sharia or the provisions of the Constitution, public order or rules of conduct in the signatory country that is requested to ratify the judgment; b- if pronounced in absentia and the party condemned in the lawsuit or judgment was not duly notified in a way that allows it to defend itself. Hence, the Personal Status Court before which the divorce ratification lawsuit is filed, shall look into the extent to which the legal and Sharia conditions are fulfilled in this fact, verify its occurrence and it shall be entitled to adopt the submitted document as one of the evidences that can be relied on in the validation and the issuance of a judgment that conforms with the ruling of the Sharia."

Thus, it considered that the judgment of the Court that revoked the ratification lawsuit was incorrect based on the requirements of the special convention on judicial cooperation, which is considered a move towards the adoption of international conventions, being one of the sources of the law, and even giving them precedence in application.

3. Palestinian Constitution

a- Constitutional Provisions

First, we refer to the special situation of the Palestinian National Authority, the legal personality of which has not matured yet to become a State at the international level and a member of the United Nations Organization (it was given the status of observer in the international organization by virtue of decision no. 3237 (d-29) dated November 22, 1974), and, consequently, it cannot be party to an international treaty.

32 See the complete text of the decision in Appendix 2, pp. 237-238.

However, by referring to the Basic Law considered equivalent in value to a Constitution and enacted on March 18, 2003, we find an indication to a tendency towards adopting human rights charters; paragraph 2 of article 10 thereof stipulates that:

> *"The Palestinian National Authority shall work without delay to join the international and regional declarations and covenants that protect human rights."*

The Basic Law is also free of any reference to the status (hierarchy) of treaties in the legal system; a matter that shall be settled in due time.

b- Conclusion and Ratification Steps

Given what was mentioned earlier, the Basic Law did not tackle the conclusion and ratification steps, as this issue was adjourned until the permanent Constitution of the State of Palestine is promulgated.

c- Judicial Applications of the Principle of Supremacy

By reference to the jurisprudence, we find that it tends to draw inspiration from the principles of human rights that are guaranteed by international human rights covenants, as will be shown in what follows.

3) Position of Other Arab Constitutions

The above applies to the States comprised in the Raoul Wallenberg Institute Program. As for the other countries, they can be described as countries that are supposed to be covered by the program and that are currently intended to be integrated therein, such as Egypt and Syria, and the other countries the constitutions of which can be classified into three categories:

1. Constitutions Enshrining the Principle of Supremacy of Treaties

Article 80 of the Mauritanian Constitution of 1991, amended in 1996, stipulates the following:

> *"Treaties or accords duly ratified or approved shall, upon their publication, be superior to laws, subject to, for each treaty or accord, its application by the other party*[33]*."*

33 See Encyclopedia of Arab Constitutions, complete, including all amendments and editions thereof, volume 1, Unified Constitutions; prepared by Dr. Omar Saadallah and Bookra Idriss, Houma Editions, 2008, p. 453.

Therefore, the Constitution enshrines the conditional supremacy of treaties over domestic law and grants the Parliament the competence to approve some treaties according to article 78 thereof that stipulates the following:

> *"Peace treaties, union treaties, commerce treaties, treaties or accords concerning an international organization, treaties which require the finances of the State, treaties which modify provisions of a legislative nature, and treaties concerning the borders of the State may only be ratified by a law. They may take effect only after being ratified or approved. No cession, no change, and no annexation of territory is valid without the consent of the people who shall decide through referendum. In the case set forth in the last paragraph of article 2, the required majority is four-fifths of the votes cast."*

2. Constitutions Granting Treaties a Status Equal to That of the Law

The Egyptian Constitution of September 11, 1971 amended in 2007, guarantees treaties a status equal to that of laws under article 151 thereof, which reads as follows:

> *"The president of the republic concludes treaties and communicates them to the People's Assembly with an appropriate statement. These treaties shall have the force of law after conclusion, ratification and publication according to the established procedures. However, peace, alliance, trade and navigation treaties as well as all the treaties that entail modification of the country's territories, that are related to the rights of sovereignty or that bring about some expenditures not provided for in the Budget, must be approved by the People's Assembly.*[34]"

We notice as well that it provides for two conditions for the enforcement of treaties: ratification and publication. It also divides the ratification competence between both the executive and the legislative authorities and places treaties and domestic laws at the same hierarchical level.

The Bahraini constitution of 2002 adopts the same position in article 37 thereof that stipulates the following:

> *"The King shall conclude treaties by Decree, and shall communicate them to the Consultative Council and the Chamber of Deputies forthwith accompanied by the appropriate statement. A treaty shall have the force of law once it has been concluded, ratified and published in the Official Gazette."*

The same goes for the Qatari Constitution of 2003, which indicates in its article 68:

> *"The Emir shall sign conventions and agreements by issuing a Decree and communicating them to the Advisory Council along with the appro-*

34 Ibid, pp. 390- 391.

priate statement. The convention or the agreement shall have the power of law after being ratified and published in the Official Gazette."

The aforementioned also applies for the Kuwaiti constitution of 1962 which stipulates in article 70 thereof:

"The Emir concludes treaties by decree and transmits them to the National Assembly with the appropriate statement. A treaty has the force of law after it is signed, ratified and published in the Official Gazette."

3. Constitutions Not Having Determined the Status of Treaties

The Syrian Constitution promulgated on March 13, 1973 and amended in 1980, 1991 and 2000, fits in this category as its article 104 stipulates the following:

"The President of the Republic ratifies and abolishes international treaties and agreements in accordance with the provisions of the Constitution."

The above is a brief text that does not indicate the status of the treaty in the internal system.

As for article 71, paragraph 5, it stipulates the following:

"The People's Assembly assumes the following powers:

5- Approval of international treaties and agreements connected with state security; namely, peace and alliance treaties, all treaties connected with the rights of sovereignty or agreements that grant concessions to foreign companies or establishments, as well as treaties and agreements which entail expenditures of the state treasury not included in the treasury's Budget, and treaties and agreements that run counter to the provisions of the laws in force or treaties and agreements that require promulgation of new legislation to be implemented."

Therefore, the power to conclude treaties is divided between both the executive and legislative authorities, for some types of treaties that are strictly limited.

The Saudi Constitution of 1992 went in the same direction and stipulated under article 70 thereof:

"International treaties, agreements, regulations and concessions are approved and amended by virtue of Royal decrees."

The same applies for the Yemeni Constitution of 1991 as article 118 thereof states:

"The President of the Republic shall have the following powers:

12 - Issuing decrees ratifying Treaties and Conventions approved by the House of Representatives.

13 - Ratifying agreements that do not require the endorsement of the House of Representatives if approved by the Cabinet."

Finally, this also applies to the UAE Constitution of 1971, which gives the right of ratification to the Supreme Council of the Union.

Chapter Two: Judicial Application of International Human Rights Treaties in Arab Courts

The judicial authority in most countries is now working on implementing international treaties that are considered part of the country's legal system as from their ratification and according to the requirements of each constitution as we have seen previously. The judge now draws his/her ruling from their numerous provisions spanning many fields that were once exclusive to domestic laws, and builds upon them to find solutions to the disputes brought before him/her.

Human rights treaties are now being heavily implemented; an issue that we will tackle in accordance with jurisprudence issued by some courts of Arab countries, namely: Algeria, Jordan, Iraq, Morocco and Palestine, and that are accessible for us either as complete documents or as excerpts of only some grounds thereof; such countries are signatories to these international and regional treaties and have ratified them bringing forth reservations and interpretative declarations[35].

We will comment on the national judge's applications of the principles of human rights in various fields, pinpoint case facts whenever possible and refer to the complete text of the decision in the appendix whenever it is available[36]. Upon a thorough examination of the decisions, we found they are focused on six fields, namely: decisions pertaining to civil and political rights; economic, social and cultural rights; rights related to a certain group or an issue; the right to resort to the judiciary; the penal field; and fair trial[37]. We only note that we removed the names of the members of the panel of judges in every decision along with the names of the parties to the case, referring to them by their initials only, in order to respect their right to privacy.

Moreover, we included decisions issued by Iraqi judicial bodies in the comment section although they do not refer expressly to human rights treaties, since according to the clarifications of the Iraqi National Working Team (INWT), whenever the international regulation is mentioned expressly and is consistent with the Constitution, referring to those constitutional provisions shall be sufficient and there shall be no need for the treaty.

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35 Please check Appendix 6, ratifications statuses for countries under study, pp. 360-362.

36 In order to cover the different nomenclatures used in courts, you can view Appendix 7, in which we included the judiciary divisions of the countries under study, and the nomenclatures adopted for different instances of courts therein, pp. 362-363.

37 In the first part, we tackled the judiciary applications related to the principle of supremacy, while adopting the same methodology we used in this part.

1) Judicial Applications of Civil and Political Human Rights

International constitutions and conventions guaranteed various rights, especially political and civil rights, and ensured they be exercised and protected from violations through the judicial authority. We will tackle hereafter this matter by examining several rights such as: the right to a nationality, freedom of information, freedom of movement and travel and other rights.

1. Right to Obtain and Retain a Nationality

Nationality is considered the bond that links an individual to a certain country. Laws regulating nationality granting base nationality rights on 2 criteria: Jus sanguinis, the bond of blood, and Jus soli, the bond of the soil. Many international agreements guaranteed the equal rights of both parents to grant their nationality to their children. In this regard, we will tackle seven decisions issued by the Jordanian High Court of Justice and the Iraqi Federal Supreme Court.

- Decision No. 105 of the Jordanian High Court of Justice

- Summary of Facts

The facts of this decision were not accessible to us. However, it seems that a Jordanian national married a foreigner who was to be deported from the Kingdom. Consequently, the foreigner resorted to the judiciary on the grounds of possessing the Jordanian nationality.

- Legal Issue

The International Declaration of Human Rights provided for the right to a nationality under article 15 thereof:

> *" (1) Everyone has the right to a nationality.*
>
> *(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."*

The International Covenant on Civil and Political Rights did not enshrine this right and limited it under article 25/2 to children only. Furthermore, in reference to the Hague Convention of April 12, 1930 related to conflicts of laws, it seems that the State has exclusive powers to determine its demographic structure but without acting arbitrarily in the matter.

The States worked on recognizing this right in different ways and domestic laws determined the cases of nationality obtainment, retaining and loss, while trying to investigate, as much as possible, the attainment of the effective nationality[38].

38 The International Court of Justice tackled the concept of effective nationality in the Nottebohm case; refer to its decision of April 6, 1955.

The Jordanian Constitution went in the same prevailing direction in the field of subjecting the regulation of the nationality to the laws of the State; article 5 thereof stipulates the following:

> *"Jordanian Nationality shall be defined by law."*

The Jordanian nationality law accurately defined the conditions for obtainment, retaining and loss of the Jordanian nationality, as mentioned in the decision.

- Comment

This case raised the issue of whether the Jordanian's foreign wife still keeps her foreign nationality or not, since it was decided that she be deported from the territories of the Hashemite Kingdom of Jordan and upon presenting the dispute before the Court to know if the Jordanian's wife has the Jordanian nationality by means of her marriage to a Jordanian national, the court referred to the conditions stipulated under article 8 of the law on nationality. The decision[39] mentions the following:

> *"…the wife of a Jordanian national shall retain her foreign nationality in conformity with the conditions indicated under paragraph two of this article, i.e. the written statement presented to the Minister of the Interior and after two years of residence in the Kingdom."*

The fact that she did not present a similar statement is evidence that she has the Jordanian nationality.

Moreover, in reference to article 9/1 of the Constitution, we find that it stipulates the following:

> *"(1) No Jordanian may be deported from the territory of the Kingdom."*

On these grounds, the Court ruled on her right to stay in Jordan given that she has the Jordanian nationality, which is consistent with the right to a nationality, as enshrined in international and domestic laws.

- Decision No. 115 of the Jordanian High Court of Justice

- Summary of Facts

The facts of this decision were not available for us either. However, it seems that the plaintiff, whose father is considered a Jordanian national and who obtained a Jordanian passport on 07/01/1976 was away in Yemen, and upon his entry to Jordan, the governor of the Capital issued an order for his deportation from the Kingdom and so he challenged the decision before the judiciary to annul it based on the grounds that he is a Jordanian national.

39 Refer to the grounds in Appendix 3, pp. 308-309.

- Legal Issue

In addition to the international texts in this concern, the Jordanian Law on Nationality included the cases of obtainment of the nationality based on the bond of blood, considering it is a general rule. This case raised the issue of the extent to which a Jordanian national who travels outside the Kingdom retains his nationality and this is what the judge detailed.

- Comment

Article 3 of the Jordanian law on nationality stipulates that:

> *"The following shall be deemed to be Jordanian nationals:*
> *(3) Any person whose father holds a Jordanian nationality."*

With reference to the current case, we find that the plaintiff's father is a Jordanian national according to the documents examined by the judges, namely the Passports Department; and that the plaintiff was registered on his father's passport on 10/12/1959. The plaintiff also acquired a Jordanian passport no. 804/112 on 07/01/1976. Therefore, according to the findings and investigations of the judges, they considered that:

> *"The papers do not mention anything that indicates that the plaintiff ceded his Jordanian nationality, or that it was withdrawn from him[40]."*

They refuted the claim that stated he carried a Yemeni passport, and concluded the following:

> *"whereas no Jordanian shall be deported from the Kingdom as it would breach the provisions of article 9 of the Constitution",*

and since the said article states the following:

> *"1- No Jordanian may be deported from the territory of the Kingdom."*

and it complies with the provisions of international conventions, especially the International Covenant on Civil and Political Rights, article 12 of which dictates:

> *"(4) No one shall be arbitrarily deprived of the right to enter his own country."*

- Decision No. 212 of the Jordanian High Court of Justice

- Summary of Facts

The only grounds available for us indicated that the plaintiff who has the Jordanian nationality by origin acquired the nationality of another country

40 Refer to the available grounds of the decision in Appendix 3, pp. 308-309.

and that when he submitted a request for the renewal of his Jordanian passport, the Passports Department refused this renewal claiming he lost his Jordanian nationality. The plaintiff then challenged this decision before the judiciary to prove he has the Jordanian nationality.

- Legal Issue

This case raised the issue of the Jordanian who acquires the nationality of another country and whether the same affects his original nationality; this is what the judges examined based on the law on nationality.

- Comment

The loss of nationality happens as well as provided by the law. The plaintiff is a Jordanian national given that he was born to Jordanian father and he acquired another nationality. The judiciary considered that the decision of the Passports Department to prohibit him from renewing his passport:

> *"is a violation of his freedom of movement and travel*[41]*."*

The Court justified its decision by referring to the law on nationality, article 18 of which listed the situations of loss of the Jordanian nationality, which include a person's entry in the military service of a foreign country without the prior consent or permission of the Jordanian Cabinet; the decision mentions the following:

> *"… the obtainment of a Jordanian of another country's nationality is not mentioned among them since the withdrawal of the nationality shall not be made based on decisions issued by the Department; the rule stipulates that what the legislator regulates by virtue of a law can only be amended by a law and shall not be amended by a decision or instructions",*

which is a correct application of the law in a way that ensures the right to a nationality.

- Decision No. 4 of the Iraqi Federal Supreme Court

- Summary of Facts

(S), (Sa), (Sa), (S) and (S) submitted a request to obtain the Iraqi nationality based on the provisions of the Iraqi law on nationality, since their mother is an Iraqi national, but their request was rejected by Mr. (W. D). Consequently, they filed a lawsuit before the Iraqi Judiciary Court considering the rejection of their request is an arbitrary denial of their rights.

41 Refer to the available grounds of the decision in Appendix 3, pp. 311-313.

- Legal Issue

Regarding the individual's possession of his country's nationality, we find that nationality laws list criteria to passing the nationality to children. In reference to the 2006 Iraqi nationality law, article 3 thereof stipulates the following:

> *"A person shall be considered Iraqi if:*
> *a. he/ she is born to an Iraqi father or an Iraqi mother";*

Likewise, the provisions of article 9 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) mention that:

> *"2. States Parties shall grant women equal rights with men with respect to the nationality of their children."*

Iraq accessed this convention on 08/13/1986 and expressed some reservations thereon[42]. However, by virtue of the new nationality law, the legislation related to the nationality is now consistent with paragraph 2 of article 9 that grants women the same right with respect to the nationality of their children; a matter that was tackled by the decision.

- Comment

Decision no. 04, which examined the decision appealed in cassation that revoked the decision of the Court of Administrative Judiciary, and considered that the request of the plaintiffs has legal grounds, states the following:

> *"Whereas the Court noticed that the plaintiffs petitioned in the lawsuit they filed that they be granted the Iraqi nationality in accordance with the provisions of article 3/1 of the nationality law no. 26 for 2006 stipulating that (A person shall be considered Iraqi if s/he is born to an Iraqi father or an Iraqi mother…); whereas the person who is born to an Iraqi father or to an Iraqi mother shall be considered Iraqi according to the law and shall be granted the Iraqi nationality regardless of the nationality of the other parent, whether he be the mother or the father, in application of the provision of article 18/2 of the Constitution of the Republic of Iraq and to article 13/a of the nationality law no. 26 for 2006; and whereas the facts, findings and grounds of the case prove that the plaintiffs are born to an Iraqi mother; therefore, they were born Iraqi by law and they are right to request that they be granted the Iraqi nationality based on the aforementioned legal texts[43]."*

Consequently, an Iraqi is entitled to obtain the Iraqi nationality from his father or mother depending on the situation[44].

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42 See the articles on which some reservations were expressed in Appendix 6, pp. 360-362.

43 See the complete text of the decision in Appendix 2, pp. 212-213.

44 See Dr. Al-Mousawi, op.cit., p. 4.

The judges applied international criteria in this matter and decided to recognize the nationality of children whose mother is an Iraqi national.

- Decisions No. 2, 18 and 30 of the Iraqi Federal Supreme Court

- Summary of Facts

The full decisions were not available for us; we only had brief grounds from which we concluded that the case revolves around disputes related to the right to obtain and retain the Iraqi nationality.

- Legal Issue

The commitment of Iraq to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) incurred the harmonization of the country's nationality-related laws with these commitments; this is what the judges implemented in the following cases.

- Comment

Decision no. 2/Federal Cassation/2009 stipulated that:

> *"The person who is born to an Iraqi mother and a non-Iraqi father shall be considered Iraqi by law and shall be granted the Iraqi nationality regardless of the father's nationality*[45]*"*

and that:

> *"The person who is born to an Iraqi mother is considered Iraqi by law and shall be granted the Iraqi nationality even if the father is not an Iraqi national."*

The grounds of the decision no. 18 also stated the following:

> *"The person born to an Iraqi father or to an Iraqi mother shall be considered Iraqi by birth by law, regardless of the other parent's nationality*[46]*."*

As for decision no. 30, it stated:

> *"the issued judgment granting the nationality to children born to an Iraqi mother, only recognizes their right to it and does not establish it. Their-mother is consequently entitled to file a lawsuit to grant them the Iraqi nationality in her own capacity and not in addition to her guardianship*[47]*."*

45 See grounds of the judgment in Appendix 2, pp. 250-252.

46 See grounds of the judgment in Appendix 2, pp. 250-252.

47 See grounds of the judgment in Appendix 2, pp. 250-252.

2. Right to Privacy

The recognition of the individual's intrinsic dignity in the International Human Rights Law is considered one of the major rights that give the human being a dimension that allows him to live safely and to perform his activities in a way that guarantees the development of his personality within a frame of respect of his privacy away from the nuisance that he might face. All international instruments related to human rights have recognized this right and have forbidden any prejudice thereto, as tackled by the Algerian judiciary in the case featured below:

- Decision No. 10874/11 of the Court of Constantine, Algeria

- Summary of the Facts (Case of "B. L." Against "T. M.")

The plaintiff "B. L." is an employee at the Algerian National Bank, holding a Master's Degree in Islamic Banking. She benefited from a training program known as "Formative Training", within the frame of her work, held at the Pyramids Hotel in the Capital where she met colleagues working at the same bank in other branches. A colleague of hers called "T. M." working in the Setif branch asked her hand in marriage but she refused.

After that, he started harassing her. He stole her mobile phone as well as her national identity card and contacted all her relatives telling them she was a woman of bad reputation and pregnant with an illegitimate child. He also posted her photograph on the YouTube website along with comments harming her reputation and honor.

He also sent letters to the dean of the University of Islamic Sciences in Constantine, to the manager of the Bank she works in, and to the manager of the company where her brother works, saying things harmful for her reputation, thus causing her to lose her job at the bank and leading the administration of the university to expel her from her masters studies.

Consequently, the plaintiff filed a formal lawsuit against "T. M." before the Prosecutor of the Republic, accusing the defendant of committing the offences of slander, defamation and insult against her. A judgment was issued convicting the defendant and ordering that the victim be compensated.

- Legal Issue

This case raises the issue of the individual's right to a private life where he can express himself freely without third party interference, whether such third party be official authorities or regular individuals. Therefore, the International Law enshrined this right starting from the Universal Declaration of Human Rights, article 12 of which stipulates the following:

> *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

This is also provided for under paragraph 1 of article 17 of the International Covenant on Civil and Political Rights, which reads as follows :

> *"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation."*

As for the regional instruments for human rights, they too provided for this right; the African Charter on Human and Peoples' Rights mentioned it briefly in articles 5 and 6 thereof. Article 5 of the said Charter states that:

> *"Every individual shall have the right to the respect of the dignity inherent in a human being…"*

and article 6 stipulates that:

> *"Every individual shall have the right to liberty…"*

The Arab Charter on Human Rights expressly enshrines this right, as the wording of both paragraphs of article 21 thereof is similar to the wording we mentioned in the Covenant, and used the word "libel" instead of the term "attacks" used in the Covenant.

Hence, the signatories worked on activating their commitments in this regard, starting from their constitutions. Article 34 of the Algerian Constitution states the following:

> *"The State guarantees the inviolability of the human entity. Any …or breach of dignity is forbidden."*

and article 35 reads as follows:

> *"Infringements committed against rights and freedoms and violations of physical or moral integrity of a human being are repressed by the law."*

Therefore, the legislator made sure to incriminate all actions that constitute an attack upon the honor and integrity of individuals and on their privacy. Indeed, the Penal Code provided for the punishment of all offences of defamation (article 296), insult (article 297) and threat of aggression or violence (article 287).

The judge based his decision on the above to issue his judgment in the case before him; the grounds thereof mentioned the following:

> *"Therefore, after reviewing the texts of articles 32, 34, 35,131, 132 and 139 of the Algerian Constitution, articles 03 and 05 of the Universal Declaration of Human Rights and the provisions of the Penal Code, the Court…"*

- Comment

Algeria acceded to the International Covenant on Civil and Political Rights in 1989 and committed itself to implementing the provisions thereof such as the recognition and protection of rights that include the right to privacy. The scope of this right varies from one community to another and from one environment to another depending on the values adopted in each of them[48]. However, this right has international concepts that do not differ from one society to another, such as the individual's right to a private life without any nuisance caused by a third party whether a public authority or an individual, and that for the purpose of protecting his privacy. The aspects of this right consist in respecting his person, preventing he be addressed degrading or harmful words, as well as respecting the privacy of his correspondence and ensuring he is not subjected to any form of spying.

With reference to the current case, we find that the defendant performed a series of acts, by which he harmed the victim; the decision mentioned that he[49]:

> *"stole her mobile phone directory, gave out her number to male strangers so that they call her, and also called all her acquaintances saying that she was a woman of bad reputation and pregnant with an illegitimate child, fruit of an illegal relationship. He also stole her national identification card and made photocopies of it and mainly of her photograph thereon; he stole as well other photographs of her from her handbag and posted them on international websites, especially YouTube, after producing videos featuring naked photographs of the complainant accompanied by comments about her family's reputation and hers and containing immoral comments under the title 'L. B. biggest whore in Constantine, infected with AIDS.' The published videos were seen by thousands of strangers according to the video statistics of the international YouTube site and other sites, such as Facebook and the University Students Forum (forum Muntada al-Jami'iyyeen.)"*

Upon examining these acts, we find that they all indicate that the defendant obtained private stuff belonging to the plaintiff, such as her mobile phone and photographs, without her consent, and that he posted them before the public without any consideration to her privacy. The publishing mean the defendant used was an important one with an extremely wide reach since YouTube are electronic websites that can be viewed without restrictions by the public; hence this was considered a prejudice to the victim's honor. The decision indicated the following:

> *"Whereas the facts and findings of the present case prove that the victim was subject to a violation of her right to live in peace, especially that her reputation as well as her family's were ruined and their honor tainted by the defendant on international websites over the internet; and that she endured a degrading treatment when she was fired and expelled from the*

48 See Dr. Alwan and Dr. Moussa, the International Human Rights Law, part 2…, op. cit., p. 288.

49 You can consult the full text of the decision in Appendix 1, pp. 191-196.

university and the bank she worked in as a result of what was published about her and her family; therefore the judicial authority has to interfere to protect basic freedoms and human rights stipulated and guaranteed under article 32 of the Algerian Constitution."

We found that the judge in this case based his judgment on the Universal Declaration solely without taking into consideration the other international instruments mentioned above; the grounds of the case mention the following:

"Whereas in application of articles 03 and 05 of the Universal Declaration of Human Rights, every individual has the right to life, to freedom and to personal security, no person shall be subject to degrading treatment."

Based on that and on the previously mentioned constitutional provisions, the actions of which the defendant (T. M.) is accused were re-characterized from misdemeanor of verbal abuse, imprecation, defamation and threats of assault to misdemeanor of prejudice to the sanctity of privacy that is punishable under articles 303 bis and 303 bis1 incorporated in the 2006 amendment of the Penal Code.

By doing so, the Court would have done justice to the victim for all the actions she was subjected to and suffered from as result of such actions, which are as ruled by the Court:

"Significant damages particularly to her honor, dignity and reputation as well as to her family's, especially that her photographs were published on international websites featuring immoral comments."

They caused her to be expelled from her university and work, and thus the Court sentenced the suspect to a term in prison and to payment of a fine, in addition to a compensation for all the damages incurred to the plaintiff.

3. Right to Freedom of Movement and Travel

This right is closely related to personal freedom, given that the individual has a legal personality that enables him to decide for himself freely. It includes the freedom of movement without restrictions, except for those defined by law[50]. We will discuss how the Jordanian and Iraqi judiciary dealt with this right in their applications through the two decisions below:

- Decision No. 34 of the Iraqi Federal Supreme Court

- Summary of Facts (Case of "M. J. A" Against "President of C. R.")

50 International covenants that tackled this right distinguished between nationals and foreigners regarding the enjoyment of this right. See Dr. Alwan and Dr. Moussa, International Law …, op. cit., part 2, p. 220.

After examining the decision of the Iraqi Federal Supreme Court, we realize that the plaintiff is an MP in the Iraqi Council of Representatives, that he traveled during the vacation and that the Council lifted his parliamentary immunity and forbade him from traveling and attending its sessions, which lead him to file a lawsuit to annul such measures[51].

- Legal Issue

The freedom of movement is considered one of the rights that were enshrined by international conventions. The Universal Declaration of Human Rights provided for it under article 13 thereof, by stating the following:

> *"1. Everyone has the right to freedom of movement and residence within the borders of each state.*
>
> *2. Everyone has the right to leave any country, including his own, and to return to his country."*

Article 12 of the International Covenant on Civil and Political Right also stipulated the following:

> *"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."*

The Iraqi Constitution provided as well for the freedom of travel and movement to all Iraqis under article 42 thereof:

> *"First: Each Iraqi has freedom of movement, travel, and residence inside and outside Iraq."*

Iraq also ratified the International Covenant on Civil and Political Rights on January 25, 1971.

In light of these international and domestic texts, the judge examined the facts to reach a solution that is in conformity therewith.

- Comment

With reference to the grounds of decision no. 34, the judges characterized the action carried out by the MP as follows:

> *"… the plaintiff made the trip in his personal capacity and during the vacation of the Council of Representatives. Therefore, on one hand, he does not have to notify the Council of Representatives of his journey, and on the other hand, the Court found that the articles of the Council's*

51 See full text of the decision in Appendix 2, pp. 220-221.

bylaws do not entitle it to lift an MP's parliamentary immunity and prevent him from traveling, unless by order of the judicial authority and in specific cases mentioned for limitation purposes, and that do not include the situation object of the present lawsuit…"

This also complies with the constitution and with article 12 of the International Covenant, and consequently, the judges reached the following:

"The Council of Representatives shall not lift one of its members' immunity and prevent the latter from traveling unless by order from the judicial authority. The Council's lifting of the plaintiff's parliamentary immunity and his prevention from travelling and from attending the Council of Representatives' sessions are procedures that are in contradiction with the provisions of the Constitution."

Such procedures are also inconsistent with article 12, paragraph 3of the Covenant which stipulates the following:

"The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

The decision of the Federal Supreme Court no. 4/Federal/Cassation/2006 confirmed the above on 03/29/2006 in its grounds:

"Preventing an individual from traveling restricts the freedom of traveling outside Iraq and shall be considered as depriving the individual from the basic rights that are ensured by the established laws."

This is the utmost enshrinement of the individual's right to personal freedom.

- Decision No. 243 of the Jordanian High Court of Justice

- Summary of Facts

The facts of the decision no. 243/1997 of the Jordanian High Court of Justice (panel of five judges) issued on 10/15/1997 were not available for us. However, the grounds in our possession indicate that the plaintiff submitted a request to renew his passport, but the director of the Passports Department refused to renew it and so the plaintiff filed a lawsuit to attain his right[52].

52 Refer to a number of human rights' related judicial decisions issued by the Jordanian Courts of Appeal and Cassation, Appendix 3, pp. 308-317.

- Legal Issue

Article 7 of the Constitution comprised a text on personal freedom that states the following:

> *"Personal freedom shall be guaranteed."*

Moreover, Jordan ratified the International Covenant that established this right, which makes it committed to applying it, as discussed in the case at hand.

- Comment

The judges considered that movement and travel are:

> *"a right established for every individual that shall not be limited or restricted unless within the boundaries of the law"*

While applying this to the dispute brought before it, the High Court of Justice considered that:

> *"The right of an individual to acquire a passport and change it, is part of the freedom of movement that constitutes one aspect of personal freedom that is guaranteed by article (7) of the Constitution and which is considered one of the pillars of modern democratic regimes."*

The judges based their decision on the Jordanian Passports Law no. 2 for 1969 that:

> *"prohibits the confiscation of any Jordanian citizen's passport and the prevention of its renewal. Every Jordanian national has the right, by virtue of article 3 of this law, to obtain a passport and this right of his is established by law and is not contingent upon the approval of any other party."*

Consequently, the Court considered that the decision taken to prohibit the plaintiff from renewing his passport is in violation of the laws as it is not based on any legal justification.

Therefore, when the High Court of Justice decided to dismiss the decision taken by the administrative bodies to prevent the renewal of the passport, it consolidated the constitutional right that grants every individual the right to move wherever and whenever he wants, as stipulated under article (9) of the Constitution:

(((i) No Jordanian may be deported from the territory of the Kingdom.

(ii) No Jordanian may be prevented from residing at any place, or be compelled to reside in any specified place, except in the circumstances prescribed by law.))

4. Non-Discrimination of Minorities

The Iraqi judiciary worked actively on establishing this principle in three decisions issued by the Federal Supreme Court, namely: decision no. 9/Federal/2008 on 11/24/2008, decision no. 15/Federal/2008 issued on 04/21/2008 and decision no. 72/Federal/2009 issued on 11/19/2009.

- Decisions No. 9/Federal/2008, No. 15/Federal/2008 and No. 72/Federal/2009 of the Federal Supreme Court

- Summary of Facts

The facts of these cases were not available for us. However, regarding decision no. 9, the lawsuit was filed before the Federal Court by a group of Chaldeans and Assyrians due to their non-representation in the Council of the Independent High Electoral Commission (IHEC).

As for the decision no. 15, the lawsuit was filed before the Federal Supreme Court by a group of Turkmens and Syriac-speaking people claiming their rights as minorities in Iraq[53]. Finally, in decision no. 72, the lawsuit was filed by some Iraqis residing outside Iraq because their candidacy to the Council or Representatives was rejected.

- Legal Issue

International conventions guarantee the principle of equality of all individuals and unconditional non-discrimination between them[54], provided for under article 2 of the Universal Declaration of Human Rights that states the following:

> *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

This is also stipulated in article 2, paragraph 1 of the International Covenant on Civil and Political Rights, the text of which reads as follows:

> *"1. 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 recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

The truth is that many countries that encompass a complex demographic tissue are composed of a certain racial or ethnic majority and include minorities as well among its constituents. International Covenants made sure to protect

53 See Dr. Ali Al-Mousawi: Notes on the enforcement …, op. cit., p. 3.

54 See Dr. Alwan and Dr. Moussa, International Law … op. cit., part 2, p. 451.

of these minorities in order to preserve their rights and enable them to exercise them. Iraq is a country that is made of various components; article 3 of the Iraqi Constitution states the following:

> *"Iraq is a country of multiple nationalities, religions, and sects."*

It comprises an Arab majority and minorities such as: Turkmens, Kurds, and others.

Furthermore, article 25 of the International Covenant on Civil and Political Rights stipulated the following:

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

The Arab Charter on Human Rights also guarantees the principle of non-discrimination in article 11 thereof that indicates the following:

> *"All people are equal before the law and are entitled to enjoy its protection without discrimination."*

Some minorities in Iraq have faced discriminatory procedures that deprived them of the right to vote and be elected and so they resorted to the judiciary to claim their right.

- Comment

Based on the principle of non-discrimination of minorities, decision no. 9 stipulated the following[55]:

> *"The composition of the Council of the Independent High Electoral Commission shall observe the representation of all components of the Iraqi people."*

Thus, it reestablished the rights of the Chaldeans and the Assyrians -as minorities- to participate in the political life in Iraq. In the same context, decision no. 15 stated that:

55 You can view the available grounds of the three decisions in Appendix 2, pp. 250-252.

> *"The Turkmen and the Syriac-speaking people living in the province of Kirkuk fall within the concept of density of population mentioned in article 4, paragraph 4 of the Constitution."*

Article 4, paragraph 4, stipulates the following:

> *"The Turkmen language and the Syriac language are two other official languages in the administrative units in which they constitute density of population."*

This is aimed at enabling these minorities to use their language freely and without discrimination, as mentioned in article 27 of the International Covenant on Civil and Political Rights that reads as follows:

> *"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."*

The Iraqi judiciary confirmed the protection of Iraqis against discrimination, as decision no. 72 stipulates the following:

> *"The Iraqi Constitution did not distinguish between Iraqis residing in Iraq or outside it, but it required that the selection of the members of the Council of Representatives shall observe the representation of all components of the population and that the female representation quota shall constitute at least 25% of the number of its members."*

This enshrines the principle of non-discrimination in general in a way that is consistent with the international and the domestic standards.

5. Right to Freedom of Expression

Freedom of expression is considered one of the fundamental freedoms for individuals and it constitutes the pillar of the State of Law[56] and consolidation of democracy. In this regard, article 19 of the Universal Declaration of Human Rights stipulates that:

> *"Everyone has the right to freedom of opinion and expression."*

56 See Dr. Alwan and Dr. Moussa, International Law …op. cit., part 2, p. 275.

Likewise, article 19 of the International Covenant on Civil and Political Rights states the following:

> *"1- Everyone shall have the right to hold opinions without interference."*

same as paragraph 2 thereof, which stipulates that:

> *"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*

In this framework, we will tackle three decisions, which are: two decisions pronounced by the Jordanian Court of Appeal: decision no. 45694/2009 (tripartite panel) on 03/25/2010 and decision no. 13781/2009 issued on 03/22/2009; and the decision of the Iraqi Federal Court of Cassation no. 419/Civil/2009 dated 05/06/2009.

- Decision No. 45694/2009 of the Jordanian Court of Appeal

- Summary of Facts (Case of Prosecution Against "S")

We did not have access to the full decision for this case. However, the available grounds indicate that a case was brought before the Sharia Courts, to which the appellant is a party, and in which the respondent, who is a journalist, had written an article published on 10/06/2008 on a subject obtained from a source in the Sharia Courts. The appellant in this case was referred to with a (special) designation what lead him to file a lawsuit against the respondent claiming that the latter breached his right to privacy.

- Legal Issue

The practice of freedom of expression is applied in the journalistic field, since the press, whether audible, visual or written, assumes the task of transmitting news and enabling people to express their opinion in compliance with the rules set by media laws that aim at maintaining public order and ensuring the respect of the freedoms of others, and that in accordance with the provisions of article 19, paragraph 3, of the International Covenant on Civil and Political Rights.

Based on this commitment, journalists are bound to exercise their profession within the limits drawn by the laws; otherwise, they would be committing offences of breach of others' privacy, which are offences with legal, material and moral elements.

- Comment

The judges analyzed the claim addressed by the appellant to the journalist respondent and confirmed accordingly that:

> *"The journalist or the writer of the article should be aware that he is performing an activity that leads to the non-respect of others' freedoms and*

> *affects their privacy. If he is not aware of the same and of the significance of his action, then, one of the elements of the criminal intent shall be eliminated and thus the entire moral element collapses*[57]*"*

This leads consequently to the elimination of the moral element of the offence.

Then, they moved to the material element, i.e. they considered that the article was written in the form of a news piece and did not attack at all the person of the appellant as the respondent did not mention the appellant's name therein. Moreover, the article presented an overview of the opinions of lawyers specialized in Sharia cases. Thus, it served exclusively as means to:

> *"transfer information, news and opinions for the purpose of circulating them among people"*

The judges based their decision on the Constitution that guarantees the freedom of the press, in paragraph 2 of article 15, which stipulates the following:

> *"2- Freedom of the press and publication shall be ensured within the limits of the law."*

They also based their decision on article 19 of the International Covenant on Civil and Political Rights that was ratified by Jordan and concluded that:

> *"What the appellant did falls within the framework of a journalistic investigation, as it is related to the common good and is a legal duty required by public interest."*

It is an express enshrinement and protection of the freedom of expression against interferences and violations, as the Court relied on the International Covenant on Civil and Political Rights to enshrine the freedom of expression, especially after Jordan ratified the International Covenant which became part of the Jordanian legal system structure.

- Decision No. 13781/2009 of the Jordanian Court of Appeal

- Summary of Facts (Case of Prosecution Against "S. D." and "N.")

We did not have access to the entire decision. However, it appears that, within the frame of its work, the newspaper received a notice from a group of teachers in a certain school revealing problems therein. Hence, journalist "N" published an article containing the information he collected about the school, which lead the school principal to file a complaint. The editor-in-chief of the newspaper as well as the journalist "N" were consequently prosecuted for breach of the Publications Law.

57 See excerpts from the decision in Appendix 3, pp. 311-313.

- Legal Issue

The International Covenant provided for the freedom of expression and the Jordanian Constitution enshrined it, but it also established rules thereto restricting it so that it does not deviate from its goal, which consists in bringing news and information to the individuals and the community; this is what the decision upon which we commented below discussed.

- Comment

Similarly to the above-mentioned decision, the editor-in-chief of the newspaper and the journalist "N" were prosecuted for violation of the Publications Law because they published an article that did not observe the conditions of integrity and objectivity.

The judges discussed the validity of the claim, referring to the right to criticism, as the decision mentioned the following[58]:

> *"Criticism shall be permissible if its conditions are met to achieve a higher good that deserves precedence over personal interests whereas it encompasses the elements of the right to permissible criticism, which are: the existence of an incontestable subject that is addressed by the criticism and that is of importance to the general public. Criticism shall also be in connection to the fact on which it relies and builds and from which it cannot be separated even if criticism was conducted with bona fide. This can be achieved through two things: the first being the seeking of the public interest in the opinions it expresses and the second its belief in the validity of the opinions it expresses."*

The judges recognized the right of the journalist, within the framework of his exercise of the freedom of opinion, to conduct criticism in such a way that does not subject individuals to slander and libel. Moreover, they confirmed the innocence of the journalist from the charge based on that he exercised the freedom of opinion in conformity with the requirements of the law; the decision stated the following:

> *"Whereas the published article did not specify the name of the claimant or the name of the school, and since it talked about problems that occur usually in lots of schools and narrated incidents reported to the newspaper by the school teachers and by virtue of a written complaint submitted by them, and whereas despite everything neither the name of the school nor the name of the principal were mentioned; since the questioning of the principal by the director of the Ministry of Education was due to the complaint addressed to the Minister of Education by the teachers that coincided with the publishing of the article; since the newspaper did not refrain from publishing any response from the claimant or from any other relevant party and since the non conduction of an investigation with the*

58 See excerpts from the decision in Appendix 3, pp. 316-317.

principal does not infringe balance, objectivity and integrity in presenting the press material, for the article talked about the problems in general and did not present any specific information concerning the claimant or the school in particular and whereas such a matter can apply to any other school and do not fall beyond the limits of permissible criticism and is merely an execution of the freedom of expression and opinion and since the criticism aims at achieving public interest and ensuring the proper functioning of public utilities."

Therefore, the above is considered an application of the provisions of international instruments and national laws within the framework of the respect of freedom of expression.

- Decision No. 419/Civil/2009 of the Iraqi Federal Court of Cassation

- Summary of Facts (Case of Prosecution Against "S.")

Decision no. 419, which complete version was not accessible to us, shows that the defendant is a journalist who published an article in the "Al-Ettijah Al-Akhar" newspaper about the Independent High Electoral Commission and that the president of the commission filed a lawsuit against him on the grounds that the article included an attack on his reputation.

- Legal Issue

The International Covenant provided for the freedom of expression and the Iraqi Constitution enshrined it but it also established rules thereto restricting it so that it does not deviate from its goal, which consists in bringing news and information to the individuals and the community; this is what the decision upon which we commented below discussed.

- Comment

The Iraqi judge adopted the same legal logic followed by the Jordanian judge; he responded to the allegations of the President of the High Electoral Commission as follows:

"The article published in the "Al-Ettijah Al-Akhar" newspaper criticized the High Electoral Commission and did not address its president specifically; it does not constitute therefore any attack on the reputation of the plaintiff, but merely is an article that expresses the opinion of its writer on the behavior of the High Electoral Commission, it does not violate public order and morals and is consistent with the freedom of opinion that is guaranteed by the Constitution[59]."

59 You can view the grounds in Appendix 2, pp. 316-317.

The Supreme Council of the Judiciary further consolidated the freedom of expression and issued the statement no. 81/1000/Q dated 07/11/2010 that announced the establishment of the court specialized in Press and Media cases, that examines the complaints and lawsuits related to the press and the media whether they are civil or criminal cases. It also announced the appointment of an experienced Judge who is well aware of the role of the press[60].

6. Right to Equality Before the Law

Equality of individuals is considered one of the fundamental human rights and the best indication to the establishment of the State of the Law. It is one of the rights that were provided for under international instruments such as: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights in addition to a number of treaties related to some groups such as women and children. Equality is a principle from which the principle of non-discrimination arises.

We will tackle this right through two decisions issued by the Iraqi Federal Supreme Court on 03/03/2010 under no. 6/Federal/2010 and no. 7/Federal/2010 respectively:

- Decision No. 6/Federal/2010 of the Iraqi Federal Supreme Court

- Summary of Facts (Case of "Kh. A. R." Against President of "C. R.")

Law no. 26 for 2009, amending the Iraqi Election Law no. 16 for 2005, was issued. It granted the Sabean component a quota amounting to one seat for the province of Baghdad whereas it granted the Christian component a quota amounting to five seats for the provinces of: Baghdad, Ninewa, Duhok and Erbil, considering that those provinces constitute one electoral division.

Mr. "Kh. A. R.", candidate for the parliamentary elections, hence filed a lawsuit before the Federal Supreme Court demanding the cancellation of the quota granted for the Sabean component and defined at the level of the province of Baghdad alone, and its integration within one electoral division at the national level, and that to achieve justice.

- Legal Issue

Article 1 of the Universal Declaration stipulated the following:

> *"All human beings are born free and equal in dignity and rights…"*

Moreover, article 2, paragraph 1, of the International Covenant on Civil and Political Rights stated the following:

60 See Dr. Ali Al-Mousawi: Notes on the enforceability …, op. cit., p. 7.

> *"1. 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 recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

It appears that non-discrimination is the most important aspect of the enshrinement of the right to equality, which goes beyond this description to reach the status of principle; article 26 of the same Covenant enshrined non-discrimination as it stipulated that:

> *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."*

Iraq ratified this covenant in 1971.
Furthermore, article 14 of the Iraqi Constitution dictated the following:

> *"Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status."*

This text complies with the stipulations of the above-mentioned international instruments, which made the Court examine the new law that affects the rights of the Sabean confession and consequently the right of the plaintiff to run for the elections.

- Comment

The decision issued by the Federal Supreme Court[61] shows that the Parliament amended the Election Law in 2009, clause 3 of which stipulates the following:

> *"The following components shall be given a quota of the compensatory seats, provided it does not affect its current percentage in case they participate in other electoral national lists; the quotas shall be as follows:*
>
> *a. The Christian component: five seats divided among the provinces of Baghdad, Ninewa, Kirkuk, Duhok and Erbil.*
> *b. The Yazidi component: one seat in the province of Ninewa.*
> *c. The Mandean Sabean component: one seat in the province of Baghdad.*
> *e. The Shabaki component: one seat in the province of Ninewa."*

Moreover, clause 5 of the same article provided for the following:

> *"The seats allocated to the Christian component from the quota shall be calculated as related to one electoral division."*

61 You can view the full text of the decision in Appendix 2, pp. 246-249.

The examination of the two clauses shows that the law granted the Christian confession a right that it did not give to the Mandean Sabean confession, which made the court decide that:

> *"The said law violated the principle of equality among Iraqis that is provided for under article 14 of the Constitution because limiting the right to vote of the Sabean component to the province of Baghdad affects the candidate as well as the Sabean component since it prevents the Sabeans of the other provinces from exercising their right as Sabean component in enjoying political rights, including the right to vote, to elect and to nominate, that are provided for in article 20 of the Constitution."*

Finally, the Court reached the following decision:

> *"Therefore, the Court decides that article 1, clause 3, paragraph (3) of the law no. 26 for 2009, amending the election law no. 16 for 2005, is not constitutional as it conflicts with articles 14 and 20 of the Constitution of the Republic of Iraq for 2005."*

Consequently, a notification was raised to the legislative authority asking it to enact a new text that complies with the above-mentioned constitutional provisions.

- Decision No. 7/Federal/2010 of the Iraqi Federal Supreme Court

- Summary of Facts (Case of "S. J. H." Against "The President of C. R.")

In the context of the same law mentioned in the above case, Mr. "S.J.H", head of the Mandean Sabean confession in Iraq, filed a lawsuit before the Federal Supreme Court demanding the cancellation of the limitation of the Sabean component quota at the level of the province of Baghdad only and its integration within one electoral division at the national level, and that to achieve justice.

- Legal Issue

Article 1 of the Universal Declaration stipulated the following:

> *"All human beings are born free and equal in dignity and rights…"*

Moreover, article 2, paragraph 1, of the International Covenant on Civil and Political Rights stated the following:

> *"1. 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 recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

It appears that non-discrimination is the most important aspect of the enshrinement of the right to equality which goes beyond this description to reach the status of principle; article 26 of the same Covenant enshrined non-discrimination as it stipulated that:

> *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."*

Iraq ratified this covenant in 1971. The same issue was raised as in the previous decision.

- Comment

The decision issued by the Federal Supreme Court[62] shows that the Parliament amended the Election Law in 2009, clause 3 of which stipulates the following:

> *"The following components shall be given a quota of the compensatory seats, provided it does not affect its current percentage in case they participate in other electoral national lists; the quotas shall be as follows:*
> *a. The Christian component: five seats divided among the provinces of Baghdad, Ninewa, Kirkuk, Duhok and Erbil.*
> *b. The Yazidi component: one seat in the province of Ninewa.*
> *c. The Mandean Sabean component: one seat in the province of Baghdad.*
> *d. The Shabaki component: one seat in the province of Ninewa."*

Moreover, clause 5 of the same article provided for the following:

> *"The seats allocated to the Christian from the quota shall be calculated as related to one electoral division."*

The examination of the two clauses shows that the law granted the Christian confession a right that it did not give to the Mandean Sabean confession, considering that article 14 of the Constitution stipulated the following:

> *"Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status."*

This text complies with the stipulations of the above-mentioned international instruments, which made the Court state that:

> *"The said law violated the principle of equality among Iraqis that is provided for under article 14 of the Constitution because limiting the right to vote of the Sabean component to the province of Baghdad affects the candidate as well as the Sabean component since it prevents the Sabeans of*

62 You can view the full text of the decision in Appendix 2, pp. 246-249.

the other provinces from exercising their right as Sabean component in enjoying political rights, including the right to vote, to elect and to nominate, that are provided for in article 20 of the Constitution[63]*."*

Article 1, paragraph 2 of the Constitution also included a text that stipulates that:

"No law shall be enacted that contradicts this Constitution."

Finally, the Court reached the following decision:

"Therefore, the Court decides that article 1, clause 3, paragraph (3) of the law no. 26 for 2009, amending the election law no. 16 for 2005, is not constitutional as it conflicts with articles 14 and 20 of the Constitution of the Republic of Iraq for 2005."

Consequently, a notification was raised to the legislative authority asking it to enact a new text that complies with the abovementioned constitutional provisions.

7. The Right Not to be Subjected to Torture or to Cruel, Inhuman or Degrading Treatment or Punishment

The various legal texts provide protection from harm to human life; the relevant conventions prohibited the execution of death penalty unless in exceptional cases. Harming human life does not occur by the loss of life only but also by the exposure to behaviors that affect his physical and mental health, which makes the prohibition of torture a supplementary to the right to life[64]. A special convention was allocated to the prohibition of torture; we will tackle it while commenting on an Algerian judicial decision.

- Decision of the Court of Constantine, Algeria, on 05/17/2011

- Summary of Facts (Case of "Kh. S." Against "B. Z.")

The jewelry store owned by the defendant "B. Z." was robbed. As a result, "B. Z." kidnapped the victim with the help of a group of people using car vehicles and by means of threat with white arms. The kidnapped was transported to a mountain where he was assaulted under the claim that he robbed the jewelry store. They also confiscated his mobile phone chip in addition to all his personal documents.

The victim's father filed a complaint, which resulted in the intervention of security forces to end the kidnapping. The defendant was criminally prosecuted.

63 Refer to the full text of the decision in Appendix 2, pp. 207-210.

64 See Dr. Mohammad Youssef Alwan and Dr. Mohammad Khalil Al-Moussa, International Human Rights Law, Protected Rights, (القانون الدولي لحقوق الإنسان، الحقوق المحميّة), part 2 …, op. cit., p. 174.

- Legal Issue

Torture is not a new phenomenon; it is traced back to ancient times and is known by all communities. Torture can take many forms, some are physical targeting the human body, others are moral targeting the human spirit subjecting it to the worst types of ugliness, individuals, in particular, may resort to torture as well as official authorities, which may refer to it as a pattern of behavior and action towards individuals; this last form is the most dangerous as it becomes a systematized mean supported by official authorities and with their complicity.

The Universal Declaration of Human Rights denounced this shameful phenomenon; article 5 thereof provided for the following:

> *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."*

Such prohibition was adopted by the International Covenant on Civil and Political Rights of 1966, which provided under its article 7 for the following:

> *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."*

An urgent need saw light for the States to produce special legal texts forbidding this crime that became punishable by the Criminal International Law[65]. The States' efforts culminated when the General Assembly of the United Nations adopted, in 1984, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that brought forward a more developed definition for torture in its article 1; we will be tackling this definition in the next point. The Convention also committed the States to undertaking all measures to prevent torture, and forbade pleading with any exceptional circumstances for its practice.

In 1989, Algeria acceded to the aforementioned convention and worked gradually on harmonizing its laws with its international commitments.

Article 5 of the African Charter on Human and Peoples' Rights, which is ratified by Algeria, included the respect for human life and confirmed the following:

> *"… All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."*

In its article 8, the Arab Charter on Human Rights that is ratified by Algeria provided a special wording about torture prevention that is inspired from the United Nations convention. Paragraph 1 of article 8 provides for the following:

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65 The prevention of torture has become a peremptory norm "jus cogens" in International Criminal Law. See ICTY, Furundzija Trial Judgment, December 18, 1998.

"1. No one shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment or punishment."

As for paragraph 2, it compelled States parties to undertake similar measures to prohibit torture.

Article 34 of the Algerian Constitution stipulated the following:

"Any form of physical or moral violence or breach of dignity is forbidden."

The Algerian Penal Code was amended in 2004 to make the definition of 'crime' in the domestic law in compliance with the wording of the Convention against Torture. Heavier penalties were imposed, especially in cases where torture is committed by an employee, until they reached life imprisonment.

The aforementioned, as we shall reveal, places the acts to which the victim was subjected within this context.

- Comment

A detailed description of the acts to which the victim was subjected was stated in one of the grounds of the decision[66]:

"… A group of about 10 unknown people including the so called "B. Z." kidnapped his son called "Kh. S." using car vehicles, which were identified as a blue Renault Kangoo, a blue Renault Clio, a white Citroen Saxo and a white Renault Clio, after threatening the victim with white arms. They transported him to an unknown location where they led him to a place called "Sarkina" then to "Jebel El Wahsh" (monster mountain), at nighttime, where they undressed him leaving him with underwear only. Then, they assaulted him under the claim that he robbed the store of the defendant "B. Z." who sells jewelry. Moreover, the kidnappers took away the SIM card of the victim's mobile and all his personal identification documents and left on board of a car heading to an unknown destination. During the torture and assault against the victim, the latter identified the defendant "B. Z.," who lives in his neighborhood, but failed to identify the other people."

The judge characterized the said facts as crime of kidnapping with torture instead of a kidnapping misdemeanor. He referred to the Convention against Torture to define torture; the decision stated:

"And whereas after examining articles 1 and 2 of the Convention … torture is defined as any act resulting in pain, or severe physical or mental suffering that is intentionally inflicted to a certain individual to obtain information or confessions, or punish him for an act he committed or is suspected to have committed, and whereas this is established in the present case and that the victim was kidnapped by a large group of 10 people under the threat of arms, and transported in car vehicles to monster mountain

66 See the full wording of the decision in Appendix 1, pp. 196-201.

"Jabal Al Wahsh" where his clothes were removed and he was assaulted in order to extract information or confessions from him, and punish him for the robbery he was suspected of having participated in committing. Therefore, the acts committed by the defendant fall within the legal framework referred to in article 1 of the Convention Against Torture and are considered according to the discretion of the Court: torture of physical nature since the victim was coerced, kidnapped and his clothes removed, and torture of mental or moral nature due to the effects left on the victim's psychological state following what he has been through."

The acts, to which the victim was subjected, are considered as physical and mental torture at the same time; the inference that should be examined though is the judge's conclusion that the convention, with its articles that comprise peremptory norms, enables him to raise them spontaneously in order to ensure the respect of human rights, which is an unfamiliar inference to judges. The judge considered in one of the grounds of the judgment the following:

"And whereas it was established in the present case and that the judicial authority is the competent party on both qualitative and regional levels, therefore it should undertake effective judicial measures to execute the terms of this convention, raised on the discretion of the Court considering the Convention Against Torture as part of public order as long as it aims at protecting humans from all forms of cruel and inhuman practices, and considering that judicial authority protects the society and freedoms, and safeguards the basic rights for all and each and every individual in accordance with article 139 of the Constitution. It is therefore necessary to confront by means of execution what was intercepted by the provisions of this International Convention to which Algeria is party."

It is an implicit acknowledgment by the judge of the direct effect of the Convention provisions as well as of the peremptory character of its clauses, which prohibit acts of torture and every action falling under this term; he considered them a public order requirement to which he can refer on his discretion. The judge characterized the actions committed against the victim as falling under the crime that deserves maximum penalty, which lines up with international instruments in this concern.

8. Right not to be Subjected to Physical Coercion

The International Covenant on Civil and Political Rights - as previously mentioned - falls under what is known as the Universal Declaration of Human Rights, and was adopted, on December[67] 16, 1966, along with the International Covenant on Economical, Social and Cultural Rights and the Optional Protocol to the International Covenant on Civil and Political Rights.

67 Algeria acceded to the International Covenant on Economical, Social and Cultural Rights in 1989 with making some interpretative declarations thereon same as Morocco in 1979.

This international convention included a set of basic human rights considered as emerging from intrinsic human dignity[68]; all these rights were listed in the Universal Declaration of Human Rights.

Article 11 of Part III of the Covenant tackled the following principle:

> *"No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation."*

It is important to highlight that this right had not been included in the Universal Declaration of Human Rights.

If this international text guarantees the right of the individual not to be imprisoned for failing to fulfill a contractual obligation, many national laws used to consider permissible the application of physical coercion in the event of failure to fulfill a civil debt until these laws rolled back and were amended to become complying with the State international commitments.

In this regard, we will tackle in turn two decisions issued by the two highest judicial parties in Algeria and Morocco; they are respectively the Algerian Supreme Court, which decision was issued on 02/22/2000, and the Morocco Supreme Court Council, which decision was issued on 04/09/1997.

- Decision of the Algerian Supreme Court on 12/11/2002

- Summary of Facts (Case of "Y. Y." Against "Kh. B.")

We find that the facts refer to a commercial transaction between (Y. Y.) and (Kh. B.) that resulted in a written acknowledgment of debt by (Y. Y.) on 04/24/2000 for the amount of 800,000 Algerian dinars, and in which he committed himself to settling his debt on the end of its term specified as on 06/24/2000. On the end of the term, the creditor initiated the execution procedures, which resulted in the drawing up of a record of insolvency. After the exhaustion of all execution procedures, the creditor petitioned for the execution through summary action by means of physical coercion.

- Legal Issue

By referring to the old Algerian Code of Civil Procedure, in light of which the decision we commented on was issued, we find that it included a special chapter on physical coercion; physical coercion was applicable by virtue of different articles, especially article 407 of the Code that provided for the following:

> *"It is permissible in commercial articles and financial debts to execute orders and provisions having the force of res adjudicate and which include the judgment to pay a principal that exceeds 500 dinars by means of physical coercion."*

68 See paragraph 3 of the preamble of the International Covenant on Civil and Political Rights.

Execution by means of physical coercion shall only be applicable after exhaustion of the execution means stipulated in the present law.

Whereas Algeria acceded to the International Covenant on Civil and Political Rights, and whereas the Constitution enshrines the supremacy of conventions over domestic law in its article 132 – as mentioned in part 1 of this manual – the conflict comes up here between the two texts. According to the Constitution the precedence in application is granted to the convention, and the comparative jurisprudence in the countries which constitutions enshrine the supremacy of conventions over the law raised what is called the control of the law compliance with the convention or the control of the conventionality of laws (Contrôle de conventionnalité des lois). Therefore, if the two texts are in compliance they are explained and the domestic law is applied. Otherwise, in case of conflict between the two texts, the domestic text is ruled out and the international text is applied[69].

- Comment

With reference to the decision of the Supreme Court, we find that the judges of first instance in the summary court ruled on the non-acceptance of the petition for execution by means of physical coercion based on article 11 of the International Covenant on Civil and Political Rights. The decision stated that:

> *"The Court decided to issue an order to refuse the petition for execution by means of physical coercion based on article 11 of International Covenant on Civil and Political Rights[70]."*

The Judicial Council (Court of Appeal in Batna) supported this judgment. We notice that the judges of the Supreme Court did not only settle for executing the wording of article 11 of the International Covenant but they also explained it since the petitioner pleaded that this article applies to civil debts without commercial debts. However, the judges of the Supreme Court gave a large explanation whereby the wording of article 11 covers both civil and commercial debts. The decision stated:

> *"And whereas the obligations' sources are divided between voluntary sources and compulsory sources and that since Algeria's accession to those covenants it is no longer permissible to execute the voluntary obligations – whether the sources thereof are civil or commercial transactions – by means of physical coercion."*

The judges then moved to decide on to the extent to which the execution by means of physical coercion may be considered applicable since they confirmed

69 See the decision issued by the French State Council on October 20, 1989, which is a preliminary decision since the French judge enshrined the principle of supremacy of treaties over domestic laws, 32 years after its enshrinement by the Constitution.

70 See the full wording of the decision in Appendix 1, pp. 168-171.

that Algeria is party to the International Covenant on Civil and Political Rights as revealed by the grounds of the decision:

> *"And whereas …, and after referring to the provisions of law no. 08/89 dated April 25, 1989, which includes the approval of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights that were both approved by the General Assembly of the United Nations on December 16, 1966.*
> *And by virtue of the presidential decree no. 67/89 dated May 16, 1989 relating to Algeria's accession to the aforementioned covenant[71]."*

The judges then came to rule out the execution of the wording of the old Code of Civil Procedure in favor of the wording of article 11 for being in conflict therewith; the decision stated:

> *"And after examining the provisions of article 11 of the aforementioned covenant that is published in Algeria's Official Gazette issue no. 11 dated February 26, 1997, and which included the following: "No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation."*

Thus, physical coercion is no longer permissible for the debtor's failure to fulfill his contractual obligations.

The decision grounds also stated:

> *"Whereas the aforementioned article 11 does not distinguish between commercial and non-commercial contractual obligations, it is therefore sufficient to have a contractual obligation whether the object thereof is a civil or commercial transaction in order to prohibit the execution of this obligation by means of physical coercion. Judging to the contrary shall be considered a violation of the provisions of the aforementioned article 11, what subjects this ruling to annulment[72]."*

However, it is not acceptable to imprison someone for his mere inability to fulfill a contractual obligation.

Moreover, the Algerian legislator annulled the old law by virtue of the new Code of Civil and Administrative Procedure no. 09/08 dated February 25, 2008 issued in the Official Gazette issue no. 21 in 2008. The new law became free of any wording permitting the application of physical coercion in civil articles, what consolidates the solution brought forward by the former jurisprudence that enshrined the supremacy of the treaty text in this regard.

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71 74- Algeria acceded to this covenant, as indicated in Appendix 6; however, it wasn't published in the Official Gazette until 1997 by virtue of the addendum of the presidential decree no.67/89, dated May 16, 1989, Official Gazette for year 1997, Issue no. 11, p. 27.

72 The first time an Algerian judge refrained from implementing article 407 of the Code of Civil Procedure was in two summary orders issued by Bir Murad Rais Court in 2001 and 2005, then by Tighennif Court and then the jurisprudence of the Supreme Court settled on the same.

- Decision of Morocco Supreme Court Council on 04/09/1997

- Summary of Facts (Case of "A. M." Against "M. S.")

The facts may be summarized with the conclusion of a shop lease contract "Kira'" between (A. M.) and (M. S.) for a monthly rental[73] amounting to 450 Moroccan Dirhams. And since the first of May, "Al Fateh," 1989 and until 12/19/1991, (M. S.) refrained from fulfilling his obligations, what lead (A. M.) to resort to the Court of First Instance in Taza requesting the issuance of an order compelling the debtor to settle the sum of 14,400 Moroccan Dirhams as rental and the sum of 1,440 Moroccan Dirhams as hygiene tax, and the application of physical coercion.

- Legal Issue

We initially note that the Dahir* no. 1/60/305 issued on February 20, 1926 deems permissible the application of physical coercion in civil matters, and that Morocco acceded to the International Covenant on Civil and Political Rights on May 3, 1979.

We noted that the former Moroccan Constitution did not expressly tackle the status of treaties within the domestic legal system; however, the Moroccan jurisprudence leans towards giving precedence to treaties over laws and placing them at a higher rank[74].

- Comment

Morocco Supreme Court Council judges adopted the same position; after referring to the decision we commented on, we find that the petitioner challenged the decision of the Court of Appeal in Taza for it ruled on the application of physical coercion against him in the event he abstained from paying, claiming that such decision is in violation of article 11 of the International Covenant. The judgment grounds stated:

> *"Whereas the petitioner complains that the decision violated the requirements of article 11 of New York covenant of the year 1966, published in the Official Gazette, issue no. 3225, dated 05/21/1980 stipulating that no one shall be imprisoned on the ground of inability to fulfill a contractual obligation; this covenant became binding and applicable, and the challenged decision supporting the judgment of the First Instance Court that fixed the coercion period to one year did not base its judgment on sound legal grounds[75]."*

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73 Referred to in the decision with 'Wajba Shahriya' (Monthly Meal). See the full decision in Appendix 4, pp. 316-322.

74 See the Moroccan Constitutional Report. The High Level Regional Meeting on Common Judicial Standards and Judicial Cooperation, …, p. 2.

* Means 'law', it is a royal decree issued by the king in matters of State such as appointments and higher decisions.

75 See the full decision in Appendix 4, pp. 316-322.

The judges however interpreted article 11 as forbidding the application of physical coercion if the subject is unable to fulfill the obligation, and not in case the subject refrains from the same, as stated in what follows:

> *"But whereas article 11 of the United Nations Charter dated 12/16/1966 relating to civil and political rights ratified by Morocco on 11/18/79 stipulates that no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation, 'therefore, the challenged decision -that affirmed the judgment of the First Instance Court that determined the period of physical coercion against the petitioner in the event he refrained from paying' and did not determine it in the case where the subject could not and was unable to pay - is not in violation of the mentioned article and the mean remains unfounded."*

We note that the Moroccan law was recently amended since the Dahir no. 01/06/169 was issued on November 22, 2006 amending the provisions of the aforementioned Dahir; it mentioned:

> *"Chapter 1:*
>
> *The execution of all final decisions or provisions stipulating the payment of an amount of money can be undertaken by means of physical coercion."*

Going back to the two decisions, we find that the judges of the two highest judicial parties in Algeria and Morocco adopted a unified position consisting in giving supremacy to treaty wording over domestic wording that is conflicting therewith.

9. Exemption of Foreigners from Payment of Guarantee

Citizens as well as foreigners can resort to the Judiciary in order to satisfy their rights. Nevertheless, many laws accompanied the right of foreigners to resort to the Judiciary with a payment of a legal guarantee requirement. Such obligation was included in order to cover judicial expenses. We also highlight in this regard that citizens as well are obliged to pay a guarantee in some legal actions. However, some exceptions to this rule saw light within interstate conventions exempting foreigners in the relevant countries from the payment of such legal guarantee. This matter will be tackled in the decision issued by the Algerian Supreme Court on 07/15/1998 under file no. 168374.

- Decision No. 168374 of the Algerian Supreme Court

- Summary of Facts (Case of "Z. K." Against "A. A.")

The petitioner (Z. K.) borrowed a sum of money amounting to 200,000 Algerian dinars from the respondent (A. A.) of Egyptian nationality who filed a lawsuit before the Khenchela Court when the debtor (Z. K.) failed to settle his debt. The Court judgment issued on April 26, 1995 was not in the creditor (A. A.) favor; he filed therefore a petition to appeal before the Judicial Council of Oum

el Bouaghi, which issued a decision on July 02, 1996 annulling the appealed judgment and binding the appellee to settle his debt along with a compensation of 5000 Algerian dinars for the prejudice. (Z.K) therefore appealed before the Supreme Court, which issued the decision we are hereby commenting on.

- Legal Issue

If it is established by law that foreigners pay a legal guarantee when resorting to the Judiciary, some exceptions might be provided for however exempting them from the guarantee in order to facilitate their resorting to courts in the host country and to reinforce their right to resort to the Judiciary. This issue was tackled by the judges in the present decision.

- Comment

The creditor (A. A.), plaintiff herein, filed a lawsuit to recover the debt (Z. K.) owes him; being a foreigner, (A. A.) paid a legal guarantee in accordance with the requirements provided for under article 460 of 1966 Code of Civil Procedure that states the following:

> *"Every foreigner who files a lawsuit before the Judiciary in the capacity of an original plaintiff or as an intervening plaintiff, shall be bound to pay a legal guarantee for expenses and compensations, which might be imposed upon him if the defendant so requests before presenting any defense in trial; the judgment whereby the guarantee is imposed shall determine its amount unless provided otherwise under political covenants[76]"*

Given that Algeria and Egypt concluded a judicial agreement on 02/29/1964, article 41 of which exempts Egyptian citizens in Algeria from paying the legal guarantee when resorting to the Algerian Judiciary and provides for the same exemption for Algerian citizens before the Egyptian Judiciary; and considering that the Algerian Constitution of 1996 stipulated the supremacy of treaties over the law; therefore, the judge gave precedence for the application of the wording of the Agreement since it contradicts the Code of Civil Procedure but he did not present such analysis in this decision and left us to tacitly conclude the same from the grounds of the judgment[77].

76 This law was annulled after the issuance of the new Code of Civil and Administrative Procedures in February 25, 2008, (article 86 and all the following.)

77 See the full published decision in Appendix 1, pp. 163-165.

2) Judicial Applications of Economic, Social and Cultural Human Rights

International conventions, whether global or regional, enshrined different civil rights for individuals in addition to other political, economic and social rights; we will indicate in this regard some points tackled by the comparative national jurisprudence, namely: the right to own property, the right to work and the inadmissibility of wrongful termination of employment.

1. Right to Own Property

We will tackle, in this regard, two decisions of the Iraqi Federal Supreme Court, namely: decision no. 18/Federal/Cassation/2006 dated 07/19/2006 and decision no. 96/Federal/Cassation/2009 dated 09/13/2009.

- Decisions No. 18/Federal/ Cassation/2006 and No. 96/Federal/Cassation/2009 of the Iraqi Federal Supreme Court

- Summary of Facts

We managed to conclude the facts from two grounds that were made available to us. Decision 18 shows that the plaintiff who owns a real estate had submitted a request for a construction permit to the municipality; the mayor refused the demand and so the plaintiff filed a cancellation lawsuit against the municipality decision. As for decision no. 96, it explains that the plaintiff owns a land that was marked by the municipality as prohibited for use for a certain period of time; when this period expired, the municipality refused to remove the said mark and so the plaintiff resorted to the Judiciary.

- Legal Issue

Democratic societies work on enshrining individual freedoms to the fullest, along with the freedom to own property, whether individual or collective; such freedoms were provided for under the Constitutions while the International Covenant on Civil and Political Rights did not prescribe it even though the Universal Declaration of Human Rights did. This goes back to the disagreement between the liberal and communist blocs at the time[78].

The Arab Charter provided for this right in its article 31:

> *"Everyone has a guaranteed right to own private property. No person shall under any circumstances be divested of all or any part of his property in an arbitrary or unlawful manner."*

78 See Dr. Mohammad Youssef Alwan and Dr. Mohammad Khalil Al-Moussa, International Human Rights Law…, op. cit., p. 120.
And also Part 2 on p. 300.

The Iraqi Constitution also guaranteed the right to property for individuals; its article 23 stipulated the following:

> *"First: Private property is protected. The owner shall have the right to benefit, exploit and dispose of private property within limits of the law."*

- Comment

The Constitution allows the owner – as per the wording we mentioned – to dispose of the real estate he owns by undertaking construction or restoration works provided the law is respected; The judge confirmed this in the decision no. 18:

> *"The refusal of the mayor to give a construction permit under the claim that the real estate shall be expropriated in the future and without referring to justifiable legal grounds is an abuse of power."*[79]

He resolved in decision no. 96 that:

> *"The municipality's opposition to remove the prohibition of use after the expiry of the prescribed period has no legal basis*[80]*."*

2. Right to Work

The International Covenant on Economic, Social and Cultural Rights of the year 1966 provided for many rights including the right to work under paragraph 1 of article 6 that stipulated the following:

> *"The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."*

This right is enshrined in multilateral as well as bilateral conventions and it branches out in different forms; this was tackled by the decision no. 43/1968 of the Jordanian High Court of Justice (panel of five judges), the decision issued by the Algerian State Council on 05/08/2000, the decision issued by Morocco Supreme Court Council on October 1, 1976 and the decision issued by the Court of Appeal in Rabat[81].

79 See the available grounds in Appendix 2, pp. 252-254.

80 Ibid.

81 The date of issuance of the decision was not made available to us.

- Decision No. 43/1968 of the Jordanian High Court of Justice

- Summary of Facts

The only available ground of judgment reveals that the Municipal Council forbade a seller of vegetables and fruits from practicing his profession; he resorted to the Judiciary to reclaim his right.

- Legal Issue

The Jordanian Constitution stipulated the right to work in paragraph 1 of article 23:

> *"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 performance level."*

This right is guaranteed for those working in the public sector as well as those working for their own account; the State imposes however laws to regulate the free practice of professions.

- Comment

The judges considered that the Municipal Council exceeded its powers:

> *"Because even if the system for the control and organization of public funds, professions and industries within the region of the municipality of Irbid for 1968 allows the Municipal Council to issue decisions determining locations of public markets, and types of goods and products that can be displayed therein, and dedicating some of these markets to a determined type of professions or forbidding the practice of some professions therein, the exercise of this power should not affect the right of the people to practice their professions in accordance with the wording of article 23 of the Constitution*[82]*."*

The aforementioned enshrines the wording of the International Covenant on Economic, Social and Cultural Rights.

- Decision No. 002111 of the Algerian State Council

- Summary of Facts (Case of "Y. B." Against the Banking Commission)

The bank (Y. B.) appointed the lawyer (J. M.) as its legal representative who is registered in the Bar Association in Paris (France) in order to defend its interests in the framework of the investigations led by the Banking Commission. The latter however refused the appointment of (J. M.), as per the decision no. 03/99 dated 03/23/1999, under the claim that the lawyer did not fulfill the requirements

82 See the available grounds in Appendix 3, pp. 308-309.

of the wording of article 6 of law no. 04/91. Thus, the other lawyers appointed for the case of bank (Y. B.) filed a petition to annul this decision invoking the judicial protocol concluded between Algeria and France on 08/28/1962.

This practice is considered an application of the right to work. The Algerian Judiciary examined cases relating to the registration of foreign lawyers and acknowledged the right to work for the said lawyers by virtue of a covenant concluded for this purpose.

- Legal Issue

The right of a foreigner to practice law was raised in this case, and the parties that refused the registration request invoked every time the domestic laws that set conditions for foreigners desiring to practice the Law profession. However, the current orientation consists in concluding bilateral protocols that regulate each country's lawyers law practice in the other country under facilitated conditions, which was accomplished in the present case. National laws relating to the law profession regulate the registration, admission, as well as practice, conditions for lawyers. The Algerian law no. 04/91 dated January 08, 1991[83] regulated the conditions for the practice of the law profession as well as the lawyer's rights and obligations.

- Comment

With reference to the State Council, we note that the Banking Commission actually based itself on the law no. 04/91 especially article 6 thereof that stipulates the following:

> *"With respect to the provisions of the international covenants and the profession conventions, the lawyer adhering to a foreign institution shall be entitled to assist, defend and represent the contending parties before the Algerian Judiciary after obtaining a special permit from the competent president of the Bar Association and after electing domicile in the office of a lawyer practicing law in the jurisdiction of the Judicial Council."*

This case – mentioned in the above article – requires the fulfillment of three conditions to allow the foreign lawyer his right to practice the profession, namely: obtain a permit from the President of the Bar Association competent at the regional level, elect domicile in the office of an Algerian lawyer, and work in the jurisdiction of the Judicial Council.

It is important to note though that many countries resorted to concluding judicial agreements relating to the exemption of lawyers from both countries from some conditions upon practicing law in each of the two countries, which is the case here, as Algeria and France concluded a judicial protocol on 08/28/1962 granting the same litigation rights for foreign lawyers in both countries; this means that the French lawyer (J. M.) does not need a permit to practice law in Algeria. The decision included the following:

83 Published in the Official Gazette issue no. 2 of 1991.

> *"Whereas it is established that as per article 16 of the judicial protocol concluded between Algeria and France on 08/28/1962, the French lawyer can help and represent opponents before all Algerian judicial parties in accordance with the same conditions that apply to lawyers registered in the Algerian Bar Association; the foreign lawyer will have though to elect domicile in the headquarters of the civil judicial party[84]."*

The decision also highlighted that the French lawyer (J. M.) abided by the condition to elect domicile in the office of an Algerian lawyer, and added that:

> *"Should be mentioned in such circumstances that the lawyer abided by the legal obligation imposed by the aforementioned international protocol whereas the Banking Commission ignored the requirements of the judicial protocol concluded between Algeria and France on 08/28/1962 upon setting as condition the need for the lawyer to submit a special permit given by the President of the Bar Association as stipulated in article 6 of the law of 01/08/1991."*

This resulted in the annulment of the Banking Commission's decision for being in contradiction with the international convention.

- Decision of Morocco Supreme Court Council

- Summary of facts (Case of "M." Against the Council of the Bar Association)

Mr. (M.), a French lawyer to the Council of the Bar Association in Casablanca, requested his re-registration; the Council refused his request under the claim that he does not speak Arabic that became the only official language to use at Moroccan tribunals as per the law of January 26, 1965. Mr. (M.) resorted to judiciary to request his re-registration.

- Legal Issue

Morocco regulated the law profession by virtue of the Dahir issued on May 19, 1959 and concluded a protocol, similar to the previous case, to allow foreign lawyers to practice law in Morocco, which was tackled by the Moroccan Judiciary.

- Comment

The Moroccan Judiciary adopted the same position indicated in the Algerian decision regarding giving precedence to the wording of conventions over the wording of the domestic law. In the case of the French lawyer Mr. (M.) and after instituting an action before the Court that supported the decision of the Council of the Bar Association in Casablanca, he filed an appeal before the Court of appeal in Rabat, which annulled the judgment based on the international agreement concluded between Morocco and France on October 2, 1957 and its

84 See the full wording of the decision in Appendix 1, pp. 166-168.

additional protocol dated May 20, 1965. The highest Moroccan judicial body (Supreme Court Council) also supported this position in the decision issued on October 1, 1976; the decision stated the following[85]:

> *"Not knowing the language of the two countries does not prevent the registration of a French or Moroccan lawyer on one of the rolls of lawyers in the two countries; it shall be sufficient that the French lawyer, who does not speak Arabic, appoints a colleague who speaks the language in all unwritten stages."*

The Moroccan Supreme Court Council supported the French lawyer's right to practice his profession.

- Decision of the Court of Appeal in Rabat, Morocco

- Summary of Facts (Case of "F. K." Against the Bar Association)

Mrs. (K.), who also requested her re-registration as a trainee lawyer at the Council of the Bar Association, faced the same issue as her request was refused for the same claim.

- Legal Issue

Morocco regulated the law profession by virtue of the Dahir issued on May 19, 1959 and concluded a protocol, similar to the previous case, to allow foreign lawyers to practice law in Morocco, which was tackled by the Moroccan Judiciary.

- Comment

In the case of the French trainee lawyer (F. K.), the Court of Appeal in Rabat considered that:

> *"The only applicable requirements in Mrs. (K.) request are those of article 23 of the Dahir issued on May 19, 1959 that regulates the law profession in Morocco and that provides in paragraph 3 thereof for the priority to apply the judicial agreement concluded between Morocco and France and the additional protocol of 1965[86]"*

The Court responded to the French lawyer petition by registering her as a trainee lawyer at the Bar Council.

This proves that the judge enshrines the wording of international conventions giving them precedence over domestic laws, in the event the two were contradictory.

85 See the ground of judgment available in Appendix 4, pp. 343-344.

86 See the available ground of judgment in Appendix 4, pp. 343-344.

3. Inadmissibility of Wrongful Termination of Employment

If the right to work is enshrined in international instruments especially in the International Covenant on Economic, Social and Cultural Rights, its protection exceeds its narrow concept to cover both the right to fair work conditions and to the protection from wrongful termination of employment. We will tackle the aforementioned through the decision issued by the Moroccan Social Judiciary.

- Decision of the Moroccan Social Judiciary

- Summary of Facts (Case of "H.O." Against the company "M.T.L")

The plaintiff was employed by the company (M.T.L) since 06/30/1986; he received a warning and was suspended from work for 8 days after he was caught wearing socks produced by the company. He did not return to work though after the suspension period was over as he was fired on 11/13/2004. He was not allowed back to work even after referring to the labor inspector to try reconciliation, and so he resorted to the Court claiming compensation for the prejudice that befell him considering that his employment was wrongfully terminated. On 05/05/2005, the Court of First Instance refused the plaintiff's claim and compelled him to pay compensation for the vacation he took. Consequently, the plaintiff filed an appeal to cancel the judgment for having no grounds.

- Legal Issue

Work relations are among ones that are tightly regulated under different legal texts; the International Covenant included in article 6/1 the right to work and compelled the States parties thereto to take the necessary measures to protect the said right, which is a tacit commitment to protect from wrongful termination of employment, which the Covenant did not explicitly tackle[87].

Work relations are ended most of the time by either the employee or the employer; the most significant problematic arise though when it is initiated by the latter. If the employer sometimes ends the employment contract for serious reasons that justify his action, he ends it at other times bringing forth no reasons, which is considered a wrongful termination of employment. In order to ensure a better protection for employees, the Convention no. 185 of the International Labor Organization relating to the termination of employment by the employer and which stipulated commitments aiming at protecting employees, was concluded in 1982; article 4 thereof stated the following:

> *"The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."*

87 See Dr. Mohammad Youssef Alwan and Dr. Mohammad Khalil Al-Moussa, International Human Rights Law…part 2, op. cit, p. 327.

The Convention also bound the employer to follow certain procedures before undertaking any dismissal in order to allow the employee to defend himself/herself. Morocco ratified this convention in 1993, and its law also included provisions in compliance with these international commitments stated under the Labor Code such as provisions on cases of termination of employment. Article 35 of the Labor Code stipulated the following:

> *"It is forbidden to terminate the employment of a worker without an acceptable reason unless the termination was related to the worker's competence or behavior …"*

We will tackle this issue in the case of the dismissed worker.

- Comment

The employer insists, in the current case, that the worker committed a major mistake, as stated in one of the grounds of judgment[88]:

> *"After the defendant responded, through its lawyer, that the worker was caught wearing socks produced by the company, which is forbidden by its bylaws, it addressed the worker a warning suspending him from work for 8 days. The latter did not return to work after the suspension period ended, and hence the claim of wrongful termination of employment is not legally confirmed."*

The worker however insists to the contrary, that his employment was wrongfully terminated without denying that he wore socks produced by the company under the claim that the socks were torn and fall under the second type of products not suitable for consumption. What's more important however is that the company fired him without respecting the legal procedures for labor contract termination, and he states he was dismissed from work not because of the fact that he wore the socks but because:

> *"He protested over working overtime in return of normal working hours' fee."*

The judges verified the actions attributed to the worker in light of the Labor Code, as one of the grounds of judgment stated:

> *"Whereas supposing the worker wore socks from the company that declared through its representative during the inquiry session that the worker did not know if the socks were suitable or not for consumption and that the witness saw the worker wearing these socks while leaving the mosque, such act is not considered however a major mistake and the employer should have respected the principle of gradual punishment stipulated in article 37 of the Labor Code. He should have respected as*

88 See the full wording of the decision in Appendix 4, pp. 331-338.

well the last paragraph of article 37 on the basis that the punishment imposed upon the worker is a third degree penalty (suspension for 8 days) and therefore it is appropriate to apply the provisions of article 26 of the Labor Code and allow the worker to defend himself."

With reference to article 39 of the Labor Code, we find that this article determines a strictly limited list of actions that are considered major mistakes and which include robbery. The judges decided though that wearing socks of the type that is not suitable for consumption does not constitute a major mistake, especially that article 38 of the Labor Code provides for the following:

"The employer shall adopt the principle of gradual punishment in disciplinary sanctions."

And even if the worker's action was a major mistake, the employer did not respect the requirements of article 62 of the Labor Code, which stated the following:

"Before firing a worker, he should be allowed the opportunity to defend himself before the employer or his representative in the presence of the workers' representative or the union representative who is chosen by the worker himself, within a period that does not exceed 8 days as from the date of the discovery of the action attributed to the worker."

Based on the aforementioned, the judges decided the following:

"The employer did not respect the formal procedures and did not declare that it had presented the dismissal letter to the worker to notify him of the mistakes attributed to him and allow him to defend himself according to the provisions of articles 62 and 63 of the Labor Code, whereas the worker respected the rules on the preliminary reconciliation and turned to the labor inspector. However, the latter failed to attend, as stated in the legal proceeding. The aforementioned was tackled by the International Convention no. 158 for year 1982 issued by the International Labor Organization as to the rules relating to the disciplinary dismissal and signed by Morocco on 10/07/1963. Therefore, the judgment of the Court of First Instance whereby the plaintiff's claims relating to the notification, dismissal and prejudice were refused should be annulled."

The judges decided that the worker was wrongfully dismissed and that he deserves compensation, which is in compliance with international and domestic instruments.

3) Judicial Applications of Human Rights Related to a Group or an Issue

Almost every country has laws regulating family affairs and the sources of inspiration behind these laws differ according to whether they rely on circumstantial or on religious views.

Several Arab countries based their family laws on the provisions of the Islamic Sharia, or made these laws a combination of both circumstantial and religious provisions. In addition to the influence of religion on the formulation of these laws, we found that large parts of the International Human Rights Law now deal with family-related issues[89] especially in conventions on specific subjects such as: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted on December 18, 1979[90] or the Convention on the Rights of the Child adopted on November 20, 1989.

Many Arab countries ratified these conventions and their jurisprudences, during recent years, were consequently influenced by the conventions' provisions; this is clearly shown in the judicial decisions that we gathered here and that can be summarized into three categories: Women's rights, Child's rights and the rights of persons with disabilities, which have been the subject of specific international conventions.

1. Judicial Applications Related to Women's Rights

a- Principle of Equality between Spouses

A principle rooted in the fundamental principle of equality between individuals defined in the majority of international texts; the principle of equality between spouses is a direct result of the prohibition of any discrimination between individuals. This right is reflected throughout marital life from conception to dissolution, and has been provided for in paragraph 1 of article 16 of the Universal Declaration of Human Rights:

> *"Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."*

The International Covenant on Civil and Political Rights (ICCPR) also cited the right to marry for both men and women in paragraph 2 of article 23 as follows:

> *"The right of men and women of marriageable age to marry and to found a family shall be recognized."*

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89 Rivier, Marie-Claire, Family Elements in the Convention on the Rights of the Child, Proceedings of Workshop Days held on December 15-16, 1994, (Eléments de la famille dans la convention du droit de l'enfant, Actes des journées d'études des 15 et 16 décembre 1994) L.G.D.J, 1995, p. 77.

90 We shall use the acronym CEDAW for the purposes of this paper.

The ICCPR also designated the State responsible for ensuring equality in this regard, as stipulated in paragraph 4 of article 23 thereof:

> *"States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."*

The CEDAW also referred to this principle in several subjects, as in paragraph 1 of article 16 which stated the following:

> *"1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
>
> *The same right to enter into marriage;*
>
> *The same right freely to choose a spouse and to enter into marriage only with their free and full consent;*
>
> *The same rights and responsibilities during marriage and at its dissolution."*

Algeria, Iraq, Jordan and Morocco[91] acceded to this Convention.

In this context, we shall comment on the judgment that was issued by an Iraqi court, which is the Decision of Hay Al-Shaab's Court of First Instance on 06/27/2011[92], and on the judgment of the Court of Karrada, Iraq on 05/31/2009.

- *Decision of Hay Al-Shaab's Court of First Instance on 06/27/2011 and Decision of the Court of Karrada, Iraq on 05/31/2009*

- *Summary of Facts*

The plaintiff (A. A. K.) and the defendant (H. A. K.) are married. They had an argument after which the wife left their marital house to her parents' house. The husband resorted to the Court requesting a travel ban on his wife, upon hearing that she was planning to leave the country with her parents, and to make use of his documents –papers that she took with her upon leaving their marital house- since he works in the Emergency Response Unit in charge of airport security, to try and seek refuge in some country. As for the second decision, it tackles a case where the plaintiff demanded from his wife to go back with him to their marital house but she refused and asked him to prepare a new house. The husband resorted to the Court where a judgment was issued to make parity between the spouses.

91 See further details in Appendix 6, pp. 360-362.

92 See the full text of the judgment in Appendix 2, pp. 201-202.

- Legal Issue

CEDAW includes principles aiming to help eliminate all forms of discrimination against women, and it seems that the prohibition of discrimination against women, as defined in the Convention, is not limited to traditional human rights categories but goes beyond those to cover other principles in which discrimination may occur, as discrimination is not restricted to the general domain but extends to cover areas relating to private life[93]. The Convention bound States parties to the obligation of taking all appropriate measures to prohibit discrimination against women (article 2), applying this also to all matters relating to marriage and family relations (article 16).

It is thus urging the States to enshrine equality between men and women in various areas.

- Comment

In reference to the judgment of Hay Al-Shaab's Court of First Instance, the husband (plaintiff) presented a request to the judge asking the Court to impose a travel ban on his wife (defendant), based on their marital bond which, in several domestic laws, grants the man the right to impose restrictions on his wife's rights and actions.

In his examination of the request made by the plaintiff (A. A. K.), the judge referred to the Procedural Law which determines the grounds for travel ban. The judgment mentioned that,

> *"the reason behind the plaintiff's request is not considered one of the grounds for travel ban that are indicated by article 142 of the Procedural Law which stipulates that travel ban can be imposed if serious reasons -where travel is probably an attempt to avoid the lawsuit- were present. If the Court obtains proof of this, the person subject to the travel ban request has the right to authorize one of the people who are legally-eligible to act for him, to represent him without being banned from travel. In the current case, the person requesting the ban did not provide this Court with evidence showing that the person subject of the ban request –the plaintiff's wife- was a party to another lawsuit which he was afraid she might avoid.[94]"*

The above came as a response to the husband's claim which stated that his wife should be placed under travel ban.

However, the important conclusion was expressed in the following grounds where the judge referred to the woman's right by describing the defendant as a fully capable human being:

> *"in addition to the fact that she is fully capable and not a minor."*

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93 See Human Rights in the Administration of Justice... (...حقوق الإنسان في مجال إقامة العدل), op. cit., p. 53.

94 See the full text of the decision in Appendix 2, pp. 201-202.

He added that the marital bond between the spouses did not, in any way, grant the husband any privilege or superiority over the wife:

> *"the marital bond between the defendant and the claimant of the travel ban does not constitute a privilege to him over her as he is not her guardian or caretaker, and their marriage was established on the basis of equality between spouses and parity of rights and obligations."*

In the justification of his judgment refusing the request to ban the defendant (the wife) from travel, the judge referred to several texts, such as the Iraqi Constitution and some international covenants represented by the Universal Declaration of Human Rights and the CEDAW convention. The judge referred to these texts to substantiate his position indicating that the right to travel is guaranteed to every person and especially to the married woman who, according to international conventions, has an independent status from her husband and has therefore the right to exercise all of her rights. The judgment stated:

> *"International conventions confirm the principle which stipulates that the wife shall have a status that is independent from that of her husband thus entitling her to exercise all her legal and constitutional rights, such as the right to life, to work and others, including the right to travel."*

In this regard, the judge made reference to paragraph 2 of article 13 of the Universal Declaration of Human Rights:

> *"Everyone has the right to leave any country, including his own, and to return to his country.*[95]*"*

The judge then confirmed the principle of equality between spouses by referring to clause (c) of paragraph 1 in article 16 of CEDAW which stated the following:

> *"States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
>
> *(c) The same rights and responsibilities during marriage and at its dissolution."*

He then reached a conclusion, according to which the spouses' marital relationship does not give the husband a status higher than that of his wife or grant him any privilege over her, which means that the plaintiff –the husband- cannot, in the current case, use his marital relationship with the defendant "H. A. K." as

95 The International Covenant on Civil and Political Rights (ICCPR) also referred to the said right in paragraph 2 of article 12: "Everyone shall be free to leave any country, including his own."

a pretext to prevent her from leaving Iraq with her parents; this is a progressive stance that is no longer considering the marital bond from a strictly domestic law point of view but also from that of international conventions which concern families in general and women in particular.1

Similarly, the judgment issued by the Court of Karrada stipulated:

> *"The aforementioned request which was based on the grounds of the husband's superiority over the wife is in violation with the Law that established equality between spouses in marital rights.*[96]"

Likewise, the decision of the Jordanian Court of Cassation (Rights) no.496/1992 (panel of five judges) dated 08/31/1992, Adaleh Center publications, stipulated:

> *"The jurisprudence referred to the principle according to which a Christian man who divorces his Christian wife after converting to Islam is bound to compensate her for the harm inflicted upon her due to the divorce if it resulted from his abusiveness, since a divorced Christian wife is deprived, after divorce, from spousal support and alimony, considering that a Christian marriage union makes the marital bond of Christians an eternal bond, in accordance with the regulations of the Christian Personal Status Law and the rules of justice and equity, all that being supported by the provisions of article 134 of the Personal Status Law for Muslims, no. 61 for the year 1976."*

b - Wife's Right to Petition for Divorce

The dissolution of marriage can be achieved by several means, pursuant to the provisions of Personal Status Laws, which are however limited to three types: divorce by the sole will of the husband, uncontested divorce and divorce initiated by the wife. The last type is divided into two categories: request for divorcement known as Khula' and request for divorce for specific reasons. We will look into four judgments issued by the Iraqi Judiciary, which are: decision no. 3549 of the Iraqi Federal Court of Cassation issued on 07/27/2011; decision no. 3804 issued by the same Court on 08/10/2011; decision no. 3769 issued by the same Court on 08/10/2011; and decision no. 3309 issued by the same Court on 07/11/2011, related respectively to a request for separation due to infliction of harm (decisions no. 3804 and No. 3549), to a request for separation due to lack of financial support (decision no. 3769) and to a request for separation due to taking a second wife without the knowledge of the first and without the permission of the Court.

- Decision No. 3769 of the Iraqi Federal Court of Cassation

- Summary of Facts (Case of "A. K. A." Against "A. J. A.")

Mr. (A. J. A.) married Ms. (A. K. A.) but did not provide her with financial support. The wife filed a lawsuit against him demanding that she be paid ali-

96 See the full text of the decision in Appendix 2, pp. 203-205.

mony. The ruling was in her favor but the husband refused to abide by it. The wife then brought the case before the Personal Status Court of Mosul demanding separation from her husband. A judgment was issued on 06/09/2011 ordering the separation of the spouses.

The defendant appealed before the Personal Status Panel at the Federal Court of Cassation which upheld the judgment of the Personal Status Court.

- Legal Issue

The CEDAW convention provided for several rights for women, notably the right to work, and the right to participate in social life. It also guaranteed her equal rights with men in several fields, as stated in article 16 thereof:

> *"1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
>
> *(c) The same rights and responsibilities during marriage and at its dissolution."*

The law granted the wife the right to ask for divorce enumerating several underlying reasons which are defined for limitation purposes; they include the breach of a marital obligation such as: unsettled alimony, the husband's conviction for a dishonoring offence, and divorce on the basis of a legally-proven harm.

In reference to the Iraqi Personal Status Law, we find that it determined the cases of legal separation; article 43 thereof stipulated the following:

> *"First – The wife has the right to ask for separation for one of the following reasons:*
>
> *9- If the husband refrains from settling the fixed cumulated alimony, after being granted a maximum respite of sixty days by the execution authority."*

The aforementioned was the point discussed by the judges in this case.

- Comment

The Court's judges applied the aforementioned principles in the current case, and for that reason their judgment was approved by the judges of the Court of Cassation whose ruling stated:

> *"…we find the Court's judgment sound and concordant with the Law and Sharia as the conditions stipulated in article 43/First-9 of the amended Personal Status Law No. 188 for 1959 were fulfilled in the appellee's lawsuit.[97]"*

97 See the full text of the Court's decision in Appendix 2, pp. 232-233.

- Decision No. 3549 of the Iraqi Federal Court of Cassation

- Summary of Facts (Case of "A. A. A." Against "H. Kh. Kh.")

Ms. (A. A. A.) filed a lawsuit against her husband Mr. (H. Kh.Kh.) before the Personal Status Court at Al-Hamdaniya requesting separation from him due to the harm which he inflicted upon her and which rendered the continuation of their marital relationship impossible. A judgment ordering separation was issued on 05/31/2011 and the defendant appealed before the Personal Status Panel at the Federal Court of Cassation that upheld the appealed judgment.

- Legal Issue

According to article 40 of the Iraqi Personal Status Law[98], both spouses have the right to ask for legal separation, if one of the cases defined therein is applicable. It specifies that:

> *"Both spouses may request separation for any of the following reasons:*
>
> *1- If one of the spouses inflicted harm to the other spouse or to their children rendering the continuation of their marital life impossible."*

This paragraph provided examples of the damage which might take several forms. However, the most important fact is that the continuation of marital life became impossible.

-Comment

We find in this case that the husband brutally assaulted his wife and was convicted thereof; the decision stated the following:

> *"Whereas, by virtue of the judgment no. 30/M/2011, issued by the Court of Misdemeanors in Al-Hamdaniya on 01/31/2011, which convicted "H. Kh." (the Appellant) for assaulting his wife by beating her (with a hose) on several parts of her body and sentenced him to simple imprisonment for one month in accordance with article 413/1 of the Penal Code, it has been established that the Appellant harmed the plaintiff in a way that rendered the continuation of their marital life impossible; which is what the Court reached in its judgment in agreement with the provisions of article 40/1 of*

98 In compliance with the majority of Family Laws in Arab countries.
See Dr. Ben Shoueikh, Al Rashid, Interpretation of the Modified Algerian Family Law. A Comparative Study for Some Arab Legislations (شرح قانون الأسرة الجزائري المعدل. دراسة مقارنة لبعض التشريعات العربية), Dar Al Khaldounia, First Edition, 2008, p. 189 et seq.
As well as Dr. Belhaj, El Arabi, Family Law with Amendment to Order 02/05 Commenting Thereon with the Principles of the Supreme Court During Forty Years 1966-2006 (قانون الأسرة مع تعديلات الأمر 02/05 و معلقاً عليه بمبادئ المحكمة العليا خلال أربعين سنة 1966-2006), University Publications, Third Edition, 2007, p. 259.

the Personal Status Law[99]." The Court's ruling is also consistent with international instruments protecting human dignity and enshrining mutual respect between spouses, which constitute the basis of marital relationships.

- Decision No. 3804 of the Iraqi Federal Court of Cassation

- Summary of Facts (Case of "A. M. K." Against "Z. Kh. M.")

Ms. (A. M. K.) filed a lawsuit against her husband Mr. (Z. Kh. M.) before the Personal Status Court in Al-Samawah, requesting separation after she was beaten and forced to leave her marital house. The Court issued its judgment on 12/23/2010 ordering the separation of the spouses due to infliction of harm.

The defendant challenged the said judgment before the Personal Status Panel of the Federal Court of Cassation that affirmed the Court's decision.

- Legal Issue

Article 40 of the Iraqi Personal Status Law defined the cases of legal separation, stating:

"Both spouses may request separation for any of the following reasons:

1- If one of the spouses inflicted harm to the other spouse or to their children rendering the continuation of marital life impossible."

- Comment

The current case proved that the husband assaulted his wife, which constituted a harmful act that justified their separation. The judgment of the Court of Cassation stipulated:

"Following the decision no. 865/M/2010 this Court regarding the appeal in cassation Al-Samawah Court of Misdemeanors, and in consideration of the sentence issued therein on 12/08/2010 ordering the appellant to pay a fine amounting to five hundred thousand Iraqi Dinars, in accordance with article 413/1 Penal Code, and after establishing that he assaulted the respondent by virtue of the medical reports attached to the lawsuit, the Court decided to affirm the judgment.[100]"

This judgment of the Court of Cassation is similar to the judgment it pronounced in the aforementioned decision no. 3549.

- Decision No. 3309 of the Iraqi Federal Court of Cassation

99 See the text of the decision in Appendix 2, pp. 230-231.

100 See the full text of the decision in Appendix 2, pp. 231-232.

- Summary of Facts (Case of "B. A. R." Against "H. A. M.")

Ms. (B. A. R.) filed a lawsuit against her husband Mr. (H. A. M.) before the Personal Status Court in Kirkuk, requesting separation from him after he took a second wife without the permission of the Court, without her approval and without her knowledge. The Court issued a judgment ordering their separation.

The defendant appealed before the Personal Status Panel at the Federal Court of Cassation which issued a decision that affirmed the Court's judgment.

- Legal Issue

Considering that marriage should be based on consent and mutual respect, the laws guaranteed the wife's rights to be treated well by her husband; and considering that Personal Status Laws in Arab countries are derived from the provisions of the Islamic Sharia which allow polygamy for men although within defined rules and conditions, namely the presence of a justification for such polygamy and the approval of the first wife, as stipulated by article 40 of the Iraqi Personal Status Law which granted the wife the right to ask for separation if the husband takes a second wife without respecting the conditions provided for in the Law; it stated the following:

> *"Both spouses may request separation for any of the following reasons:*
>
> *5. If the husband marries another wife without the permission of the Court."*

The condition which requires that the first wife be aware of a second marriage is an essential guarantee for her rights, and this was what the judges adopted to guarantee such rights.

- Comment

In its decision, the Court affirmed the separation judgment; it stated:

> *"…we find the Court's judgment sound and consistent with the Sharia and the Law as it fulfills the conditions stipulated in article 40/5 of the amended Personal Status Law No. 188 for 1959 …We therefore affirm the appealed judgment.*[101]*"*

c- The Right of the Needy Divorcee to Benefit from the Family Solidarity Fund (Takaful) as an Alternative to Alimony

Several rights protect the divorced woman and her children to enable her to raise them in decent living conditions. The most important of those rights is the right to alimony and child support that the husband commits to provide

101 See the full text of the decision in Appendix 2, pp. 232-233.

proportionally to his financial capacity and income. However, if the husband is insolvent and is unable to settle this alimony, a solidarity system established in several countries offers an alternative to alimony and child support and provides the divorcee and her children with resources for decent living – as is the case in Morocco. The decision issued by the Moroccan Judiciary stipulated:

- Decision of the Moroccan Judiciary on 06/19/2012

- Summary of Facts (Case of "S. A." Against "A. H.")

Ms. (S. A.), divorcee of Mr. (A. H.), filed a lawsuit against him before the Court of First Instance requesting alimony and child support for herself and her two children (F.) and (Y.). The judgment was issued on 01/17/2007 ordering the ex-husband to pay alimony. The husband refrained from settling it, a fact proven by the abstention record presented by the plaintiff who submitted to the Court a request to benefit from the allocations of the Family Solidarity Fund, being a divorcee, a mother of two and in need.

- Legal Issue

As the nucleus of society, family is granted legal protection as stipulated by the International Covenant on Economic, Social and Cultural Rights (ICESCR) in paragraph 1 of article 23 thereof:

> *"1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."*

The same text is also included in paragraph 3 of article 16 of the Universal Declaration of Human Rights. This protection applies whether the family is united or disintegrated by divorce, as child custody is mostly awarded to the mother. With the increase of divorce cases and social hardship, Morocco established the Social Solidarity Fund by virtue of the 2011 Finance Law with the aim to enable disadvantaged divorcees and widows to benefit from its allocations whilst waiting for the courts' final ruling in divorce and alimony cases. The amount of the allocation was set to 350 Moroccan Dirhams for each beneficiary provided that the maximum total amount allocated per family does not exceed 1050 Dirhams. The aforementioned was tackled in the Court's decision.

- Comment

The law of the Social Solidarity Fund granted the disadvantaged divorced women, who was not able to execute the judgment ordering her husband to settle alimony, the right to receive help. However, the Court's presiding judge should decide on the divorcee's eligibility for receiving allocations after ensuring all conditions are met through the documents she provides. The Court's judgment stated the following:

> *"Based on the request made by Ms. S. A., daughter of M. … to benefit*

from the allocations of the Family Solidarity Fund given that she is the mother of two children (F. H.) and (Y. H.), divorced and in financial need,

Based on the following documents attached to the request:

- A copy of the judgment no. 29, file no. 296/2006 issued by the Court of First Instance in Benslimane on 01/17/2007, determining child support for the two above-mentioned children.

- A copy of the judgment of divorce due to marital discord, also issued on 01/17/2007.

- The report dated 12/18/2010 subject of execution file no. 195/2009.

- The two Birth Certificates of the children, certificate no. 12 for 1994, Municipality of Benslimane and certificate no. 279 for 1998, Municipality of Benslimane.

- Attestation of joint living dated 06/01/2012.

- School attestation for the female child F. dated 05/02/2012.

- Certificate of poverty, no. 113 on 06/06/2012.

- Tax exemption certificate dated 05/22/2012.

Whereas the above-mentioned judgment defined the beneficiaries of child support:

+ F. H. born on 01/01/1994
+ Y. H. born on 08/23/1998[102]

And upon examining all these documents, the Judge decided that the applicant's request met all legal conditions. He ordered the allocation of a fixed amount from the Fund to the mother and her two children that she is representing, thus guaranteeing the family protection from poverty, since the mother had no income and that her daughter was still in school. The judgment ordered the allocation of:

"the total amount of 500 Moroccan Dirhams per month starting 06/12/2012, date of the request. We order the execution of this decision upon showing the original copy and without serving notice." – in order for the family to cover living expenses and for the girl to continue her education.

102 See the full text of the decision in Appendix 4, pp. 336-338.

d- Women's Right to Work with Dignity

All international instruments recognized a set of rights for women to enjoy without being subject to any discrimination and in order to establish their full equality with men, such as the right to work. However, this right should be considered in its larger notion to enable working women to exercise their right to work without any harassment. We shall consider this matter through the judgment issued by the Moroccan Judiciary.

- Decision of the Moroccan Court of Appeal on 05/17/2007

- Summary of Facts (Case of "N. A." Against "A. H. S. Sh. M. Company")

The Plaintiff was employed as an administrative clerk at the defendant company since the beginning of November 1989. In mid-March 2004, she was dismissed from her job for negligence and she resorted to the Work Inspector to reach a settlement but without success. She then filed a lawsuit before the Court requesting compensation for arbitrary dismissal. The Court issued a decision rejecting her request and she appealed the judgment.

- Legal Issue

The working woman is often subjected to some verbal or physical harassments aiming to violate her dignity and undermine her person in order to push her to quit her job. This phenomenon, known as sexual harassment against women[103] spread in such a way that countries had to deal with this issue through legal texts that aim at fighting it. The International Covenant on Economic, Social and Cultural Rights provided for the right to work without discrimination, but the CEDAW convention detailed this right further in article 11 thereof, stipulating the following as an example:

> *"1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:*
>
> *(a) The right to work as an inalienable right of all human beings;*
>
> *(b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment…"*

However, the continuous violence towards women which prevented them from fully enjoying their rights, made the international community intensify its efforts and issue the Declaration on the Elimination of Violence against Women

103 See Dr. Alwan and Dr. El Moussa, International Law…, (القانون الدولي...), Volume Two, op. cit., p. 513.

adopted by the United Nations General Assembly on December 20, 1993[104]; it defined violence against women as follows:

> *"The term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."*

The International Labor Organization was also concerned in protecting working women as it adopted the Convention concerning Discrimination in Respect of Employment and Occupation, no. 111 in 1958.

Morocco ratified the convention and worked on amending domestic legislations to make them concordant with its international obligations, what was reflected in the Moroccan Labor Code that comprised several provisions to prevent discrimination against working women and protect them from any harassment in the workplace. The judgment[105] herein stated the following:

> *"Whereas the act of sexual harassment that the employee was subjected to is considered insulting and humiliating to women and an act of injustice towards her humanity."*

Consequently, the judges gave prime importance to this matter as we will showcase hereinafter.

- Comment

Many working women are subjected to all kinds of harassment that they keep quiet about and cause them to quit their jobs. However, with the spread of awareness on women's rights and legal protection provided by law, especially after the criminalization of sexual harassment, women are resorting to the Judiciary to claim that they be treated with fairness. In this context, the plaintiff who was employed at the defendant's company was dismissed for negligence, while in fact she was being subjected to sexual harassment by her employer as she refused to waive her rights. The decision[106] stated the following:

> *"The employer forced her to sign a new employment contract in March 2004 and when she objected, the employer started pressuring and harassing her so that she either signs the new contract or quits her job. He reassigned her to the archiving department, although her initial position was an administrative clerk. He also moved her office to the ground floor next to the restrooms, what caused her great harm and constituted an act of revenge against her which proves the case of provocation and harassment."*

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104 The resolution no. 48/104 was adopted by the General Assembly based on the report of the Third Committee (A/484B/629).

105 See the full text of the decision in Appendix 4, pp. 322-330.

106 See the full text of the decision in Appendix 4, pp. 322-330.

The plaintiff provided proof of the harm inflicted upon her by the employer both verbally and effectively, as shown in her appeal that was examined by the judges:

> *"The employee declared that her employer forced her into signing a new contract but she refused as it would have made her lose her job seniority. Following that, she was subjected to insults and harassments; they took away her phone and computer and relocated her office next to the restrooms in order to humiliate her. She added that her employer (J. M.) and (Al.) used to walk into the restroom by passing in front of her to humiliate her intentionally. Her employer (J.) then started to place pornographic magazines and other irrelevant documents on her desk. She also noted that her employer used to grab her hand and to subject her to sexual harassment whenever she tried to hand him work related documents as he used to deliberately touch her and hold her hand. When asked why she would not return to work, the employee replied that she feared her employer's reprisal."*

These actions were obviously intended to weaken the employee's position and humiliate her to push her to waive her lawful rights. The plaintiff also summoned a witness, a coworker who confirmed that the employer used to address the plaintiff, specifically among all other female employees, in a suggestive manner and comment on her looks and clothes. The judges were therefore able to conclude the following:

> *"The plaintiff was evidently sexually harassed by her employer and she has therefore the right to refuse to work and return to her job as requested by her employer, regardless of any disciplinary punishment whether it was effectively decided by the employer or not, or of her return to work or her abstention which is no longer a matter of discussion here after she was sexually harassed in her workplace, what gives her the right to leave her job without giving notice to her employer with her being considered in circumstance of wrongful termination of employment and he would be the one who committed the grave mistake pursuant to national and international law."*

The judges referred to the legal texts protecting working women:

> *"All laws, domestic and international, call for the protection of women from sexual harassment and discrimination at work, as raised by the employee's attorney who referred to international charters and conventions issued by the International Labor Organization, since Morocco, as internationally recognized, respects international legitimacy and human rights and has ratified several relevant international charters and conventions; and since article 5 of the Universal Declaration of Human Rights has condemned any act degrading to human dignity, and article 7 of the International Covenant on Economic, Social and Cultural Rights provided for the right of every person, without discrimination, to the enjoyment of just and favorable conditions of work. The Convention on the Elimination of All Forms of Discrimination against Women, signed by Morocco in 1993 in Austria, confirmed in its preamble and in article 11 thereof the right of women to work without any discrimination based on gender, and provided for health and moral protection. Conventions no. 100 and 111*

issued by the International Labor Organization and signed by Morocco provided for the protection of working women and their right to be able to work without any discrimination based on gender, and to protect them from sexual harassment that might impede social growth and hinder the full development of the country."

Perhaps the most important development supporting the judges' conclusion would be the provisions of the Moroccan Labor Code, especially article 40 thereof which considered sexual harassment committed by the employer against an employee a grave mistake that entails indemnification of the employee; therefore, the Court ordered that the plaintiff be indemnified.

e- Inadmissibility to Dismiss a Woman from Work Due to Pregnancy

Women's working status concurs with pregnancy and childbirth which might affect their performance at work, and they are sometimes subjected to discriminatory practices from the employer at work which may lead to their dismissal. The following decision tackled this matter:

- Decision of the Moroccan Court of Appeal on 01/23/2006

- Summary of Facts (Case of "B. S." Against Company "M. A. A.")

The plaintiff (B. S.) was employed by the defendant- company since 11/19/1992 and was arbitrarily dismissed on 04/16/2004. She resorted to the Judiciary requesting compensation for wrongful dismissal. The Court ruled in her favor and the defendant appealed the judgment but the Court of Appeal affirmed the judgment.

- Legal Issue

The International Bill of Human Rights ensured women's rights in general and in special cases women naturally experience such as pregnancy and childbirth which are the core elements of founding a family; the second paragraph of article 10 of the International Covenant on Economic, Social and Cultural Rights stipulate the following:

"2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits."

This text guarantees that working women preserve their job positions while assuming their duties as mothers; thus protecting the family which constitutes the nucleus of society.

A more specific protection was provided by the CEDAW convention as subparagraph (a) of paragraph 2 of article 10 stated that:

" 2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;"

This is an essential obligation that provides an adequate protection and defines deterring measures in case of any violation.

Article 5 of the Convention no. 158 issued by the International Labor Organization also stated:

"The following, inter alia, shall not constitute valid reasons for termination, especially the provisions of article 6 hereof:

"Temporary absence from work because of illness or injury shall not constitute a valid reason for termination."

Morocco ratified all conventions and worked on amending its domestic laws to be in compliance with its international obligations; article 36 of the Labor Code stipulated the following:

"The following do not constitute acceptable justifications for disciplinary punishment or dismissal:

5. Race, color, gender, marital status, family obligations, creed, political opinion, national origin or social origin."

This is what led the plaintiff to refer to the decision and claim indemnity for the harm inflicted upon her by her employer, as stated in the judgment.

- Comment

The employer tried to justify the plaintiff's dismissal by claiming that she used to skip work without any legal justification, and that she traveled to France at the time and presented medical reports –by mere courtesy– proving she was pregnant, adding that she only reported back to work after 4 months, which created a case of unjustified absence. The judges answered the defendant's claim:

"Whereas the company's pleas claiming that the medical evidence provided –of which it acknowledged receipt- were presented for mere courtesy purposes and exaggerated did not constitute serious arguments,

knowing that the employee reported back to work after childbirth and recovery and worked for 15 days after receiving the letter of dismissal.[107]*"*

Based on all legal texts to which Morocco committed itself, the Judges reached the following:

"Whereas protecting working women from dismissal on the grounds of pregnancy, childbirth or any health condition resulting therefrom, is a conditional right supported by national and international systems providing for human rights protection; knowing that the employee in the current case was dismissed 15 days after reporting back to work following childbirth, which means that the employment contract was continued after her return, and the employee's dismissal without any misconduct from her side constituted an arbitrary termination of employment requiring indemnification."

Considering that the employer wrongfully dismissed the plaintiff, the Judges ordered her indemnification for this wrongful dismissal, in compliance with the Law protecting working women from wrongful dismissal on the grounds of family-related conditions.

2. Judicial Applications Related to the Rights of the Child

a- Child's Best Interest

The Convention on the Rights of the Child is one of the conventions providing for the rights of specific groups of persons, compared to the conventions providing for general rights to all individuals regardless of their category: men, women, children, disabled persons or others, which fall under the International Bill of Human Rights represented mainly by: the Universal Declaration of Human Rights[108] of December 11, 1948; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of December 16, 1966; and the two Optional Protocols to the ICCPR of 1990, the First Optional Protocol being related to the Human Rights Committee and the second to the abolition of the death penalty.

By adopting the Convention on the Rights of the Child, States tried to enshrine the basic rights of this category which should be granted special protection and care given its vulnerability, and the principle of the best interest of the child is considered one of the principles that all State parties agreed to consecrate as specified in paragraph 1 of article 3 of the convention which stipulated the following:

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authori-

107 See the full text of the decision in Appendix 4, pp. 338-343.

108 The Universal Declaration of Human Rights is not an international convention per say; it has however established the basic principles for Human Rights conventions.

ties or legislative bodies, the best interests of the child shall be a primary consideration."

It is of use here to tackle the essential nature of the "best interests of the child"; which is considered a concept that bears some ambiguity and that has been the subject of contradicting interpretations and constructions. Some jurists consider that the term "best" should not be interpreted in such a way that the interest of the child prevails over any other interest. In fact, the agreement to consider child's interest a reference in many juvenile-related international conventions is due to the ambiguity of this concept, which some jurists described as the fill-in-the-blank question the judge has to answer[109].

This Convention was adopted on November 20, 1989 and entered into force after achieving quorum for ratification on September 02, 1990; it constituted one of the most adopted conventions as it was ratified, till the present day, by 193 States.[110]

Both the Algerian judge and the Iraqi judge applied this convention's provisions in their judgments. However we notice that a long time elapsed between the date of ratification and that of its judicial application. We shall explain this through a judgment issued by the Misdemeanors Division at the Court of Constantine on 03/29/2011, and the judgment issued by the Personal Status Court of Hay Al-Shaab on 05/13/2008; we will also present briefly the Moroccan position on the matter.

- Decision of the Court of Constantine, Algeria, on 03/29/2011

- Summary of Facts (Case of "A. A." Against "Sh. M.")

Ms. (Sh. M.) married Mr. (A. A.) and they had two children (A.) and (A.). They divorced and custody of the children was awarded to the father as the mother resided in France; weekly visit days to their sons were set for Thursdays and Fridays. In this context, on 09/16/2010 the mother picked up her children and did not return them on Friday as agreed but kept them with her till Saturday. The father filed a lawsuit against his divorcee considering she committed a misdemeanor by not returning the children on time; the Judiciary pronounced her innocent.

- Legal Issue

The Convention on the Rights of the Child approved several rights for children as they represent a specific category requiring special care, most importantly the right to life, the right from birth to a name, the right to acquire a nationality and freedom of expression.

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109 Rivier, Marie-Claire, Family Elements in the Convention on the Rights of the Child, Proceee dings of Workshop Days held on December 15-16, 1994, (Eléments de la famille dans la convention du droit de l'enfant, Actes des journées d'études des 15 et 16 décembre 1994), L.G.D.J., p. 80.

110 Ratified by Algeria, Jordan, Morocco and Iraq. More details available under section Comment of the decisions in which this convention was applied. See Appendix 6, pp. 360-362.

It also included the text on the principle of the best interests of the child in paragraph 1 of article 3 which stipulated the following: "1. In all actions concerning children… the best interests of the child shall be a primary consideration."

That is, as mentioned before, understandable and positive but requires a tangible activation away from textual abstraction.

The jurisprudence conducting the comparison considered that the wording of article 3 is self-executing which is not the case for other clauses of the Convention on the Rights of the Child although some jurists rely on article 4 which stipulates that:

> *"States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation."*

In order to consider that the convention is not self-executing, it is first the responsibility of the State to take appropriate measures to integrate it within its domestic system[111]. However there is a withdrawal towards considering the provisions of the convention self-executing.

- Comment

In reference to the judgment issued by the Court of Constantine, we find that the plaintiff (A. A.) filed a complaint against the defendant (Sh. M.) before the Judicial Police pursuant to article 328 of the Penal Code which stipulated the following:

> *"A sentence of one month to one year of imprisonment and a fine of 500 to 5,000 Dinars await the father, the mother or any other person who does not deliver a child whose custody was subject to summary enforcement or to a final judgment to his rightful guardian; or any person entrusted with his guardianship that abducts him, or in certain locations in which he placed him or from which he took him away; or any person he resorted to in order to abduct the child for him or relocate him, even if the aforementioned took place without acts of deception or violence."*

The Public Prosecution referred to the above article to transfer the reports to the Court of Misdemeanors in order to prosecute the accused for the misdemeanor she committed. The defendant stated, in her defense, that she did not commit any misdemeanor according to the Penal Code, and that all she wanted was to see her children.

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111 See Bonnet, Baptiste, The State Council and the International Convention on the Rights of the Child at the Time of Assessment. Of the Art of Pragmatism (Le Conseil d'Etat et la convention internationale des droits de l'enfant à l'heure du bilan. De l'art du pragmatisme), DALLOZ Colt lection, April 29, 2010, N° 17, p. 1031.

We notice that the judge carefully studied the validity of the accusation against the defendant. The judgment stipulated the following:

> *"Whereas in order for the aforementioned misdemeanor to be established, the father or the mother are required to abstain from returning a child whose custody was awarded to the child's rightful guardian by a summary judgment or by final judgment.*[112]*"*

The judge also referred to articles 3 and 9 of the Convention on the Rights of the Child, where article 9 stipulated the following:

> *"3- States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."*

The judge found that the defendant, the mother of the children who has the right to visit them, only wanted to see her children and that is why she kept them with her for an additional day –that is one day more than she was allowed- which is consistent with the above-mentioned article 9. The judge considered that:

> *"The defendant took her children on Thursday 09/16/2010 and brought them back on Saturday 09/19/2010, infringing the requirements of the judgment which set the visitation period till Friday only, and she justified this delay before the Court stating that she lived in France and needed to see her children."*

The judge did not refer to the Convention only in order to refute the accusation but referred also to the jurisprudence of the Supreme Court which mentioned the following:

> *"In order to substantiate the misdemeanor of not returning a child to his custodial parent, the fundamental element must be available and demonstrated by the conviction decision; the fundamental element being the abstention from returning the minor child, and it must be established by an abstention record issued by a process server after following the relevant execution procedures."*

Based on the above and in application of this jurisprudence to the current case, we find that no such record was issued against the defendant and that a one-day delay in returning the children does not constitute –in any way– an abduction case, especially when we consider the wording of article 9 of the Convention which encourages maintaining personal relations and direct contact between the child and the parent from whom the child has been separated, the judge reached the following conclusion:

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112 See the full text of the decision in Appendix 1, pp. 170-174.

> *"Given that there is no clear explanation as to the best interests of the child, which requires jurisprudence in the current case and which is explained in this context as the child's inherent right to grow up among his parents and to visit both of them."*

The judge therefore concluded that the abduction accusation against the defendant does not stand and considered that she was only exercising her right which is enshrined by the Convention on the Rights of the Child.

The application of the concept of the best interests of the child in the current case is positive and audacious considering it constitutes the basis upon which the nonexistence of the offence is established.

- Decision of the Iraqi Court of Personal Status on 05/13/2008

- Summary of Facts (Case of "A. Kh." Against "F. Y.")

The merits of the case show that the plaintiff, Mr. (A. Kh.), and Ms. (B. H.) were married and had a child, (H. A. Kh.), on 01/08/2000. They later divorced, as recorded in the judgment issued by the Personal Status Court of Al Azamiyah on 03/05/2006.

The divorcee, Ms. (B.H.) then passed away and the defendants (M. H.) and (F. Y.) -the parents of the deceased divorcee- refused to give the child to his father, the plaintiff, who resorted to the Court requesting custody of his child.

- Legal Issue

In order to be able to reach a verdict on child custody, the Judge referred to the Convention on the Rights of the Child -ratified by Iraq by virtue of Law no. 3 of 1994- more precisely to the above-mentioned article 9, as well as to the 1959 Personal Status Law no. 188 which stipulated the following, in paragraph 7 of article 57 thereof, under chapter 6 on Procreation and its Results, section 2 on Breastfeeding and Custody:

> *"7. If the mother of the youngster ceases to fulfill custody requirements, or in the event of her death, custody is transferred to the father, unless the interests of the youngster require otherwise. The choice of the guardian is then left to the discretion of the Court, taking into account the interests of the youngster."*

The Judge characterized custody as part of the rights of the child -pursuant to the above-mentioned paragraph 7 of article 57 of the Personal Status Law- and not as part of the rights of the parents or direct relatives; a characterization related to the protection that the child must have, especially in this field.

- Comment

The judgment of the Personal Status Court of Hay Al-Shaab shows that the same principle of "best interest of the child" is applied, considering that the plaintiff asked the Court to grant him custody of his child, (H. A. Kh.), given

that he is his father and his rightful guardian after the death of his mother. The defendants were compelled to give the child to his father.

It seems all disputing parties were in a suitable condition for child custody, as the judgment stipulated:

> *"The Court also examined … and the report of the Preliminary Medical-Psychological Committee, no. 1048 on 12/16/2007, which showed that all parties to this lawsuit were in good mental health, in the present time, qualifying them for custody of the child (H. A. Kh.), and leaving the decision on the best guardian to the discretion of the Court.*[113]"

In reference to the facts of this dispute, the Court saw that the child was under the guardianship of his maternal grand-mother, (F. Y.) the second defendant, and referred to the report of the social field research, dated 01/03/2008, which concluded that the plaintiff (A. H.) provided a place of residence for the child; a proof of his capability in this field. The Court also relied on another report issued by the same entity on 05/04/2008, which stated the following:

> *"The child needs the presence and care of the father, as his presence and supervision will contribute to rendering the child's life balanced."*

Given that the best interests of the child are the reliable criteria, according to which all actions pertaining to children are taken pursuant to article 3 of the Convention on the Rights of the Child, then this interest requires that the child be raised within a family that guarantees the establishment of family bonds. The judgment considered that:

> *"The family of the child is formed by his close relatives who empower him; they include his father, siblings and half-siblings. The child's family has its own impact and psychological formation in reforming individual behavior and in bringing life and tranquility to the child; through it he learns the language and acquires some values and orientations."*

The Judge then considered that the father was responsible for the welfare of his children as confirmed by article 218 of the Civil Law and by article 29 of the Juvenile Welfare Law.

In addition to the substantive law that enshrines the responsibility of the father in respect to welfare. The judge also referred to the provisions of the Islamic Sharia which attributed children welfare and sponsoring to the father, as it considered the child who lost his father an orphan, while the one who lost his mother was not considered an orphan. Therefore the judge concluded that:

> *"It is best and most suitable for the child to grow up within a family made of his closest relatives."*

113 See the full text of the decision in Appendix 2, pp. 201-202.

This hierarchy in child custody was defined in paragraph 7 of article 57, of the Personal Status Law which considered the mother as the first legal guardian, and in the event of her death or inability to fulfill one of the custody requirements, child custody must be granted to the plaintiff given that he is the father and that the mother is deceased. The judgment read as follows:

> *"It is in the best interest of the child that he be raised within his family under the guardianship of his father, regarding whom the Court did not find any indication that showed he was not eligible for custody, that his family had any issues that might negatively affect the child's upbringing or that suggested any ill social behavior from his side."*

The judge ordered the defendant -maternal grandmother- to deliver the child (H. A. Kh.) to the plaintiff.

- Moroccan Judiciary

The Moroccan Judiciary kept trying to consider the best interest of the child as the basis for any judgment related to children issues and confirmed this on many circumstances such as the judgment issued by the Court of First Instance of Tangier on 11/26/2009, file no. 2495/08 which included the following:

> *"Whereas, paragraph 1 of article 3 of the Convention on the Rights of the Child that was adopted by the General Assembly of the United Nations on November 20, 1989 and ratified by Morocco on 06/21/1993, stipulates that the Judiciary must take the best interest of the child into consideration when examining child-related disputes."*

The above is also confirmed in the judgment issued by the same Court in a case related to custody, file no. 616/1607/2009. It stipulated the following:

> *"whereas, in cases of child custody the Court observes all actual and legal facts and conditions that seek the best interest of the child as such interest is the pivot of the special provisions related to the child, pursuant to the Convention on the Rights of the Child dated November 20, 1989 and to which Morocco acceded on 06/21/1993.*[114]"

b- Right to Pursue Studies:

Most constitutions guaranteed the right to education for everyone and even made primary education compulsory and in reference to the previous Moroccan Constitution we find that article 13 thereof stated:

114 The full texts of the two judgments were not available, we were therefore unable to present detailed facts and comments. See excerpts from both judgments in Appendix 4, pp. 343-344.

"The right to education and work is an equal right to all citizens."

Article 31 of the new Constitution also stipulated the following:

"The State, public institutions and educational entities shall seek to invest all available means to facilitate the establishment of the equal right to all citizens, men and women, to:

'enjoy modern accessible and quality education.'"

International instruments also guaranteed this right. In reference to the International Covenant on Economic, Social and Cultural Rights for 1966, we find that it is provided for in article 13 thereof, as follows:

"1. The States Parties to the present Covenant recognize the right of everyone to education."

This right was enshrined in a way that enabled it to contribute to the development of the child's personality; education being the vital basis for building and developing societies. The aforementioned was confirmed by the same article:

"They further agree that education shall enable all persons to participate effectively in a free society."

This right was also provided for in the Convention on the Rights of the Child, in paragraph 1 of article 28 which stipulated the following:

"1. States Parties recognize the right of the child to education."

It also specified the desired outcome from the recognition of this right in article 29 that stated the following:

"1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;"

The right to education was applied by the Moroccan Judiciary in the judgment issued by the Court of First Instance of Al-Hoceima on 02/22/2007, no. 14/2007 –we were not able to obtain the full text of the judgment– One of the grounds of the judgment indicated that:

"The right of children to pursue their studies is one of the major rights that the father and mother should fulfill and are stipulated in the Constitution and all international charters.[115]*"*

c- Custody of the Child

Personal Status Laws guaranteed the right of the child to grow up within his family in a way that ensures his wellbeing and balance, in compliance with the provisions of international conventions in this regard. They also provided for the protection of the child in cases of divorce by enshrining the right to custody for one of the parents in order to avoid any harm to the child resulting from the separation of the family. This right was granted to a group of family members following a specific hierarchy. The national Judiciary applied the right to custody in accordance with the provisions of the Personal Status Laws; We shall tackle the aforementioned in the following three judgments: judgment of the Court of First Instance of Kenitra issued on 04/14/2010; judgment no. 994 issued by the Iraqi Federal Court of Cassation on 03/29/2011, and judgment no. 3867 issued by the same entity on 08/14/2011.

- Decision of the Moroccan Court of First Instance on 04/14/2010

- Summary of Facts (Case of "A. M." Against "E. A.")

Mr. (E.A.), defendant, and Ms. (A. M.), of French nationality, married and had two children, (A. M. A.) and (H. M. A.). They all lived in the defendant's house in France. The plaintiff left the house, what made the defendant resort to the French Police Department and submit a statement which enabled him to issue passports for his children. He then took them with him from the place of custody to Kenitra and kept them with him. The plaintiff obtained a judgment from the Superior Court of First Instance in Creteil (France), on 05/29/2009, which awarded the custody of the children to their mother. The defendant refrained from returning the children to her and thus a second judgment was issued attributing parental authority to the mother and setting visitation rights for the father. The mother presented a request before the French authorities which led the French Ministry of Justice to send the Moroccan Ministry of Justice a letter with two judgments and several other documents, demanding the execution of the judgment that awarded her the custody of her children.

- Legal Issue

With the increase of mixed marriages in many countries of the Maghreb, the latter countries concluded bilateral agreements regulating family related issues, such as marriage, divorce and child custody. In this context, Morocco and France concluded an agreement on 08/10/1981 relating to the status of persons

115 See Appendix 4, pp. 343-344.

and families and to judicial cooperation; it was published in the Official Gazette by virtue of the Royal Decree dated 11/14/1986.

In reference to the agreement, namely article 7 thereof, we find that it stipulated the following:

> *"The applicable law is that of the common domicile of the spouses, applicable also to issues related to child custody and alimony."*

- Comment

In reference to the judgment, we find that the judges examined the documents sent by the French Ministry of Justice; it stated the following:

> *"The case-file revealed that the defendant, Ms. (A. M.) and their two French-born children were indeed living in France regularly until the defendant moved with the children to Morocco."*

They also referred to the statements of the defendant who:

> *"Stated before the Judicial Police, in the Public Prosecution file no. 22 N. Q. D. 09, on 10/07/2009 that he used to live with Ms. (A.) in France since 2004 in an effective and regular manner with their two children, and that although he was currently in Morocco he still had business affairs in France that required tending to.*[116]*"*

The aforementioned shows that the country of the spouses' common domicile is France and not Morocco. In this context, article 24 of the bilateral agreement specified that:

> *"In regard to child custody, none of the two countries is entitled to reject the recognition or implementation of a judgment issued by the other country if the Court that delivered the judgment is that of the parents' common effective domicile or that of the residence of the parent with whom the child is ordinarily living."*

Pursuant to the above clause, the Judges concluded that:

> *"The judgment that awarded the mother the parental authority was issued by a competent court and, according to the aforementioned Agreement, our Court is not entitled to discuss it."*

Therefore, the judgment delivered by the Court of Creteil was characterized as a judgment issued by a competent court that should be accepted, and thus the defendant was ordered to deliver the children to their mother.

116 See the full text of the decision in Appendix 4, pp. 316-319.

- Decision No. 994 of the Iraqi Federal Court of Cassation

- Summary of Facts (Case of "Gh. J. M." Against "F. Gh. A.")

Ms. (Gh. J. M.) is married to Mr. (F. Gh. A.) and they have two children: (Sh.) and (A.).

The father took the children away from their mother by force and the latter filed a lawsuit against him before the Personal Status Court of Al-Fallujah claiming her right to custody. The Court issued a judgment on 12/30/2010 awarding custody of the children to the mother. The defendant appealed the judgment in cassation before the First Personal Status Panel at the Federal Court of Cassation that affirmed the judgment of the Court of Al-Fallujah.

- Legal Issue

Child custody is considered one of the most important rights of the child after the dissolution of the marital bond; it is a guarantee for the child's care and upbringing in a sound environment, with which the child's psychological balance is achieved and his personality is accomplished. It includes caring, raising and looking after him. The international instruments provided for the rights of this group considering it is one of the most vulnerable groups of society[117]. The International Covenant on Civil and Political Rights comprised the right of the child to protection and article 24 thereof stipulated the following:

> *"1. Every child shall have … the right to such measures of protection as are required by his status as a minor, on the part of his family."*

Article 5 of the Convention on the Rights of the Child also stated the following:

> *"States Parties shall respect the responsibilities, rights and duties of parents … to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."*

The majority of the laws regulating personal status issues in Arab countries stipulated that the custodial parent must present traits such as: maturity, reason, integrity, and the ability to nurture and protect the child. They awarded this custody to the mother unless she did not fit the required criteria, and custody would then be granted to another person in accordance with the requirements set therein; the laws also regulated cases of child custody revocation.

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117 See Dr. Mohammad Youssef Alwan and Dr. Mohammad Khalil Al-Moussa, International Human Rights Law …, (د. محمد يوسف علوان و د. محمد خليل الموسى، القانون الدولي لحقوق الإنسان...), op. cit., p. 145.

The Iraqi Personal Status Law issued on 12/19/1959 featured provisions regarding child custody in article 57 thereof; it stipulated the following:

> *"1. The mother is the person who is the most eligible to custody of the child and to raising him upon the completion of marriage and following its dissolution, unless it is not in the best interest of the child."*

- Comment

The above-mentioned was mentioned in the decision of the Federal Court of Cassation which affirmed the judgment issued by the Court of Al-Fallujah:

> *"… found that it (i.e. the appealed judgment) is sound and concordant with the Sharia and the Law because the mother is the person who is the most eligible to custody of the children as soon as marriage is completed, especially that the children (Sh.) and (A.) were born in 2008 and 2009 respectively. The investigations conducted by the Court confirmed that the plaintiff fulfills all custody requirements.*[118]*"*

This judgment is considered consistent with the right of the child to custody as regulated by international conventions.

- Decision No. 3867 of the Iraqi Federal Court of Cassation

- Summary of Facts (Case of "J. A. Z." Against "Kh. K. M.")

Ms. (J. A. Z.) married Mr. (Kh. K. M.) and had a female child (A.). The couple separated and the father took the girl away from her mother who filed a lawsuit against him before the Personal Status Court of Abu Al-Khasib. The Court issued a judgment on 05/20/2010 compelling the defendant to return the child back to her custodial parent -her mother. The defendant later appealed this judgment before the First Personal Status Panel at the Federal Court of Cassation which affirmed the judgment of the Court.

- Legal Issue

This case revolves around custody rights after dissolution of marriage; a right provided for in international instruments and in the Iraqi Personal Status Law in the aforementioned article 57.

- Comment

The decision of the Court of Cassation stipulated the following:

> *"Whereas the Court conducted its investigations in this case in light of the cassation decision which confirmed the mother still fulfills all custody*

118 See the full text of the decision in Appendix 2, p. 234-235.

requirements and lives in an environment suitable for the upbringing of the child who is still within the age of nurture. Therefore, this Court affirms the appealed judgment.[119]"

Whereas the Court did not see any reason to revoke the custody from the mother and transfer it to the father, as it is decided in such cases; this decision is in compliance with international instruments.

3. Judicial Applications Related to the Rights of Persons with Disabilities

The two international covenants of 1966 provided for the principle of non-discrimination on any basis and guaranteed all rights pursuant to this principle. On December 13, 2006 efforts culminated in the adoption of the Convention on the Rights of Persons with Disabilities, ensuring the protection and rights of this category of persons to enable them to live in dignity within society as stated in article 1 of the Convention.

The convention binds States parties to commit to taking all necessary measures to guarantee that persons with disabilities enjoy their rights; we shall study this further through the judgment issued by the Palestinian Judiciary.

- Decision of the Palestinian High Court of Justice

- Summary of Facts (Case of "M. J. Sh." and "J. M." Against "W. Sh. E.", "W. J. M." and "M. W. F.")

Both (M. J. Sh.) and (J. M.) filed a lawsuit against (W. Sh. E.), (W. J. M.) and (M. W. F.) before the High Court of Justice for refraining from taking necessary legal and administrative measures to ensure the accessibility of the public places they frequent in order to apply the Disability Law no. 14 for 1994. A preliminary ruling was issued on 04/20/2005 requesting the defendants to present a statement of the due reasons that prevented the application of the Law. The Court issued another decision on 09/06/2005 compelling the defendants to apply articles 12 to 15 of the Disability Law.

- Legal Issue

Article 3 of the Convention on the Rights of Persons with Disabilities stated the principles of the convention which are as follows:

"a. Respect for inherent dignity, individual autonomy …;
b. Non-discrimination;
c. Full and effective participation and inclusion in society;
f. Accessibility;"

119 See the full text of the decision in Appendix 2, pp. 230-231.

In order to achieve this goal, article 4 provided for a set of obligations that should be honored by the states parties, such as:

> *"a. To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention; e. To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise."*

Thus we notice some negligence on the part of the competent authorities in ensuring accessibility of public places for the disabled, which led the plaintiffs to resort to Justice.

- Comment

The judgment of the Court tackled this issue in what follows:

> *"Whereas human dignity is an inherent right to all human beings, and whereas persons with disabilities have the right to take all necessary measures enabling them to achieve maximum individual autonomy and independence and facilitate their participation and integration into society.*[120]"

The judgment concluded that:

> *"Therefore, the Court decided to compel the concerned parties to apply the provisions of articles 12 to 15 of the Disability Law relating to the accessibility of public places for the disabled, in addition to the relevant executive regulation and to take all decisions and measures that ensure the above and achieve the application of the above-mentioned articles."*

4) Right to Resort to the Judiciary (Courts)

Contemporary societies work hard to ensure the rights of individuals and to establish a judicial system that undertakes to solve disputes and ensure these rights; an individual can no longer ensure his own right by himself. Instead, it is the State that guarantees him his right by the means of an official system.

Constitutions also provided for this right and guaranteed it to everyone and without any discrimination. We shall discuss this further when we comment on the decisions no. 1789/2006 dated 10/04/2006 and no. 1339/2008 dated 03/19/2009 issued by the Jordanian Court of Cassation, and on a judgment issued by the Court of Constantine (Algeria) no. 11646/11.

- Decision No. 1789/2006 of the Jordanian Court of Cassation

- Summary of Facts (Case of "J. S. M." Against the American Company)

120 See the full text of the decision in Appendix 5, pp. 355-359.

Mr. (J. S. M.) was insured at the American company by virtue of two insurance policies holding no. 8156740 and 8156742 respectively. He was hospitalized several times and his stays amounted to 40 days in total. He filed a lawsuit against the insurance company before the Court of First Instance of Amman, Rights Division, in 2004 demanding the insurance company to pay him the amount of /7,857/ Jordanian Dinars. The Court issued a decision that compelled the defendant to pay the amount of /1,767/ Jordanian Dinars to the plaintiff. The defendant filed an appeal before the Court of Cassation that dismissed his request.

- Legal Issue

The right of a person to resort to the Judiciary –as mentioned before– is an unalienable right that is ensured by the Universal Declaration of Human Rights in article 8 thereof and enshrined in paragraph 1 of article 101 of the Jordanian Constitution which stipulated that:

> *"1. The courts shall be open to all and shall be free from any interference in their affairs."*

- Comment

Decision no. 1789/2006 considered that:

> *"The courts shall be open to all and shall be free from any interference in their affairs, that being an equal right to all citizens.*[121]*"*

The Court reached the following conclusion:

> *"Whereas the appellant did not provide any proof of the plaintiff's ill-will in instituting legal proceedings, which makes the appealed judgment lawful and well-grounded.*[122]*"*

The Court therefore dismissed the appeal.

- Decision No. 1339/2008 of the Jordanian Court of Cassation

- Summary of Facts (Case of "A. R." Against "N. Kh.")

Mr. (A. R.) and Mr. (N. Kh.) are partners in housing projects and since the latter gave him a bad check, (A. R.) filed a lawsuit against (N. Kh.) before Amman's Criminal Magistrates Court for the misdemeanor of issuing a bad check. When the plaintiff's (A. R.) attorney presented the agreement of partnership, the defendant, (N. Kh.), denied having signed it. The Court then issued a judgment convicting the defendant with the crime of fabrication and sentencing him to hard labor. The defendant filed an appeal but the judgment was affirmed. Then

121 See the full text of the decision in Appendix 3, pp. 279-281.

122 –Ibid.

the defendant filed an appeal in cassation and the Court of Cassation accepted to repeal the judgment.

- Legal Issue

The right of a person to resort to the Judiciary –as mentioned before– is an unalienable right, ensured by the Universal Declaration of Human Rights in article 8 thereof and enshrined in paragraph 1 of article 101 of the Jordanian Constitution which stipulated that:

> *"1. The courts shall be open to all and shall be free from any interference in their affairs."*

- Comment

The right to resort to the Judiciary is one of the fundamental rights provided for by the Jordanian Constitution as mentioned before. The judgment stated the following:

> *"If the right to resort to the Judiciary was a permit equally granted to all citizens and guaranteed by virtue of Article 101 of the Constitution, then it is conditional on not having used this permit in ill-will or to commit any offence."*[123]

The above was not established in this case as the plaintiff had no ill-will.

- Decision No. 11646/11 of the Court of Constantine, Algeria

- Summary of Facts (Case of "B. S." Against "F. A." and "S. Y.")

On 07/12/2008, a jewelry store, owned by the two defendants in this case, was robbed by anonymous persons. The owners filed a complaint and the Judicial Police made accusations against 16 persons, including the plaintiff in the current case, for committing two crimes: the formation of a criminal gang and the said robbery. Following the investigation, the Chamber of Accusation issued a decision of non-suit for some of the suspects, including the plaintiff. Consequently, the latter filed a lawsuit against the owners of the jewelry shop for false denunciation, but the Court issued a judgment and pronounced them innocent.

- Legal Issue

International covenants guaranteed the right to resort to the Judiciary for all persons, starting with the Universal Declaration of Human Rights in article 8 thereof, and also some regional instruments such as the African [Banjul] Charter on Human and Peoples' Rights, which stipulated in article 7 thereof that:

123 See the full text of the decision in Appendix 3, pp. 264-278.

> *"1. Every individual shall have the right to have his cause heard. This comprises:*
>
> *(a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;"*

Algeria ratified the Charter without any reservations and should therefore abide by its provisions.

The International Covenant on Civil and Political Rights did not provide for this right, which is considered a setback from what the Universal Declaration of Human Rights has enshrined.

Article 140 of the Algerian Constitution stipulated the following:

> *"All are equal before the Judiciary which is accessible to all and represented by the respect of the Law."*

The above was tackled in the decision.

- Comment

The defendants filed a complaint against anonymous persons for robbing their shop. During preliminary investigations, accusations were made against the plaintiff who was later found innocent of the charge by virtue of a judgment of non-suit. He then filed a complaint against the defendants for false denunciation and the Judge tried to characterize the facts accordingly. In reference to the robbery case, the judgment stated the following[124]:

> *"Whereas the Court established, after the investigation it conducted in session and after it reviewed the decision of the Chamber of Accusations issued on 04/06/2010, index no. 304-10 10, that the persons accused of false denunciation in the current case were only exercising their constitutional right to resort to the Judiciary; a right also ensured by the international conventions ratified by the Algerian State including the African Charter on Human and Peoples' Rights which ensures the right of the citizens to resort to national courts, in regard to any impeachment of their fundamental constitutional rights; whereas it was proven that the accused submitted a statement to the authorities in the aim of exercising their right to resort to the Judiciary for protection considering that they were victims and that their jewelry shop was robbed."*

It appears that -following the robbery- the defendants filed a complaint against anonymous persons which can be proven by the fact that they did not refer to the name of the plaintiff and it is the primary investigations that mentioned his name on the list of the accused. In any case, the defendants cannot be blamed for resorting to the Judiciary to recover their right that was lost

124 See the full text of the decision in Appendix 1, pp. 180-184.

following the robbery of the jewelry business they own. The Judge based his conclusion on the African Charter and the grounds of the judgment stipulated the following:

> *"Whereas, after reviewing article 7 of the African Charter, published in the Official Gazette issue no.6 of 1987, which, according to the Court's discretionary power, after its induction aims to establish the constitutional rules and fair trial rules for any country, and is part of the public order; the Judge should always bring it up by himself as long as it seeks to protect Human Rights, especially paragraph (a) thereof which stipulates that the right to litigate and resort to the Judiciary is guaranteed to all and provides for the right to refer to national Courts that are competent in examining an act that constitutes a violation of the recognized fundamental rights guaranteed by the conventions, laws, regulations and customs in force."*

Consequently, the judge dismissed the false denunciation misdemeanor against the defendants and pronounced them innocent, in conformity with relevant international and domestic laws.

5) Judicial Applications of Human Rights in Criminal Matters

Mutual respect between individuals and disciplined conduct constitute one of the pillars of society, an essential guarantee for its stability and the rule of security therein. Hence the importance of the Code of Criminal Procedure that is considered the fundamental pillar, upon which are based the criminalization of acts violating the safety of individuals and society and the decision of the proper punishment for such acts according to their gravity. In addition to the Penal Code, there are other complementary laws that provide for sanctioning actions; such as: the Exchange Law, Customs Law, Health Law, etc.

Given that the application of this law by the Judicial Police as well as by the Criminal Judge (prosecution, investigation and judgment) affect human rights by restricting them, all states based it on a fundamental pillar which is the principle of Criminal Legitimacy that is enshrined in countries constitutions and penal codes. This basic principle entails another equally important principle that consists in the non-retroactivity of the penal codes[125], the presumption of innocence, and the accurate interpretation of criminal texts.

Article 140 of the 1996 Algerian Constitution stipulated the following:

> *"Justice is founded on the principles of lawfulness and equality."*

Article 142 also provided for:

125 See Dr. Mohammad Youssef Alwan and Dr. Mohammad Khalil Al-Moussa, International Human Rights Law (...القانون الدولي) …, Part 2, op. cit., pp. 255-256. and Dulandah Yussuf, The Lexicon of Fair Trial Guarantees(الوجيز في ضمانات المحاكمة العادلة), Editions Houma, Second Edition, 2006, p. 29.

"Punishments should comply with the principles of lawfulness and individuality."

And article 1 of the Penal Code stated the following:

"No crime, and no penalty or security measures exist without a law."

Where national laws criminalize actions in regard to national crimes, there are a set of offences known as organized transnational crimes that have witnessed an increase since years and lead countries to conclude multilateral conventions to fight such crimes in an efficient manner. We will discuss the aforementioned by commenting on the Algerian Supreme Court decision issued on 02/22/2000.

- Decision of the Algerian Supreme Court Issued on 02/22/2000

- Summary of Facts

A group of people conducted illicit drug trafficking which entailed the filing of a public lawsuit. The defendants were brought before the Misdemeanors Department in the Court of M'Sila that issued a judgment on 04/08/1996 declaring lack of competence ratione materiae. The Public Prosecution challenged the said judgment before the M'Sila Judicial Council which issued a decision on 07/14/1996 annulling the former judgment and convicting the defendants: (L. D.), (H. Y.), (B. Y,), (B. M.), (Q. M.), (N. M.), (M. D.). and (M. H.) of misdemeanors consisting in drug transportation and trafficking through deceit, according to article 243 of the Health Law. The defendants (H. Y.) and (Q. M.) were also incriminated for the misdemeanor of forgery and were sentenced to enforceable imprisonment and fine payment. and (B. A.) was also convicted of the misdemeanor of using forged material and was sentenced to imprisonment and fine. The accused (D. A.) and (Q. A.) were found innocent of the charges attributed to them and the car with a falsified license plate and the seized sums of money were confiscated.

- Legal Issue

In reference to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances that was ratified in Vienna on 12/20/1988, we find that its preamble referred to confiscation as follows:

"Determined to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing."

This was confirmed therein in article 3 on offences and penalties; its first paragraph stipulated the following:

"1- Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

b) i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions."

Moreover, paragraph 4 provided for the following:

"4- a) Each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation."

Article 5 concerning confiscation detailed this procedure and provided for the following:

"1- Each Party shall adopt such measures as may be necessary to enable confiscation of:
Proceeds derived from offences established in accordance with paragraph 1 of article 3, or property the value of which corresponds to that of such proceeds."

- Comment

In reference to the decision, we find that the appellants' lawyers objected to different points in the Council's decision, such as: the violation of substantive rules in procedures or the commission of a mistake in law enforcement. However, we will stress on the ground of the challenge upon which one of the lawyers based his defense, that is the lack of legal basis. The lawyer considered that the Council judges decided the confiscation of the seized sums of money and of the car with a falsified license plate without referring to legal texts upon which they based their defense. This decision stipulated the following:

"But whereas, according to the provisions of article 246 of the Health Law, the confiscation of the vehicle that transported the narcotic drugs is an obligation. Therefore, the confiscation of the car is legal."[126]

Even if the judges didn't mention it in their decision, the legal text that provides for the confiscation of the car with a falsified license plate exists and is included in article 246 of the Health Law.

126 See the full text of the decision in Appendix 1, pp. 174-175.

The judges then moved to the part pertaining to the confiscation of the sums of money as they referred to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, as one of the most important grounds of the decision stated the following:

> *"And whereas in this regard the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which was ratified in Vienna on 12/20/1988, stipulates that "Each Party shall adopt such measures as may be necessary to enable confiscation of proceeds derived from offences established in accordance with article 3, paragraph 1," and consisting in the current case in drug trafficking.*

And whereas the mentioned convention was ratified by virtue of the presidential decree no. 41/95 dated 01/28/1995.

Algeria acceded to this Convention after ratifying it with reservations by virtue of the presidential decree no. 41/95 dated 01/28/1995[127]. The said Convention was approved on December 20, 1988 to complement and support previous conventions such as the only convention on drugs that was established in 1961.

We find that this Convention listed a number of incriminating acts compelling States to undertake appropriate measures to officially condemn and penalize such acts.

In reference to the decision, we find that judges referred to the Convention to justify the Council's decision which stated the following:

> *"And whereas article 132 of the Constitution explicitly acknowledges that ratified treaties and conventions are superior to the law in force and become therefore integrated in the Algerian jurisdiction;"*

This is the first decision issued by the higher Algerian judicial entity, that is explicitly based on the principle of supremacy. However, we will present some notes about the application of this principle in the current case: The judges referred to point a) of the first paragraph of article 5 to confirm the validity of the decision issued by Judicial Council of M'Sila, as shown in one of its grounds:

> *"whereas … stipulates: Each party undertakes all necessary measures to enable the confiscation of the proceeds of crimes provided for in article 3 paragraph 1".*

In the current case, the offence consists in drug trafficking; but in reference to this convention, similarly to conventions related to the criminal field, we find that all of them require that adequate measures be taken for their activation, as mentioned in paragraph 1 of article 2 that stipulated the following:

> *"… When fulfilling their obligations according to the Convention, the Parties shall undertake necessary measures, including legislative and ad-*

127 It was published in the Official Gazette issue no. 7 for 1995.

ministrative measures, in conformity with fundamental provisions of their respective domestic legislative systems."

Hence, this Convention cannot be directly executed and requires that legislative measures be taken after its ratification, and that according to the principle of criminal legitimacy. The judges thus decided the following:

"… It then becomes integrated in the internal legislation."

The direct integration of the Convention about crimes into the domestic legal system is considered a bold position on one hand, and we find on the other hand that these judges referred to the principle of supremacy while a legal vacuum exists in this regard since the Health Law does not comprise any text on the confiscation of proceeds of illicit drug trafficking. Thus, the Judges applied the principle of supremacy to fill the legal vacuum due to the absence of any domestic legal text to which the Vienna Convention on drugs is superior. Algeria only integrated the Convention in its legal system after the decision was issued, by virtue of law no. 04-18 dated December 25, 2004, pertaining to the prevention from Narcotic Drugs and Psychotropic Substances and the repression of their illicit use and trafficking:

Article 29 provided for the confiscation:

"In addition, the judicial party is allowed to rule with the following:

- The confiscation of used things, things that were destined to be used in the offence, or resulting things."

Article 34 had an absolute judgment in this regard and stipulated the following:

"The competent Judicial Authority orders in all cases to confiscate the cash used in committing offences stated in this law or the cash earned from these offences without prejudice to others' goodwill interests."

Regardless of what can be said concerning this decision, it enshrined the principle of supremacy to reinforce the fight against organized crime in its modern forms.

6) Right to a Fair Trial

The principle of criminal legitimacy does not provide for the prohibition of people's accusation and punishment in the absence of legal texts that criminalize their actions and behaviors and that provide for proper penalties for them. However, the accused should be criminally prosecuted and convicted according to standards that protect their rights as human beings and preserve their human dignity.

The right to a fair trial is considered one of the most prominent rights provided for in the International Human Rights Law, starting with the Universal Declaration of Human Rights, article 10 of which stipulated the following:

> *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*

The International Covenant on Civil and Political Rights also stipulated the following in paragraph 1 of article 14 thereof:

> *"1- All persons shall be equal before the courts and tribunals. 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."*

Also in this regard, regional conventions for human rights provided for this right considering it the pillar of the State of Law, and it was tackled in the European Convention on Human Rights (article 6), in the American Convention on Human Rights (article 8), in the African Charter on Human and Peoples' Rights (article 7) as well as in the Arab Charter on Human Rights (article 13).

Fair trial guarantees are divided into guarantees related to court, guarantees related to trial and other guarantees related to the accused[128].

We will tackle individuals' rights before trial, as well as the rights they have during trial through talking about the presumption of innocence, non-conviction twice for the same crime, the right to appear before a competent court duly constituted in accordance with the Law, the right to defense, the right to have recourse to a translator, the inadmissibility of arbitrary detention, the invalidity of illegal confessions or confessions extracted under torture, and the right to benefit from the lighter penalty along with the annulment of judgment in absentia.

These rights are clarified in what follows:

a- The Presumption of Innocence

The presumption of innocence from any accusation is one of the basic human rights. It protects one's dignity and keeps him from being subjected to prosecution without grounds or evidence.

The International Covenant on Civil and Political Rights provided for this right in paragraph 2 of article 14 that stipulated the following:

> *"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."*

We will tackle the aforementioned by commenting on the decision of the Court of Appeal of Amman (Jordan), no. 3861/2009 (tripartite panel) dated 03/18/2009, the decision of the Court of Appeal of Amman no. 40096/2009 issued on 09/13/2009, the decision no. 19735/11 issued by the Court of Constantine

128 See BURGORGUE-LARSEN, Laurence, UBEDA DE TORRES, Ahaya, Major decisions of the Inter-American Court for Human Rights (Les grandes décisions de la cour interaméricaine des droits de l'homme), BRYULANT, 2008, p. 671.

(Algeria) on 12/13/2011, and the decision issued by the Criminal Court of Missan (Iraq) on 04/23/2012.

- Decision No. 3861/2009 of Amman Court of Appeal (Jordan)

- Summary of Facts (Case of Organization "S." Against "F.", "N." and "D." Newspaper)

The defendant Mr. (F.), a journalist in the (D.) newspaper, published an article, the title of which was written in bold and read (The Transfer of the "S" File to the Judiciary – إحالة ملف «س» إلى القضاء) on 08/28/2007. The journalist relied in his article on declarations made by (S.). The article stated: "the preliminary results of the investigation on the situation of the Association of Cooperative Facilities (S.) will be brought to the Judiciary to be examined and to issue the appropriate legal judgments for the association's abuses." The next day the newspaper published an article refuting these allegations.

The association subject of the article filed a complaint before the Amman Prosecutor General against the journalist (F.), the editor (N.) and the newspaper for libel and slander and for violation of the Publications Law. The Criminal Court of First Instance in Amman issued a decision on 11/24/2008, convicting the 3 defendants for the violation of articles 5 and 7 of the Press and Publications Law. They were sentenced to pay a 500 Jordanian Dinar fine each.

The defendants challenged the judgment before the Amman Court of Appeal considering the conviction as void; journalist (F.), for his part, held that his article was consistent with article 4 of the Publications Law.

The Court of Appeal annulled the challenged judgment and pronounced the defendants not guilty.

- Legal Issue

The right to be presumed innocent until proven guilty is one of the guarantees allocated to the accused; such treatment should be given to the accused during the criminal investigations period and court procedures, and until the final examination of the merits of the case[129].

Paragraph 1 of article 11 of the Universal Declaration of Human Rights provided for the following:

> *"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law..."*

129 See Human Rights in the Establishment of Justice (حقوق الإنسان في مجال إقامة العدل) …, op. cit., p. 198. Busaqia Lahsan, Requirements of a Fair Trial (مقتضيات المحاكمة العادلة), A Formational session about "the Management of the Judicial Civil Case" (دورة تكوينية حول إدارة الدعوى القضائية المدنية), Higher School of Magistracy, Algeria, from May 17 to May 21, 2008, p.3. BURGORGUE-LARSEN, Laurence, UBEDA DE TORRES, Ahaya, The Bid Decisions … op.cit, p. 698.

and paragraph 2 of article 14 of the International Covenant on Civil and Political Rights stipulated the following:

> *"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."*

This is a basic guarantee forbidding any wrongful behavior towards individuals.

- Comment

In reference to the decision of Amman's Criminal Court of First Instance, we find that it condemned the journalist's article on the basis that:

> *"The defendant (journalist) relied in his comment on invalid facts and information … This is a deviation from the journalist's obligations and from the ethics of journalism; this also deviates journalism as a whole from its framework that consists in spreading awareness, intellect and culture. The published material violates therefore the provisions of article 7 of the Press and Publications Law."*

In reference to article 41 of the Publications Law, we find that the legislator presumed the existence of criminal intent in publication crimes assigned to the editor; the article assumes that the editor is knowledgeable about all articles and news. The Prosecutor General is therefore exempted from its duty to substantiate the crime:

> *"Transferring the burden of proving the refutation of the offence to the accused, in a way that contradicts the rules decided by virtue of the Country's public penal laws that article 103 of the Jordanian Constitution binds courts to abide by.*[130]*"*

Based on the above, the judges of the Court of Cassation decided that the presumption of innocence, provided for in article 174 of the Code of Criminal Procedure, was violated:

> *"The accused is innocent until proven guilty."*

The Court of Cassation then concluded that:

> *"The article violates the boundaries that separate between the jurisdiction and duties provided for by virtue of the Jordanian Constitution for each of the Country's authorities."*

Consequently, the Court of Cassation pronounced the following judgment:

130 See the full text of the decision in Appendix 3, pp. 296-298.

> *"Thus, the wording of paragraph "b" of article 41 of the Press and Publications Law violates the Jordanian Constitution…*
> *Based on the above, the Court of First Instance had to refrain from applying paragraph "b" of article 41 and to look into the extent to which the elements of the crime attributed to the editor-in-chief are available… and not to consider that his responsibility is superimposed and that he cannot let go of it. Whereas the Court of First Instance did not act in the aforementioned direction and considered that the editor-in-chief is an original doer without finding the elements of the crime that is attributed to him; therefore the Court's decision in this regard is in violation with the law."*

It is clear from the judges' conclusion that this text, presuming it is the newspaper editor's responsibility, ignores the presumption of innocence that each person is entitled to and that is provided for in the international conventions ratified by Jordan; even more, such text in the Penal Code affects the principle of separation of powers that is enshrined by the Constitution.

- Decision No. 40096/2009 of the Court of Appeal in Amman, Jordan

- Summary of Facts (Case of "S." Against "R. T., N." and "S" Newspaper)

We couldn't get hold of the full wording of the decision, however we can conclude from the grounds that the journalist (N.) in the newspaper (S.) published an article that says that the Management of the Jerash Festival terminated the contract of (Sh. J. Z.), and that the newspaper responded to this news and refuted it. However, (Sh. J. Z.) filed a complaint against the newspaper for violation of the Publications Law. Amman's Court of Appeal ruled with the innocence of the defendants.

- Legal Issue

We indicated in the previous case, which is consistent with this one, that both the International Covenant on Civil and Political Rights and the Jordanian Constitution enshrine the presumption of innocence, as discussed by the judges of the Court of Appeal in the light of the Publications Law.

- Comment

The grounds of the judgment reveal that the plaintiff considered that the journalist committed a publication crime violating article 27 of the Publications Law. However, the judges refuted this accusation considering that the financial and moral elements of the crime were not established. The grounds of judgment read as follows[131]:

> *"After closely examining all the data presented in this case, it was proven that the published news was not correct and that the newspaper responded and published a refutation of the news according to article*

131 See the available grounds of judgment in Appendix 3, pp. 298-300.

> *27 of the Press and Publications Law. The newspaper representative's miscomprehension had resulted in the publishing of the report by the newspaper. According to this last fact and to the evidence presented by the defense, especially the interview conducted with the Director of the Festival, the suspect did not know that the news article was incorrect and published it intentionally, and thus his bad faith was not proven what means that the moral element does not exist, which requires consequently the he be declared not guilty since the action along with this case do not constitute a crime punishable by the Law."*

The aforementioned confirms the presumption of innocence that constitutes the norm.

- Decision No. 19735/11 of the Court of Constantine, Algeria

- Summary of Facts (Case of the "J." Directorate Against "L. A." and "R. M.")

On 03/30/2011, a car containing 62 parcels of purchased merchandise intended to be smuggled outside Algeria was seized along with "L. A." and "R. M." who were on board. The Customs mobile squad confiscated the car and the merchandise, and both the driver and the passenger were criminally prosecuted for smuggling.

- Legal Issue

We stressed earlier on the importance of the presumption of innocence and its enshrinement in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights that was ratified by Algeria and consecrated in article 45 of its Constitution which stipulated the following:

> *"Any person is presumed not guilty until his culpability is established by a regular jurisdiction with all the guarantees required by the law."*

The respect of this basic principle was raised in this case as we will demonstrate in what follows:

- Comment

Upon arresting the suspects, "L. A." declared that he didn't know "R. M." and that he only rented his car. During trial, the suspect "R. M." declared that he transported merchandise and that "L. A." asked him to transport the merchandise he had bought. When transporting the merchandise, "R. M." did not know it was intended to be smuggled outside Algeria and he didn't know either that transporting this type of merchandise constituted a smuggling misdemeanor.

It is important that we examine the demands of the Prosecutor General as the decision stated the following[132]:

132 See the full text of the decision in Appendix 1, pp. 184-191.

"Whereas, after commenting on the pleading of the defense, the Prosecutor General's representative and the Customs Administration representative declared that, according to article 281 of the Customs Law which stipulates that the judge is not entitled to pronounce the offenders innocent based on their intent, the suspect cannot be pronounced innocent in the article of the Customs Law based on the his intent."

The truth is that such a wording breaches the general rules of the Penal Code and violates Algeria's international commitments and even its Constitution. Therefore, the judge referred to paragraph 2 of article 14 of the International Covenant on Civil and Political Rights, and built his conclusion as follows:

"Whereas in application of the general rules of criminal proceedings, every crime must have a moral element represented by the criminal intent that leads the offender to commit the crime with the knowledge of its legal components; whereas in the absence of the moral element, the crime is not substantiated; given that after the questioning conducted by the Court during trial, it was established that the suspect "R. M" clearly transported people and merchandise from the commercial market to Al Alma city through provinces and that he was not aware of the intention of the suspect "L. A." to smuggle the merchandise into the Tunisian territories through the city of Tabsa; however, the fact that the suspect "R. M." did not intend to commit the smuggling misdemeanor in this case is not recognized by the Customs legislation, and given that this misdemeanor is one, the general provisions of which, especially in the part thereof pertaining to the criminal intent, are subject to the wording of article 281 of the Customs Law that forbids the judge from pronouncing the suspect innocent based on his intent."

The Court reached the problematic of conflicting legal texts and its decision stipulated the following:

"The problem of conflict between paragraph 2 of article 14 of the International Covenant on Civil and Political Rights, providing for the international principle of the presumption of innocence, and article 281 of Customs Law forbidding the judge from pronouncing the suspect innocent based on his intent, is raised."

The Court referred to the Law to reach a decision in the case, considering that article 132 of the Algerian Constitution acknowledged the supremacy of the Convention over the Law. The judge decided the following:

"Consequently, the application of the provisions of article 281 of the Customs Law must be ruled out, since the investigation conducted by the Court with all its powers confirmed that the suspect "R. M." had neither the knowledge nor the intention to commit smuggling, what ascertains the presumption of innocence in his favor. The Court consequently declared him innocent based on paragraph 2 of article 14 of the provisions of the International Covenant on Civil and Political Rights."

The judge enshrined this basic guarantee in compliance with both international and domestic texts, and did not apply the provisions of the Customs Law.

- Decision of the Criminal Court in Missan, Iraq, Issued on 04/23/2012

- Summary of Facts (Case of Prosecution Against "A. R. A." and "M. R. A.")

Each of "A. R. A." and "M. R. A." were accused of participating with other suspects in the murder of the victim "K. A." by gun fire. When they appeared before the Missan Criminal Court for trial, the Court decided to annul the accusation against them for insufficiency of evidence. When the case was referred to the Criminal Panel at the Federal Court of Cassation, the latter held the aforementioned judgment.

- Legal Issue

In addition to the International Covenant, we find that paragraph Fifth of article 19 of the Iraqi Constitution stipulated the following:

> *"The accused is innocent until proven guilty in a fair legal trial…"*

The aforementioned was confirmed in this case.

- Comment

During the trial of the suspects for murder, the Criminal Court could not find enough evidence to prove the charges raised against them, considering this issue pertains to a crime, for which conviction is only decided by virtue of strong evidence, the validity of which cannot be doubted or questioned; one of the grounds of the decision stated the following[133]:

> *"The Criminal Court in Missan decided to annul the charges against the aforementioned suspects in lawsuit no. (57/C/2012) dated 02/13/2012… for lack of evidence against them in the offence of participating with other suspects -thus separating their case from that of the other suspects- in intercepting the victim "K. A." when he was driving his car on 06/15/2011 and shooting him near their house, which led to the victim's death after an armed conflict took place between them."*

The Criminal Panel at the Federal Court of Cassation approved the aforementioned and decided the following:

> *"After close examination and deliberation, the decision issued on 02/13/2012 in the lawsuit no. (75/C/2012) by the Criminal Court in Missan that annulled the accusation and released the suspect (1- A. R. A. and 2- M. R. A.), was found to be sound and concordant with the Law, and*

133 See the text of the decision in Appendix 2, pp. 239-240.

was therefore approved."

The Court of Cassation, which is a higher judicial entity, confirmed that the Criminal Court's decision was correct because no conviction shall take place in the absence of evidence.

b- Non-Conviction Twice for the Same Crime

All legal systems bring criminal offenders before the court of justice to try them and apply appropriate penalties against them. Therefore, they award their judgments in this respect the binding force to punish criminals whose cases are never to be opened again to serve justice. In this regard, we will tackle judgment no. 10870/11 of 05/31/2001 that was issued by the Criminal Court of Constantine, Algeria.

- Decision No. 10870/11 of the Criminal Court of Constantine (Algeria)

- Summary of Facts (Case of "S. N." Against "T. N.")

The plaintiff and the defendant got a divorce on 11/11/2008 and the custody of their 2 children (S.) and (N.) was awarded to the mother. The father was granted visitation rights during weekends and visitation rights during holidays were equally split between the two parents.

In June 2009, the defendant married a foreigner and moved with him abroad taking her 2 children with her, what deprived the plaintiff from visiting his children. The plaintiff filed a complaint against the mother for not returning the child. The defendant attended the court session and declared that she had been already tried and convicted for the same matter. The judge then examined the issue.

- Legal Issue

The principle of the inadmissibility of convicting the same person for the same crime twice is considered one of the most important guarantees of a fair trial, as provided for in paragraph 7 of article 14 of the International Covenant on Civil and Political Rights that stipulated the following:

> *"7. 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 procedure of each country."*

Both the African Charter on Human and Peoples' Rights and the Arab Charter on Human Rights did not tackle this principle.

The Algerian Constitution did not tackle this principle either, but the text of the Code of Criminal Procedure (as well as the Code of Civil Procedure) stipulated that final judgments hold the same power as the force of res judicata, which implicitly enshrines the aforementioned principle. This was tackled by the judge in the current case.

- Comment

When she appeared before Court in the case filed against her, the defendant declared she had been already tried before for the same matter. One of the grounds of judgment mentioned the following[134]:

> *"She declared that she had been previously prosecuted before the Court of Constantine for the same facts in a trial between the same parties, but by a different panel of judges, on. 06/16/2010 and was sentenced to 2 months of unenforceable imprisonment. She also stated that she challenged the judgment, but the Court of Appeal held the challenged judgment and the same penalty was confirmed by virtue of the decision issued by the Criminal Chamber in Constantine on 01/06/2011. The defendant presented two original copies of both the judgment and the decision to substantiate her depositions before the Court."*

Therefore, it appears that the plaintiff had sued the defendant before in a similar case and got her convicted, what she confirmed by presenting copies of the judgment that was issued against her. The plaintiff is therefore seeking to subject her to a second prosecution and conviction. The judge referred to paragraph 7 of article 14 of the International Covenant and to the copies of the judgments to decide the following:

> *"whereas, following the investigation it conducted during trial, and after examining judgment no. 13206-10 issued by the Court of Constantine on 06/16/2010 and judgment no. 00229-11 issued on 01/06/2011, and given that the defendant, by committing the aforementioned action that is considered a crime of not returning a child to his custodial parent according to article 328 of the Penal Code, it was proven to the Court that the defendant had been sentenced previously to two months of imprisonment; a sentence that was suspended and was ratified by the Judicial Council."*

The judge then reached the following conclusion:

> *"Whereas, in the present case, the Court of Misdemeanors is not entitled to retry the defendant according to article 7 of the International Covenant that provides for the inadmissibility of subjecting the defendant to trial or punishment again for a crime she had been convicted for by a judgment and decision that became final according to the wording of article 6 of the Code of Criminal Procedure which provides for the abatement of the public lawsuit that is intended to apply the penalty after the issuance of the authentic judgment, which is in total compliance with the provisions of the Covenant in this regard, what requires the acknowledgment of the abatement of the public lawsuit for previous adjudication, in application of the rules of fair trial."*

134 See the full text of the decision in Appendix 1, pp. 176-180.

The judgment was issued in compliance with the provisions of Algeria's international commitments.

c- Right to Appear Before a Competent Court Duly Constituted According to the Law

Paragraph 1 of article 14 of the International Covenant on Civil and Political Rights provided for the following:

> *"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 … hearing by a competent … tribunal established by law."*

The condition of appearing before a competent court is considered one of the guarantees relating to the Court, and the rules that determine the Court's competences are considered part of the public order in the State's domestic legal system. In this regard, we will tackle the decision no. 2399 issued by the Jordanian Court of Cassation on 01/24/2012.

- Decision No. 2399 of the Jordanian Court of Cassation

- Summary of Facts

(M. N. A.), (.M. Y. A.), (M. Y. A. M.), (Y. A. H.) and the company (N. M.) were accused of participating in the commission of fraud and breach of trust, according to the provisions of articles 417 and 67 of the Penal Code, and articles 3/a, 3/c/5 and 4/6/b of the Economic Crimes Code, before the State Security Court which issued a decision on 11/26/2011 declaring the non-liability of the suspects following the issuance of the General Amnesty Law in 2011.

The Prosecutor General contested the decision of the Court before the Court of Cassation on the basis that the State Security Court is no longer competent to rule in this case, as per the constitutional amendment of 2011, and that civil judiciary is the authority that is competent to look into the present case. However, the Court revoked the contested decision considering that the State Security Court is competent to rule in this case, but its composition is in violation with the Law.

- Legal Issue

Article 99 of the Jordanian Constitution provided for the following:

> *"The courts shall be divided into three categories:*
>
> *Civil Courts.*
> *Religious Courts.*
> *Special Courts."*

Paragraph 2 of article 101 also provided for the following:

> *"It is forbidden to try civilians in criminal cases before courts whose judges are not all civilians. However, this prohibition does not apply to crimes relating to treason, espionage, terrorism, drugs, and banknote counterfeiting."*

In reference to the State Security Court Law no. 17 of 1959, we find that article 2 stipulates the following:

> *"In special circumstances related to public interest, the Prime Minister is empowered to establish, one or many times, a competent court called State Security Court formed of a tripartite panel of civilian or military judges that are appointed by the Prime Minister, based on the recommendation of the Minister of Justice for civilian judges, and by the head of the Joint Chiefs of Staff for military judges."*

- Comment

Based on the above, the Court of Cassation decided the following:

> *"The constitutional amendments of 2011 did not take away from the mentioned Court its competence to examine the crimes falling under its jurisdiction as stipulated in article 3 of the State Security Law… but prohibited from the prosecution of any civilian in criminal cases before courts whose judges are not all civilians. However, this prohibition does not apply to crimes related to treason, espionage, terrorism, drugs, and banknote counterfeiting.*
>
> *Accordingly, the State Security Court is competent to examine this case because, in his letter no. 19/11/1/19810 dated 10/26/2008, the Prime Minister referred to the powers attributed to him by virtue of article 11/a/3 of the State Security Law and remanded the case to the aforementioned Court considering it is related to economic security.*[135]*"*

However, the constitutional amendment introduced a provision that rendered the examination of the case by an all-civilian tripartite panel compulsory. Thus, the Court of Cassation reached the following:

> *"and whereas the Court was not constituted of three civilian judges, the procedures undertaken from the mentioned date and the challenged decision are invalid as they violate the provisions of article 101/2 of the Jordanian Constitution."*

This shows that the systematic composition of the Court is a fundamental issue and an enshrinement to the individual's rights to be tried before his lawful judge.

135 See the complete text of the decision in Appendix 3, pp. 292-296.

d- The Right to Defense

Fair trial enshrined the right of the suspect to defend himself using all legal means[136], paragraph 3/b of article 14 of the International Covenant on Civil and Political Rights provided for the following:

> *"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
>
> *b- to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing."*

In this context, we will successively tackle the following decisions: the decision of the Jordanian High Court of Justice dated 06/10/2007, decision no. 104 dated 03/23/2006 of the Iraqi Central Criminal Court, 3 decisions of the Iraqi Federal Court of Cassation: decision no. 157 on 12/11/2006, decision no. 704/705 on 12/28/2011 and decision no. 187 on 04/10/2012, and decision no. 605 on 04/01/2012 of Al Qadsiyah Criminal Court.

- The Decision of the Jordanian High Court of Justice on 06/10/2007

- Summary of Facts (Case of "Z. M. A. S." Against "M. Q.")

Mr. (Z. M. A. S.) was appointed Judge of the Court of Cassation in 2000. On 04/12/2007, the Judicial Council issued decision no. 44 to transfer him to provisional retirement starting 04/15/2007 for loss of his authority of jurisdiction. Mr. (Z. M. A. S.) filed a lawsuit before the Jordanian High Court of Justice demanding the annulment of the decision because he did not have the chance to defend himself according to the provisions of article 14 of the International Covenant on Civil and Political Rights.

- Legal Issue

In reference to the Law on the Independence of the Judiciary, n. 15 for 2001, we find that article 16/b thereof stipulates the following:

> *"The Council has the right to put an end to a function of a judge or to order his provisional retirement even if he has not yet completed the legal period required to reach retirement."*

The aforementioned article grants this committee -which is formed from judges who, given the nature of their positions, are on top of the Jordanian Judiciary System- the power to check the extent to which judiciary practice standards are available in practitioner judges, to monitor their work and undertake decisions in this regard. In consequence, the committee has the right to issue decisions of transfer to provisional retirement.

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136 See Dulandah, The Lexicon of Fair Trial Guarantees (الوجيز في ضمانات المحاكمة العادلة)…, op. cit., p. 50.

- Comment

Based on the Judicial Council's competence to transfer the judges to provisional retirement, the decision stated the following:

> *"It has the right to transfer to provisional retirement without subjecting its decision to a critical examiner, as its power in this regard is a discretionary power that is not subject to judicial control as long as it is in compliance with the principle of legitimacy, and if emotional conviction is available therein.*[137]*"*

In regard to their reply to the plaintiff who claimed that the Judicial Council did not respect his right to defense, the judges' decision stated the following:

> *"We are not conducting a prosecution in order to demand that the trial be fair, independent, and unbiased, and that guarantees of defense be observed therein."*

Thus, through the concept of violation, the High Court of Justice stated that observing the right to defense is a must when a lawsuit is brought before the Court.

- Decision No. 104 of the Iraqi Central Criminal Court

- Summary of Facts (Case of Prosecution Against "M. Kh. Sh. J.")

The examining magistrate transferred the suspect (M. Kh. Sh. J.) to appear before the Iraqi Central Criminal Court in Baghdad, for commanding an armed group that aims at preventing and obstructing the application of laws as well as breaching security and stability in the country, according to article 194 of Penal Code. The Court convicted him for this offence in the decision it issued on 03/23/2006; the same Court issued the decision no. 104 on the same day sentencing him to death by hanging.

- Legal Issue

The Code of Criminal Procedure no. 23 for 1971 and its amendments stipulate the following:

> *"The lawsuit documents of the person who is sentenced to death shall be automatically sent to the Federal Court of Cassation to review the judgment in cassation. The accused is entitled to challenge the judgment before the Court of Cassation within 30 days, starting the second day of the pronouncement of the judgment."*

These procedures are considered a guarantee for the person who is sentenced to death.

137 See the complete text of the decision in Appendix 3, pp. 254-255.

- Comment

The aforementioned was observed in the present case as the decision of the Court stated the following:

> *"The Court explained to the aforementioned convict that his lawsuit documents will be automatically sent to the Court of Cassation for examination, and that he has the right to challenge the judgment before the Court of Cassation within 30 days after the second day of the judgment pronouncement.*[138]*"*

- Decision No. 157 of the Iraqi Federal Court of Cassation

- Summary of Facts (Case of Prosecution Against "A. M. H.")

On 12/25/2005, Dhi Qar Criminal Court convicted the suspect (A. M. H.) for the murder of the victim (N. S. A.) and sentenced him to life imprisonment according to article 132/111 of the Penal Code. The criminal panel at the Court of Cassation decided to dismiss the lawsuit and remand it to the Criminal Court in order to impose a heavier penalty. On 08/15/2006, the Criminal Court decided to sentence the convict to death by hanging.

- Legal Issue

The Code of Criminal Procedure no. 23 for 1971 and its amendments provide for the following:

> *"The lawsuit documents of the person who is sentenced to death shall be automatically sent to the Federal Court of Cassation to review the judgment in cassation. The accused is entitled to challenge the judgment before the Court of Cassation within 30 days, starting the second day of the pronouncement of the judgment."*

These procedures are considered a guarantee for the person who is sentenced to death.

- Comment

The Code of Criminal Procedure provides for –as we mentioned in the previous comment- explaining to the suspect that he has the right to challenge the judgment. However, the judges of the Second Degree Court blamed the Criminal Court for not allowing the suspect to defend himself; they decided the following:

> *"The Criminal Court sentenced the criminal (A. M. H.) to death by hanging… without explaining to him that his case documents will be automatically*

138 See the full text of the decision in Appendix 2, p. 227, and the conviction decision in pp. 223-224.

sent to the Federal Court of Cassation to review the judgment in cassation within the 30 days… and by doing so the Criminal Court misjudged.[139]"

The judges reached the following:

"Annulling the penalty decision issued by the Criminal Court of Dhi Qar … , returning the documents of the case to its original Court in order to bring the suspect before it for the pronouncement of a new penalty and to explain to him the provisions of article 224/d of the Code of Criminal Procedure, and warning the Court as to the necessity to observe procedures in Law in the future."

The aforementioned is considered a means to enable the convict to defend himself in conformity with the provisions of article 14 of the International Covenant on Civil and Political Rights.

- Decision No. 704/705 of the Iraqi Federal Court of Cassation

- Summary of Facts (Case of Prosecution Against "M. A. M.", "A. M. H". and "A. M. H.")

A heated argument took place between the victim (M. H. A.) and the suspect (M. A. M.) who fired a gun at (M. H. A.) wounding him; he also fired at (B. M. H.) and wounded his as well. Upon leaving the crime scene, the suspect shot (S. H. A.) in the chest what led to his death. All the aforementioned occurred with the complicity of the suspects (A. M. H.) and (A. M. H.) Medical attention prevented the death of (M. H. A.) and (B. M. H.)

The suspect (M. A. M.) was brought before the Criminal Court of Karbala and convicted for the murder of the victim (S. H. A.) and the attempted murder of the victims (M. H. A.) and (B. M. H.). The Court sentenced the suspect (M. A. M.) to death by hanging and the suspect (A. M. H.) to 15 years in prison, and decided to dismiss the accusations against the suspect (A. M. H.)

The lawyer of the convicted (M. A. M.) challenged the judgment of the Court requesting its annulment, and the transfer of his client to specialized medical committees. Following this request, the head of the public prosecution demanded that all decisions issued against the defendant (M. A. M.) be repealed and that he be retried by appearing before the Forensic Medical Committee, the decision of the Federal Court of Cassation observed the above.

- Legal Issue

The right to defense, enshrined by the International Covenant on Civil and Political Rights, aims at enabling the defendant to plead innocent from the charges brought against him by legal means, which is consecrated by domestic laws, namely the Code of Criminal Procedure. Proving that the suspect is guilty of the offence cannot be substantiated by the presence of its physical element

139 See the complete text of the decision in Appendix 2, pp. 222-223.

only, for it also requires the presence of the moral element that is translated by sound free will, which is also known as criminal liability prevention, as during his trial the accused of murder requested to be examined by a physician for suffering from a psychological disease but the Court did not take his request into consideration, which made both lawyers and Prosecution raise this point in their appeal in cassation as we will reveal hereinunder.

- Comment

Whereas the act of murder was established as the doing of the defendant by his own confession before the Court and by the testimony of the two injured victims, as stated in one of the grounds of the decision[140]:

> *"The aforementioned was substantiated by the confession of the defendant (M. A. M.) during the investigation and trial stages, the depositions of the plaintiffs who instituted this lawsuit and the witnesses of the incident, the depositions of the injured victims (M. H. A.) and (B. M. H.), the autopsy report of the deceased victim, the primary and final medical reports of the wounded, and the inspection report and map of the crime scene."*

Criminal liability rules require that the physical element, consisting in committing the act or refraining from it, be connected to the criminal's will to commit the act, on the condition that the criminal does not suffer from one of the conditions that prevent the establishment of his liability, such as insanity and the like which are known as liability prevention, for in this case, the crime loses an important element that prevents holding the perpetuator liable, as if he had lost his senses due to insanity or to another mental disorder. This condition is examined by the competent physician who determines if the criminal was aware or sane when he committed the crime.

In his defense, the defendant requested that he be examined by a physician. The decision of the Court stated the following:

> *"However, we noticed that the Karbala Criminal Court did not consider the request presented to it by the defendant's (M. A. M.) lawyer on 10/08/2009, demanding that his client be referred to the specialized Forensic Medical Committee to undergo medical examination since he suffers from schizophrenia and is not aware therefore of his criminal liability. The lawyer also attached thereto preliminary medical reports of the defendant's case."*

The Federal Court of Cassation affirmed the defendant's right to defend himself through repealing the judgment of the Court of Karbala, by stating the following:

> *"In order to reach a fair and sound judgment, the Court had to refer the defendant to the official medical committee to establish whether he was aware of his criminal liability or not."*

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140 See the complete text of the decision in Appendix 2, pp. 242-244.

The Court then decided the following:

> *"The decision was reached in mutual agreement and ordered to annul the judgments issued against the defendant (M. A. M) and to transfer the case back to its court in order to refer the defendant to a specialized official medical committee to examine him and determine the extent of his criminal responsibility."*

The aforementioned is in compliance with the requirements of a fair trial by allowing the accused to defend himself through legal procedures.

- Decision No. 187 of the Iraqi Federal Court of Cassation

- Summary of Facts (Case of Prosecution Against "S. M. K.")

After the accused (W. J.), (S. M. K.) and (A. A. Kh.) kidnapped the child (K. A. J.) and killed him in Al Foudayliya region, they were brought before Al Rasafa Criminal Court which incriminated and sentenced them to death by hanging, and inferred to decision no. 86 for 1994 regarding the defendant (S. M. K.) for being under 20 of age when he committed the crime. The lawyers of the suspect (S. M. K.) requested that he be retried due to a difference in his identity, what was approved by the Court of Cassation.

- Legal Issue

The aim behind establishing a Penal Code in each country is to control individuals' behaviors, prevent them from committing crimes -which is the preventive function- and penalize those who violate its provisions ensuring security and stability of the society. A sentence is considered personal and is imposed upon the criminal alone in order to serve justice. The aforementioned was tackled in this case through the defendant's attempt to defend himself by submitting a request asking to be retried.

- Comment

The verification of the identity of the defendant (S. M. .K.) was raised in this case as one of the grounds of judgment indicated the presence of an ambiguity in this regard as follows[141]:

> *"Since the Civil Status Identity Card (photocopy) attached to the case file indicates that the convict's name is (S. M. K.) and that he was born on 08/24/1989, while the letter no. S/160 dated 02/21/2012 (paragraph 7 thereof) issued by the Ministry of Justice/ Office of the Senior Agent mentioned that the aforementioned convict told the judge supervising the execution of the death penalty against him that his name was (S. K. M.) and that he was born in 1993, which made the supervising judge suspend the execution of the death penalty against him."*

141 See the full text of the decision in Appendix 2, pp. 245-246.

Facing this confusion, the judge found he was dealing with two different identities: (S. M. K.) and (S. K. M.), which prevented the execution of the penalty that was pronounced against the defendant (S. M. K.), since according to the defendant's statements which claimed he was (S. M. K.) he becomes not liable and the penalty cannot be applied against him because he is innocent. In this regard, we find that paragraph 4 of article 270 of the Code of Criminal Procedure stipulates the following:

> *"A re-trial can be requested for a case which resulted in a sentence or imposition of penalties for a felony or misdemeanor under the following circumstances:*
>
> *4- If after the judgment is issued, facts come to light, or documents are presented which were not known at the time of the trial, and these prove the innocence of the convicted person."*

Therefore, the Court of Cassation approved the defendant's request for retrial in the frame of exercising his right to defend himself; its decision stated the following:

> *"whereas such a claim requires further examination and in order to know the convict's correct name as indicated in duly recognized official documents or in an attached identification document, and since the conditions for retrial are substantiated, the Public Panel in the Federal Court of Cassation decided to affirm the request for retrial and to remand the case to the Criminal Court to verify the true identity of the convicted and issue the legally required decisions accordingly."*

The aforementioned is an application of fair trial requirements in respect to the guarantees pertaining to the accused.

- Decision no. 605 of the Criminal Court in Al Qadisiya, Iraq

- Summary of Facts (Case of Prosecution Against "A. A. S. Kh.")

While the Narcotics Control Bureau was conducting investigations with an accused, the defendant (A. A. S. Kh.) called the latter to buy narcotic pills. A police officer answered the phone claiming he was the drug dealer and set a meeting with him. The defendant showed up at the meeting where he was arrested and brought before the Court to stand trial.

- Legal Issue

The International Covenant on Civil and Political Rights enshrined the right to Defense in the aforementioned article 14/3/b, by virtue of which the accused assumes his own defense or appoints a lawyer for this purpose. However, in some cases the defendant cannot appoint a lawyer due to his financial situation given the high remuneration fees set by lawyers in major cases, especially criminal ones. State laws usually provide for judicial assistance procedures where a lawyer is appointed by the Court and is paid by the Treasury. Article 19/Eleventh of the

Iraqi Constitution stipulated the following:

> *"The court shall appoint a lawyer at the expense of the state for an accused of a felony or misdemeanor who does not have a defense lawyer."*

The aforementioned was applied in the current case.

- Comment

Drug trafficking is considered one of the major offences that are harshly sanctioned by the Penal Code, and is an offence for which the Law compels the defendant to defend himself through a lawyer.

In reference to this case, we find that the defendant (A. A. S. Kh.) who is accused of drug trafficking was brought before the Court and had no lawyer to undertake his defense. The Court decided therefore to appoint a lawyer for him as a means of judicial assistance. The decision stipulated the following:

> *"On the day of the trial, the Court was formed in the presence of the Deputy Prosecutor Mr. (H. A. A.) and the defendant was brought before the Court which appointed a lawyer to undertake the latter's defense and the public peremptory trial was initiated.* [142]*"*

As the defendant was not proven guilty, the Court decided to dismiss the charges against him and ruled as follows:

> *"Therefore, and based on the above, the Court decided to dismiss the accusation made against the defendant (A. A. S.), to discharge him for lack of evidence against him and to release him unless he was wanted in another case. The Court also ruled that the lawyer (A. R. Kh.) be paid 50 thousand Iraqi Dinars by the State Treasury after the judgment gains a peremptory status."*

The judgment is considered consistent with the Law since it enabled the suspect to defend himself by appointing a lawyer for his defense, especially that in such criminal cases the defense can only be undertaken by a lawyer.

e- The Right to Have Recourse to an Interpreter

If in normal cases the person appearing before the Court is a citizen of the State and is familiar with the State's language, it might happen that a foreigner too appears before that Court without knowing its language; the foreigner is therefore provided with an interpreter to help him defend himself. We will tackle the aforementioned through the decision issued by the Criminal Court of Karbala on 04/09/2012.

142 The full text of the decision in Appendix 2, pp. 250-252.

- Decision of the Criminal Court of Karbala, Iraq, Issued on 04/09/2012

- Summary of facts (Case of Prosecution Against "A. M. A. T.")

The defendant "A. M. A. T." - a Turkish citizen - entered Iraq through the Ibrahim Khalil border crossing point in the province of Kurdistan, where the competent authorities granted him a visa on the condition that he refers to the Residence Department within ten days.

The defendant entered the city of Karbala and was arrested and prosecuted before the Criminal Court of Karbala.

- Legal Issue

International human rights instruments provided for the right of a foreigner tried outside his country before a court that uses a language he does not understand, to have recourse to an interpreter to assist him in proceedings so that he understands the charges pressed against him and manages to defend himself.

Paragraph 3/f of article 14 of the International Covenant on Civil and Political Rights[143] provided for the following:

> *"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
>
> *f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."*

The aforementioned was tackled in the case of the defendant standing trial before the Criminal Court of Karbala.

- Comment

When the defendant "A. M. A. T" appeared before the Court for the offence of entering the Iraqi province in violation of the Foreigners' Residence Law, we found that the Court provided an interpreter for the defendant considering he was a Turkish citizen who did not speak or use the Arabic language. One of the grounds of the decision tackled this issue as follows:

> *"The defendant was brought before the Court and the trial began in presence of the litigants. The Court recorded the defendant's identity through the interpreter and the decision of transfer was read to him in public… Then the Court recorded the depositions of the defendant through the interpreter."*

The judges applied the provisions of paragraph 3/f of article 14 of the International Convention on Civil and Political Rights; the interpreter reported the de-

143 See Human Rights in the Establishment of Justice (حقوق الإنسان في مجال إقامة العدل) …, op. cit., p. 264.

fendant's identity to assure he is the person concerned in this case and the latter also defended himself through the interpreter. The decision stated the following:

> *"The defendant admitted -through the interpreter- that he entered Iraq from the Ibrahim Khalil border crossing point and that his passport was stamped in the province of Kurdistan, adding that he was not familiar with residence procedures."*

Apparently, the defendant's ignorance of the language made him disregard referring to the Residency Department, what proved him guilty and the Court decided upon the appropriate penalty in this case after having provided the defendant with an interpreter, which confirmed the legitimacy of the judgment.

f- Inadmissibility of Arbitrary Detention

Every human being has the right to the respect of his freedom and security, and without an effective guarantee to ensure them, it would be hard to protect other rights. Cases of detention and arrests without a reasonable cause -constituting arbitrary detention- increased. Article 9/1 of the International Covenant on Civil and Political Rights stipulated the following:

> *"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."*

The Judiciary imposed the respect of the aforementioned right; we will tackle it through commenting on the following decisions: the decision issued by the Jordanian Court of Cassation on 11/23/2003, the decision issued by the Iraqi Federal Supreme Court on 02/22/2011, and the 2 decisions issued by the Palestinian High Court of Justice dated 10/30/2005, 06/02/2008 and 12/21/2010.

- Decision of the Jordanian Court of Cassation Issued on 11/23/2003

- Summary of Facts

(B. M. M. Kh.), (M. A. A. Kh.), (A. Sh. M.) and (M. A. M) were accused of the rubbery of a showroom, intervention in the robbery, threatening and the fabrication of crimes. On 01/29/2003, the Criminal Court in Amman sentenced the defendants to temporary hard labor. The defendants challenged the judgment claiming that the police detained them for a long time, which constituted arbitrary detention against them. The Court of Appeal in Amman rejected the appeal, and the appellants then challenged the judgment before the Court of Cassation that annulled the repealed judgment.

- Legal Issue

Different Codes of Criminal Procedure stipulated that the police shall not detain people for a long period of time, or else such detainment shall be considered an arbitrary detention. Article 100 of the Jordanian Code of Criminal Procedure stated the following:

> *"The Judicial Police shall immediately listen to the depositions of the detainees who should be brought before the competent Prosecutor General within 24 hours of arrest."*

- Comment

In reference to the aforementioned case, the Court of Cassation concluded the following:

> *"The accused were arrested on 08/11/2001 and brought before the Prosecutor General on 08/20/2001; they were detained in the police station for 9 days, which under the rule of healthy legal logic and reason is a proof that … because logic dictates that the accused should not be detained for all this period in the police station and that they should be directly brought before the Prosecutor General.*[144]"

Thus the judges decided to annul the repealed judgment because the detention of the accused exceeded the reasonable period, which is consistent with the provisions of the International Covenant on Civil and Political Rights. The jurisprudence of the Criminal Chamber of the Court of Cassation excluded all evidence obtained under physical or moral coercion. This jurisprudence was reinforced after Jordan's ratification of the Convention against Torture in 2007, which resulted in the amendment of the provisions of article 208 of the Penal Code, which culminated in the latest constitutional amendment of 2011 that stipulated it explicitly.

- Decision of the Iraqi Federal Supreme Court Issued on 02/22/2011

- Summary of Facts

Based on the powers granted to him by virtue of article 237/2/a of the Customs Law for 1984, the Customs Manager of Tarbil border crossing point arrested (M. A. A.) and (Q. J. A.) according to article 194 of the Customs Law.

The Investigation Court of Al Ratba requested from the Federal Supreme Court to annul the aforementioned procedure because article 237 became inconsistent with the Iraqi Constitution. The Supreme Court decided to annul this text.

144 See the full text of the decision in Appendix 3, pp. 260-266.

Legal Issue

In reference to the Iraqi Constitution, we find that article 37 thereof provides for the following:

> *"No person may be kept in custody or investigated except according to a judicial decision."*

- Comment

Based on the aforementioned, the Federal Court examined the case as follows:

> *"Whereas paragraph A of clause 2 of the article 237 of the Customs Law no. 23 for 1948 stipulated: 'the detention decision shall be issued by the Director General or any other authorized party, and the detained shall be brought before the Customs Court within 3 days of his detention date.' Article 237 thus grants the jurisdiction of detaining the accused to the Director General or any other authorized party who is not a judge. Therefore, the aforementioned text contradicts and violates paragraph First/B of article 37 of the Iraqi Constitution of 2005 that has supremacy in application.*[145]"

The Court then concluded that this text is invalid by virtue of article 37 of the Constitution, which proves that the accused were arbitrarily detained and shows that the judgment issued by the Court is in compliance with the International Covenant.

- Decision of the Palestinian High Court of Justice Issued on 10/30/2005

- Summary of Facts (Case of "H. H. S. A." Against the Governor "N.")

Mr. "H. H. S. A" was arrested by Governor (N.) on 07/06/2005 pending further case investigation for attempted murder and burglary. The defendant was referred to the Criminal Court of First Instance in Nablus, which decided to release him on 06/06/2005 in return of a bail until he is tried. However, (M. N.) decided to detain him in the Nablus prison, on 06/07/2005. The accused challenged this decision before the Palestinian High Court of Justice, which annulled the detention decision.

- Legal Issue

Article 11/1 of the basic Law of the Palestinian Authority stipulated the following:

> *"Personal freedom is a natural right, it shall be guaranteed and preserved."*

145 See the full text of the decision in Appendix 2, pp. 210-212.

And article 98 provided for the following:

> *"Judges are independent and face no power in their judgment but Law, no authority shall interfere in judiciary or in justice matters."*

- Comment

In reference to the decision, we find that the judges stated the following:

> *"The Judicial Authority Law no. (1) for 2002 is the basic Law of Judiciary, it established peremptory rules that forbid interference in judicial matters to protect the Judicial Power from the intrusion of the Executive Power over the specialization and independence of the Judiciary.*[146]*"*

In reference to the basic Law of Judiciary, we find that article 82 thereof provided for the following:

> *"Judicial provisions shall be executed; abstaining from the execution or obstructing it is a crime penalized with imprisonment, and dismissal if the accused was an employee in the public sector or appointed for a public service."*

The Court then concluded that:

> *"The Code of Criminal Procedure no. (3) for 2001 imposed rules and restrictions that guarantee the respect of basic human rights that are stipulated by declarations, and international as well as regional conventions protecting human rights. By virtue of articles 117 and 119 of the aforementioned law, police stations and General Prosecutors cannot detain people under arrest for a period exceeding 48 hours; any detention exceeding this period falls under the competence of the Courts."*

The Court decided therefore to cancel the decision ordering the detention of the accused, which constitutes an arbitrary detention, what complies with the International Covenant on Civil and Political Rights.

- Decision of the Palestinian High Court of Justice Issued on 06/02/2008

- Summary of Facts (Case of "A. Y. A." and "S. D. Y." Against the Force "S")

The force (S.) arrested Mr. (A. Y. A.) and Mr. (S. D. Y.) from their residence in the village of Bidya on 05/01/2008. The latters were not brought before the Prosecutor General and the competent Courts and so, they filed a lawsuit before the High Court of Justice claiming that they were subject to arbitrary detention; the Court issued a decision annulling their detention.

146 See the full text of the decision in Appendix 5, pp. 347-351.

- Legal Issue

Article 11/1 of the Basic Law of the Palestinian Authority stipulated that:

> *"Personal freedom is a natural right, it shall be guaranteed and preserved."*

- Comment

Considering that the two detained were arrested by a military entity, the decision stipulated the following:

> *"Based on the aforementioned, we find that the party that arrested, detained and extended the detention of the plaintiffs operates under a private Law and has a defined jurisdiction that it cannot outstrip and beyond the limits of which it does not have the power to act, such limits being the military frame. And whereas the plaintiffs are civilians … the practice of the third defendant -consisting in detaining them and extending such detention for a period that is originally in violation with the Law- is a practice that breaches the rules of competence."*[147]

The Court decided to release the detained immediately as their detention was arbitrary.

- The Decision of the Palestinian High Court of Justice of 10/21/2010

- Summary of Facts (Case of Public Prosecution Against "A. M. A.")

Mr. (A. M. A.) was imprisoned for premeditated murder, and the Court of First Instance of Jericho issue a decision on 11/10/2010 rejecting his release. The detained challenged the judgment before the Jerusalem Court of Appeal, which rejected his appeal.

- Legal Issue

Article 121 of the Code of Criminal Procedures stipulated the following:

> *"It is forbidden to issue an arrest warrant against any accused in his absence, unless the judge was convinced, by virtue of medical reports, that the accused cannot be brought before the Court due to illness."*

- Comment

The appellant stressed that the challenged decision violated the aforementioned article since the decision of his detention was issued in his absence, which makes the procedure invalid. The Court of Appeal concluded the following:

147 See the full text of the decision in Appendix 5, pp. 345-347.

> *"Extending the detention in the absence of the appellant does not actually affect his right to defense before the Court; it is a temporary measure… This case is also a crime of premeditated murder as the General Prosecution indicated and the victim's family did not grant the appellant a grace period, which means that his release would endanger his life.*[148]"

The Court of Appeal considered therefore the appellant's detention was justified for his own good and a way to preserve his life, it was not considered arbitrary. Consequently the Court dismissed the appeal.

g- Invalidity of Illegal Confessions or Confessions Extracted Under Torture

We will tackle 2 decisions issued by the Jordanian Court of Cassation dated 11/23/2003 and 11/14/2011:

- Decision No. 820/2003 of the Jordanian Court of Cassation

- Summary of Facts

We already tackled the facts of this decision in the point relating to the inadmissibility of arbitrary detention, as one of the causes of cassation stated that the accused were tortured to take their depositions and they requested a report on the invalidity of their statements. The Court repealed the challenged decision.

- Legal Issue

Article 10/1 of the International Covenant on Civil and Political Rights provided for the following:

> *"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."*

This treatment requires the prohibition of the use of coercion and pressure means to obtain confessions from prisoners[149].

- Comment

In reference to the decision, we find that the judges concluded the following:

> *"The accused were arrested on 08/11/2001 and were brought before the Prosecutor General on 08/20/2001, their detention for 9 days in the Police Station is considered, under the rule of legal logic and reason, evidence that their confessions are not valid… The conclusion that is in compliance*

148 See the full text of the decision in Appendix 5, pp. 352-355.

149 See Human Rights in the Establishment of Justice (حقوق الإنسان في مجال إقامة العدل) …, op. cit., p. 208.

with the logic and reason is that they confessed under violence and torture, and that the Judicial Police personnel detained them by virtue of an administrative arrest warrant until marks of torture disappeared off their bodies.[150]"

The judges then added:

"Therefore, the facts obtained indicate that the circumstances of the depositions of the accused were not valid and not sound… and thus referring to these depositions as a basis for the Prosecution to prove charges against the accused violates the Law."

Consequently, the judges repealed the challenged judgment.

- Decision No. 1757/2011 of the Jordanian Court of Cassation

- Summary of Facts (Case of "S." Against "A.")

We could not obtain the facts of the decision, but we can conclude from the grounds of the judgment we examined that the depositions of "A", who is accused of robbery, were taken before the Judicial Police. "A" was brought before the Court to stand trial and he was convicted with the crime. His defense challenged the validity of his confession for being advanced in violation with the Law; the Court of Cassation ruled on the above in its decision.

- Legal Issue

In addition to article 10 of the aforementioned international covenant, the Jordanian Code of Criminal Procedure included various guarantees for obtaining a confession from an accused and indicated the cases of invalidity of such confession since the detained made a confession, the validity of which was questioned by the defense.

- Comment

After arresting and detaining the accused who was interrogated by the Judicial Police after a period of time, he was brought before the Court to stand trial and he was convicted afterwards according to his interrogation reports. His lawyer contested the confession's validity, which was supported by the Court of Cassation since the grounds of judgment[151] included the following:

"If the accused confessed before the Judicial Police, after a period exceeding 24 hours of detention as required in article (100) of the Code of Criminal Procedure, this confession is eliminated for violating the provisions of the Law. Therefore, as this confession before the Judicial Police is eliminated, its subsequent procedures which consist in the testimony of

150 See the full text of the decision in Appendix 3, pp. 260-266.

151 See the grounds of judgment in Appendix 3, pp. 311-313.

the detective who recorded the deposition of the accused and in revealing the robbery site are eliminated as well."

The aforementioned is in compliance with international and internal standards of fair trial.

h- Right to Benefit from the Lighter Penalty

All Penal Codes include and define the principle of imposing the lightest penalties or what is known by the "law favorable to the defendant"; it is also provided for under article 15/1 of the International Covenant on Civil and Political Rights, which reads as follows:

"1… Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."

No restriction to the wording of this article is admissible even in cases of state of emergency[152].

In this concern, we will tackle the decision issued by the Iraqi Federal Court of Cassation on 05/29/2008 and the decision issued by Amman Court of Appeal on 09/13/2010.

- Decision of the Iraqi Federal Court of Cassation Issued on 05/29/2008

- Summary of Facts (Case of Prosecution Against "M. M. R.")

The defendant (M. M. R.) was apprehended in the possession of a quantity of hashish on 12/26/2004, and he was tried before Dhi Qar Criminal Court, which issued its decision on 04/19/2005 finding the defendant guilty according to article 14/First/B/2 of the Narcotics Drug Law of year 1965 and sentenced him to 15 years imprisonment in compliance with the stipulations of article 132/3 of the Penal Code with confiscation of his movable and immovable properties and then deportation from Iraq after he ends his time in jail since he is of Egyptian nationality.

The Criminal Panel of the Court of Cassation decided to overturn the action and return it to its Court for a retrial; a decision was issued on 08/19/2007 sentencing the defendant to death by hanging. All papers of the lawsuit were transferred to the Court of Cassation and the Head of the General Prosecution asked for ratification of all decisions, and so this Court issued a judgment to reduce the penalty.

152 See Human Rights in the Administration of Justice. A Manual on Human Rights for Judges, Prosecutors and Lawyers, Office of the High Commissioner for Human Rights in cooperation with the International Bar Association, United Nations, New York and Geneva, 2003, p. 273.

- Legal Issue

Article 19/2 of the Iraqi Constitution stipulated the following:

> *"A harsher sentence than the applicable sentence at the time of the offence may not be imposed."*

- Comment

In reference to the decision issued by the Court, the facts show that a quantity of narcotics was apprehended in the possession of the defendant and he admitted himself that he had intentions of dealing and selling it to the American Forces, what makes him guilty of the crime of drug trafficking and thus the decision of the Criminal Court incriminating him is correct. However, in what concerns the death penalty, the decision stipulated the following:

> *"As to the penalty inflicted upon him sentencing him to death by hanging, it was found incorrect as the death penalty was suspended by virtue of the Coalition Provisional Authority Order No.7 part 3/1 for year 2003. When it was reinstituted by the Cabinet Order No. 3 for year 2004, it added a condition for the offenders who committed the offences provided for under article 14/First/B, C, D of the Narcotics Drug Law … that the purpose of the said offence be the transfer or the assistance in the activities and actions stipulated under article 190 of the Penal Code, and whereas it had not been proved by the evidence of the case that the defendant had transferred or assisted in the activities and actions stipulated under the aforementioned article, thus the provisions of the Cabinet Order No. 3 for year 2004 do not apply to the defendant's case … and therefore the penalty that should be inflicted upon the offender Mr. (M. M. R.) is life imprisonment[153]."*

This led to the reduction of his sentence, which is in compliance with the international standards in this regard.

- Decision of the Court of Appeal in Amman, Jordan, Issued on 09/13/2010

- Summary of Facts

Newspaper (T) published an article on 05/08/2005 on administrative and financial transgressions in a certain municipality; it also published another article on 05/15/2005 on the same issue. The plaintiff filed a complaint before the public prosecution pleading the violation of articles 7 and 27 of the Publications Law and articles 358, 359 and 360 of the Penal Code. The public prosecution referred the case to Amman Criminal Court of First Instance, which issued its decision on 10/14/2009 to amend the qualification of the criminal case of the defendants (A. A. F.) the editor in chief and (A. A. M.) from violating article 27 of the Publications Law to violating article 5 thereof and sentence them to a fine of 25 dinars

153 See the full text of the decision in Appendix 2, pp. 237-238.

and then impose the heavier penalty so the fine becomes 50 dinars.

The plaintiff and complainant filed an appeal demanding the re-description of the criminal case and the imposition of a heavier penalty in compliance with the law of 2007, but the Court rejected this appeal.

- Legal Issue

Article 46 of the Press and Publications Law for year 1998 stipulates the punishment of whoever violates its provisions by payment of a fine of no less than 3000 dinars; the fine was increased to a minimum of 5000 dinars upon the said article's amendment in 2007.

- Comment

In reference to the decision, the Court declared the following:

> *"Whereas the offence, object of the complaint, took place in 2005, meaning before the amended law became effective, then the provisions of Law No.8 for year 1998 should be applied, and whereas article 6 of the Penal code stipulates the non-execution of a law that imposes a heavier penalty; thus, the Court's execution of Law No.8 for year 1998 is in compliance with the law and this is what we rule upon."*

i- Annulment of the Judgment in Absentia

It is only reasonable that a person be tried while attending the hearings so he may defend himself; however, trials in absentia (absentee trials) usually do take place thus leading afterwards to challenges to the Courts' integrity; this is what we will tackle in the decision issued by the Federal Court of Cassation on 02/13/2012.

- Decision of the Iraqi Federal Court of Cassation Issued on 02/13/2012

- Summary of Facts (Case of Prosecution Against "R. Z. Z." and "Ra. Z. Z."

"R. Z. Z." and "Ra. Z. Z." were accused of murdering the victim (H. J. G.), and after conducting a trial in absentia the Dhi Qar Criminal Court issued a judgment convicting them on 08/18/2011. It sentenced the defendant "Ra. Z. Z." to death by hanging and the defendant "R. Z. Z." to life imprisonment as he did not reach yet 20 years of age.

Both defendants surrendered themselves on 08/04/2011 and they were tried again.

- Legal Issue

Article 14, paragraph 3/d of the International Covenant on Civil and Political Rights stipulates the following:

"3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(d) To be tried in his presence…"

This basic guarantee for the accused is considered one of the main guarantees that allow him to defend himself properly; he examines the charge against him, understands what it includes, and undertakes its refutation using legal means.

The Arab Charter included this guarantee as well under article 16, paragraph 3, which reads as follows:

"Everyone charged with a criminal offence shall be presumed innocent until proven guilty by a final judgment rendered according to law and, in the course of the investigation and trial, he shall enjoy the following minimum guarantees:

3. The right to be tried in his presence before an ordinary court..."

The Iraqi Code of Criminal Procedure included a provision on the trial in presence of the defendants, as it provided for the following:

"The trial should be held in presence of the defendant; the presence of his attorney shall not be substitute thereto."

It provided for some exceptions that allow trials in absentia and in the event a defendant was tried in his absence and such trial was not justified the higher panels shall annul the same, and this is what was proposed in the present case.

- Comment

After a trial was held in the absence of the defendants charged with murder and their surrendering themselves afterwards, Dhi Qar Court decided to subject them to a re-trial; the Court decision[154] stated the following:

"Dhi Qar Criminal Court had issued an absentee judgment against the defendants "R. Z. Z." and "Ra. Z. Z."… and on 08/04/2011 the convicted surrendered themselves to justice and they were re-tried; the Court decided on 08/18/2011 issue no. 1255/C/2011 to annul the charge against them according to article 406/1/A of the Penal Code and as referred to under articles 47, 48, and 49 thereof relating to accessories to offences as well as to the Cabinet Order No. 3 for year 2004, and release them and annul the absentee judgment issued against them."

Whereas after the defendants who were convicted in their absence surrendered themselves to justice, the in absentee judgment was rendered unjustified, and thus the Court decided to subject them to another trial in their presence; the file

154 The full text of the decision can be reviewed in Appendix 2, pp. 239-240.

was raised before the Criminal Panel of the Federal Court of Cassation, which acknowledged the results of the Criminal Court and endorsed its judgment and as mentioned in the grounds of the decision:

> *"Upon examination and deliberation, Dhi Qar Criminal Court decision - issued on August 2011 to withdraw the charge, release the defendants "R. Z. Z." and "Ra. Z. Z." and annul the in absentee judgment issued against them on 07/17/2011 for the reasons adopted by the Court- was found correct and in compliance with the Law."*

Such case confirms the guarantee of an in presence trial, as the defendants in this case held on to their claim of innocence from the offence they were charged with and the Court found them innocent because of insufficient evidence condemning them.

Conclusion

The Arab States have known - similar to the other countries of the world – deep changes in the aftermath of the cold war; such changes mainly took the form of a democratic movement aiming at taking the Arabs to a new level through the acknowledgement of their different rights within their constitutions that did not tackle such rights previously except in a very narrow scope. This procedure was accompanied by a tendency to commit to international human rights treaties adopted after World War Two so it constituted a beginning of a new era where individuals and collectivities are allowed to enjoy rights, most of which are inherent to the human being since birth. Hence, these instruments only came to reveal such rights and bring awareness to the necessity of respecting and guaranteeing the same.

In parallel, the Judicial Authority in the Arab States witnessed radical reforms that led it to achieving more independence and efficiency, since it is the mirror that reflects societies' progress, the guarantor who ensures the protection of the rights in case of any violation thereof and by any party whatsoever, and the refuge to which the individual turns when his rights are violated seeking therefrom justice and equity. The change in the Judiciary's work was not only limited to the amendment of the texts that regulate its course and determine its competences. Indeed, it was accompanied by an important amendment that consisted in incorporating the international treaties within the legal system of the Arab States and considering the same as legal sources from which judges draw their rulings in the cases brought before them, as well as justifications and grounds they use for issuing their judgments and decisions. The judges can therefore base themselves on strong foundations built on the commitment of their respective countries to abide by the provisions of such treaties and they try – as much as possible – to reduce the negative effects of the reservations made thereto by their countries.

In this regard, it is important not to neglect the constructive role of the judicial institutes in preparing the future judicial competencies through their educational programs and academic plans in which International Law and human rights standards have a significant part, and that in order to achieve justice and protect rights. The examination of the different judicial decisions and provisions, which constitute the essence of this manual, may enable us to decide on the matter. The exchange of knowledge and experiences in this field and the judges' examination of the experiences of their counterparts in the Arab States constitute a good opportunity to consolidate these principles and protect them as well as to expand their actual application in such a way so as to contribute to the advancement and prosperity of the society, the protection of its' individuals' rights both penal and civil, and the establishment of a rich capital that rivals the one we relied on while completing this study.

Therefore, all judicial decisions upon which we commented show that the judges relied on human rights standards in order to activate them in the best way possible; this constitutes an important course in the performance of the Arab States courts that came to be in compliance with the tendencies to enshrine international human rights instruments.

Chapter Three: Appendices

Appendix 1: Algerian Jurisprudence

1) The Constitutional Council

Decision no. 1 (decision by the Constitutional Council) dated 18 Muharram 1410 A.H. corresponding to August 20, 1989 A.D. relating to the elections law.

The Constitutional Council,

Upon notifying the President of the Republic, in accordance with article 67, paragraph 2, and articles 153, 155 and 156 of the Constitution by virtue of letter no. 259 A. A. H. dated August 8, 1989 and registered at the constitutional council on August 13, 1989 under no. 1 A.M.D 1989, in relation with the constitutionality of the provisions of law no. 13-89 dated 5 Muharram 1410 corresponding to August 7, 1990 published in the Official Gazette of the People's Democratic Republic of Algeria, issue no. 32 dated August 7, 1989 and especially articles 61, 62, 82, 85, 86, 92, 108, 110 and 111 thereof,

Upon articles 153, 154, 155, 156, 157, and 159 of the Constitution,

And in accordance with the regulation dated 5 Muharram 1410 A.H. corresponding to August 7, 1989 A.D. that determines the work procedures of the Constitutional Council, published in the Official Gazette of the People's Democratic Republic of Algeria, issue no. 32 dated August 7, 1989.

Third: In relation with article 86 as to the candidacy eligibility to the National Popular Council, the Constitutional Council considers that if the required age clause does not raise any particular remark, this is absolutely not the same case for the request that candidates and their spouses have the Algerian nationality by origin.

And with regard to the stipulations of the provisions of article 47 of the Constitution, they recognize the right of all citizens who fulfill all legal conditions to vote and be elected. The legal provisions adopted in this regard may impose conditions for the performance of this right but they may not eliminate it completely for a certain group of Algerian citizens due to their origin.

In other words, the exercise of this right may not be subject to restrictions that are necessary only in a democratic society in order to protect freedoms and rights provided for under the Constitution and then ensure their entire effect.

Whereas order no. 86-70 dated 17 Shawwal 1390 A.H. corresponding to

December 15, 1970 A.D. comprising the Algerian nationality law had determined the conditions for obtaining and losing the nationality, had shown in particular and in an accurate way the effects of obtaining the Algerian nationality, had acknowledged rights among which we mention in particular the right to undertake an electoral task five years after obtaining such nationality while taking into consideration that this term may be cancelled from another side by virtue of the nationalization decree.

Whereas such legal rule cannot be subject to a selective or partial execution,

Whereas the Algerian nationality by origin is not a requirement for the candidates to the elections in municipal and state popular councils,

Whereas article 28 of the Constitution acknowledges the principle of equality of the citizens before the law with no possibility of discrimination of any kind based on birth, race, gender, opinion or any other personal or social condition or circumstance,

Whereas any convention after ratification and publication thereof is incorporated into the domestic law, becomes superior to laws under article 123 of the Constitution, and enables all Algerian citizens to invoke it before judicial parties. This is the case particularly with regards to the United Nations Charter for year 1966 ratified by Law no. 08-89 dated 19 Ramadan 1409 A.H. corresponding to April 25, 1989 A.D. to which Algeria acceded by presidential decree no. 67-89 dated 11 Shawwal 1409 A.D. corresponding to May 16, 1989 A.D., and the African Charter on Human and Peoples' Rights ratified by decree no. 37-87 dated Jumada Al-Thani 1407 A.H. corresponding to February 3, 1987 A.D. Such legal instruments prohibit expressly any and all forms of discrimination.

Whereas voters have the right to assess each candidate's merits to undertake public functions. Thus, the Constitutional Council declares that the requirement of a nationality by origin for the candidate for the legislative elections is not in conformity with the Constitution.

It also states that paragraph 3 of article 86, which stipulates that the candidate's spouse should have Algerian nationality by origin, as well as the last paragraph of the same article, are not consistent with the Constitution in what they impose as a condition that is not relevant to the candidate's person or capacity and that is discriminatory.

2) Case File No. 168374 Decision Dated 07/15/1998

Case of (Z. K.) Against (A. A.)

Payment of guarantee by foreigners – Obligation to refer to and abide by the terms of the Algerian-Egyptian Judicial Agreement – Exemption from payment of legal guarantee, article 460 of Code of Civil Procedure.

It is established by law that "Any foreigner filing a case before the Judiciary as original plaintiff… shall deposit a guarantee for payment of expenses and compensations… unless provided otherwise under political agreements.

The ruling to pay the amount of the guarantee determined for foreigners imposes, for the application of such guarantee, the referral to the judicial agreement concluded between Algeria and the relevant foreign country.

Whereas it has been established in the present case that article 41 of the Algerian-Egyptian Agreement exempts the Egyptian nationals in Algeria from paying the guarantee and applies the same for Algerian nationals before the Egyptian Judiciary, therefore the appealed decision is correct.

Therefore, in this case, the appeal should be rejected.

The Supreme Court

In its public session held in its headquarters located at 11 December 1960 Street, El Biar, Algiers, Algeria.

After legal deliberation, issued the following decision:

Upon articles 231, 233, 234, 235, 239, 244, 257 et seq. of the Code of Civil Procedure,

After examining all papers and documents related to the case file and the petition to appeal in cassation submitted to the offices of the registry of the Supreme Court on September 17, 1996,

After hearing Mr. "B. T.", judge in charge of legal inquiry, presenting his written report, and Mr. "L. M. T.", prosecutor general, presenting his written claims,

Whereas (Z. K.) appealed in cassation the decision issued by Judicial Council of Oum el Bouaghi on July 2, 1996 to cancel the challenged ruling issued by Khenchela Court on April 26, 1995 and to oblige again the appellant (Z. K.) to pay the sum of 200,000 Algerian Dinars in counterpart of his due debt as well as a compensation amounting to 5000 Algerian Dinars for damages and judicial expenses.

Whereas the public prosecution asked in its claims to overturn the appealed decision,

Whereas the appeal that fulfilled all formalities is based on two grounds:

The first ground drawn from the violation of an essential rule in the procedures.

The council judges wrongfully considered that the appellant when he settled the judicial expenses and elected domicile in Algeria is considered to have paid

the guarantee. As for the compensations provided for under that article, the appellant is the creditor and not the debtor, and hence he is not concerned with the said compensations.

However, whereas in the matter of payment of the guarantee stipulated in article 460 of the Code of Civil Procedure the judicial agreements concluded between Algeria and other countries shall be respected.

Whereas in what concerns Egyptian nationals, the judicial agreement concluded with Egypt on 02/29/1964, article 41 of which includes an exemption for Egyptians in Algeria from paying the legal guarantee when before the Algerian Judiciary and the same applies for Algerians before the Egyptian Judiciary, should be referred to.

And whereas in what concerns the other aspect of this ground related to the compensation issue, the reference to the appellant to pay such compensation is nothing but the result of a material mistake and therefore the said ground raised is not valid.

The second ground drawn from the wrong application of the law.

The appellant did not deal with the appellee under any capacity whatsoever and completely denied having had such dealing what compelled the trial judges to apply article 333 of the Civil Code that imposes in such case the submission of written evidence to the allegations, which was not carried out.

However, whereas the trial judges have the absolute power to assess the evidence and prioritize the same, therefore the ground raised is not serious and based on the aforementioned the appeal should be rejected.

In consideration whereof,

The Supreme Court decides:

To accept the appeal in the form, reject the substance and impose the judicial expenses on the appellant.

The decision is hereby issued and pronounced in the public session held on July 15, 1998 by the Supreme Court, Civil Chamber, composed of:

3) State Council	**Pleading of a French lawyer before the Algerian Judiciary**
Chamber five	
Case file no.: 002111 (decision)	- Necessity to obtain permit by the President of the Bar Association competent at the regional level

Session date: 05/08/2000

- Sufficiency of electing domicile at the offices of an Algerian Lawyer (yes)

Reference: Article 16 of the Judicial Protocol concluded between Algeria and France on 08/28/1962.

Case: Y. B.

Against: M. B. A.

- The French lawyer may help and represent contending parties before the Algerian Judiciary in accordance with the same conditions that apply to the lawyers registered in an Algerian Bar provided he elects a domicile.

Therefore,

Whereas the Banking Commission and before any discussion in the substance issued an independent decision - in the matter of accepting the appointment of the lawyer by virtue of decision no. 3/99 dated 03/23/1999 – to reject her appointment as she did not fulfill the requirements of article 6 of Law no. 04/91 dated 01/08/1991 that include provisions regulating the profession of law, in that she did not submit to the Banking Commission the document confirming her compliance with the previously mentioned requirements.

Whereas (Y. B.) submitted through the lawyers (K. M. A.) and (Y. M.) a petition to annul this decision invoking article 16 of the Judicial Protocol concluded between Algeria and France on 08/28/1962 according to which the lawyer (J. M.) was not obliged to submit the special permit delivered by the President of the Bar Association stipulated in article 6 of the law dated 01/08/1991 that includes provisions regulating the profession of law, and that the mere election of a domicile, as is the case in the present lawsuit, was sufficient for the fulfillment of the legal conditions.

She therefore asks the annulment of the appealed decision and the recognition that her appointment as legal representative be accepted before all Algerian Judicial Parties including the State Council.

Whereas it is established by law that in application of article 6 of law dated 01/08/1991, the foreign lawyer is compelled to prepare himself/herself duly, submit to Algerian Judicial Parties a permit by the President of the Bar Association who is competent at the regional level, and elect domicile in the office of an Algerian Lawyer practicing in the jurisdiction of the Judicial Council in compliance with the international conventions.

Whereas it is established that in accordance with article 16 of the Judicial Protocol concluded between Algeria and France on 08/28/1962, the French lawyer may help and represent contending parties before all Algerian Judicial Parties according to the same conditions applicable to the lawyers registered in the Algerian Bar Association provided s/he elects domicile in the jurisdiction of the civil judicial party.

Whereas in the present case, lawyer (J. M.) registered in the Paris Bar Association, submitted to the Banking Commission the proxy for representing (Y. B.) and defending her interests and elected domicile in the office of lawyer (A.) in 3 Ammar Ben Sheikh Street, Algeria and therefore in such circumstances, it must be said that she abided by the legal obligation imposed by the above-mentioned international protocol and that the Banking Commission upon requiring the special permit issued by the President of the Bar Association stipulated in article 6 of law dated 01/08/1991 had ignored the requirements of the judicial protocol dated 01/08/1991 concluded between Algeria and France.

Therefore, its decision should be annulled and it must be recognized that such annulment does not incur any legal consequences and does not affect the validity of the decision issued in the matter as (Y. B.) is legally represented by lawyer B. before the Algerian Judicial Council.

Whereas from another side, it should be declared that it is not possible to rule on the petition to issue a decision by the State Council to accept the representation by a French lawyer before the Supreme Court according to the same assessment standards since a decision on this petition was reached on the same day in case no. 2129.

In consideration whereof,

The State Council

Dealing with public and in presence annulment cases

Decides the following:

In the form: to accept the appeal in the form

In the substance: to annul the appealed decision whereby the representation by the French lawyer (J. M.), registered in the Paris Bar Association, before the Banking Commission was rejected.

Decides that such annulment does not incur legal effects on the decision issued by the Banking Commission.

Decides that it is not possible to rule on the second ground of the petition related to the representation by a foreign lawyer before the State Council.

To put the burden of the expenses on the public treasury.

The decision is hereby issued and pronounced in the public session held on May 8, 2000 by the State Council that is composed of:

4) Case File No. 288587 Decision Dated 12/11/2002

Case of (Y. Y.) Against (Kh. B.)

Substance: Physical coercion – commercial debt – non-settlement thereof – application of physical coercion – non-permissibility in accordance with the International Covenant on Economic, Social and Cultural Rights.

The principle: In application of the provisions of article 11 of the International Covenant on Economic, Social and Cultural Rights as well as the provisions of the International Covenant on Civil and Political Rights, no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation, and since Algeria's accession to those covenants it is no longer permissible to execute any voluntary commitments, whether civil or commercial, by means of physical coercion.

The Supreme Court

In its public session held at 11 December 1960 Street, El Biar, Algeria.
After legal deliberation, issued the following decision:

Upon articles 231, 233, 235, 239, 244, 257 et seq. of the Code of Civil Procedure,
After examining all papers and documents related to the case file and the petition to appeal in cassation submitted on October 2, 2001,

After hearing Mr. "Z. A.", judge in charge of legal inquiry, presenting his written report and Mr. "L. M. T." prosecutor general, presenting his written claims,
Whereas the appellant petitioned for overturning the decision index no. 140 issued on 09/08/2001 by Batna Judicial Council providing for the annulment of the returned order and the issuance again of a decision to apply physical coercion on the appellant for two years because of his refusal to settle his due commercial debt.

In form: Whereas the appeal in cassation had fulfilled all formalities it is therefore correct.

In substance: Whereas the facts of the case may be determined in the summary action filed by the appellee and which stated that the appellant had made a written confession acknowledging the debt on 04/24/2000 estimated at 800,000 Algerian Dinars as a result of a transaction between him and the appellant, that the latter had committed himself to settling such debt by the term specified on 06/24/2000, and that upon the expiry of such term the appellee initiated execution procedures that resulted in the issuance of a record of insolvency.

And whereas all execution procedures were exhausted, he is hereby petitioning for the issuance of an order for execution by means of physical coercion.

Whereas the appellant responded confirming his due debt to the appellee of the aforementioned amount, and taking into consideration his financial status, he is asking for ruling out the execution by means of physical coercion and allowing him a respite to settle the debt on installments over one year as from the date of issuance of the present order.

The lawsuit ended by the issuance of an order to reject the petition to execute by means of physical coercion in accordance with the provisions of article 11 of the International Covenant on Civil and Political Rights.

In the appeal, the Council issued the decision being appealed in cassation.

And whereas the appeal in cassation is based on three grounds.

In the third ground: drawn from the wrong application of the law.

Whereas the appellant pleads regarding the appealed decision, that the judges of the Council had stated that the Judge of First Instance Court had based his judgment on the provisions of article 11 of the International Covenant on Civil and Political Rights, which does not apply to the commercial contract as the rights tackled in this article are civil rights and not commercial rights, and therefore he pleads that stating its application to the civil rights excluding the commercial rights is a mistake in understanding the law and therefore their decision may be repealed.

And whereas the appellant's objections to what came in the appealed decision are valid, since and after referring to the provisions of Law no. 08-89 dated April 25, 1989, which provides for the approval of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights approved by the General Assembly of the United Nations on December 16, 1966.

And Upon Royal Decree no. 67-89 dated May 16, 1989 relating to Algeria's accession to the above-mentioned covenants.

And after examining the provisions of article 11 of the above-mentioned covenant, published in the Official Gazette of the Algerian Republic, issue no. 11 dated February 26, 1997, which read as follows: "No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation."

Therefore, the application of physical coercion is no longer permissible for the non-execution by the debtor of his contractual obligation.

And whereas the obligations' sources are divided between voluntary sources and involuntary sources and that since Algeria's accession to those covenants it is no longer permissible to execute the voluntary obligations – whether the sources thereof are civil or commercial transactions – by means of physical coercion.

And whereas as established by the facts of the case that the source of the obligation to be executed is a transaction, i.e. a commercial contract.

Whereas the aforementioned article 11 does not distinguish between commercial and non-commercial contractual obligations, it is therefore sufficient to have a contractual obligation whether the object thereof is a civil or commercial transaction in order to prohibit the execution of this obligation by means of physical coercion. Judging to the contrary shall be considered a violation of the provisions of the aforementioned article 11 that subjects this ruling to annulment.

And whereas there are no other remaining issues to rule on, therefore this judgment should be repealed without any transfer thereof.

In consideration whereof,

The Supreme Court decides

That the appeal is valid in the form

And in the substance to overturn and annul the appealed decision issued on 09/08/2001 by Batna Judicial Council and without any transfer thereof.

And to impose the judicial expenses on the appellee.

The decision is hereby issued and pronounced in the public session held on December 11, 2002, by the Supreme Court, Civil Chamber, Division 1 composed of:

5) People's Democratic Republic of Algeria

In the Name of the Algerian People

Judgment

In the public hearing held at the seat of the Court of Constantine

On: **March twenty-nine of the year two thousand and eleven**

Examination of Misdemeanor Cases

The hereinafter criminal judgment was issued between the following parties:
The Attorney for the Republic – as a public interest plaintiff

and/ (A. A.)

1) ..... **Victim** **Present** **Divorced**

From one side and from another side

Against / (Sh. M.)

1)..... **Accused** **Present not under arrest** **Divorced**

Statement of the Merits of the Case

Whereas the accused (Sh. M.) is being prosecuted by the Court of Constantine's Attorney for the Republic for committing – from a time that did not exceed yet the statutory limitation period and within the jurisdiction of the Court of Constantine and its Judicial Council – a misdemeanor consisting in not returning a child to his custodian parent, which is prohibited and punishable by virtue of article 328 of the Penal Code;

Whereas the parties to the case were referred to the Court of Misdemeanors by direct summons procedures in accordance with the wording of articles 334 and 335 of the Code of Criminal Procedure;

Whereas the file of the case and its accompanying minutes indicate that the merits of the case go back to 09/19/2010, a date in which the complainant filed an official lawsuit before the Attorney for the Republic against the respondent, on the grounds that both parties to the case were married and had two children "A." and "A. M.", but that the couple had frequent disagreements, and so a petition for divorce was filed. The marital bond was broken by the sole will of the husband, the divorcee was empowered with all of her rights, and the custody of the children was awarded to their father as the divorcee (the defendant) resides in France. Visitations rights were scheduled for her on each Thursday and Friday. However, within the framework of the visitation rights granted to the respondent, the latter took the children on Thursday 09/16/2010 under the presumption that she would return them to their father on Friday, but she kept the children with her until Saturday 09/19/2010 what is qualified according to the complainant as the misdemeanor of not returning a child to his custodian parent, since the respondent violated the requirements of the judgment issued by the Family Court. Consequently, the Judicial Police listened and recorded the statements of the parties and the official minutes were sent to the Attorney for the Republic who decided to take legal action against the accused on the charge of misdemeanor of not returning the children to their custodian parent and to refer the parties to the trial court so they be prosecuted in accordance with the Law;

Whereas the accused attended the hearing - meaning that she shall be tried in presence- and refuted the merits attributed to her stating that she only wanted to see her children;

Whereas the victim attended the hearing, meaning the judgment shall be pronounced in presence of both victim and accused, and confirmed the statements he made before the judicial police and in his complaint before the Attorney for the Republic;

Whereas the victim was instituted a civil party in the hearing according to articles 03 and 242 of the Code of Criminal Procedure through his lawyer "B. A. B.", and he ceded his right to compensation;

Whereas the representative of the Attorney for the Republic demanded the application of the Law;

Whereas the lawyer of the accused, esq. "D. R.", pleaded that his client was innocent;

Whereas the defendant was given the right to make the last statement according to the wording of article 353 of the Code of Criminal Procedure and she asked for forgiveness from the Court;

Whereas the case was therefore reexamined in the hearing of 03/29/2011 for the pronouncement of the below judgment,

Therefore, the Court,

After examining the file of the case and its accompanying documents,

After examining the wordings of articles 131 and 132 of the Algerian Constitution,

After examining the Convention on the Rights of the Child ratified by Algeria on December 19, 1992,

After examining the Presidential Decree on the ratification of the Convention on the Rights of the Child No. 461/92, dated December 19, 1992,

After examining the texts of the Penal Code, namely article 212 thereof et seq.,

After examining the texts of the Penal Code, namely article 328 thereof,

After examination in accordance with the Law

In the Public Action:

Following the legal discussions and the final investigation that took place during the hearing as well as the statements recorded in the report of the Judicial Police, the Court found that the charge for which the defendant is being prosecuted is the misdemeanor of not returning a child to his custodian parent, which is an act punishable by virtue of article 328 of the Penal Code;

Whereas in order for the aforementioned misdemeanor to be substantiated, the father or the mother should refrain from returning the minor - whose custody was ruled on, either by a decision with summary enforcement or by a final decision- to the person who is entitled to claim him;

Whereas in application of the provisions of articles 131 and 132 of the Constitution, the President of the Republic ratifies treaties relating to the Law on Persons, the framework of which encompasses the Convention of the Rights of the Child that is ratified by virtue of presidential decree no. 461/92 and whereas the said convention became superior to the Law after its ratification in accordance with the conditions stipulated by the Constitution;

Whereas after examining articles 03 and paragraph 03 of article 09 of the Convention on the Rights of the Child published in the Official Gazette issue no. 91 for 1992, the States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests; and given that in all children-related procedures conducted by the courts the child's best interests are taken into account;

Whereas the Court found that while exercising the visitation right she was awarded by virtue of the decision issued by the Family Court on 01/12/2009 and falling within maintaining personal relationship on a regular basis with the child that has been separated from his parents as per the international Convention, the defendant picked her kids up on Thursday 09/16/2010 and returned them on Saturday 09/19/2010 thus violating the provisions of the judgment that awarded her custody until Friday only and she justified her action before the Court saying she lived in France and needed to see her children;

Whereas in application of the provisions of article 03 and paragraph 03 of article 09 of the Convention on the Rights of the Child and article 328 of the Penal Code, and according to the jurisprudences of the Supreme Court, particularly in its decision issued on 04/14/1997, file no. 145722 (unpublished), and whereas in order for the misdemeanor of not returning a child to his custodian parent to be established, a basic element should be necessarily present and brought forward by the conviction decision, namely the accused abstention from returning the minor. The establishment of this element is undertaken by means of a record of abstention made by a process server after having followed enforcement procedures; and whereas it was established in the present case that the accused abstained from returning the children by a day, violating the provisions of the judgment issued by the Family Court. Whereas the aforementioned falls in the framework of the provisions of the Convention on the Rights of the Child that requires that States Parties respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, provided it is not in contradiction with the child's best interests and as long as there is no interpretation as to the child's best interests, which requires that jurisprudence be given way in this case, and which is interpreted in this regard

in the inherent right of the child to grow up with both his parents and visit them both. Given the absence of the moral element for this misdemeanor of not returning the child, that consists in the intention of not returning him, as well as the absence of the physical element, the establishment of which - as per the requirements of the Supreme Court- is contingent upon producing a record of abstention issued by a process server, and in application of the child's best interests. the accused should therefore be pronounced innocent as she merely exercised her right that is enshrined by virtue of the Convention on the Rights of the Child;

and whereas the judicial expenses are incumbent upon the Public Treasury according to the provisions of article 364 of the Code of Criminal Procedure;

In consideration whereof,

Upon dealing with misdemeanor cases of first instance, in open court and in the presence of both the accused and the victim, the Court decided the following:

In the Public Action:

The accused (Sh. M.) is declared innocent from the offence attributed to her.

The judicial expenses shall be incumbent upon the Public Treasury.

The judgment is hereby issued and pronounced expressly in the public hearing held on the aforementioned date. The original copy was signed by us, the President and the Court Clerk.

President Court Clerk

6) File No. 167921 Decision of 02/22/2000

Case of M.- A. and his Accomplices Against N. - A.

Confiscation – Seizure – Money Resulting from Drug Trafficking – Correct Application of the Law.

Article 246 of the Health Law.

It is legally established that confiscating the car that was used as means of transport to narcotics is required by Law.

The fate of funds acquired from illegal drug trafficking is considered a legal procedure by itself even if the competent judges did not mention the applicable legal text, knowing that Algeria had ratified the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances approved in Vienna on 12/20/1988. The said Convention allows the following: "each Party

shall adopt such measures as may be necessary to enable confiscation of proceeds derived from offences established in accordance with article 3, paragraph 1."

Accordingly the appealed decision came as a sound application of the Law.

The Supreme Court

After hearing the judge in charge of legal inquiry… reading his report and the Attorney General … presenting his claims;

Deciding in the appeals in cassation filed on July 16 and 17, 1996 by the defendants M. A., B. M., H. Y., B. Y., Q. M., N. M., M. H. and L. D. against the decision issued by the Judicial Council of M'Sila on 07/14/1996 that annulled the judgment issued on 04/08/1996 by the Court of M'Sila claiming lack of competence ratione materiae. The decision once more convicted the suspects L. D., H. Y., B. Y., B. M., Q. M., N. M., M. D. and M. H. of misdemeanor charges consisting in transportation of and trafficking in narcotics by means of deceit according to the provisions of article 243 of the Health Law, as well as of the misdemeanor of counterfeit for the suspects H. Y. and Q. M. As a punishment, the Court sentenced each of them to applicable ten year of imprisonment with payment of an applicable fine of 20,000 Algerian Dinars. The Court also convicted the accused B. A. of the misdemeanor of using falsified material in accordance with article 222 of the Penal Code and sentenced him to an applicable one year imprisonment and to the payment of a 1,000-Algerian Dinar fine (applicable sentence). The Court pronounced the accused D. Y. and Q. A. innocent from the accusations attributed to them and ordered the confiscation of the car, the papers of which were falsified and of the seized amounts of money.

In the Second Ground Raised: By the lawyer…., Against Q. M. and drawn from the Lack of Legal Basis

On the plea that the car, the papers of which were falsified, was confiscated along with the seized amounts of money without any mention of legal texts, especially article 246 of the Health Law; therefore, this is considered a lack of legal basis and it shall incur the repeal of the decision.

However, whereas the confiscation of the means by which narcotic drugs were transported is required by the provisions of article 246 of the Health Law, what made the confiscation of the car lawful from one side;
And from Another Side:

Whereas it is proven that the accused obtained the amounts of money seized by the Judicial Police through selling drugs;

Whereas, in this context the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances that was ratified in Vienna on 12/20/1988 stipulates that "each Party shall adopt such measures as may be necessary

to enable confiscation of proceeds derived from offences established in accordance with article 3, paragraph 1." that consists in the present case in drug dealing;

Whereas the aforementioned Convention was ratified by virtue of presidential decree no. 41/95, dated 01/28/1995;

And given that article 132 of the Constitution recognizes expressly that ratified treaties and conventions have a status that is superior to that of the law in force and they become consequently part of the Algerian legislation;

Therefore, the confiscation of the amounts of money obtained from illicit drug trafficking, as is the case in the current legal action, is considered a legal procedure in itself even if the trial judges did not really mention the legal text that should be applied. Accordingly, the pleas made against the challenged decision are not well-founded and should be dismissed along with the challenge for having no valid grounds.

7) Court of Constantine

Misdemeanor Division In the name of the Algerian People

Judgment

List No.: 04577/11 **In the public hearing held in the seat of the Court of Constantine**

Index No.: 10870/11 **on the thirty first of May of the year two thousand and eleven**

Date of the Judgment: **05/31/11 Examination of Misdemeanor Cases**

Presided by Mr(s): M. Y. President Direct summonsAssisted by Mr(s): M. Sh.
Court Clerk In the presence of Mr(s): M. AR. Attorney for the Republic

**** Statement of the Merits of the Case ****

Whereas the accused (T. N..) is being prosecuted by the Court of Constantine's Attorney for the Republic for committing – from a time that did not exceed yet the statutory limitation period and within the jurisdiction of the Court of Constantine and its Judicial Council – a misdemeanor consisting in not returning a child to his custodian parent, which is prohibited and punishable by virtue of article 328 of the Penal Code;

Whereas the parties to the case were referred to the Court of Misdemeanors by direct summons procedures in accordance with the wording of articles 334 and 335 of the Code of Criminal Procedure;

Whereas the file of the case and its accompanying minutes indicate that the merits of the case go back to 03/08/2010, a date on which the complainant Sh. N. filed an official complaint before the Attorney for the Republic against the respondent T. N., on the grounds that the latter who is a dentist was his wife and they had two children: S. four years and N. 3 years, that due to the bad relationship between them a judgment was issued by the Family Affairs Division on 11/11/2008 breaking their marital bond with granting custody of the children to their mother and visitation rights to the father on weekends and national and religious holidays equally distributed between both parents. The said judgment also stated that in the month of July of the year 2009 the defendant got married again to a man outside the country, in Tunisia to be exact, and that she took her children with her thus depriving her ex-husband from his visitation rights and breaching the provisions of the judicial judgment issued by the Family Court and that awarded the father visitation rights to see his children.

Whereas based on a prosecution directive issued by the Attorney for the Republic, the parties were referred to the Judicial Police for investigation in the case. The Judicial Police recorded their depositions in official reports, which were sent to the Attorney for the Republic who decided to bring legal action against the accused and referred the parties to the relevant Court so they be prosecuted according to the Law.

Whereas the accused attended the trial, which incurs her prosecution in her presence, and she stated that she was previously tried for the same merits and with the same parties by the Court of Misdemeanors in Constantine but with a different panel of judges on 06/16/2010; that she had received an unenforceable imprisonment sentence of two months; that she challenged the judgment and that such judgment was sustained and the same sentence was held by virtue of the decision issued by the Penal Chamber of Constantine on 01/06/2011; and that she presented two original copies of the judgment and the decision substantiating her statements before the Court;

Whereas the victim did not attend the trial, and therefore the judgment should be pronounced in absentia;

Whereas the representative of the Attorney for the Republic pleaded that the law be applied.

Whereas the defense lawyer A. pleaded for her client and demanded that the public lawsuit be pronounced abated for previous adjudication or otherwise that the defendant be pronounced innocent.

Whereas the last statement was given to the accused according to the provisions of article 353 of the Code of Criminal Procedure and that the latter asked the Court for forgiveness.

And whereas the case was therefore reexamined in the hearing of 05/31/2011 for the pronouncement of the below judgment;

****Therefore, the Court****

After examining the file of the case and its accompanying documents,

After examining the provisions of articles 131 and 132 of the Algerian Constitution,

After examining the International Convention on Civil and Political Rights ratified by Algeria on May 16, 1989, and after examining the presidential decree on the ratification of the International Covenant published in the Official Gazette issue no. 20 dated May 17, 1989,

After examining the full text of the International Covenant published in the Official Gazette issue no. 11 dated February 26, 1997, particularly paragraph 07 of article 14 thereof relating to the implementation in the current case,

After examining the interpretative declarations on articles 01, 22 and 23 that are considered as reservations that the Court should avoid applying as long as they are relevant to the issue of the sovereignty of the State over its territories and that are not relevant to article 07, the implementation of which is required in the current case,

After examining the texts of the Code of Criminal Procedure, especially articles 06 and 212 thereof,

After examining the texts of the Penal Code, namely article 328 thereof,

And after examination in accordance with the Law

In the Public Action:

Whereas the legal discussions and the final investigation that took place during the hearing session as well as the statements recorded in the official complaint submitted to the Attorney for the Republic and the statements in the report of the Judiciary Police established to the Court that the charge for which the defendant is being prosecuted is the misdemeanor of not returning a child to his custodian parent that is indicated and punishable according to article 328 of the Penal Code; Whereas it is established by Law, in accordance with the provisions of article 06 of the Code of Criminal Procedure and that the public legal action aiming at applying the sentence abates by the issuance of the judgment having the force of res judicata; and whereas in application of the provisions of articles 131 and 132 of the Constitution, the President of the Republic ratifies treaties pertaining to the Law on persons the frame of which also includes the International Covenant on Civil and Political Rights that was ratified by presidential

decree no. 89-67 and given that the latter and its ratification according to the clauses provided for under the Constitution is superior to the Law;

Whereas, after examining article 14 of the International Covenant published in the Official Gazette issue no. 11 for the year 1997 that according to the discretionary power of the Court after its induction aims at establishing the rules of fair trial considered as part of the public order and that the judge is supposed to bring up at his own discretion as long as they aim at protecting human rights, especially paragraph 7 which stipulates that no person shall be subjected to trial or punishment twice for a crime he had already been convicted for or exonerated from by a final judgment in accordance with the Code of Criminal Procedure of each country.

Whereas after the investigation undertaken in the court session and after examining the judgment of the Court of Misdemeanors in Constantine issued on 06/16/2010 index no. 13206/10 and the decision of the Criminal Chamber issued on 01/06/2011 index no. 00229/11, the Court found that, in the framework of what the accused committed, considered as the offence of not returning a child to his custodian parent according to article 328 of the Penal Code, the defendant was previously sentenced to an unenforceable two-month imprisonment penalty that was approved by the Judicial Council;

Whereas the Court of Misdemeanors is not entitled in the current case to retry the defendant in application of paragraph 7 of article 14 of the International Covenant, which provides for the inadmissibility of subjecting the accused to prosecution or punishment for a crime she was convicted for before, and that according to the judgment and decision which became final according to article 06 of the Code of Criminal Procedure that stipulates that the public lawsuit aiming at applying the punishment by the issuance of the judgment having the force of res judicata and which is completely consistent with the provisions of the Covenant in this regard, and therefore the public lawsuit should be pronounced abated due to previous adjudication in conformity with the rules of fair trial. And whereas the judicial expenses are incumbent upon the Public Treasury according to the provisions of article 364 of the Code of Criminal Procedure;

**** In consideration whereof,****

Upon dealing in misdemeanor cases of first instance, in open court, in the presence of the accused and in the absence of the victim, the Court decided:

In the Public Action:

To declare the abatement of the public action due to previous adjudication according to article 06 of the Code of Criminal Procedure.

The judicial expenses shall be incumbent upon the Public Treasury.

The judgment is hereby issued and pronounced publically in open court held on the date mentioned above and the original judgment was signed by us, the President and the Court Clerk.

President **Court Clerk**

8) People's Democratic Republic of Algeria

Judicial Council of Constantine **Court of Constantine**

In the Name of the Algerian People

Judgment Misdemeanors Division

In the open court session held in the seat of the Court of **Constantine** on the **fourteenth of June two thousand eleven, to examine misdemeanor cases**

List No.: 04143/**11**

Index No.: 11646/**11**

Date of the Judgment: **06/14/11**

Presided by Mr(s): **M. Y. President**

Assisted by Mr(s): **M. Sh. Court Clerk**

In the Presence of Mr(s): **B. N. Attorney for the Republic**

The criminal judgment hereinafter stated was issued in regard to the dispute between the following parties:

Mr. Attorney for the Republic- public interest plaintiff

Public Prosecution Against/ F. A. and S. Y.

**** Statement of the Merits of the Case ****

Whereas the two accused, "F. A." and "S. Y.", are prosecuted by the public prosecution of the Court of Constantine for committing the misdemeanor of false denunciation that is defined and penalized under article 300 of the Penal Code, since a period of time not exceeding that of the statute of limitation in the jurisdiction of the Court of Constantine and its Judicial Council,

Whereas the parties to this case have been referred to the Court of Misdemeanors by direct summons procedures in accordance with the provisions of articles 334 and 335 of the Code of Criminal Procedure,

Whereas we conclude from the case file and the reports attached thereto that the facts of the case date back to the night of 07/12/2008 when the jewelry business the two accused own and work at was subject to theft by unknown persons and that a complaint was filed before the Judicial Police by the accused on the grounds that their shop was broken into through its fragile ceiling, made from wood gypsum and clay, and the metal safe was forcefully opened and different types of jewelry were stolen weighing about 15 kg of gold and having the value of 152 million centimes. Following this, the Judicial Police prompted the necessary investigation for information collection and several persons were interviewed then presented to the Attorney for the Republic who issued accusations against 16 of them, including "B. S.", on grounds of two crimes namely, the formation of a criminal gang and the said theft, under circumstances of nighttime, plurality, use of fake keys and other devices used for breaking and entry, and dishonesty. The procedures were initiated and the statements of the accused were heard; they were then referred to the investigating judge who, after completing his work, transferred the file to the prosecutor general to be referred to the Chamber of Accusation which declared a nonsuit in favor of some the accused, including "B. S.",

Whereas, following the order of nonsuit issued by the Chamber of Accusation, in favor of several accused including "B. S.", the latter filed a complaint before the Attorney for the Republic against the jewelry shop owners, "F. A." and "S. Y.", on grounds of false denunciation. They were thus prosecuted by the Attorney for the Republic of the Court of Constantine for false denunciation pursuant to article 300 of the Penal Code, and referred to the Court of Misdemeanors by direct summons procedures to be tried in accordance with the Law,

Whereas the accused "F. A." attended the trial session leading to that the trial be conducted in his presence, and he denied the facts attributed to him stating he did not know the victim and that he filed his complaint against unknown persons,

Whereas the accused "S. Y." attended the trial session leading to that the trial be conducted in his presence, and he denied the facts attributed to him stating he did not know the victim, that he filed his complaint against unknown persons and that the investigation aiming at identifying the perpetrators was conducted by the judicial police,

Whereas the victim attended the trial session leading to that the judgment be pronounced in the presence of both litigating parties, and he insisted that the accused meant him harm by filing the complaint and that he suffered considerably from the prosecution, which ended by the issuance of a decision by the Chamber of Accusation declaring nonsuit and thus dismissing the case,

Whereas the victim, via his attorney Mr. T., was made civil party to this trial, pursuant to articles 3 and 242 of the Code of Criminal Procedure, claiming 1,000,000.00 Algerian dinars in compulsory compensation for the damages inflicted upon him; whereas the public prosecution representative requested

an enforceable six-month imprisonment penalty along with an enforceable 20,000-Algerian dinar fine,

Whereas the defense attorney of the accused, Mr. M., pleaded for his clients and presented a claim for the declaration of innocence of the two accused; whereas and pursuant to article 353 of the Code of Criminal Procedure, the last word was given to the accused who asked for forgiveness from the court,

Whereas the case was therefore reexamined in the hearing of 06/14/2011 for the pronouncement of the below judgment.

Therefore, the Court

After examining the case file and its accompanying documents,

After examining articles 131 and 132 of the Algerian Constitution,

After examining the African Charter on Human and Peoples' Rights, ratified by Algeria on February 03, 1987,

After examining the decree of ratification no. 37-87 dated February 03, 1987,

After examining the full text of the African Charter on Human and Peoples' Rights published in the Official Gazette no. 06 dated February 04, 1987, especially article 07, paragraph (a) thereof, to be applied in the present case,

After examining the provisions of the Code of Criminal Procedure, especially article 300 thereof,

In the Public Action:

Whereas it was made evident to the Court, through in-session legal argumentations and final investigation, as well as statements recorded in the official complaint submitted to the Attorney for the Republic and in the Judicial Police report, that the accused is charged with the misdemeanor of false denunciation, defined and penalized under article 300 of the Penal Code,

Whereas it is set by law that the misdemeanor of false denunciation, against one person or more, shall be reported to the Judicial Police or Administrative Police, Whereas and in application of the provisions of articles 131 and 132 of the Constitution, the President of the Republic ratifies treaties regarding the law on persons, which include the African Charter on Human and Peoples' Rights ratified by virtue of the Presidential Decree No. 37-87, and the said Charter prevails over the law after its ratification in accordance with the conditions set forth by the Constitution,

Whereas and after examining article 7 of the African Charter, published in the Official Gazette issue no.6 of 1987, which, according to the discretionary power of the Court and after inference by induction, aims to set constitutional and fair trial rules for all countries, is considered part of the public order, and judges should refer to it at their own discretion as it seeks the protection of human rights, especially paragraph (a) of article 7, which provides that the right to litigate and resort to justice is enshrined for all and includes the right to refer to national courts that have jurisdiction to examine acts violating the recognized fundamental rights ensured by conventions, laws, regulations and customs in force,

Whereas it was made evident to this Court, after the investigation conducted in the session and after reviewing the decision of the Chamber of Accusation issued on 04/06/2010, index no. 304-1010, that the accused of false denunciation in the present case were only exercising their constitutional right to resort to justice, a right also ensured by the international conventions endorsed by the Algerian State and which include the African Charter on Human and Peoples' Rights that ensures the right of the citizens to resort to national courts in regard to any violation of their fundamental constitutional rights; whereas it was established that the accused had filed their complaint before the competent authorities in an act of exercising their right to resort to the Judiciary seeking protection, as they were victims of a theft that occurred in their jewelry business where 15 kg of gold and large sums of money were stolen; and whereas the statement submitted to the competent authorities was not false, according to article 300 of the Penal Code, that it merely included a complaint against unknown persons, that the declaration of nonsuit by the Chamber of Accusation in favor of "B. S." is part of its judicial work in investigating and attributing charges according to evidence established through judicial investigation, and that the accused in the present case have nothing to do with what has been issued by the competent authorities, each in its area of competence, as long as the in-session investigation did not prove any ill-will and false statements; therefore, the innocence of the accused should be declared as they were only exercising their right to resort to the Judiciary – a right ensured by the constitution and reaffirmed by article 7, paragraph (a) of the African Charter on Human and Peoples' Rights.

In the Civil Action:

Whereas the right in civil actions is related to the claim of compensation for damages resulting from a crime, misdemeanor or infraction, or the right of anyone who personally suffered direct damages resulting from the offence; whereas it was established in the present case that the two accused were found in the public action innocent of the charges attributed to them, which renders the civil claims for compensation unfounded as the basis for a civil action should be in conformity with article 3 of the Code of Criminal Procedure,

And whereas legal expenses are incumbent upon the public treasury pursuant to article 364 of the Code of Criminal Procedure,

**** In Consideration whereof****

Upon examining misdemeanor cases, the Court ruled, in its first instance capacity, in open court and in the presence of the litigants, as follows:

In the Public Action:

The two accused, "F. A."and S. Youssef, are declared innocent of the charges attributed to them pursuant to article 364 of the Code of Criminal Procedure.

In the Civil Action:

The case is dismissed for lack of cause of action.

Legal expenses are to be covered by the public treasury.

The judgment is hereby rendered publicly in open court session held on the above mentioned date, and we, the President and the Court Clerk have signed the original hereof.

President **Court Clerk**

9) Judicial Council of Constantine

Court of Constantine **People's Democratic Republic of Algeria**
Misdemeanors Division **In the Name of the Algerian People**

Judgment

In the open court session held in the Court of **Constantine**

on the t**hirteenth of December two thousand eleven, to examine misdemeanor cases**

List No.: **14243/11**

Index No.: **19735/11**

Date of the Judgment: **12/13/11**

Presided by Mr(s): **M. Y. President** Direct Summons

Assisted by Mr(s): **M. Sh. Court Clerk**

In the Presence of Mr(s): **Z. S. Attorney for the Republic**

The criminal judgment hereinafter stated was issued in regard to the dispute between the following parties: Public Prosecution against/

Mr. Attorney for the Republic- public interest plaintiff

**** Statement of the Merits of the Case ****

Whereas the two accused, "L. A." and "R. M.", are prosecuted by the public prosecution of the Court of Constantine for committing the misdemeanor of smuggling, defined and penalized under article 10 of Order No. 05-06 on anti-smuggling, and that since a period of time not exceeding that of the statute of limitation in the jurisdiction of the Court of Constantine and its Judicial Council,

Whereas the parties to this case have been referred to the Court of Misdemeanors by direct summons procedures in accordance with the provisions of articles 334 and 335 of the Code of Criminal Procedure,

Whereas, we conclude from the case file and reports attached thereto, that the facts of the dispute date back to 03/30/2011 when mobile customs controls in Constantine stopped a vehicle, of Chana brand, license plate no. 19-307-04978, with two passengers on board. Upon examination of the car papers, it found that the vehicle belongs to "S. A."; it found as well that the name of the driver was "R. M." and the name of the passenger "L. A." of Tunisian nationality. After searching the vehicle, the customs found 62 packages containing 72,280 dinner spoons and forks and 3500 teaspoons. "L. A." stated the merchandise belongs to him and that he bought it from shops in the city of El Eulma to transport it to the city of Tebessa and later smuggle it into Tunisia in batches without passing through customs; he also stated he does not know "R. M." but only rented the vehicle from him in an agreement to transport the merchandise from El Eulma to Tebessa in exchange for 7000 Algerian dinars as full transport fees. The statements of the infractors were officially recorded by the customs officers, the vehicle and merchandise were seized, and all parties and case documents were referred to the Attorney for the Republic of the Court of Constantine who decided to criminally prosecute the accused on grounds of the misdemeanor of smuggling pursuant to article 10 of Order No. 05-06 and to refer parties to the Court of Misdemeanors to be tried according to the Law,

Whereas the accused "R. M." attended the trial session leading to that the trial be conducted in his presence, and he stated that he works in merchandise transport from El Eulma city to other provinces using a vehicle he does not own, which belongs to "S. A." who charitably lends it to him, and that on the date of the incident he was approached by "L. A." who introduced himself as a Tunisian national and explained that he bought merchandise in packages. Then, after some negotiations on the transport fee they agreed on the amount of 7000 Algerian dinars. He also stated that on the one hand, he did not know that the accused "L.A." was smuggling merchandise from Algeria to Tunisia across the Tunisian borders through the Tebessa crossing point without passing through

customs, and on the other hand he was not aware that transporting this type of merchandise is considered a smuggling misdemeanor,

Whereas the accused "L. A." did not attend this session and nothing in the case file indicates that the summons document was handed to him in person and therefore he shall be tried in absentia pursuant to article 346,

Whereas Customs Administration was lawfully made civil party to this trial and submitted a memorandum requesting the Court orders the confiscation of the seized merchandise to the benefit of the treasury, as well as the confiscation of the vehicle and the payment of a fiscal fine amounting to 731,400.00 Algerian dinars, which is a fine 10 times the combined value of the seized merchandise and vehicle,

Whereas the representative of the public prosecution requested the imposition of a two-year imprisonment penalty and the confiscation of the merchandise and vehicle,

Whereas the defense attorney, Mr. M., of the attending accused, pleaded in favor of the latter and submitted in the first place a declaration of innocence of his client on grounds of his intent given that he was not aware of the plans of the Tunisian accused,

Whereas the representative of the public prosecution, along with the representative of the Customs Administration, stated, in answer to the defense argument, that a declaration of innocence cannot be made based on the intent of the accused pursuant to article 281 of the Customs Law, which stipulates that judges shall not acquit offenders on grounds of their intent,

Whereas Mr. L. submitted, in the last pleadings, a memorandum founded on the right of the vehicle owner "S. A.", requesting the Court orders the vehicle be returned to its owner,

Whereas, after the closing of the pleadings, the last word was given to the attending accused, pursuant to article 353 of the Code of Criminal Procedure, who asked for forgiveness from the Court,

Whereas the case was therefore reexamined in the hearing of 12/13/2011 for the pronouncement of the below judgment,

Therefore, the Court

After examining the case file and its accompanying documents,

After examining the provisions of articles 131 and 132 of the Algerian Constitution,

After examining the International Covenant on Civil and Political Rights, ratified by Algeria on May 16, 1989,

After examining the Presidential Decree on the ratification of the International Covenant, published in the Official Gazette No. 20 on May 17, 1989,

After examining the full text of the International Covenant published in the Official Gazette No. 11 dated February 26, 1997, especially article 14, paragraph 2 thereof, to be applied in the present case,

After examining the interpretative declarations on articles 1, 22 and 23, which are considered reservations not to be applied by the Court as they are relevant to the State's sovereignty in its territories, and are not related to article 14 to be applied in the present case,

After examining the Customs Law, especially article 281 thereof,

After examining the provisions of the Code of Criminal Procedure, especially article 212 thereof et seq.,

After examining Order No. 05-06 on Anti-smuggling, amended and completed by Order 06-09, especially article 10 thereof,

And after due examination in accordance with the Law,

In the Public Action:

As for the attending accused M.:

Whereas it was made evident to the Court, through in-session legal deliberation and final investigation, as well as through the statements recorded in the reports of Customs Administration of Constantine Province, the official complaint submitted to Attorney for the Republic by the Ministry of Finance and the search and seizure reports of the mobile customs controls unit, that the accused is prosecuted for the misdemeanor of smuggling, defined and penalized under article 10 of the Order No. 05-06 on Anti-smuggling,

Whereas it is defined by law, pursuant to article 281 of Customs Law, that judges shall not acquit offenders on basis of their intent,

Whereas and in application of the provisions of articles 131 and 132 of the Constitution, the President of the Republic ratifies treaties regarding the law on persons, which include the International Covenant on Civil and Political Rights, ratified by virtue of Presidential Decree No. 89-67, and that such Covenant after ratification in accordance with the conditions set forth by the Constitution takes precedence over the law,

Whereas and after examining article 14 of the International Covenant, published in the Official Gazette No. 11 of 1997, which, in accordance with the discretionary power of the Court, and after inference by induction, aims to set consti-

tutional and fair trial rules, is considered part of the public order, and judges should refer to it at their own discretion as it seeks protection of Human Rights, especially paragraph 2 of article 14 which provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law,

Whereas, pursuant to the general rules of criminal proceedings, each offence is conditional upon the presence of the moral element - the criminal intent, meaning the intent of the offender to perpetuate an offence despite knowing its legal components - and in the absence of the moral element the crime is negated; whereas it was established in the present case, and after investigation conducted by the Court in session, that the accused "R. M." works in the transport of people and merchandise from El Eulma city market to other provinces and was not aware of the accused "L. A." intent to smuggle merchandise into Tunisian territory through Tebessa city; however, the absence of the intent of "R. M." to commit the misdemeanor of smuggling is not valid and cannot be taken into consideration according to Customs Law, as this misdemeanor falls into the category of misdemeanors, the general provisions of which are subject, and particularly the provision on criminal intent, to the wording of article 281 of Customs Law that does not allow judges to acquit offenders based on their intent.

Whereas and in consecration of the general rules of fair trial established by the International Covenant on Civil and Political Rights, the Court should evoke the application of the provisions of the said Covenant, and hence raise the issue of the contradiction between article 14, paragraph 2, of the International Covenant, stipulating the universal principle of presumption of innocence, and article 281 of Customs Law prohibiting the judge from acquitting an accused on grounds of his intent,

Whereas we should in this case resort to the provisions of the constitutional legislator, particularly article 132 of the Constitution, which stipulates that the treaties ratified by the President of the Republic in accordance with the conditions set forth in the Constitution shall prevail over the law; whereas the provisions of the Constitution as to the issue of conflicting articles raised in the present case are express and clear and require the exclusion of the provisions of article 281 of Customs law - given that the investigation conducted by the Court, while investing all its powers, concluded that the accused "R. M." did not have the intent to commit the smuggling misdemeanor and did not know about the other accused's intent, which supports the presumption of his innocence – as well as require the declaration of his innocence pursuant to article 14, paragraph 2, of the International Covenant on Civil and Political Rights.

As for the accused "L. A.", absent from the session:

Whereas it is determined by law and pursuant to article 10 of Order No. 05-06 that the misdemeanor of smuggling should comprise the three following conditions:
1- That the merchandise object of the infraction, as defined by article 2 of the said

Order, be any commercial and non-commercial products and goods subject to ownership and trade; and whereas the merchandise in question in the present case include 62 packages of spoons and forks, it is therefore subject to the provisions of article 2 of Order No. 05-06,

2- That the offender be in possession of the said goods for commercial purposes within the customs territory; and whereas it was proven in the present case that the offender was arrested within Algerian customs territory, pursuant to article 1 of Customs Law, and he admitted before customs officers – whose reports are considered official and cannot be contested on any grounds except forgery – that he was in possession of the goods for commercial purposes and was planning on smuggling them to Tunisia to resell them; hence the second condition for the misdemeanor of smuggling is fulfilled,

3- That the owner of the merchandise fails to submit legal documents and customs receipts proving lawful ownership; and whereas it was proven in the present case that the accused was unable to provide any legal document, especially purchase invoices or customs receipts that prove the lawful status of the merchandise according to Customs Law; therefore all the conditions of the material element are fulfilled,

Whereas the moral element, consisting in the intent of the offender to perpetuate an offence despite knowing its legal components, is supported by the accused acknowledgment that he intended to smuggle the merchandise to Tunisia through the Algerian borders of the city of Tebessa without passing through customs as required by the Customs Law; hence, the accused was aware of his act and therefore all elements of the crime are existent,

Whereas and pursuant to article 3 of the Penal Code, the criminal law is applied on all Algerian territories whether the crime was committed by Algerian nationals or foreigners; whereas it was proven in the present case that the accused is of Tunisian nationality and should be convicted and punished according to the in rem principle of the criminal law, which requires punishing all perpetrators of an offence that violates the basic rights of the Algerian State regardless of their nationality; whereas it was established as well in the present case that smuggling offences are offences that violate the basic rights of the Algerian State, especially its national economy, an order of arrest should therefore be issued against the accused pursuant to article 358 of the Code of Criminal Procedure.

In Levy Action:

In the Form:

Whereas the institution of legal action by the Customs Administration is in accordance with statuses provided for under articles 3 and 242 of the Code of Criminal Procedure, and it should therefore be accepted in form,

In the Substance:

Whereas the owner of the vehicle "S. A." submitted a petition requesting the return of the vehicle seized by the Customs Administration of Constantine,

Whereas the owner of the vehicle is considered well-intentioned and he had lent his vehicle to the accused, who has been declared innocent on grounds of his unawareness of the issue, and the vehicle should therefore be returned to its owner pursuant to article 373 of the Code of Criminal Procedure,

Whereas levy actions are initiated to claim fines and confiscations made according to the law, and whereas it was established in the present case and ordered to return the seized vehicle, which therefore incurs the dismissal of the overall evaluation included in the petition submitted by the Customs Administration – and that by subtracting the doubled value of the vehicle from the overall amount and calculating the fine on the basis of five times the value of the merchandise, pursuant to article 10 of Order No. 05-06,

Whereas the legal expenses shall be incumbent upon the convicted pursuant to article 367 of the Code of Criminal Procedure,

And whereas physical coercion was set to its maximum period, which is defined by law pursuant to articles 600 and 602 of the Code of Criminal Procedure,

**** In Consideration whereof****

Upon examining misdemeanor cases, the Court ruled, in its first instance capacity, in open court, in the presence of the litigants "R. M." and the Customs Administration, and in the absence of litigant "L. A.", as follows:

In the Public Action: Declare the innocence of the accused "R. M." from the crime attributed to him,

- Convict the accused "L. A." for committing the misdemeanor of smuggling, pursuant to article 10 of Order No. 05-06 and sentence him to enforceable five-year imprisonment time with issuance of an order of arrest against him,

In the Levy Action: In the Form: Accept the institution of legal action by the Customs Administration,
In the Substance: Oblige the convicted to pay to the Customs Administration the amount of 3,657,000.00 Algerian dinars in compulsory compensation for all the damages incurred,

Order the return of the vehicle, of Chana brand, license plate no. 19-307-04978 and vehicle registration card no. 0404405-19, to its owner "S. A."

And charge all legal expenses, amounting to 800 Algerian dinars, on the convicted, and set the physical coercion to its maximum period,

The judgment is hereby issued publicly in the open court session held on the above mentioned date, and we, the President and the Court Clerk have signed the original hereof.

President **Court Clerk**

10) Judicial Council of Constantine

Court of Constantine **People's Democratic Republic of Algeria**

Misdemeanors Division **In the Name of the Algerian People**

Judgment

In the open court session held in the seat of the Court of **Constantine**

on the **thirty first of May two thousand eleven,**

Examination of misdemeanor cases

List No.: **04814/11**

Index No.: **10874/11**

Date of the Judgment: **05/31/2011**

Presided by Mr(s): **M. Y. President**

Assisted by Mr(s): **M. Sh. Court Clerk**

In the Presence of Mr(s): **M. Ar. Attorney for the Republic**

The criminal judgment hereinafter stated was issued in regard to the dispute between the following parties

**** Statement of the Merits of the Case ****

Whereas the accused "T.M." is prosecuted by the public prosecution of the Court of Constantine for committing the misdemeanor of verbal abuse, imprecation, defamation and threat of assault, defined and penalized under articles 297, 299, 296 and 287 of the Penal Code, since a period of time not exceeding that of the statute of limitation in the jurisdiction of the Court and Judicial Council of Constantine,

Whereas the parties to this case have been referred to the Court of Misdemeanors by direct summons procedures according to the provisions of articles 334 and 335 of the Code of Criminal Procedure,

Whereas, we conclude from the case file and its accompanying reports, that the facts of the dispute date back to 09/14/2010 when the complainant (B. L.) filed an official complaint before the Attorney for the Republic against the defendant, on the grounds that the complainant, who is considered a student holder of a Master's degree in Islamic Banking, and who works at the National Bank of Algeria, had benefitted from a training program within the frame of her work held at the Pyramids Hotel in the Capital, and that the defendant was a colleague who participated in the same training program, and who works at the National Bank of Algeria in Setif branch and that he later proposed to her but she refused; from that moment onwards he started harassing and provoking her. He stole her mobile phone directory, gave out her number to male strangers so that they call her, and also called all her acquaintances saying that she was a woman of bad reputation and pregnant with an illegitimate child, fruit of an illegal relationship. He also stole her national identification card and made photocopies of it and mainly of her photograph thereon; he stole as well other photographs of her from her handbag and posted them on international websites, especially YouTube, after producing videos featuring naked photographs of the complainant accompanied by comments about her family's reputation and hers and containing immoral comments under the title 'L. B. biggest whore in Constantine, infected with AIDS.' The published videos were seen by thousands of strangers according to the video statistics of the international YouTube site and other sites, such as Facebook and the University Students Forum (forum Muntada al-Jami'iyyeen.) The defendant did not stop at this point but he also sent out three letters, namely:

1- A letter to the Dean of Prince Abdul Qader University of Islamic Studies in Constantine stating that the Master's student "L. B." is a prostitute and a whore who lost her virginity, and was pregnant with an illegitimate child that she aborted. He advised the dean, in order to confirm this, to check the information published online on the student.

2- A letter to the National Bank of Algeria where the complainant is employed stating that Ms. B. lost her virginity and is a prostitute, and that whoever likes to have more information about her can check online websites, especially YouTube and Facebook.
3- A third letter to the director of the National Tobacco and Sulfur Company, where the brother of the complainant works, stating that the sister of employee "B. A." lost her virginity and is a whore, and that the medical attestation she provided to prove her virginity is fake adding that the girl comes from a family of bad reputation and that anyone of the factory's employees who would like to confirm this can check online websites.

The three letters sent by the accused resulted in that the victim "L. B." be expelled from college and from her master's studies by the administration on grounds of protecting the university campus, given what has been published about her; she was also dismissed from her job at the National Bank of Algeria.

By virtue of a prosecution notice sent by the Attorney for the Republic to the judicial police requesting the investigation of the case with the accused, and by virtue of the authorization allowing the prosecution to work outside its territorial jurisdiction in the city of Constantine, given that the accused lives in Setif, the police headed to the house of the accused, but did not find him there; official summons were sent to him to which he did not respond.

Whereas and after the victim was heard by the judicial police, and after the completion of the tracing requisition by the mobile network operator, Najma, which proved that all the calls made by the accused from private numbers in order to harass the victim were made through the SIM card registered under the accused name, the official reports were sent to the Attorney for the Republic who decided to refer the parties to the present Court to be tried pursuant to direct summons procedures,

Whereas the accused "T. M." failed to attend the trial session despite the several summons sent to him, and nothing in the case file shows that the summons were handed to him in person, and therefore he shall be tried in absentia pursuant to the provisions of article 346 of the Code of Criminal Procedure,

Whereas the victim attended the trial session, and the judgment shall be pronounced in the presence of the plaintiff who confirmed the statements she made to the judicial police and presented to the Court all evidential documents, especially the letters because of which she was expelled from college as well as the CDs containing the videos uploaded online through the YouTube international website and which published photographs of the victim along with comments bringing prejudice to her honor and dignity as well as to those of her family,

Whereas the victim was made civil party to this trial pursuant to articles 3 and 242 of the Code of Criminal Procedure and she requested a compensation of 2,000,000.00 Algerian dinars for all the damages incurred,

Whereas the representative of the Prosecutor for the Republic requested an enforceable 3-year imprisonment penalty, an enforceable fine of 100,000 Algerian dinars as well as an order of arrest against the accused,
Whereas and the case was therefore reexamined in the hearing of 05/31/2011 for the pronouncement of the below judgment,

****Therefore, the Court****

After examining the case file and its accompanying documents,

After examining the provisions of articles 32, 34, 35, 131, 132 and 139 of the Algerian Constitution,

After examining articles 3 and 5 of the Universal Declaration of Human Rights ratified by virtue of article 11 of the 1963 Constitution and published in the Official Gazette No. 64 for 1963,

After examining the provisions of the Code of Criminal Procedure, especially articles 6 and 212 thereof,

After examining the provisions of the Penal Code, especially article 328 thereof,

And after due examination according to the Law,

In the Public Action:

Whereas the public prosecution is prosecuting the accused for committing the two misdemeanors of verbal abuse, imprecation, defamation and threat of assault, pursuant to articles 297, 299, 296 and 287 of the Penal Code,

Whereas the characterization of the crime adopted by the public prosecution does not concur with the facts of the case given that neither the case file nor the in-session investigation provide proof that the accused insulted, threatened or defamed the victim; however, the facts of the case rather fall under the legal description provided for under articles 303 bis and 303 bis 1 and which consists in bringing prejudice to the sanctity of people's privacy and making it available to the public, without the permission or consent of the concerned person; therefore, the facts of the misdemeanor should be re-characterized to apply to the misdemeanor of prejudice to the sanctity of privacy,

Whereas it is determined by the Constitution, by virtue of articles 34, 35 and 139, that the State shall ensure the protection of the sanctity of the human being privacy, prohibit any moral violence or violation of dignity, and penalize any act that violates the moral integrity of the human being and that the judicial authority shall protect the society and freedoms and ensure to each and every person the protection of their fundamental rights,

Whereas in application of articles 03 and 05 of the Universal Declaration of Human Rights, every individual has the right to life, to freedom and to personal security, no person shall be subject to degrading treatment; and whereas it was established in the present case that the victim's right to live in peace had been violated, especially that her reputation as well as her family's were ruined and their honor tainted by the defendant on international websites over the internet, and that she endured a degrading treatment when she was fired and expelled from the university and the bank she worked in as a result of what was published about her and her family; therefore the judicial authority has to interfere to

protect basic freedoms and human rights stipulated and guaranteed under article 32 of the Algerian Constitution.,

Whereas it was made evident to the Court after the in-session investigation and after examination of documents proving that a letter had been sent to the dean of Prince Abdul Qader University of Islamic Studies in Constantine stating that the student "L. B." was a prostitute and a whore, that she had lost her virginity, and had been pregnant with an illegitimate child that she aborted, and that the said letter advised the dean, in order to confirm the authenticity of this information, to check what was published online about her; also proving that another letter had been sent to the National Bank of Algeria stating that Ms. B. had lost her virginity and was a prostitute; and that a third letter had been sent to the director of the National Tobacco and Sulfur Company, where the victim's brother was employed stating that Ms. L. B., sister of the employee "B. A.", had lost her virginity and was a whore, and that the medical attestation she provided to prove her virginity was fake adding that the girl comes from a family of bad reputation and that the factory's employees who would like to confirm this can check the information online,

In addition to the fake information and private photographs of the victim, published on international online websites stating that the victim was a whore, not virgin and from a bad family along with comments prejudicing the honor, reputation and dignity of B.'s family in general and of the victim in particular – all this made available to the public and, as proved by the investigation, seen by thousands of viewers on YouTube international website,

The acts that constitute the material element of the offence, defined by article 303 bis of the Penal Code, and also the moral element that aims to harm the victim and ruin her reputation as well as her family's, require the Court to convict the accused and punish him according to the Law,

Whereas it is established by law in the provisions of article 358 of the Code of Criminal Procedure that the Court - upon ruling on a misdemeanor case under general law - can issue a special order of arrest against the accused,

In the Civil Action:

In the Form: Whereas the institution of legal action by the victim is in accordance with statuses provided for under articles 3 and 242 of the Code of Criminal Procedure, and it should therefore be accepted in form,
In the Substance:
Whereas the right in civil actions is related to the claim of compensation for damages arising from a misdemeanor or the right of anyone who personally incurred direct damages resulting from the offence; whereas it was established in the present case that the civil plaintiff has incurred significant damages particularly to her honor, dignity and reputation as well as to her family's especially that her photographs were published on international websites featuring immoral

comments, in addition to the damage she suffered from as she was expelled from her university and work at the bank; and therefore the institution of her legal action should be accepted and responded to with a compensation for all the damages incurred to her,

Whereas the legal expenses shall be incumbent upon the accused pursuant to article 367 of the Code of Criminal Procedure,

And whereas physical coercion was set for its maximum period, defined according to the law, pursuant to articles 600 and 602 of the Code of Criminal Procedure,

**** In Consideration whereof****

Upon examining misdemeanor cases, the Court ruled, in its first instance capacity, in open court and in the presence of the victim and absence of the accused, as follows:

In the Public Action: Order the re-characterization of facts to fit the misdemeanor of bringing prejudice to the sanctity of people's privacy pursuant to the provisions of articles 303 bis and 303 bis 1 of the Penal Code, and the conviction of the accused "T. M." sentencing him to an enforceable three-year imprisonment time and an enforceable fine of 300,000 Algerian dinars in addition to the issuance of an arrest order against him.

In the Civil Action: In the Form: Accept that the victim be made civil party.

In the Substance: Oblige the convicted to settle a fine of 2,000,000.00 Algerian dinars to the benefit of the civil party in compulsory compensation for all the damages incurred to her, charge him with the overall legal expenses amounting to 800 Algerian dinars and set the physical coercion to its maximum period.

The judgment is hereby publicly rendered in open court session held on the above mentioned date, and we, the President and the Court Clerk signed the original hereof.

President **Court Clerk**

11) Judicial Council of Constantine

Court of Constantine **People's Democratic Republic of Algeria**

Misdemeanors Division **In the Name of the Algerian People**

Judgment

In the open court session held in the seat of the Court of Constantine

on the **seventeenth of May two thousand eleven,**

to examine misdemeanor cases

List No.: **04096/11**

Index No.: **09943/11**

Date of the Judgment: **05/17/11**

Presided by Mr(s): **M. Y. President**

Assisted by Mr(s): **M. S. Court Clerk**

In the Presence of Mr(s): **M. Ar. Attorney for the Republic**

The criminal judgment was hereby rendered in regard to the dispute between the following parties as follows: Public Prosecution against/ Mr. Attorney

**** Statement of the Merits of the Case ****

Whereas the accused "B. Z." is prosecuted by the public prosecution of the Court of Constantine for committing the misdemeanor of kidnapping, defined and penalized under article 291 of the Penal Code, since a period of time not exceeding that of the statute of limitation in the jurisdiction of the Court of Constantine and its Judicial Council,

Whereas the parties to this case had been referred to the Court of Misdemeanors by direct summons procedures according to the provisions of article 334 and 335 of the Code of Criminal Procedure,

Whereas, we conclude from the case file and its accompanying reports, that the facts of the dispute date back to 03/20/2010 when the complainant, who is the father of the victim, filed before the judicial police an official complaint against the accused on grounds that on the said date a group of about 10 unknown people including the so called "B. Z." kidnapped his son called "Kh. S." using car vehicles, which were identified as a blue Renault Kangoo, a blue Renault Clio, a white Citroen Saxo and a white Renault Clio, after threatening the victim with white arms. They transported him to an unknown location where they led him to a place called "Sarkina" then to "Jebel El Wahsh" (monster mountain), at nighttime, where they undressed him leaving him with underwear only. Then, they assaulted him under the claim that he robbed the store of the defendant "B. Z." who sells jewelry. Moreover, the kidnappers took away the SIM card of the

victim's mobile and all his personal identification documents and left on board of a car heading to an unknown destination. During the torture and assault against the victim, the latter identified the defendant "B. Z.," who lives in his neighborhood, but failed to identify the other people." The security forces intervened and ended the kidnapping, and the parties were heard and their statements recorded in official reports that were sent to the Attorney for the Republic who decided to criminally prosecute the accused "B. Z." and refer the parties to the Court of Misdemeanors to be tried according to the Law,

Whereas the accused "B. Z." attended the trial session leading to that the trial be conducted in his presence, and he utterly denied all accusations made against him and stated that the presumed victim is the person who robbed his business,
Whereas the victim "Kh. S." attended the trial session and hence the judgment shall be pronounced in his presence, and he confirmed the statements he made before the judicial police that the accused and a group of persons kidnapped him, undressed him and left him in his underwear only, and that during the kidnapping and torture all the orders were given by the main accused,

Whereas the witness Kh. attended the trial session and was exempted from taking the legal oath given that he is the father of the victim, and was heard for deductive reasoning purposes only, he stated that his son was kidnapped before his eyes and under the threat of white weapons,

Whereas the witness "B. N." attended the trial session and was exempted from taking the legal oath given that he is the brother of the accused, and was heard for deductive reasoning purposes only, he stated that his brother did not kidnap the victim,

Whereas the victim, via his attorney Ms. "M. B.", was made civil party to this session, pursuant to articles 3 and 242 of the Code of Criminal procedures, and the said attorney requested in her pleading a compensation of 500,000 Algerian dinars,

Whereas the public prosecution representative requested the imposition of an enforceable 2-year imprisonment penalty and an enforceable fine of 100,000 Algerian dinars,

Whereas the defense attorney "M. B." of the accused pleaded for his client and presented a claim for the declaration of innocence of the accused,
Whereas and pursuant to article 353 of the Code of Criminal Procedure, the last word was given to the accused who asked for forgiveness from the court,

Whereas the case was therefore re-examined in the hearing of 05/17/2011 for the pronouncement of the below judgment,

Therefore, the Court

After examining the case file and its accompanying documents,

After examining the provisions of articles 131, 132 and 139 of the Algerian Constitution,

After examining the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and after examining the Presidential Decree on the ratification of the Convention Against Torture No. 66-89 dated May 16, 1989 and published in the Official Gazette No. 20 of 1989,

After examining the provisions of the Code of Criminal Procedure, especially article 212 thereof et seq.,

After examining the provisions of the Penal Code, especially articles 263 bis, 263 bis 2, and 291 thereof,

And after due examination according to the Law,

In the Public Action:

Whereas it was made evident to the Court through in-session legal deliberation, especially after hearing the accused, the victim and the final in-session investigation, as well as statements recorded in the judicial police report, that the accused is prosecuted for the offence of kidnapping, defined and penalized under article 291 of the Penal Code,

Whereas and in order to establish the above mentioned misdemeanor, the facts required are the kidnapping, arrest, imprisonment or confinement of a person without an order from competent authorities and in circumstances of arrests of persons not permissible or ordered by law,

Whereas and in application of articles 131 and 132 of the Constitution, the President of the Republic ratifies the conventions and treaties that include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by Presidential Decree No. 66-89, and the said Convention prevails over the law after ratification in accordance with the conditions set forth by the Constitution,

Whereas and after examining articles 1 and 2 of the Convention published in the Official Gazette No. 20 of 1898, the term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him information or a confession, punishing him for an act he has committed or is suspected of having committed, and whereas it was established in the present case that the victim had been

kidnapped by a group of about 10 persons, under the threat of white weapons and taken on board of vehicles to Jebel El Wahsh where he was undressed and assaulted, with the purpose of obtaining from him information and confession on, and punish him for, the robbery that the accused suspect him to be involved in; therefore, the acts of the accused fall under the legal scope defined by the first article of the Convention against Torture which, according to the discretion of the Court, is considered torture on the physical level, given that the victim was coerced, kidnapped and undressed, as well as on the mental moral level given the psychological effects that the victim might suffer from because of what he was subjected to,

Whereas it is determined pursuant to the clauses of the international convention, which prevails over the law, that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction, and whereas it is established in the present case that the judicial authority is the qualitatively and regionally competent authority in the present case, it shall therefore take the effective judicial measures to implement the clauses of the said Convention, that have been raised by the Court proprio motu as it falls under the public order, given that the objective of the Convention against Torture is the protection of the human being from all forms of cruel and inhuman treatment and given that the judicial authority protects the society and freedoms and ensures to each and every person the protection of their fundamental rights pursuant to article 139 of the Constitution, and we should therefore confront through implementation what is confronted by the provisions of this international convention, to which Algeria is party,

Whereas the measure to be taken in application of the provisions of the said international convention, and according to the discretion of the Court, in the present case, is to rule by the non-qualitative jurisdiction of the Court of Misdemeanors; and rule that the case facts constitute the crime of kidnapping with torture in application of articles 263 bis, 263 bis 2 and 291 of the Penal Code that is penalized with imprisonment for up to 20 years, and which does not fall under the jurisdiction of the Court of Misdemeanors given that the rules of qualitative jurisdiction in criminal law are considered of the public order, contrary to what is mentioned in the proceeding of the public prosecution, which only prosecuted the accused for kidnapping, whereas it is not permissible under any circumstance to dismiss torture that constitutes in itself an separate crime, penalized under article 263 bis of the Penal Code, and criminalized by the international Convention against Torture to which judges refer as it is considered part of the public order, given that the Convention aims to protect human rights and oppose all forms of cruel and inhuman treatment; which require the ruling by the non-qualitative jurisdiction of the Court, and rule that the case facts constitute a crime that falls under the inherent jurisdiction of the Criminal Court,

Whereas the legal expenses shall be incumbent upon the public treasury pursuant to article 364 of the Code of Criminal Procedure,

**** In Consideration whereof****

Upon examining misdemeanor cases, the Court ruled, in its first instance capacity, in open court and in the presence of the accused and the victim, as follows:

In the Public Action:

Rule by the non-qualitative jurisdiction of the Court

And keep legal expenses on the public treasury.

The judgment is hereby publicly rendered in the open court session held on the above mentioned date, and we, the President and the Court Clerk signed the original hereof.

President **Court Clerk**

Appendix 2: Iraqi Jurisprudence

1) The Court of First Instance of Hay Al-Shaab came in session on 6/27/2011, presided by judge "S. R. A." empowered with the judicial authority in the name of the people; the decision was rendered as follows:

Claimant of the travel ban / A. A. K.

Subject of the travel ban claim / H. A. K.

Decision

On the travel ban claim and for the in absentia public hearing where the claimant of the travel ban requested the ban of the defendant from travel on grounds that she is his wife and is planning, without his knowledge, to travel outside Iraq with her father. Following the pleadings, the Court examined the Civil Status ID of the claimant and concluded that the person subject of the ban claim is his wife - according to the information recorded under Marital Status section - and the claimant explained that the reason for his demand is that his wife, after a domestic dispute, left to her parents' house and he later knew that she is planning on travelling outside Iraq with her parents, adding that when she left their marital house she took their children as well as documents on him as working in the Emergency Response Unit in charge of airport security and is attempting to use those documents in order to facilitate the process of getting refuge in another country - according to the claimant's statements recorded in the minutes of the session of 6/27/2011. Through the course of the pleadings the Court found that the reason for the travel ban claim is not a valid reason listed among the ban

reasons defined in article 142 Procedural Law, which provides that travel ban is permissible if serious reasons were presented and the act of travel is considered an attempt to avoid lawsuit. If the Court obtains proof of such attempt, the person subject of the travel ban claim has the right to appoint a legally-eligible representative and not be banned from travel. In the present case, the claimant of the travel ban did not provide the Court with an evidence of lawsuit against the person subject of the ban claim that would indicate attempt to escape lawsuit, in addition to the fact that she is not a minor, that she enjoys full capacity, and that the marital bond between her and the ban claimant does not constitute a privilege he has over her as he is not her guardian or caretaker, and their marriage was established on basis of equality between spouses and parity of rights and obligations. Furthermore, the right to travel of the person subject of the travel ban claim is ensured by the Constitution pursuant to paragraph 1 of article 42 of the 2005 Iraqi Constitution, which stipulates that "Each Iraqi enjoys the right of free movement, travel, and residence inside and outside Iraq". Also, international conventions confirm that the wife has an independent status from that of her husband and that she is entitled to exercise all her legal and constitutional rights, such as the right to life, to work and others including the right to travel. Among such conventions we mention the Universal Declaration of Human Rights, which provides for the following under paragraph 2 of article 13 thereof: "Everyone has the right to leave any country, including his own, and to return to his country"; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which provides for the following under clause (c) of article 16 of Part II thereof: "States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: the same rights and responsibilities during marriage and at its dissolution", and others; Therefore, in consideration whereof and whereas the travel ban claim is not based on the legal reasons that make it permissible, we have decided to reject the claim pursuant to the provisions of article 142 Procedural Law, in an appealable judgment rendered publicly on 6/27/2011.

Judge S. R. A.

2)

Case No.: 1135/Personal/2007
Date: 5/13/2008

The Court of First Instance of Hay Al-Shaab came in session on 5/13/2008 presided by judge S. R. A. empowered with the judicial authority in the name of the people; the decision was rendered as follows:

Plaintiff/ A. Kh. – His Attorneys: Lawyers A. A. and A. A.

Defendant/ 1- M. H.

2- F. Y. Their Attorney: Lawyer A. A. F.

Decision

In the plaintiff's lawsuit and the public hearing in presence of the litigants, the plaintiff claimed that the defendants, the parents of his deceased divorcee "B. H." mother of his child Haidar born in marriage on 1/8/2000, are refusing to give him his child, and he considers that, being the father of the child, he has priority for child custody after the death of the mother, therefore he requests the issuance of a judgment ordering the defendants to give him the child. The Court examined the judgment of the Personal Status Court of Al Azamiyah, Issue No. 24/Personal/2006 on 03/05/2006, which pronounces the divorce between the plaintiff and the deceased Bane Mahdi Hashem before her death, and also examined a copy of the Civil Status ID of the child "H. A. Kh." and the report of the Preliminary Medical-Psychological Committee, issue no. 1048 on 12/16/2007, which states that all parties to this lawsuit are of good mental health, in the present time, what qualifies them for custody of the child "H. A. Kh.", and leaving the decision of the best guardian to the discretion of the Court; the Court also examined the legal regulations exchanged between the attorneys of both parties, and noticed through investigations conducted by the Court that the current guardian of the child is his maternal grand-mother, "F. Y." the second defendant, and not the maternal grand-father, the first defendant; the Court also found through the report of the social field research dated 01/03/2008 that the plaintiff has provided a place of residence for the child, and it referred as well to the other field report issued by the Social Research Office, dated 5/4/2008, which stated that "the child needs the presence and care of the father, as his presence and supervision will contribute to making the child's life balanced."; and whereas all international treaties and charters, including the Convention on the Rights of the Child, adopted by the UN General Assembly on November 20, 1989 and ratified by Iraq by virtue of Law No. 3 for year 1994, which provides under article 9 thereof that: "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.", and also paragraph 7 of article 57 of the Personal Status Law provides that primary consideration shall be given to the interests of the child; the Court considers that custody is one of the rights of the child and not of those of the parents or direct relatives, that it is the right to refer to and the protection of which will enable the protection the child, and that the best interests of the child are ensured when he is raised in a family atmosphere that strengthens family bonds between family members, whether between father and child or between siblings; the family of a child are his relatives that include his father, siblings and half-siblings, and that empower him, positively influencing his psychological health and development and reforming his conduct, and bringing life and tranquility to the child who learns the language and acquires some values

and orientations through his family. It has been proven in psychology that the most serious complexes, and the most propitious of personality disorders, are the ones that form during early childhood especially those related to the child's relationship with his parents. Also, the social norms confirm that the father is responsible for the care of children, and the law holds the father who does not take care of his children responsible and makes him accountable for the deeds of his children, pursuant to the provisions of article 218 of the Civil Law, which stipulates that "the father, or otherwise the grand-father, shall be obliged to compensate for the damages caused by the youngster", and pursuant to the provisions of article 29 of the Juvenile Welfare Law. This responsibility is achieved through the direct supervision over child-rearing and the growth of the child under his father's care; this will ensure the child under custody a family atmosphere that will enable him to be in harmony with the values of the family or relatives he belongs to. Also, the Islamic Sharia considers the child who lost his father an orphan, as the care, guardianship and responsibility of the children are linked to the father not the mother - the orphan being the one who lost his father before reaching manhood - so if the father dies before the boy reaches adulthood then the boy is considered an orphan and if the father dies after the boy reaches adulthood then the boy is not considered an orphan, and also if the mother dies before the boy reaches adulthood he is not an orphan but he is called "Aji" (motherless). This is an indication for the father's responsibility for the child-rearing and care, and also that it is best for the child that he be raised within a family including his closest relatives. Paragraph 7 of article 57 of the Personal Status Law defines the hierarchy for child custody: the mother is the first guardian, and in the event of her death or inability to fulfill a custody requirement, child custody is granted to the father, according to the said legal text; the right of custody, after the mother, is for the father or for others in case of the exception, mentioned in the abovementioned paragraph, when it is so required for the best interest of the child. Therefore, the Court finds that it is in the best interests of the child that he be raised within his family and under the care and protection of his father who did not show this Court any indication of ineligibility for custody or that his family holds any risk for the child's upbringing or is of bad influence on his social behavior, besides the fact that the child is not an infant anymore and is eight years old; therefore, in consideration whereof, for the best interests of the child that are achieved through his presence with his father, and upon request, the judgment orders the second defendant to give the child "H. A. Kh." to the plaintiff, prohibits her from opposing him in his custody, and imposes upon her the duties and expenses as well as the fees of the plaintiff's attorneys, "A. A." and "A. K.", of the amount of five thousands dinars; the judgment also dismisses the lawsuit of the plaintiff against the first defendant as there is no dispute given that he was not a guardian of the child and imposes upon the plaintiff the relative duties and expenses as well as the fees of the defendant's attorney "A. A. F." of the amount of five thousands dinars, according to the provisions of article 57/7 Personal Status, 21, 25, 59 and 123 Proof, 161, 163, 166 and 300 Pleadings, and 63 Lawyers; an appealable judgment rendered publicly on Jumada al-Thani 7, 1429 A.H., corresponding to May 13, 2008 A.D.

Judge S. R. A.

3) The Personal Status Court of Karrada came in session on 5/31/2009 presided by judge "H. A. A." empowered with the judicial authority in the name of the people; the decision was rendered as follows:

Plaintiff/ S. J. Br. – His Attorney: Lawyer J. A.

Defendant/ H. A. A. R. A. - Her Attorney: Lawyer N. A.

Decision:

The plaintiff claimed through his attorney that the defendant, his duly married wife and mother of his child Mariam born in marriage, had left their marital house without his permission and he therefore demanded that she be called to appear before the court and be ordered by court judgment to return to the house in obedience; the Court summoned both parties and the public hearing was held in the presence of the litigants where the husband provided the marriage contract between the litigants issued by the Chaldean Patriarchate of Babylon / Church of "Al-Hikmah al-Ilahiyah" (the divine wisdom), and certified by this Court in Issue No. 121 dated 6/7/2007; whereas both parties to the dispute are of the Christian faith, the Court decided to refer to the Chaldean Patriarchate of Babylon and seek its religious opinion regarding the husband's claim for obedience from his wife in order to know whether the religious provisions require the wife to obey her husband or not; whereas the response of the said Patriarchate dated 11/25/2008 and signed by Father "B. H."/ the head of the Patriarchal Office stated the following: "In the matter of the case of 'S. J.' and the woman named 'H. A. A. R. A', we hereby say that the ruling on the wife's obedience to the husband should be made pursuant to the civil law in force in Iraq" – End of Letter – it is therefore clear from the letter that there are no specific religious provisions for the wife's obedience, according to the said church; then, on the hearing of 12/24/2008 the plaintiff declared that the house prepared for the wife's return by obedience is the same previous house with the same furniture; in consideration whereof, the Court issued a judgment dismissing the case on 12/31/2008. The plaintiff appealed the judgment issued by this Court before the Federal Court of Cassation, which overturned the judgment of this Court by its judgment no. 766/Personal-First/2009 dated 3/15/2009, which stated the following: "…the plaintiff's claim to order his wife (the defendant) to return to the marital house in obedience is not considered a coercive measure and does not contradict the wife's freedom and dignity but is rather a legitimate measure (…), and the response letter of the Chaldean Patriarchate of Babylon, dated 11/25/2008 provides that the provisions for the wife's obedience to her husband are set pursuant to the law in force in Iraq, and whereas the ecclesiastical provisions do not mention any clause as to the ruling on the wife's obedience, the general principles on the matter shall therefore be applied and the plaintiff shall be instructed to prepare an independent marital house furnished with undisputed furniture…". Pursuant to the judgment of cassation, the Court summoned both parties to a hearing and the judgment of the Court of Cassation was pronounced in the scheduled session. Upon examination of the judgment of cassation, it was found that the

claim for obedience is a legitimate measure in accordance with the Sharia, and this statement was examined by this Court on grounds that the claim was not a legitimate measure given that the response of the church did not support its legitimacy in accordance with ecclesiastical provisions but rather asked the court to seek the provisions of the civil law in force in Iraq; the demand for obedience is only lawful if the legal provisions provide for the same, and it is not a legitimate claim in accordance with the Sharia as the honorable Court of Cassation described it. Also, the provisions of the Islamic Sharia cannot be applied in the case of the plaintiff's claim given that the current Constitution recognized the plurality of nationalities and religions (article 3), required the State to protect all persons from any coercion on the intellectual, political or religious level (article 37/2) and provided for the freedom of worship (article 42). Therefore and whereas the plaintiff's claim is not a legitimate claim pursuant to the response letter of the church and to the inapplicability of the Islamic Sharia provisions on the case of the litigants according to the above mentioned constitutional provisions, hence the law in force and that is applicable to the case of the litigants should be sought. And after examination, the Court concluded that the most relevant provisions dealing with the case are the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), ratified by Iraq by virtue of the Law No. 66 for year 1986 published in the Official Gazette of Iraq, Issue No. 3107 dated 7/21/1986, the provisions thereof having become part of the national Iraqi Law after ratification and official publication; therefore the application of the Convention's provisions is required by law, such as the provisions of article 16, paragraphs (a) and (c), which require States Parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular to ensure the right to enter into marriage and the same rights and responsibilities during marriage and at its dissolution. The Convention also sought to achieve the elimination of prejudices, customary habits and traditions, and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women (article 5/a of CEDAW). Also, the State is required to "ensure equality of rights and responsibilities of spouses as to marriage, during marriage", pursuant to article 23, paragraph (4) of the International Covenant on Civil and Political Rights, ratified by Iraq by virtue of the Law No. 197 for the year 1970 published in the Official Gazette of Iraq, Issue No. 1927 dated 10/7/1970, and the provisions thereof have become part of the national law. In consideration whereof, and whereas marriage contracts concluded according to the provisions of the Christian law are based on affection, love and respect, and the demand of the plaintiff for his wife to resume their marital life in the way described above does not reflect affection and respect and is therefore contradicting to the provisions of the marriage contract; also, the said demand is based on the principle of the husband's superiority to his wife, which is against the law ensuring equality in marital rights between spouses; and the demand has no legitimate basis according to the church's opinion; in addition to the fact that it contradicts the freedom and dignity of the person ensured by article 37/a of the Constitution. The demand of the plaintiff is hence a coercive measure that falls under the concept of violence against women and uses unfair treatment

as a means to meet his ends, add to that the fact that he was unable to provide the marital house the Court instructed him to prepare and which should be an independent house furnished with undisputed furniture, but rather insisted on staying in the same house with the same disputed furniture. In consideration whereof, the case of the plaintiff should be dismissed for the above mentioned reasons and therefore the Court decided to rule by the dismissal of the plaintiff's case and to impose upon him the legal expenses and fees of the defendant's lawyer, N. A., amounting to ten thousands dinars. The judgment was issued pursuant to articles 151, 161, 166 Procedural Law, 22, 25 and 59 Proof, 63 Lawyers, the 1986 Law No. 66 and the 1997 Law No. 197; an appealable judgment rendered publicly on 5/31/2009.

Judge H. A. A.

4) Republic of Iraq

Federal Supreme Court

7/Federal/2010

The Federal Court was formed on 03/03/2010 presided by judge "M. M." and with membership of judges "F. M. S.", "J. N. H.", "A. T. M.", "A. M. B.", "M. S. N.", "A. S. T.", "M. H. Q. K." and "H. A. T." empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

Plaintiff/ "S. J. H." – Head of the Mandean Sabean confession in Iraq and the world in addition to his position - Represented by his lawyer "A. M. H. H.".

Defendant/ (President of C. R.) in addition to his position – Represented by the legal expert in the (C. R.), Mr. "M. H. D. M."

Claim:

The plaintiff's lawyer claimed before this Court that the Council of Representatives had issued a law amending the Election Law no. 16 for 2005 and granting the Sabean component a quota amounting to one seat for the province of Baghdad, whereas it granted the Christian component a quota amounting to five seats for the provinces of: Baghdad, Ninewa, Duhok and Erbil, considering that those provinces constitute one electoral division. Whereas the above-mentioned law prejudiced his client through the allocation of a quota at the level of the province of Baghdad alone and not within one electoral division at the level of Iraq knowing that the Sabeans reside all over the country and therefore this law would deprive most of the Sabeans from their right to contribute to the election of the representative they find suitable to fill the seat allocated to the Sabean component at the Council of Representatives and that the law is in contradiction with the provisions of (article

14) of the Constitution that stipulates that (Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status) and thus it violates the principle of equality between the Sabean and the Christian Components; therefore, he instituted an action against the defendant in addition to his position in order to obtain a judgment to cancel the determination of the Sabean component quota at the level of the province of Baghdad alone and render it within one electoral division at the level of Iraq in order to achieve justice. After this lawsuit was recorded in accordance with the provisions of (article 1), paragraph 3 of the Federal Supreme Court bylaws and the required procedures as per (article 2), paragraph 2 thereof were completed, a date was set for the Court hearing, and it was attended by the plaintiff's attorney Mr. "A. M. H. E." by virtue of his general proxy as well as the defendant's attorney Mr. "M. H. D." by virtue of his official general proxy no. 55 dated 05/11/2009 issued by the legal department of the Council of Representatives and the open court in presence of the defendant was held. The plaintiff's lawyer reiterated the statements of the Writ of Summons and asked that a judgment in respect therewith be issued explaining that his client's claim is to consider Iraq one electoral division and therefore all members of the Mandean Sabean confession are allowed to vote for the candidate of their choice wherever they are on the Iraqi territories. Therefore he petitioned for the amendment of the Election Law in accordance with the Writ of Summons and in application of the provisions of (article 14) of the Iraqi Constitution that laid the foundations for the rules enshrining the equality to which the plaintiff and his confession aspire, which consists in the equality between the Sabean confession and the other components which form the Iraqi people such as the Christian component. The defendant's lawyer responded reiterating the statements of defense already submitted to the Court and dated 01/26/2010 and that called for the claim's dismissal, as the plaintiff filed the lawsuit requesting the cancelation of the determination of the Sabean component quota, which is a legislative act that falls under the jurisdiction of the legislative authority and outside the jurisdiction of the Federal Supreme Court, as defined in (article 4) of the Federal Supreme Court Law no. 30 for 2005 and (article 93) of the Iraqi Constitution, especially that the amendment of the Election Law by virtue of the law no. 26 for 2009, law amending the Election Law no. 16 for 2005 granted the components mentioned in (article 01), clause 3, (paragraph c), of the aforementioned Law a (quota) calculated according to the seats allocated for their provinces, provided it does not affect their participation rates in other national lists, which did not violate or contradict with the Constitution. After attending the hearing, the plaintiff himself clarified that the Sabeans can be found in all Iraqi provinces especially the southern ones, and that a part thereof has moved to the province of Kurdistan. Therefore, restricting the Sabean component right to vote to Baghdad alone brings prejudice to the interest of the confession as it deprives its members from exercising their right as one of the Iraqi components. The plaintiff's lawyer also submitted a statement dated 03/01/2010 in response to the defendant's lawyer statement in which he stated that the Federal Supreme Court is the competent party to hear this case for the causes stated in his statement and according to the jurisdictions of the Federal Supreme Court as stipulated in (article 04) of the Federal Supreme Court Law no. 30 for

2005 and (article 93) of the Constitution, the lawyer also added that article (20) of the Constitution guaranteed for all citizens the right to vote, elect and run for office, and that granting the Christian component alone a quota considering its compensatory seats within one electoral division even though it is the largest between the other components and depriving the Sabean component from such treatment even though it is the smallest component, contradicts with the Constitution. The lawsuit falls therefore under the functional jurisdiction of the Federal Supreme Court. After giving his statement, the said statement was recorded and filed with the Court clerk and both litigating parties' representatives reiterated their pleadings and claims and petitioned for the issuance of a judgment in respect therewith. The Court investigated the pleadings and claims of both the plaintiff's and defendant's representatives as well as their statements, and whereas it completed such investigation and examination, the Federal Supreme Court decided to announce the closure of the proceedings and declare its decision publicly.

Decision:

Upon examination and deliberation by the Federal Supreme Court, it was established that clause 3 of (article 01) of Law no. 26 for 2009 amending the Electoral Law no. 16 for 2005 stipulated that (the following components shall be given a quota of the compensatory seats, provided it does not affect its current percentage in case they participate in other electoral national lists; the quotas shall be as follows:

a. The Christian component: five seats divided among the provinces of Baghdad, Ninewa, Kirkuk, Duhok and Erbil.

b. The Yazidi component: one seat in the province of Ninewa.

c. The Mandean Sabean component: one seat in the province of Baghdad.

d. The Shabaki component: one seat in the province of Ninewa.)

Moreover, clause 5 of the same aforementioned article stipulated that (the seats allocated to the Christian component from the quota shall be calculated as related to one electoral division.); and whereas (article 14) of the Iraqi Constitution for 2005 stipulated that (Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status); and whereas article 1, paragraph 5 of Law no. 26 for the year 2009 amending the Election Law no. 16 for the year 2005 considered the seats allocated to the Christian component- as per their quota – as within one electoral division and such law did not grant this right to the Mandean Sabean confession when it restricted their right to vote and to nominate to the province of Baghdad alone; therefore, the said Law breached the principle of equality between the Iraqis provided for under (article 14) of the Constitution since the restriction of the Sabean component's right to vote to the province of Baghdad alone brings prejudice to the candidate as well as to the

Sabean component since it deprives Sabeans in the other provinces from exercising their right as Sabean component in enjoying political rights, including the right to vote, to elect and to nominate, that are provided for in (article 20) of the Constitution, and that also stipulated that (the citizens, men and women, have the right to participate in public affairs and to enjoy political rights including the right to vote, to elect and to nominate) and whereas (article 13), paragraph 2 thereof stipulated that (no law shall be enacted that contradicts this Constitution. Any text in any regional constitutions or any other legal text that contradicts it is deemed void.) and paragraph 1 of the same article stated that (this Constitution is the sublime and supreme law in Iraq and shall be binding in all parts of Iraq without exception.); therefore, the Court decided on the unconstitutionality of clause (c) of paragraph 3 of (article 1) of the Law no. 26 for the year 2009 amending the Election Law no. 16 for the year 2005 for contradicting (articles 14 and 20) of the Iraqi Constitution for the year 2005, and decided as well to notify the Council of Representatives to draw a new legal text that complies with the provisions of the said (articles 14 and 20) considering the seats allocated as per the entire Sabean component quota within one electoral division, provided it does not affect the procedures set for the election of the members of the Council of Representatives for the year 2010 since the said elections date is scheduled on 03/07/2010 and since the last legislative quarter of the current Council of Representatives ends on 03/15/2010. It decided as well as to impose on the defendant in addition to his position the proceedings expenses and attorney fees of the plaintiff's representative Mr. "A. M. H. H." amounting to the sum of ten thousand Iraqi Dinars. The decision was issued in presence of the defendant and by unanimous agreement of the panel in accordance with the provisions of the (articles 13, 14, 20, 93/1, and 94) of the Constitution and (article 4/2) of the Federal Supreme Court Law no. (30 for the year 2005) and it was announced publicly on 03/03/2010.

5) Republic of Iraq

Federal Supreme Court

No.: 15/Federal/2011

The Federal Supreme Court was formed on 02/22/2011 presided by judge "M. M." and with membership of judges "F. M. S.", "J. N. H.", "A. T.", "A. A. B.", "M. S. N.", "A. S. T.", "M. Sh. Q. K." and "H. A. T.", empowered with the judicial authority in the name of the people. The Federal Supreme Court issued its decision as follows:

Request:

Al Rutba Court of Inquiry asked the Federal Supreme Court, by virtue of its letter no. (71) dated 01/20/2011, for the following: On 01/12/2011, the Customs Station Director in the bordering town on Tarbil decided to arrest the accused

"M. A. A." and "Q. J. E.", according to (article 194) of the Customs Law, based on the powers granted to him by virtue of the provisions of (article 237), paragraph 2 –A, of the Customs Law no. 23 for the year 1984; the Court found therefore that the aforementioned article is in conflict with the Iraqi Constitution in force for the following reasons:

1- (Article 13), paragraph 2, of the Constitution in force annuls any other legal text that conflicts with it.

2- The directors of Customs Stations are employees and not judges, and therefore by detaining people they contradict (article 19), paragraph 12 of the Constitution prohibiting detention; and paragraph 13 of the same article requires presenting investigation papers to the competent judge within a period that does not exceed 24 hours from the moment at which the accused is arrested.

3- (Article 37), clause 1, paragraph b, of the Constitution, which was included in the text on freedoms forbids detention or investigation unless by virtue of a judicial decision.

4- Constitutional rules occupy the apex of the legal pyramid in the State and have therefore supremacy over other legal rules and the principle of supremacy of the Constitution requires that the entire legal system of the State be governed by constitutional rules, and whereas the Constitution in force was issued after the date of issuance of Customs Law and whereas its wordings were contradictory to the provisions of (article 237-2) of the Customs Law, which means that this article was tacitly annulled and that there were no explicit law issued in this regard by the legislative authority. Based on the above, this Court asks your Court to decide on whether or not (paragraph a) of clause 2 of (article 237) of the Customs Law no. 23 for 1984 is legitimate.

The request was subjected to the examination and deliberation of the Federal Supreme Court in its session dated 02/22/2011 and decided the following:

Decision:

Upon examination and deliberation by the Federal Supreme Court, it was established that (article 37), (paragraph B/First) of the Iraqi Constitution for the year 2005 stipulated that (No person may be kept in custody or investigated except according to a judicial decision), and whereas (article 237), clause Second, (paragraph a) of the Customs Law no. 23 for the year 1984 stipulated that (the decision of arrest shall be issued by the Director General or the person he mandates and thus the detainee shall be brought before the Court of Customs within three days from his arrest,) which means that it granted the competence to arrest the accused to the Director General or the person he mandates, who is not a judge. The aforementioned text is therefore contradictory and in violation with (article 37), (paragraph B/First) of the Iraqi Constitution for the year 2005

that has supremacy in application. The wording of (article 237/Second/a) of the Customs Law is thus considered not valid by virtue of article (37/First/B) of the Iraqi Constitution for the year 2005 and the decision was issued with irrevocable agreement according to article (93) of the Constitution and article (3) of the domestic legal system of the Federal Supreme Court no. (1) for the year 2005.

6) Republic of Iraq

Federal Supreme Court

The Federal Supreme Court was formed on 9 Rabi Al-Thani 1428 A.H. corresponding to 04/26/2007, presided by judge "M. M." and with the membership of judges "F. M. S.", "J. N. H.", "A. T. M.", "A. A. B.", "M. S. N.", "A. S. T.", "M. Sh. Q. K." and "H. A. T." empowered with the judicial authority in the name of the people. The Court issued its decision as follows:
Appellant/ Defendant/ Mr. (W. D.)/ In addition to his position.

Appellees/ Plaintiffs/ "S.", "Sa.", "Sa.", "S." and "Si." - Represented by their lawyer "A. S."

The plaintiffs' lawyer had already filed a claim before the Administrative Judicial Court in case no. 100/Administrative Judiciary/2006 regarding the demand presented by his clients to the defendant (appellant)/ in addition to his position, asking him to grant them the Iraqi nationality based on the provision of (article 18), clause 2, of the Constitution and (article 3), (paragraph a) of the Iraqi Nationality Law, especially that their mother holds the Iraqi nationality along with the Iraqi nationality certificate no. (33,183) dated 04/21/1962. The defendant/in addition to his position, refused to grant them the Iraqi nationality despite the fact that they filed a grievance on 05/16/2006 on the same date, and whereas the aforementioned refusal is considered a breach of their right to obtain the Iraqi nationality and is not established on a legal basis; it is contradictory to the wording of the Constitution. Therefore, the plaintiffs (appellees) asked to bring the defendant – appellant/in addition to his position, before the Court and to compel him to grant them the Iraqi nationality. After listening to the pleadings of the two parties, the Court issued its decision on 08/23/2006, ordering the dismissal of the plaintiffs' claim for the reasons stated therein. The plaintiffs were not convinced with the aforementioned decision and thus challenged it in cassation before the Federal Supreme Court, which issued its decision no. 26/ Federal/Cassation/2006 dated 11/30/2006 to repeal the challenged judgment for the reasons explained therein and according to the aforementioned decision and following the public hearing held in presence of all parties, the Court found that the plaintiffs' request to be granted the Iraqi nationality has a legal basis by virtue of (article 18), paragraph 2, of the Iraqi Constitution which stipulates that anyone who is born to an Iraqi father or to an Iraqi mother shall be considered Iraqi, and by virtue of (article 3), (paragraph a), of the Iraqi Nationality Law since their mother is Iraqi and holds the Iraqi Nationality. Consequently, the Administrative Judicial Court issued a judgment in the presence of all parties on 02/18/2007

consisting in compelling the defendant, Mr. (W. D.)/in addition to his position, to grant the defendants the Iraqi nationality and imposing on him the payment of the fees and expenses in addition to lawyers fees. The defendant-appellant- did not settle for the aforementioned judgment and requested its annulment for the reasons stated by his lawyer in his petition for cassation presented to this Court on 03/06/2008.

Decision:

Upon examination and deliberation by the Federal Supreme Court, it was established that the challenge in cassation was filed within the legal period and decided to accept it in form. After examining the judgment challenged in cassation, the Court found that the judgment was sound and concordant with the Law and that it was issued following the cassation decision pronounced by this Court under file no. 26/Federal/Cassation/2006 on 11/30/2006, where the Court realized that the plaintiffs requested in their claim to be granted the Iraqi nationality based on the provision of (article 3/a) of the Nationality Law number 26 for 2006 stipulating that (A person shall be considered Iraqi if he/ she is born to an Iraqi father or an Iraqi mother …) and whereas a person who is born to an Iraqi father or to an Iraqi mother shall be considered Iraqi by virtue of the Law and shall be granted the Iraqi nationality regardless of the other parent's nationality, be it the father or the mother, in application of the wording of (article 18/ Second) of the Iraqi Constitution and (article 13/I) of the nationality Law no. 26 for 2006. Whereas it was established for the Court through the facts and corroborative documents of the case that the plaintiffs were born to an Iraqi mother and thus they are born Iraqis according to the Law; the plaintiffs' are therefore rightful in their request to receive the Iraqi nationality based on the abovementioned legal texts. As for the wording of (article 6/Second) of the Nationality Law, it does not apply to anyone who was born to an Iraqi mother, and does not intersect with the wording of (article 18/Second) of the Constitution and (article 3/a) of the Nationality Law as the wording of this (article 6/Second) pertains to the Palestinian father who was not born to an Iraqi mother, especially that the wording of (article 18/Second) of the Constitution was included in the Constitution, which is the highest Law, and is therefore binding without exceptions by virtue of (article 13) thereof. Whereas the judgment challenged in cassation observed in its decision the aforementioned legal point of view, it is therefore sound and concordant with the Law. The Court of Cassation decided to uphold it and to dismiss the pleas in cassation, charging the appellant/in addition to his position the cassation fees. The irrevocable decision was issued in unanimous agreement according to (article 5/Second) of the Federal Supreme Court Law no. 30 for 2005 dated Rabi Al-Thani 1428 A.H. corresponding to 04/26/2007.

7) Republic of Iraq

Federal Supreme Court

34/Federal/2008

The Federal Supreme Court was formed on 24 Dhu'l-Qa'dah 1429 A.H., corresponding to 11/24/2008, presided by judge "M. M" and with the membership of judges "F. S.", "J. N. H.", "A. T. M.", "A. A. B.", "M. S. N.", "A. S. T.", "M. Sh. Q. K." and "H. A. T." empowered by the judicial authority in the name of the people. The Court issued its decision as follows:

Plaintiff/ "M. J. A."- Represented by his lawyer "T. Q. H."

Defendant/ Mr. (President of C. R.)/ In addition to his position - Represented by his legal expert/the employee "M. Ha. M."

Claim:

The plaintiff's lawyer filed a lawsuit before this Court claiming that the Council of Representatives issued a decision on 09/14/2008 to lift the immunity off his client/plaintiff, who is a member of the Parliament, and undertake actions against him, and whereas the decision became illegal and lost its legal base and did not find a base in the domestic legal system as defined in (article 93/First, Second and Third) of the Constitution, (article 4/Second) of the Federal Supreme Court Law no. 30 for 2005 and (article 6) of the Court's bylaws, the lawyer asked therefore to bring the defendant before the Court for prosecution and to issue a judgment pronouncing the cancellation and annulment of the decision of the Council of Representatives with all its provisions for the following reasons:

1- The decision violated the wording of (article 44/First) of the Constitution, which stipulated that (each Iraqi has freedom of movement, travel, and residence inside and outside Iraq) and this freedom is absolute and comprehensive for all States and parties, it is not binding, private, or fractioned in relation to some States or parties, since the expression (outside Iraq) referred to all States, and there is no liability upon Iraqi citizens when using this right.

2- The previous National Assembly and the Council of Representatives did not issue any legislation or law, nor did governments advance any decision, order or statement since 04/09/2003 till now, that prohibits travelling to any State or destination outside Iraq. If there were an order prohibiting traveling to a certain State or destination, competent entities such as the Passports Directorate, would mark the passport with a prevention and prohibition note as it used to do before 04/09/2003 when the Iraqi passport used to be marked with the expression (All States excluding Israel.)

3- The decision of the Council of Representatives violated the provisions on lifting immunity that are defined in (article 63/Second) of the Constitution, where this article required that the crime be established or that the defendant be caught in the act. The aforementioned did not apply in the case of his client where there were no crime and the defendant was not caught in the act as stipulated in (article 20) of the bylaws of the Council of Representatives.

4- The decision of the Council of Representatives to lift one of its members' immunity violated the provisions of (article 47) of the Constitution which stipulated the principle of separation of Powers, especially that the Council of Representatives exercised the Judicial Power from one side and the Legislative Power from the other side. Investigating a judicial accusation falls within the jurisdiction of the Judicial Authority and not the Legislative Authority (the Council of Representatives). The Council of Representatives should have observed this constitutional principle rather than acted like an investigation authority and then issued a decision to lift the immunity and taken measures in this regard.

5- The decision of the Council of Representatives violated the provisions of its bylaws pertaining to committees. The Council of Representatives had to transfer the case to the competent committee, which is the Member's Affairs committee mentioned in (article 109) of the Council's bylaws, or to form a special committee to investigate the case. According to the results reached by the committee, the Council undertakes to discuss the committee's report and to vote on lifting the immunity; the Council did not abide by the above in its decision.

6- As for the issue of communicating with a foreign State, it violates the provisions of (articles 158-159) of the Penal Code no. 111 for 1969, as (article 158) thereof spoke about the communication with a foreign country to commit hostile acts against Iraq and (article 159) spoke about the communication with a country to assist the latter in its military operations against Iraq. There were no hostile or military operations against Iraq, but the trip to Israel was made in order to attend a conference about fighting terrorism; the same terrorism which hurt Iraq before any other State. The Council of Representatives should have proven one of the points provided for in the wording of the 2 articles before voting on lifting the immunity of the aforementioned MP.

7- (Article 63/First/A) of the Constitution granted a member of the Council of Representatives immunity for his opinions and stipulated that he may not be prosecuted before the courts for them and that (the opinions) mentioned in the constitutional text include statements and actions such as travelling to any destination he desires outside Iraq. The decision of the Council of Representatives violated the rule stipulated in this text, and for the aforementioned reasons the plaintiff's lawyer requested that

the Court issue a decision canceling the Council's decision for all that it included, as well as annulling it for violating the provisions of the Constitution, for contradicting the provisions of the Law and for differing from the wording of the Council's bylaws. After recording the case before this Court in accordance with (article 01), paragraph 3, of the Federal Supreme Court's bylaws no. (01) for 2005, and after completing the required procedures by virtue of (article 02), paragraph 2, of the aforementioned bylaws, a date was set for the Court hearing, and it was attended by the plaintiff's attorney "Tarek Qassem Harb" by virtue of his general proxy ratified by the Notary Public Department of Karrada no. (57996) dated 11/14/2007. It was also attended by the attorney of the defendant in addition to his position, the legal expert in the Council of Representatives, Mr. "Mohamed Hashem Daoud Al Mussawi" by virtue of the official general proxy no. (238) dated 09/25/2008, the open court was held in the presence of the defendant. The plaintiff's lawyer reiterated the statements of the Writ of Summons and asked that a judgment in respect therewith be issued and the defendant's lawyer responded reiterating the statements of defense already submitted to the Court on 10/06/2008 wherein he requested the dismissal of the plaintiff's claim and to impose on the plaintiff all its expenses for the reasons stated therein, such as the fact that the Federal Supreme Court is not competent to examine this case as its competence is determined in the wording of (article 93) of the Iraqi Constitution and in the Law no. 30 for 2005 as well as in its bylaws, and the fact that the examination of lifting the immunity off a member of the Council of Representatives is not included within the powers stipulated in (article 93) of the Constitution and in the above-mentioned Law of the Federal Supreme Court because lifting the immunity of the said member is one of the preliminary procedures that precede the issuance of the decision, whether legislative or administrative, which means that it is a material action and not legal and thus it does not result in any legal effect and it cannot be contested before the Judiciary alone because the annulment case is related to legislative and administrative decisions according to the aforementioned texts.

Therefore, the plaintiff's claim has no legal base within the competency of the Federal Supreme Court and the measure taken by the Council of Representatives consisting in lifting the immunity of the plaintiff did not violate the provisions of (article 44/First) of the Constitution as claimed by the plaintiff's lawyer in the writ of summons, especially that (article 130) of the Constitution stipulated that (existing laws shall remain in force, unless annulled or amended in accordance with the provisions of this Constitution).

The State of Iraq considers the Zionist entity as a usurper of the Palestinian territory adding that Israel is an occupation State and that Iraq, ever since the establishment of the State of Israel in 1948, announced it will boycott Israel in all fields. There are no relations, whether diplomatic or commercial, between both States and Iraq issued many decisions that considered the Zionist entity an enemy State

to Iraq and prohibited all sorts of dealings or communications with it, considering such dealings and communications a crime punishable by Law. Since the decisions of boycott and travel ban are still in force and were not cancelled or amended, and since (article 130) of the Constitution in force considered those legislations enforceable and applicable, the visit of the plaintiff to the Zionist entity is therefore a violation of the Constitution. As for (Article 63/Second) of the Constitution, it stipulated that a member of the Council of Representatives cannot be arrested unless in certain cases that are determined in the said article, and after the required approvals are given for each case to lift the immunity. The provisions of (article 47) of the Constitution showcased the components of the federal authorities and the practice of their jurisdictions based on the principle of separation of Powers. Lifting the immunity of the plaintiff did not violate the wording of the aforementioned article since the duties of the Council of Representatives consist in dismissing members, terminating their membership and organizing their replacement for the reasons stated in law no. (06) for 2006 and its amending law no. (49) for 2007. The undertaken procedure consisted in lifting the immunity and not dismissing a member of the Council of Representatives or terminating this membership. (Article 109) of the bylaws of the Council, for its part, tackled the jurisdictions of the Members of Affairs and Parliamentary Development Committee. None of those jurisdictions include the necessity to transfer the member before the Committee upon committing an act violating the Constitution such as one of its members contacting or dealing with an enemy State with which the Laws in force forbade its members from dealing in any form; knowing that (article 16), paragraph 3, of the Council's bylaws required that the MP commits to inform the Presidency of the Council of Representatives of his travel outside Iraq. Traveling to Israel is considered in itself a hostile act and Israel is the source of terrorism, thus the plaintiff should have issued a statement before the Council to denounce the organization of a conference on fighting terrorism held in the disseized Palestinian territory under the patronage of the terrorist State of Israel. The plaintiff's writ of claims mentioned that, being a member of the Council of Representatives, the plaintiff enjoys immunity for his opinions and shall not be prosecuted and thus he considered that traveling to Israel is one of those opinions mentioned in the constitutional wording of (article 63) of the Constitution. Thus this statement of his was answered through the explicit nature of the text based on the legal principle (no jurisprudence shall be made in the presence of a legal text). When the Court inquired if his client informed the Council of Representatives he was traveling to Israel and if his visit occurred during the Council of Representatives' parliamentary recess or during its sessions, the plaintiff's lawyer answered the Court and asked the defendant's attorney to present the legal documents which he used in taking his decision. The plaintiff's lawyer revealed in his written statement, presented to this Court and dated 10/23/2008, that his client's trip abroad took place during the Council's parliamentary recess, i.e. during the Council's vacations and after the end of the first legislative quarter, he added that all MPs travel abroad without obtaining the approval of the Parliament presidency committee, annexing to his pleading a letter issued by the legal committee in the Council of Representatives addressed the plaintiff under the title "statement of opinion" under the no. (L.Q 972) on 10/22/2008, including (in reference to your memorandum dated

10/21/2008 in spite of the comments we presented in the session that was dedicated to the subject of your above-mentioned memorandum, from the legal point of view, the decision to lift the immunity violated the Law since there were no judicial lawsuit filed and the decision should be issued based on the request of the Higher Judicial Council and not the opposite, sincerely.) The defendant's lawyer responded on 10/29/2008 clarifying the statement of the Chief Prosecutor General who requested by virtue of his letter no. /the office/confidential, private and urgent no. 112/office/2008 on 09/18/2008 the transfer of the complaint to Al Karkh Court of Inquiry as per the request of the General Secretariat for the Council of Ministers in the letter no. (Q/2/1/100/42/2265) on 09/15/2008 and summoning the legal representative of the General Secretariat for the Council of Ministers to take his depositions and to explain what the visit of MP Mithal Al-Alusi represents in terms of violation to the legislations in force and he demanded the adjournment of the case till after the issuance of the decision on the complaint mentioned in the letter of the Chief Prosecutor General. The Court examined the said letter (a copy thereof) that is annexed to the writ. The plaintiff's lawyer submitted an answer to the defendant's statement of claims dated 10/29/2008, in which he revealed that the latter failed to prove his client's claim. Therefore, the measure taken by the Parliament as to lifting the immunity breached the Constitution and his request led the case to be adjourned as the Court will have to wait until a judgment is pronounced in the complaint based on the provisions of letter of the Chief Prosecutor General. The said letter included the statement of opinion, the legal opinion and the consultation. The Court of Inquiry is not an entity that issues statements of opinion or legal opinions. This request supported therefore the non-existence of a constitutional and legal ground upon the issuance of the decision subject of the lawsuit; and thus his request cannot be legally accepted because annulling the action of lifting the immunity is not dependent upon the statement of opinion of the Court of Inquiry. Upon examination and verification, it was established that the decision on the subject of this case is not dependent upon the result of the decision of Al Karkh Court of Inquiry. Therefore, the Court decided, in the session dated 11/04/2008, to dismiss the request submitted by the defendant's lawyer to adjourn the case until the Al Karkh Court of Inquiry issues its statement of opinion. The defendant's lawyer presented on 11/17/2008 a plea including his answer to his appointment by the Court on the session dated 11/04/2008 to explain the grounds and laws adopted by his client in his decision to lift the immunity of the plaintiff. The Court examined the pleading which was read in the hearing and kept in the case file; the pleading revealed that the Public Directorate for Nationality was approached with the confidential letter no. (01/13/56) on 10/25/2008. The Directorate responded with the letter no. (18911) on 10/27/2008 stating that the instructions that were in force in the Passports Directorate under the former regime in this regard and that used to be issued from the dissolved National Security Council affiliated with the dissolved Office of the President were subject to theft, looting and fire during the incidents that followed 04/09/2009; which makes it hard for it to provide instructions. A copy of the mentioned letter was annexed to the pleading. After examining the statements exchanged between both parties and the minutes of the Parliament session dated September 14, 2008, including the lifting of the immunity of MP Mithal Al-Alusi. The minutes stated that the Council of

Representatives voted with in its majority in favor of lifting the immunity of the MP and prevented him from attending its parliamentary sessions and from traveling outside Iraq. After examining the plaintiff's lawyer pleading dated 11/19/2008 where he reiterated his previous depositions that the defendant's lawyer claims were not valid because lifting the immunity of his client is a legal decision, and that the Federal Supreme Court, according to (article 93/Third) of the Constitution is competent to look into the case as the decision to lift the immunity was taken by the Council of Representatives and was not a material action as mentioned by the defendant's lawyer. The presented letter proved that no orders or instructions were issued after 04/09/2003 preventing traveling to any State and there were no proof indicating that the dissolved National Security Council issued a travel ban. The Federal Supreme Court continued its investigations in the case and the decision was ready to be issued. Therefore, the Court decided to announce the closure of the proceedings and announce its decision publicly.

Decision:

The Federal Supreme Court examined and deliberated the case along with its statement of claims and different pleadings exchanged between both parties, and found that its subject is governed by the articles on freedoms included in (section 2), (chapter 2), of the Iraqi Constitution, such as (article 44/First) thereof, which stipulates that (each Iraqi has freedom of movement, travel, and residence inside and outside Iraq.) By virtue of the aforementioned article the Court found that the Constitution awarded Iraqis the right to move and travel inside and outside Iraq without any restrictions; and this right shall not be restricted by the wording of a law, system or instructions according to the wording of (article 2/First/C) of the Constitution. The Court also found that the plaintiff undertook this trip in his personal capacity and during the parliamentary vacation. Hence the plaintiff was not bound to notify the Council of Representatives of his travel, on one side. On the other side, the Court found that the articles of the bylaws of the Council of Representatives do not entitle the latter to take decisions against one of its members lifting his immunity and preventing him from travelling, unless by virtue of a request made by the Judicial Authority in specific cases that were listed exclusively, and the current case was not mentioned therein, and after an administrative investigation is carried out by the Parliament. Therefore and by virtue of the provisions of (article 93/Third) of the Constitution, which granted the Federal Supreme Court the competence to adjudicate in decisions and procedures undertaken by the Federal Authority that comprised, by virtue of (article 74) of the Constitution, the Legislative, Executive and Judicial Authorities. Consequently, the Federal Supreme Court found that the Parliament's decision to lift the immunity of MP "M. J. A.", and to prevent him from traveling and attending the parliamentary sessions for the reason stated in the decision issued on 09/14/2008, was in contradiction with the wordings of the Constitution and bylaws of the Council of Representatives.

Based the above, the Federal Supreme Court decided to annul the decision issued

by the Council of Representatives on 09/14/2008 which provided for lifting the immunity of MP "M. J. A." and preventing him from traveling and attending the parliamentary sessions. It also decided to charge the defendant/ in addition to his position the lawsuit expenses and the fees of the plaintiff's lawyer Esq. "T. H." amounting to the sum of one hundred and fifty thousand Iraqi Dinars. The decision was issued by unanimous agreement on 24 Dhu'l-Qa'dah 1429 A.H., corresponding to 11/24/2008.

8) Republic of Iraq

Supreme Council of the Judiciary

Federal Court of Cassation

The General Panel in the Federal Court of Cassation was formed on 20 Dhu'l-Qa'dah 1427 A.H., corresponding to 12/11/2006 presided by the Vice-President Mr. "N. F." and with membership of the Vice-President Mr. "H. E. H" and judges "K. B.", "Al. Kh.", "S. A.", "A. F.", "M. T.", "S. A.", "H. A.", "M. S.", "H. H.", "N. H.", "S. M.", "K. Sh.", "E. Kh.", "Kh. E. Kh." and "N. T." empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

Accused/ "A. M. H."

The Criminal Court of Dhi Qar in its decision no. 354/C/2005 on 12/25/2005 to convict the above-mentioned accused by virtue of (article 406/1/C) of the Penal Code and sentenced him to life imprisonment based on (article 132/1) of the Penal Code, taking into consideration his detention period. The Court also charged the lawyer fees on the Public Treasury, and ordered that the shotgun that was seized as per the record of evidence attached to the case papers be confiscated and that the said shotgun be sent to the Ministry of Defense so that the latter deals with it in accordance with the Law.

In his indictment no. (820/C/2006) on 03/27/2006, the Chief Prosecutor General requested the ratification of the decisions and their amendment. On 06/25/2006 the Criminal Panel at the Court of Cassation issued its decision no. (2061/ Criminal Panel/2006) dismissing and remanding the case to its original Court so that the latter impose a heavy enough penalty, without referring to (article 132/Penal Code). Following to the aforementioned decision, the Criminal Court decided on 08/15/2006 to sentence the above-mentioned accused to death by hanging, and granted the plaintiff the right to request compensation before Civil Courts. The Court also ordered the confiscation and deposition of the shotgun seized with no buttstock and no cartridge clip at the Ministry of Defense to deal therewith according to the Law after the decision earns the final degree. The Chief Prosecutor General requested in his indictment no. (102/ General Panel/2006) dated 09/24/2006 the ratification of the decisions and their amendment by

substituting (paragraph A) with (paragraph C) as per the provisions of (article 259/A-1) of the Code of Criminal Procedure.

Decision:

Upon examination and deliberation by the General Panel at the Federal Court of Cassation, it was established that Dhi Qar Criminal Court issued its decision on 08/15/2006 in the case no. (354/C/2005) following the decision of Cassation no. 2061/ Criminal Panel/ 2006 on 06/25/2006, sentencing the accused "A. M. H" to death by hanging based on the wording of (article 406/1-h) of the Penal Code, and as per the order of the Council of Ministers no. 3 for 2004, paragraph First/ 4 thereof, for the murder of the victim "Naima Sabeq Alak" without explaining to him that the case will be automatically transferred to the Federal Court of Cassation to review the judgment in cassation and that he can challenge the judgment issued against him before the Court of Cassation within thirty days starting from the day after the judgment has been issued, in accordance with the provisions of (article 224/D) of the Code of Criminal Procedure no. 23 for 1971 along with its amendments, thus the judgment is not valid, Whereas the accused did not challenge the judgment issued by the Criminal Court, and given that the Criminal Court did not inform him of the wording of (article 224/D) of the Code of Criminal Procedure, even though it was compulsory, the General Panel of the Federal Supreme Court decided therefore to annul the penalty issued by the Dhi Qar Criminal Court on 08/15/2006 in the case no. 254/C/2005 and to remand the case to its original Court to summon the accused before it and issue a new decision regarding the penalty and inform him of the wording of (article 224/D) of the Code of Criminal Procedure. The General Panel also warned the Criminal Court about the necessity of observing legal procedures in the future and the decision was issued by unanimous agreement on 20 Dhu'l-Qa'dah 1427 A.H., corresponding to 12/11/2006.

Vice-President N. F.

9) Republic of Iraq

Supreme Council of the Judiciary

Central Criminal Court of Iraq

(The Conviction Decision)

(1)

The Central Criminal Court of Iraq in Baghdad, second panel, was formed on 03/23/2006 presided by judge "K. Y." and with membership of judges "D. M." and "B. H. H." empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

Defendant: "M. Kh. Sh. J." (also known as A. T.)

The Investigating Judge of the Central Court transferred the above-mentioned accused before this Court to be tried in a non-summary case in accordance with (article 194) of the Penal Code by virtue of remand decision no. 129 on 01/09/2006.

On the day designated for trial, the Court was formed in the presence of the Prosecutor General "T. S. H.". The defendant was brought before the Court and informed about his rights in the presence of his lawyer "M. S. J.", delegated by the Court to defend the accused, and an open trial was initiated publicly in presence of the defendant by recording the identity of the accused. The referral decision was recited. The depositions of the accused "H. A. Ib.", "A. M.", "H. H. A.", "S. M. A.", "M. A. M.", "E. A. A.", "A. F. A.", "M. Z. Ib.", "M. M. M.", "M. F. A.", "B. S. A." and "A. S. H. S. A. F." -that were recorded in the preliminary investigation - were read considering the latters as witnesses for not being brought before the Court, as per (article 172) of the Code of Criminal Procedure.

The warrants and records annexed to this case were then recited and the defendant's deposition was recorded and the charge was pressed against him, in accordance with the first part of (article 194) of the Penal Code, for assuming command of an armed group intending to prevent and obstruct the application of laws as well as undermine the country's security and stability. The accused pleaded innocent after the accusations were recited and explained to him. The Court heard the defendant's response who pleaded innocent, then heard the indictment of the Prosecutor General and the statements of the lawyer representing the defendant, then it heard the latter's last pleading, announced the closure of the hearing, and retired to issue the decision. The Court finally resumed the session again and announced its decision as follows:

Decision:

Upon examination, deliberation and observation of the preliminary and judicial investigation process as well as the work progress in the ongoing trial, it was established that the facts of the case are summarized as follows: in the midst of the incidents that took place upon the fall of the reigning regime in Iraq on 04/09/2003 and the emergence of anarchy resulting from the deterioration of security and stability, armed groups were formed. These groups took advantage of the situation, rendering specific regions of the country safe havens from which they could launch their activities which consisted in committing murders, kidnappings and extortions, using religion as a cover and a justification for their crimes. The city of Mosul had its share of the activities of this individual who sometimes adhered to a group called (Jamaat Al Tawhid Wal Jihad) and some other times joined "Jamaat Ansar Al Islam" or "Ansar Al Sunna". However, those groups were watched closely by the eyes of Justice and thus, after coordinating with the security agencies and the Multinational Forces in Iraq, and based on the intelligence available about these armed groups and their members, many

of them were arrested including the accused in this case, "M. Kh. Sh. J." (also known as "A. T.") who was arrested based on the information that were collected on his account regarding his work involvement with the terrorist "A. M. Z." as he was charge of planning, coordinating and conducting attacks, kidnappings and murders in the cities of Mosul and Baghdad in return for a monthly salary ranging between (50, 000 and 100, 000 U.S Dollars.)

2- Collected Evidence:

a- The depositions of the accused "H. A.", "Ib. Kh.", "A. A. M.", "H. H. A.", "S. M.", "A. S.", "M. A. M.", "Ib. A.", "A. F. A.", "M. Z. Ib. J.", "M. M. M.", "A. S. H.", "S. F.", "M. M. A." and "B. S. A." that were recorded in their personal capacity as witnesses in the preliminary investigation departments.

A- Witness "H. Al. E. Kh.":

The above-mentioned witness revealed that the accused "M. Kh. Sh." is one of his relatives as he is his mother's cousin. This deposition also stated that the accused "M." also known as "A. T." used to collect weapons and equipment to start fighting US Forces for he was an Islamic extremist who conducted operations against the Coalition Forces. The witness affirmed that the accused used to call him (i.e. the witness), and that he (the accused) was the leader of one of the subgroups related to the group called "Jamaat Al Tawhid Wal Jihad." The witness added that, by meeting those groups as well as by his direct meetings with "Abou Talha", he used to hear about the operations they used to conduct against the Coalition and the civilian citizens of the city of Mosul, such as murders, slayings and kidnappings, and sometimes he would discuss with the accused "M." (A. T.) issues related to his operations and he (i.e. the accused) was not convinced with his statements and would accuse him of having Baathist ideas.

B- Witness "A. M." (called A. A. K.):

The above-mentioned witness revealed the organizational structure of the groups they were commanding and identified the Emirs of those groups. He explained that the accused "A. T." (M. Kh.) was the Emir of the city of Mosul as well as the cities of Tikrit and Biji. The witness added that he met the accused only once in 2004 and that the latter remained until 01/15/2005 (the date of the witness' arrest) the Emir of the city of Mosul, and that during their only meeting the defendant was accompanied by "A. M." and that both of them transported him to a town in Mosul for the purpose of booby trapping a car.

C- Witness "H. H. A.":

The above-mentioned witness revealed that one day he gave the accused "A. T." a ride to the house of "A. A." in Al Ramadi where the meeting took place in the house of "A. M. Z.".

D- Witness "S. M. A. S.":

The above-mentioned witness revealed that he used to accompany his uncle "A. S." who worked with the accused "M. Kh." -a.k.a. "A. T." and "A. A."- and that he kept working with his uncle even though he knew that the accused "M." was a terrorist, adding that the latter used to command several people, who were each in charge of one of the regions of Mosul.

E- Witness "M. A. M.":

The above-mentioned witness revealed that he once gave the sum of thirty thousand US Dollars to the group of "A. T." to be used for Jihad; he added that the said accused used to move from one place to another in disguise and that he knew the members of the group of the accused "M. Khalaf. Sh."

F- Witness "E. A. A.":

The above-mentioned witness revealed that the accused, "A. T." (M. Kh. Sh.), is the Emir of Mosul and works with "A. M. Z." The witness had met with the defendant at the house of "A. S." in Hay Al Mukhabarat area in Al Jihad Street. "A. T." was a member of "Jamaat Al Islam". The witness accompanied the accused to a meeting with "A. M. Z." in Fallujah. The said meeting was for the consultative and command council of the group which included, in addition to "A. T.", each of "A. M. L.", "A. S.", "A. A." the Emir of Al Anbar, and "A. A. Sh." the (Mufti of the group."

G- Witness "A. F. A.":

The above-mentioned witness revealed that he had met "A. T." several times, and that the last time he met him was at the end of March 2005 in the village of Qabr Al Abd- Hamam Al Alil- Mosul. The organization of "A. T." called the Salafi Fighting Movement is an organization affiliated with Al-Qaeda, and that he was close to adherents to this group, such as "A. M." who is the military chief of the left wing military organization in Mosul which is under the direction of the group of "A. T.". The witness added that he was accompanying "A. T." once when the latter was giving "A. M." and "A. A." orders to deploy their military patrols in the eastern and western parts of Mosul to detect National Guards Forces, Police Forces as well as the Coalition forces to attack them.

H- Witness "M. Z. E. J.":

The above-mentioned witness revealed that he had been approached to join the group of "A. T." who is the Emir of the Mujahidin in Mosul, in return for a monthly salary of one hundred and fifty thousand Iraqi Dinars. He added that he met the accused "A. T." who gave him the sum of one thousand five hundred US Dollars to buy some necessities.

I- Witness "M. M. M. A.":

The above-mentioned witness revealed that shortly after the fall of the regime and upon the entry of the US troops to Iraq, when he heard a speech of "A. T." inciting people to fight the aforementioned forces, which made them excited to do. Hence they formed a group led by a group under the command of the accused "A. T." (M. Kh. Sh.). The witness revealed the names of the adherents to this group first and then he explained how they collected weapons from Al Ghazlani camp in Mosul; he also counted how "A. T." appointed "A. M." once to deliver sums of money to four different groups and to distribute them by the witness to be distributed by the witness as one thousand five hundred US Dollars for each group. These groups attacked US forces, national Guards and the Police.

J- Witness "A. S. H.":

The above-mentioned witness revealed he learned from "A. S." (A. Ib.) that the latter was a member of the organizations of "A. T." and the person in charge of the left coast of the city of Mosul in the organization of "A. T.". "A. S." had told the witness that "A. T." (M. Kh. Sh.), whom he saw twice in Mosul, was the leader of the biggest group in the aforementioned city, and that he also learned from "A. S." that all car bombings were executed under the command of "A. T."

K- Witness "S. A. F. N." also known as (A. D.):

The above-mentioned witness revealed that he had belonged to the group of "A. M", which is one of the groups related to "A. T." in Mosul and that he participated in executing many operations. As for his testimony concerning the accused "M. Kh.", the witness explained that the said accused had slain Bulgarian people and that he performed the slayings himself, adding that, "A. M.", "A. S." and a person called "S." were with him and assisted him in executing the slaying operations.

L- Witnesses "M. F. A." and "B. S. A.":

The above-mentioned witnesses revealed having heard that the accused "M. Kh. Sh.", also known as "A. T.", was the Emir of the groups affiliated with Al Tawhid Organization in Mosul.

3- Technical Evidence Consisting in Transcribed CDs in Content Breakdown Reports Annexed to the Case Documents:

The evidence consisted in 2 CDs confiscated upon the arrest of the accused; the CDs were transcribed and their breakdown reports were organized as follows:

A- **First CD:** According to the breakdown report that was issued on 08/31/2005, the CD featured a group of people sitting in a room talking about topics related to Jihad (as they expressed); then 3 people -one of them was covering his face- read statements about the execution of a (Jihadi) suicidal operation, and cited the names of the suicide bombers "A. T. N." and "A. M. Gh." without mentioning the name of the third

one. Then, the accused "M. Kh. Sh." showed up covering his face at the beginning and started explaining a lesson on how to perform a suicide bombing operation against one of the headquarters of the Multinational Forces and the Iraqi Army in Mosul. The accused "M. Kh. Sh." (A. T.) also bid the suicide bombers who performed the suicide operation farewell. The CD explained as well how the booby-trapped car was equipped and how the suicide bombing was carried out by filming the operation remotely through cameras; knowing that while filming these incidents the expression "the Jihad Base in Iraq" (Qaidat Al Jihad Fi Bilad Al Rafidayn) was displayed on the top of the screen. The CD also featured the execution of a group of people who worked in Al Ghazalani camp in Mosul, the latters were interrogated by the accused and then executed in the street by masked men. The CD showed as well slaying operations against a number of people carried out by masked men in addition to a bombing operation near one of the US bases.

B- **Second CD:** This CD showed the accused "M. Kh. Sh." (A. T.) in a residential apartment with a group of people, where he recorded a speech addressed to the Mujahidin inciting them to be patient and carry on with their Jihad. He then discussed some religious issues related to Jihad with the people that were present in that apartment; among those there was a person with a wounded leg who was sleeping on a bed in the room. The CD also contained passages of "Abou Talha" explaining the same lesson about the execution of the terrorist operation in Mosul using a big truck.

The Defendant M. Kh. Sh. J." Also Known As (A. T.):

As per his depositions that were recorded in the preliminary and judicial investigation, the aforementioned accused revealed that due to his opposition of Saddam's regime since 1995 and to the constant harassments he endured from Saddam's men, he had to leave Mosul with his family and head to the Kurdistan region in the hope of leaving Iraq. Consequently, due to harsh hostile circumstances, the accused could not travel outside Iraq and thus he stayed in Kurdistan, more specifically in Halabja, then he moved to Biara in As-Sulaimaniyah and after the general amnesty law was issued in 2002 he returned to Mosul. Following the arrival of the US Forces to Iraq in 2003, and given that they did not accomplish any important achievement for the Iraqi people and given that the US Forces killed his brother "M. Kh." -who was unarmed- in his house with no reason, the accused had a reaction, following which he decided to fight Occupation through participating in councils with the villagers and in mosques. When the first incidents of Fallujah occurred in April 2004, the accused went to the said city to check the situation, and while he was sitting in a guesthouse, he was approached by a person he did not know. The latter asked him about his name and about his nickname (A. T.), informing him that someone wanted to meet him. The accused accompanied this man to a house in Fallujah (Kh. M. H. H.) where there were about 10 people he was introduced to, namely: "A. N. Sh.", "A. M. L.", "A. S.", "A. B." and "H. M." The fugitive "A. M. Z." then showed up and

during the gathering, the fugitive met privately with the accused in one of the rooms in the house. They spoke and the fugitive asked him to join the organization. However, the accused refused the offer of "A. M. Z." claiming that the latter's (A. M.) ideas contradicted with his, especially that the accused rejected the extremist ideas of "A. M." against the police, the army and the Arab Shiites, adding that he told him he refused that the Iraqi Resistance be commanded by a non-Iraqi person. The first meeting ended after scheduling a second meeting that would be held within 20 days from the first. The second meeting took place in the same house which, according to the accused, belonged to "A. B." and he was brought in the same way as in the first meeting. This time, there were around fifteen people in the house and after half an hour, the accused "A. M. Z." arrived and had a private conversation with the defendant in one of the rooms in the house in which they spoke of the same issue without reaching any conclusion. The accused "M." revealed that this meeting took place at the end of June 2004, and that he then returned to Mosul afterwards.

The defendant added that he met the accused "A. M." for the third time following terrorist attacks in the city of Mosul. "A. Sl." contacted him and told him the accused "A. M. Z." wanted to see him. The defendant "Mohammed" met the said accused in Baghdad near Abu Ghraib Prison in December 2004. The defendant also indicated that he had changed his place of residence several times and that he used to change his facial features to mislead the authorities fearing they would arrest him. The accused also revealed information he had about the terrorist organizations present in Mosul and about their members. When the Court asked the accused about the contents of the confiscated CDs, he explained that they were made in the beginning of December 2004 when one of his friends (M.) asked him to accompany him to his house in Al Yarmuk Street in Mosul, and after he (the accused) entered the house he saw about 7 to 10 people who were not covering their faces and were wearing civilian clothes. The accused recognized "A. M." and "Y." (A. A.) among them. He was asked to explain a military lesson written on a paper and comprising the bombing of a building used by US Forces followed by the capture of the US soldiers therein it by the means of a big truck. The paper also described how to break into the building with the help of a Force that would execute the task. The accused said he presented the lesson after they insisted as the lesson was written on a paper and that he memorized it and explained it to the audience through a tracing fixed on a wall. He added that the black clothes, covered faces and the farewell were required for security reasons which consisted in the non-disclosure of the identities of the people that were present there. As for the part where he bid farewell to the combatants, he claimed it was part of the lesson and denied his affiliation with "Jamaat Al Tawhid Wal Jihad" and his leadership of the armed groups in Mosul as well as his relation to or knowledge of the terrorist attacks that occurred in the aforementioned city or in any other.

Based on the presented evidence and their clues consisting in the depositions of the aforementioned accused that were recorded in their capacity as witnesses and that presented conclusive evidence as to the responsibilities that the accused in

this case was assuming given his leadership position in the organization known as "Jamaat Al Tawhid Wal Jihad" that is affiliated with Al-Qaeda in Iraq. Those testimonies highlighted the defendant's activities and movements within the above-mentioned organization especially that they were found conclusive, given the direct contact that the witnesses have with the defendant in this case. The said testimonies were conclusive those who presented them relied on absolutely all their human senses. Those testimonies were backed by technical evidence (CDs) that were transcribed as per the content breakdown reports annexed to the papers and dated 08/31/2005.

In addition to the defendant's confession regarding his meeting with the leader of the aforementioned organization and the contents of the presented CDs, the evidence were sufficient and proved that the accused "M. Kh. Sh." also known as "A. T." was guilty of commanding an armed group intending to prevent and obstruct the application of laws as well as undermine the security and stability of the country and that his action applies to the first part of (article 194) of the Penal Code. The Court therefore decided to convict him by virtue thereof and to set his penalty in accordance with its provisions.

The decision was issued by unanimous agreement based on (article 182/A) of the Code of Criminal Procedure in the presence of the parties and hence requires cassation. It was declared publicly on 03/23/2006.

10) The Republic of Iraq

The Supreme Council of the Judiciary

The Iraqi Central Criminal Court

(Judgment of Conviction)

(11)

The Iraqi Central Criminal Court in Baghdad, Second Panel, was formed on 03/23/2006 presided by Judge "K. A. Y." and with membership of Judges "D. A. M." and "B. H. H." empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

The Convicted: "M. Kh. Sh. J."

Decision:

1- The Court, held in presence of the defendant "M. Kh. Sh. J.", sentenced the latter to death by hanging, as per article 194/First of the Penal Code and ruled on taking into consideration his detention period from 06/15/2005 to 03/22/2006.

2- The Court informed the said convicted that his case file will be automatically sent to the Court of Cassation for examination, and that he will have the right to appeal the judgment before the Court of Cassation within 30 days as from the second day of issuance of the present decision.

3- Determine the fees of the defendant's appointed lawyer "M. S. J." as amounting to 50 thousand dinars to be paid from the State Treasury after the decision becomes final.

4- The decision was issued by agreement of all the panel members and by virtue of (article 182/A) of the Code of Criminal Procedure, in presence and with possibility of appeal; it was announced in public on 03/23/2006.

11) The Republic of Iraq

The Supreme Council of the Judiciary

The Federal Court of Cassation

The First Personal Status Panel of the Federal Court of Cassation was formed on Ramadan 14, 1432 A.H. corresponding to August 14, 2011 A.D., presided by the vice-president "S. M." and with membership of judges "S. A." and "N. K." empowered with the judicial authority in the name of the people. The decision was issued as follows:

The Appellant/ Defendant/ "Kh. K. M."/ his lawyer "A. S."

The Appellee/ Plaintiff/ "J. A. Z."

The plaintiff claimed before Abi Al Khasib Personal Status Court that the defendant is her former husband and that he took her daughter (A.) away. She therefore requested he be called to defend himself before the Court, and petitioned for the issuance of a ruling in her favor for the recovery of her daughter and the imposition of the fees and expenses on the defendant. The Court issued its decision no. 70/Sh/2010 on 05/20/2010 in the presence of the defendant binding him to deliver the kid (A.) to her custodian, her mother the plaintiff, and to pay all the fees and expenses in addition to the plaintiff's lawyer fees. The appellant's lawyer appealed the aforementioned decision before the Court of cassation by his statement dated 05/24/2010. The judgment was consequently returned to the Personal Status Court repealed by the decision of the Court of Cassation no. 3232/First Personal Panel/2010 dated 9/19/2010. Consequently, the trial court issued on 05/31/2010 and under the same number, a decision in the presence of the defendant binding him to deliver the kid (A.) to her mother, the plaintiff who shall be considered the custodian, and to pay the fees, expenses, as well as the plaintiff's lawyer fees. The appellant's lawyer appealed the above-mentioned decision before the Court of Cassation by his petition for cassation dated 06/07/2011.

Decision:

After examination and deliberation it was established that the appeal before the Court of Cassation was submitted within the legal period and therefore, it was accepted in form. After examination of the appealed judgment, the Court found it was valid and in compliance with the Sharia and the Law, and that following issuance of the repealing decision by this Court under no. 3232/First Personal Panel/2010 dated 9/19/2010. The Court carried out its investigations in light of the repealing decision and it was proven that the plaintiff meets with custody terms and that her environment is suitable to raise the kid who is still of tender age. The Court hence decided to affirm the appealed judgment and dismiss the appeal in cassation, as well as to charge the appellant with the cassation fees. The decision was issued by agreement of all the panel members on 08/14/2011.

12) The Republic of Iraq

The Supreme Council of the Judiciary

The Federal Court of Cassation

The First Personal Status Panel of the Federal Court of Cassation was formed on Shaban 28, 1432 A.H. corresponding to July 27, 2011 A.D., presided by the most senior judge "S. A." and with membership of judges "N. K." and "Y. A." empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

The Appellant/ Defendant/ "H. Kh. Kh."/ his lawyer "M. A. D."

The Appellee/ Plaintiff/ "A. A. A."

The plaintiff, represented by her lawyer, claimed before Al Hamadaniyah Personal Status Court that the defendant is her lawful husband. Referring to the damage caused by the persistence of this marriage, the plaintiff requested he be called to Court in order to issue a separation judgment as per (article 40) of the Personal Status Law, and to charge him with all fees and expenses including the plaintiff's lawyer fees. The trial court issued the judgment no. 87/Personal Status/2011 on 05/31/2011 in presence ruling on the separation of the litigating parties considering it an irrevocable divorce with minor separation occurring for the first time; they shall not be allowed to return as husband and wife unless by virtue of a new contract. The plaintiff was bound to commit to the Iddah (waiting period) of 3 months, and abstain from marrying another man before the expiration of the said period and before the judgment becomes final. The defendant was charged with all fees and expenses in addition to the plaintiff's lawyer fees. The defendant's lawyer appealed the above-mentioned judgment before the Court of Cassation by virtue of his petition for cassation dated 06/12/2011.

Decision:

After examination and deliberation it was established that the appeal before the Court of Cassation was submitted within the legal period. Therefore, it was accepted in form. After examination of the appealed judgment, the Court found it was valid and in compliance with the Sharia and the Law, as it was established by virtue of Al Hamadaniyah Court of Misdemeanors judgment no. 30/Criminal Misdemeanors/2011 dated 01/31/2011 that sentenced the convicted (appellant) "H. Kh." to simple imprisonment by virtue of (article 413/1) of the Penal Code for assaulting the plaintiff (with a hose) over different parts of her body. Hence, the persistence of the marriage is rendered impossible by the harm brought by the appellant to the plaintiff, and the Court ruled on the same in its judgment issued in compliance with the provisions of (article 40/1) of the Personal Status Law. The Court decided therefore to affirm the appealed judgment, dismiss the appeal in cassation, and charge the appellant with the cassation fees. The decision was issued by agreement of all panel members on Shaban 28, 1432 A.H. corresponding to July 27, 2011 A.D.

13) The Republic of Iraq

The Supreme Council of the Judiciary

The Federal Court of Cassation

The First Personal Status Panel of the Federal Court of Cassation was formed on Ramadan 10, 1432 A.H. corresponding to August 10, 2011 A.D. presided by the vice-president "S. M." and with membership of judges "S. A." and "N. K." empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

The Appellant/ Defendant/ "Z. Kh. M."

The Appellee/ Plaintiff/ "A. M. K."

The plaintiff filed a lawsuit before Al-Samawah Personal Status Court against the defendant, her lawful husband, for beating her in an inhumane manner and forcing her to leave their home; and hence for impossibility of persistence of the marital life, the plaintiff petitioned for calling the defendant to appear before the Court and issuing a separation judgment as per (article 40) of the Personal Status Law charging the defendant with all fees and expenses. The trial court held in presence, issued judgment no. 2844/Personal Status/2010 on 12/23/2010 ruling on the judicial separation of the litigating parties due to the incurred harm considering it an irrevocable divorce with minor separation occurring for the first time. Thus, they shall not be allowed to return as husband and wife during the Iddah (waiting period) unless by virtue of a new contract and dower. The plaintiff was also bound to commit to the Iddah of 3 months, and abstain from marrying

another man before the expiration of the said period and before the judgment becomes final. The defendant was charged with fees and expenses in addition to the plaintiff's lawyer fees. The appellant appealed the above-mentioned judgment in cassation by virtue of his petition for cassation dated 12/28/2010. The judgment was returned to Al-Samawah Personal Status Court repealed by the decision of the Court of Cassation no. 636/First Personal Status/2011 dated 02/21/2011. Consequently, the trial court issued on 06/09/2011 a judgment having the same above-mentioned number ruling on the separation of the litigating parties, due to the incurred harm, considering it an irrevocable divorce with minor separation. The judgment bound the plaintiff to observe a three-month Iddah and abstain from marrying another man before the expiration of this period and before the judgment becomes final; the defendant was charged with fees and expenses in addition to the plaintiff's lawyer fees. The plaintiff appealed the said judgment by virtue of his petition for cassation dated 06/16/2011.

Decision:

After examination and deliberation it was established that the appeal was submitted within the legal period. Therefore, it was accepted in form. After examination of the appealed judgment, the Court found it was valid and in compliance with the Sharia and the Law. And following the repealing decision of this Court no. 636/First Personal Status/2011 on 02/29/2011, the trial court connected the criminal case no. 865/Criminal/2010 Al-Samawah Misdemeanors and the judgment issued by it on 12/08/2010 sentencing the appellant to payment of a fine amounting to five hundred thousand dinars in accordance with (article 413/1) of the Penal Code, since it was established through the medical reports attached to the case file that the defendant assaulted the appellee. Therefore, the Court decided to affirm the judgment, dismiss the petition for cassation and charge the appellant with the cassation fees. The decision was issued by agreement of the majority of the panel members on Ramadan 10, 1432 A.H. corresponding to August 10, 2011 A.D.

14) The Republic of Iraq

The Supreme Council of the Judiciary

The Federal Court of Cassation

The First Personal Status Panel of the Federal Court of Cassation was formed on Ramadan 10, 1432 A.H. corresponding to August 10, 2011 A.D., presided by the vice-president "S. M." and with membership of judges "S. A." and "Na. K." empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

The Appellant/ Defendant/ "A. J. A."

The Appellee/ Plaintiff/ "A. K. A."

The plaintiff, represented by her two lawyers, filed a lawsuit before Al Mosul Personal Status Court whereby the defendant is her lawful husband and he does not attend to her financially. The alimony decision was executed, but the defendant was abstaining from payment. Therefore, the plaintiff requested he be called to appear before the Court, a separation judgment be issued as per (article 43/ First/9) of the Personal Status Law, and the defendant be charged with fees, expenses and the plaintiff's lawyer fees. The trial court issued, in presence, the judgment no. 4321/2011 on 06/09/2011 ruling on the separation of the litigating parties considering it an irrevocable divorce with minor separation occurring for the first time; they shall not be allowed to return as husband and wife unless by virtue of a new contract and dower. The plaintiff is therefore bound to commit to the Iddah (waiting period) of 3 months as from 06/09/2011, and to abstain from marrying another man before the expiration of the said waiting period and before the judgment becomes final. The defendant was charged with fees and expenses in addition to the plaintiff's lawyer fees. The defendant appealed the above-mentioned judgment in cassation by virtue of his petition for cassation dated 06/13/2011.

Decision:

After examination and deliberation it was established that the appeal in cassation was submitted within the legal period; it was hence accepted in form. After examination of the appealed judgment, the Court found it was valid and in compliance with the Sharia and the Law as it fulfills the clauses of (article 43/ First/9) of the Personal Status Law no. 188 for year 1959 amended in the appellee case. As for the appellant's statements in his petition for cassation, they cannot be brought forward as per article 209/3 of the Code of Civil Procedure no. 83 for year 1969. The Court therefore decided to affirm the judgment, dismiss the petition for cassation and impose the cassation fee on the appellant. The decision was issued by agreement of all panel members on Ramadan 10, 1432 A.H. corresponding to August 10, 2011 A.D.

15) The Republic of Iraq

The Supreme Council of the Judiciary

The Federal Court of Cassation

The First Personal Status Panel of the Federal Court of Cassation was formed on Shaban 12, 1432 A.H. corresponding to July 11, 2011 A.D., presided by the vice-president "S. M." and with membership of judges "S. A." and "N. K." empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

The Appellant/ Defendant/ "H. A. M."/ his lawyer "K. R. B."

The Appellee/ Plaintiff/ "B. A. R."

The plaintiff, represented by her lawyer, claimed before Kirkuk Personal Status Court that the defendant is her lawful husband and that he married another woman on 05/28/2009 without a court permission, and without the plaintiff's knowledge and approval. Hence, the plaintiff petitioned he be called to appear before the Court, a separation judgment be issued as per (article 40/5) of the Personal Status Law, and he be charged with all expenses and plaintiff's lawyer fees. The trial court issued, in presence, judgment no. 483/Personal Status/2011 on 05/23/2011 ruling on the separation of the litigating parties considering it an irrevocable divorce with minor separation occurring for the first time; they shall not be allowed to get back as husband and wife unless by virtue of a new contract and dower, and after the plaintiff's approval. The plaintiff was informed that she shall commit to the Iddah (waiting period) of 3 months, and abstain from marrying another man before the expiration of the said waiting period and before the judgment becomes final. The defendant was charged with all expenses in addition to the plaintiff's lawyer fees. The defendant's lawyer appealed the above-mentioned judgment in cassation by virtue of his petition for cassation dated 05/26/2011.

Decision:

After examination and deliberation it was established that the appeal was submitted within the legal period; it was hence accepted in form. After examination of the appealed judgment, the Court found it was valid and in compliance with the Sharia and the Law for fulfilling the requirements of (article 40/5) of the Personal Status Law no. 188 for year 1959 amended in the appellee case. The Court therefore decided to affirm the judgment, dismiss the petition for cassation and impose the cassation fee on the appellant. The decision was issued by agreement of all panel members on Shaban 12, 1432 A.H. corresponding to July 11, 2011 A.D.

16) The Republic of Iraq

The Supreme Council of the Judiciary

The Federal Court of Cassation

The First Personal Status Panel of the Federal Court of Cassation was formed on Rabi al-Thani 25, 1432 A.H. corresponding to March 29, 2011 A.D. presided by the vice-president "S. M." and with membership of judges "S. A." and "N. K." empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

The Appellant/ Defendant/ "F. Gh. A."/ his lawyer "B. Y. J."

The Appellee/ Plaintiff/ "Gh. J. M."

The plaintiff claimed before Fallujah Personal Status Court that the defendant is her husband and that he took her kids (Sh. and A.) by force. Hence, she requested he be called to appear before the Court, as well as the issuance of a judgment grant her custody of her children and charging the defendant with all fees and expenses. The trial court issued, in presence, judgment no. 2216/ Personal Status/2010 on 12/30/2010 granting custody of the children (Sh. and A.) to their mother, the plaintiff hereto, forbidding the defendant from opposing her, and imposing upon him all fees and expenses in addition to the plaintiff's lawyer fees. The defendant's lawyer appealed the above-mentioned judgment in cassation on 01/03/2011.

Decision:

After examination and deliberation it was established that the appeal in cassation was submitted within the legal period and was hence accepted in form. After the examination of the appealed judgment, the Court found it was valid and in compliance with the Sharia and the Law since the mother has priority of the custody of her children if within the marriage and especially more that Shahad was born in 2008 and Ahd in 2009. The Court investigations established that the plaintiff meets custody requirements, that the custody case is held with the benefit of the children in mind and that the appeal in cassation had no legal grounds. Therefore, the Court dismissed the appeal and affirmed the appealed judgment imposing the cassation fee upon the appellant. The decision was issued by agreement of all panel members on Rabi al-Thani 25, 1432 A.H. corresponding to March 29, 2011 A.D.

17) The Republic of Iraq

The Supreme Council of the Judiciary

The Federal Court of Cassation

The General Panel of the Federal Court of Cassation was formed on Jumada al-Awwal 1429 A.H. corresponding to May 29, 2008 A.D. presided by the vice-president "N. F." and with membership of vice-president "H. E. H." and judges "K. B.", "A. Kh.", "D. Kh.", "H. A.", "A. F. O.", "R. Kh.", "S. A.", "H. A.", "M. S.", "H. B.", "A. A.", "A. M.", "N. H.", "S. M.", "M. H.", "E. Kh." and "N. A." empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

The Defendant/ Mr. "M. M. R."

On 04/19/2005, Dhi Qar Criminal Court incriminated the defendant "M. M."

by virtue of decision no. 86/J/2005 in accordance with (article 14/First/B/2) of the amended Narcotics Drug Law no. 68 for year1965 and sentenced him to 15 years of imprisonment as per (article 132/3) of the Penal Code while taking into consideration his detention period and deducting the same from the sentence period. The Court also ruled on the confiscation of the defendant's movable and immovable properties in addition to the Hashish that would be entrusted to the competent authority to destroy it. It also ordered the deportation of the defendant from Iraq as soon as his sentence expires for being of Egyptian nationality. The Chief Prosecutor General petitioned in his findings statement no. 1625/A/2005 issued on 06/22/2005 to repeal all decisions and return the case to Dhi Qar Criminal Court to retry the defendant. The Criminal Panel of the Court of Cassation decided, on 07/11/2005 index no. 2188/Criminal Panel/2005, to repeal the decisions and return the case to the Criminal Court to retry the defendant. Following the decision of cassation issued by the Criminal Panel, the Criminal Court sentenced the above-mentioned defendant on 08/19/2007 to death by hanging and decided to take his detention period into consideration and confiscate his movable and immovable properties, without tackling the fate of the confiscated drugs delivered to Al Karkh Major Crimes Department as per letter no. 194 dated 02/23/2005. The convicted was informed that his case file will be automatically sent to the Court of Cassation within 30 days as from the second day following the pronouncement of the judgment. The Chief Prosecutor General petitioned in his findings statement no. 208/General Panel/2007 issued on 11/13/2007 to affirm all decisions.

Decision:

After examination and deliberation of the General Panel of the Federal Court of Cassation it was established that Dhi Qar Criminal Court decided on 04/19/2005 in case no. 86/J/2005 to incriminate the defendant "M. M. R. S." in accordance with the provisions of (article 14/First/B/2) of the amended Narcotics Drug Law no. 68 for year 1965 and sentenced him to 15 years of imprisonment as per (article 132/3) of the Penal Code. The Chief Prosecutor General petitioned to repeal all decisions issued in the present case; the Court of Cassation decided on 07/11/2005 as per the case file no. 2188/Criminal Panel/2005 to repeal all the decisions issued in the present case in order to confirm the quantity of confiscated Hashish and impose a heavier penalty without adopting (article 132) of the Penal Code. Following the above decision, Dhi Qar Criminal Court decided on 08/19/2007 in case no. 86/J/2005 to incriminate the aforementioned defendant in accordance with the provisions of (article 14/First/B/2) of the Narcotics Drug Law and sentence him to death by hanging. After examination of the case file and the relevant decisions issued thereon by the General Panel, it was established that the incident facts as uncovered after inquiry and trial are summarized as follows: On 11/20/2004, a quantity of Hashish was seized in the possession of the accused and the Forensic Medicine Institute report no. (10/11/4/16416) dated 12/26/2004 established that this material is a drug. The defendant confessed his possession of this material and that he intended to deal with it and sell it to the US Forces; such action is sanctioned by the provisions of (article 14/First/B/2) of

the amended Narcotics Drug Law no. 68 for year 1965. And whereas Dhi Qar Criminal Court incriminated the defendant in accordance with the provisions of the above-mentioned article, the incriminating judgment issued in this case is therefore valid and in compliance with the Sharia and the Law, and the Panel decided to affirm it. As for the inflicted death penalty by hanging, the Panel found it was not valid since death penalty was suspended as per the Coalition Authority's order no. (7), part (3/1), for year 2003. Death penalty by hanging was reapplied as per Cabinet order no. (3) for year 2004 for criminal acts stipulated in (article 14/First/B, C and D) of the Narcotics Drug Law relating to dealing with narcotic drugs if such acts were committed with the purpose of transferring or helping activities, as well as for actions determined in (article 190) of the Penal Code. Whereas it was not proven by the collected evidence in the current case that the defendant transferred or helped in activities and actions stipulated in the aforementioned article, the defendant is therefore not comprised in the Cabinet order no. 3 for year 2004. And whereas penalties provided for in (article 14/First/B/2) of the Narcotics Drug Law are either death penalty or life imprisonment, and whereas death penalty was suspended as shown above, therefore the defendant "M. M. R." should be sentenced to life imprisonment. Hence, it was decided to reduce the sentence to life imprisonment and to issue a new warrant of commitment to prison and notify the prison directorate thereof. The decision was issued by agreement of the panel members on Jumada al-Awwal 1429 A.H. corresponding to May 29, 2008 in accordance with the provisions of (article 209/A) of the Code of Criminal Procedure.

18) The Republic of Iraq

The Federal Supreme Court

The Federal Court of Cassation

The Expanded Civil Panel of the Federal Court of Cassation was formed on Dhul-Hijjah 7, 1430 corresponding to November 24, 2009, presided by the vice-president Mr. "N. F." and with membership of judges "K. B.", "D. Kh.", "A. B.", "A. M.", "S. M.", "M. H.", "Kh. E.", "N. A.", "F. K." and "J. Kh." empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

The Appellant/ "A. H. A."/ his lawyer "M. Y. A."

The Appellee/ "F. A. J."

The lawyer of the plaintiff "A. H. A." claimed before Karrada Personal Status Court that the defendant "F. A. J. A." was his client's lawful wife, whom he duly divorced by virtue of the certificate of Divorce no. (44/2009) issued on 02/02/2009 by Sharjah Sharia Court in the UAE in the presence of witnesses whose names were included in the certificate annexed to the Writ of Summons.

Hence, the lawyer petitioned to call the above-mentioned defendant to appear before the Court so a judgment be issued to ratify the divorce. Karrada Personal Status Court issued on 08/09/2009, in the presence of the defendant, decision no. 930/Sh/2009 ruling on dismissing the plaintiff's lawsuit charging him with all fees and expenses including the defendant's lawyer fees amounting to (5000 dinars). The plaintiff however was not convinced by the above-mentioned decision and petitioned it be examined in cassation and repealed for the grounds stated in his lawyer's petition for cassation dated 08/17/2009.

Decision:

After examination and deliberation by the Expanded Civil Panel of the Federal Court of Cassation, it was established that the appeal in cassation was submitted within the legal period; it was accepted hence in form. After examination of the appealed judgment, the Court found it was invalid and contradictory to the Sharia and the Law since the trial court dismissed the case considering that the submitted document attributed to Sharjah Sharia Court had fulfilled all formalities in terms of ratification by the Iraqi embassy in Dubai and the competent parties in accordance with the provisions of the Law on Ratification of Signatures on Iraqi and Foreign Documents no. (52) for year 1970 noting that fulfilling formal requirements does not also mean fulfilling requirements of the substance of the submitted document in the present case, and which falls under the competence of the trial court since (article 30) of Riyadh Arab Agreement for Judicial Cooperation ratified by Iraq as per law no. (110) for year 1983 granted the judgments (consisting in every decision, however it is called, issued by virtue of Judicial or State procedures emanating from courts or any other competent party in any of the contracting parties (article 25) of the above-mentioned agreement) issued in Personal Status cases as it stipulated that (the judgment shall be refuted in the following cases: if it violated the provisions of the Islamic Sharia, the provisions of the Constitution, the public order or morals in the contracting party who is required to confess: if the judgment was issued in absentia and the convicted in the case was not duly informed of the case or judgment thus enabling him to defend himself. This means that the Personal Status Court examining the case of divorce ratification shall look into the extent to which the legal and Sharia requirement are fulfilled in this fact and shall ascertain they effectively took place; this Court may also use the submitted document as one of the evidence that may be relied upon for the establishment and issuance of a judgment in compliance with the Sharia. And whereas the Court procedures leading to the appealed judgment were contrary to the above-mentioned, it was decided to repeal the judgment, return the case file to its Court so the trial may be held as previously drawn and leave the decision relating to the imposition of the cassation to the result of the trial. The decision was rendered by agreement of all the panel members on Dhul-Hijjah 7, 1430 corresponding to November 24, 2009.)

19) The Republic of Iraq

The Supreme Council of the Judiciary

The Presidency of Karbala Federal Court of Appeal

Karbala Criminal Court

Karbala Criminal Court was formed on 04/09/2012 presided by judge (R. H. M.) and with membership of judges (F. Sh. H. and M. A. Sh.) empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

The Defendant/ A. E. M. A. T. / his lawyer A. Gh. S.

The investigating judge of Holy Karbala Court transferred the above accused (in detention) before this Court to sue him in long proceedings action… according to the provisions of article 24 of the Residence Law by virtue of the transfer decision no. 1408/Transfer/2012 dated 04/05/2012. As soon as the General Prosecutor Office transferred the case file to the present Court, it was registered under the above-mentioned number and date set for the trial and the panel was formed. The trial was held in presence of the General Prosecutor "N. A.", the defendant was brought before the Court and the open trial proceedings in presence of all parties commenced. The Court registered the identity of the defendant through having recourse to an interpreter and the transfer decision was recited in public. The Court listened afterwards to the deposition of the legal representative of Karbala Residence Department as well as to the deposition of the witness "M. A. M. A.", and the case records were recited. Then, the Court recorded the defendant's depositions making use of the interpreter and recited the charges brought against the defendant as per article 24/2 of the Foreigners Residence Law no. 118 for year 1978. The defendant denied the charges against him after they were recited and explained to him. Then, the General Prosecutor submitted his findings, the defendant's lawyer presented his statement of defense and the defendant repeated his last depositions. The panel retreated for deliberation and examination before issuing the decision.

Decision:

After the examination, deliberation and control of the preliminary and judicial investigations, the Court found that the facts of this case may be summarized as follows: on 02/27/2012, the incident date, Tourist Police detachments arrested the defendant "A. E. M. A. T." of Turkish nationality when he entered Karbala city through Kurdistan without referring to the Residence Department. And as mentioned in the depositions of the legal representative of Karbala Residence Department, the defendant in the present case entered Iraq through Ibrahim Al Khalil border crossing point. The competent authorities in Kurdistan had given him a visa notifying him to refer to the Residence Department within 10

days. The defendant however came to Karbala and was arrested on 02/27/2012, as he did not refer to the Residence Department even after more than 2 months of his entrance to Iraq and issuance of a complaint against him. The defendant acknowledged through an interpreter that he entered Iraq through Ibrahim Al Khalil border crossing point and that he obtained a visa in Kurdistan Region while adding that he had no knowledge about the residence procedures applicable to him. Therefore, following the depositions of the legal representative of Karbala Residence Department and of the defendant and after examining the passport of the defendant and the visa affixed thereto, the Court found that the latter entered Iraq through Kurdistan and had to go to the Residence Department within 10 days, but that he did not and he got arrested on 02/27/2012. Hence, the defendant effectively committed an act to which the provisions of article 24/2 of the Foreigners Residence Law no. 118 for year 1978 apply, what led to his conviction. The defendant' sentence was thus determined according to article 182/A of the Code of Criminal Procedure and the decision was issued by agreement of all the panel members in presence of all parties, and was announced in public on 04/09/2012.

First: The Court in presence of both parties sentenced the defendant (A. E. M. A. T.) to simple imprisonment for 3 months as per the provisions of article 24/2 of the Foreigners Residence Law no. 118 for year 1978 taking his detention period between 02/27/2012 and 04/08/2012 into consideration.

Second: The Court decided to deport the said defendant from Iraq when his term in prison ends as per article 24/2, paragraph 5, of the Foreigners Residence Law no. 118 for year 1978.

Third: Send the case file to the Federal Court of Cassation as per automatic cassation. The judgment was issued by agreement of all the panel members, in the presence of all parties and with possibility of appeal in cassation; it was publically rendered on 04/09/2012.

20) The Criminal Panel of the Federal Court of Cassation was formed on Rabi al-Awwal 21, 1432 A.H. corresponding to February 13, 2012 A.D., presided by the most senior judge "S. A." and with membership of judges "S. A.", "J. J.", "S. A." and "K. T." empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

The defendants/ 1- R. Z. Z. 2 - Ra. Z. Z.

Dhi Qar Criminal Court had already issued a sentence in absentia against the accused (R. Z. Z.) and (Ra. Z. Z.) on 07/17/2011 in case no. 1255/J/2011 convicting them in accordance with the provisions of article 406/1/A of the Penal Code, and as referred to under articles 47,48, and 49 thereof relating to accessories to offences, as well as by virtue of the Cabinet order no. 3 for year 2004. The Court had sentenced the defendant (R. Z. Z) to death by hanging and the defendant (Ra. Z. Z.) to lifetime imprisonment for being under 20 years of age, and that for

the murder of the victim (H. J. Gh.). On 08/04/2011, the convicted surrendered themselves to justice and they were tried once again. On 08/18/2011, the Court decided in case no. 1255/J/2011 to annul the charge brought against them as per article 406/1/A of the Penal Code, and as referred to under articles 47,48, and 49 thereof relating to accessories to offences, as well as by virtue of Cabinet order no. 3 for year 2004, and ruled on releasing them and annulling the judgment in absentia issued against them in case no. 1255/J/2011 dated 07/17/2011 for insufficiency of evidence against them for the murder of the victim (H. J. Gh.). The Chief Prosecutor General requested to affirm the decision in its indictment no. 358/J/2012 dated 01/08/2012.

Decision:

After examination and deliberation it was established that the decision issued on 08/18/2011 in case no. 1255/J/2011 by Dhi Qar Criminal Court annulling the charges and releasing the defendants (R. Z. Z.) and (Ra. Z. Z.) as well as annulling the judgment in absentia issued against them on 07/17/2011 for the reasons adopted by Court, was valid and in compliance with the Law, because the defendants refuted the accusations brought against them after issuance of the judgment and such refutation was not disapproved by any valid legal evidence that allows their conviction. The Court decided therefore to affirm the decision as per the wording of article (259/A-2) of the Code of Criminal Procedure; the decision was rendered by agreement of all the panel members on Rabi al-Awwal 21, 1432 A.H. corresponding to February 13, 2012 A.D.

21) The Criminal Panel of the Federal Court of Cassation was formed on Jumada al-Thani 2, 1432 A.H. corresponding to April 23, 2012 A.D., presided by the most senior judge "S. A." and with membership of judges "S. A.", "J. J.", "S. A." and "K. T." empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

The Defendants/ 1- "A. R. A." 2 – "M. R. A."

Missan Criminal Court decided in case no. 57/J/2012 on 02/13/2012 to annul the charge brought against the above-mentioned defendants in accordance with the provisions of article (405/Penal Code), and as referred to under articles 47,48, and 49 thereof relating to accessories to offences, for insufficiency of evidence against them for being accessory in the offence along with two other defendants who obstructed the way of the victim (K. A.) when he was driving his car on 06/15/2011 and shot him near their house, killing the victim as a result of an armed altercation between both parties. The Court also determined the lawyer fees as amounting to 50 thousand dinars and decided to impose them on the State Treasury after the decision becomes final and the defendants are released in accordance with article (182) of the Code of Criminal Procedure. The Chief Prosecutor General requested in his indictment no. (3361/J/2012) dated 03/19/2012 to affirm all decisions issued in this case.

Decision:

After examination and deliberation it was established that the decision issued on 02/13/2012 in case no. (57/J/2012) by Missan Criminal Court, which annulled the charges brought against the defendants (1- "A. R. A." 2 – "M. R. A."), and released them for the reasons adopted by Court, was valid and in compliance with the Law and was therefore affirmed based on the wording of article (259/A-2) of the Code of Criminal Procedure. The decision was rendered by agreement of the Panel on Jumada al-Thani 2, 1432 A.H. corresponding to April 23, 2012 A.D.

22) The General Panel of the Federal Court of Cassation was formed on Safar 3, 1433 A.H. corresponding to December 28, 2011 A.D., presided by the vice-president (H. E. H.) and with membership of vice-presidents (D. Kh.) and (S. M.) and judges (S. A.), (S. A.), (A. A.), (A. M.), (M. H.), (K. Sh.), (E. Kh.), (A. H.), (Q. S.), (F. K.), (J. Kh.), (J. J.), (M. A. H.) and (S. A. A.) empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

The Defendants/ 1) (M. A. M) born on 11/09/1982

2) (A. M. H) born on 02/26/1948

3) (A. M. H) born on 07/04/1956

Karbala investigating judge transferred, by his decision no. 1805/Transfer/2009 dated 09/30/2009, the detained defendants (M. A. M.), (A. M. H.) and (A. M. H.) to Karbala Criminal Court to prosecute them in long proceedings action as per article 406 of the Penal Code, and as referred to under articles 47, 48, and 49 thereof relating to accessories to offences. Karbala Criminal Court decided on 11/03/2009 in the case no. 679/J/2009 to convict the defendants (M. A. M.), (A. M. H.) and (A. M. H.) in accordance with the provisions of article 406/1/A/Z of the Penal Code, and as referred to under articles 47, 48, and 49 thereof relating to accessories to offences, as well as by virtue of the Cabinet Order no. 3/First/4 for year 2004 for being accessory to the murder of the victim (S. H. A.) and to the attempted murder of the victims (M. H. A.) and (B. M. H.) through shooting them. The Court sentenced (M. A. M.) to death by hanging and decided to take his detention period into consideration. It informed the latter as well that his case file will be automatically sent to the Federal Court of Cassation and that he has the right to challenge the judgment within 30 days as from the second day of issuance of the decision. The Court sentenced the defendant (A. M. H.) to 15 years imprisonment as per article 132/1 of the Penal Code taking his detention period into consideration; the Court decided to annul the charge against (A. M. H.) and release him immediately for insufficiency of evidence against him in relation with the charge provided he is not detained for other charges, and that in accordance with the provisions of article 182/J of the Code of Criminal Procedure. The Court maintained the personal right of the plaintiffs to claim compensation after the decision becomes final. The Deputy Prosecutor General in Karbala appealed the judgment in cassation petitioning for the annulment of

the appealed decision convicting the defendant (A. M. H) and annulment and dismissal of the penalty inflicted upon him for the reasons stated in the Deputy Prosecutor's petition dated 11/08/2009. The lawyer (A.M.) of the convicted (A. M. H.) and (M. A. M.) appealed the judgment in cassation demanding the dismissal of the decision for the reasons stated in his petition dated 11/10/2009; the lawyers (S. A.) and (M. H. T) of (A. M. H.) and (M. A. M.) appealed the judgment is cassation demanding the annulment thereof for the reasons stated in the petition dated 11/11/2009; the lawyer (F. H. Gh.) of (M. A. M.) and (A. M. H.) appealed the judgment in cassation demanding the annulment thereof for the reasons stated in the petition dated 11/12/2009; the lawyer (O. M.) of (A. M. H) and (M. A. M) appealed the judgment in cassation demanding the release of his convicted client (A. M. H) and the transfer of (M. A. M.) to the competent medical committees for the reasons stated in the petition dated 11/23/2009; the lawyer (N. H.) of the convicted (A. M. H) appealed the judgment in cassation demanding the annulment thereof for the reasons stated in the petition dated 11/23/2009; the lawyers (K. H. Z.) and (N. Gh. H.) of (M. A. M) and (A. M. H) appealed the judgment in cassation demanding the annulment thereof for the reasons stated in the petition dated 06/03/2010, the lawyer (Gh. H.) submitted an annex to the petition on 08/10/2010, and on 05/25/2010 the lawyers (K. H. Z.) and (N. Gh. H.) submitted a petition to which are annexed a petition of complaint and a claim. The lawyer (R. H. Kh.) appealed the judgment in cassation demanding his client (M. A. M) be examined by psychotherapists for the reasons stated in the petition dated 08/02/2011. The Chief Prosecutor General requested in his indictment no. 412/General Panel/2009 dated 12/17/2009 to repeal all decisions issued against (M. A. M) and remand the case to Karbala Criminal Court to retry him and examine him by psychotherapists. He also requested to change the legal qualification of the criminal case of (A. M. H) rendering it complying with the provisions of article 273/1 of the Penal Code, and reduce the sentence to the suitable legal limit. The Chief Prosecutor General requested to affirm the decision annulling the charges brought against the defendant (A. M. H) and releasing him for insufficiency of evidence for this crime.

Decision:

After examination and deliberation of the General Panel of the Federal Court of Cassation, it was established that the case facts revealed through the inquiry and trial may be described as follows: on 11/13/2005, the incident date, in Aun (A) area in Al Ali Mill, a verbal altercation occurred between the wounded victim (M. H. A) and the defendant (M. A. M) following which the latter shot the victim using a gun he was carrying with him wounding him with 4 bullets in different parts of his body. He fired also at the victim (B. M. H.) wounding him with 3 bullets in different parts of his body. Medical emergency aid however saved the two victims' lives. As the defendant was leaving the incident site, he fired at the victim (S. H. A.) wounding him in the chest what eventually killed him. The above-mentioned facts were ascertained by the confession of the defendant (M. A. M.) during the investigations and trial, as well as by the depositions of the plaintiffs filing the actions in their personal capacity, the incident witnesses,

the depositions of the wounded victims (M. H. A.) and (B. M. H.), the autopsy report of the deceased victim's cadaver, the primary and final medical reports of the wounded, and the report of the visit to the incident site. It was noted though that Karbala Criminal Court did not consider the petition submitted by (M. A. M.)'s lawyer on 10/08/2009 to transfer the defendant to the specialized Forensic Medical Committee for medical tests since he suffers from schizophrenia and therefore is not aware of his criminal liability. The lawyer also included primary medical reports related to the defendant's condition. In order to issue a fair and sound judgment, the Court had to transfer the defendant to the official medical committee to decide whether he is aware of his criminal liability or not. As for the defendant (A. M. H.), the legal characterization of his actions applies to the provisions of article (273/1) of the Penal Code as he helped the defendant (M. A. M.) by giving the keys of his car that was parked in the incident site to the defendant's brother (M. R. A. M.) who is tried in a separate case for giving shelter to the defendant (M. A. M.) and helping him escape even though the defendant was accused of a crime penalized with death penalty. As for the defendant (A. M. H.), no evidence or presumptions were brought against him and therefore the Criminal Court's decision to annul the charges against him and release him is valid and in compliance with the Law for insufficiency of evidence against him. Thus, it was decided by agreement of all panel members to dismiss the charges against (M. A. M.) and to return the case file to Karbala Criminal Court for retrial after his examination by a competent medical committee to determine his criminal liability. The Criminal Court highlighted though the inadmissibility of considering both paragraphs A and Z and required the imposition of one charge as per the article 406/1/Z of the Penal Code and his conviction and penalty determination in compliance with the said article, in addition to the dismissal of all decisions against the defendant (A. M. H.) in order to convict him as per the provisions of article 273/1 of the Penal Code, determine the penalty accordingly, and affirm the decision ordering the release of the defendant (A. M. H.). The decision was issued as per the provisions of article 259/A/7 of the Code of Criminal Procedure no. 23 for year 1971 on Safar 3, 1433 A.H. corresponding to December 28, 2011 A.D.

23) The General Panel of the Federal Court of Cassation was formed on 04/10/2012 presided by the vice-president (H. E. H.) and with the membership of vice-presidents (D. Kh.), (S. M.) and (A. F.) and Judges (S. A.), (S. A.), (A. A.), (A. M.), (K. H.), (E. Kh.), (A. H.), (Q. S.), (F. K.), (J. Kh.), (J. J.), and (M. A.) empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

Party Petitioning for Retrial/ The Convicted/ (S. M. K.)

Al Rasafa investigating judge transferred, in transfer decision no. (376) dated 04/04/2010, the detained accused (W. J.), (S. M.) and (A. A.) for prosecution in long proceedings action case as per article 4/1 of Anti-Terrorism Law no. 13 for year 2005 before the Criminal Court in the Palace of Justice in Al Rasafa. The Criminal Court decided on 06/09/2010 in the case no. 1178/J2/2012 to incrim-

inate the defendants (W. J.), (S. M. K.) and (A. A. Kh.) by virtue of article 4/1 evidenced by article2/1 and article 8 of the Anti-Terrorism Law. The Court sentenced each of the above-mentioned defendants to death by hanging taking their detention period from 05/25/2009 to 06/08/2010 into consideration and that for the kidnapping of the child (K. A. J.) and his murder in Al Fudailiyah area. The Court maintained the personal right of the plaintiffs, the victim's family, to claim compensation and refer to Civil Courts after the judgment becomes final and it also informed the defendants that their case file will be automatically sent to the Federal Court of Cassation within 30 days as from the second day of issuance of the decision. The Court also ruled on the delivery of the confiscated school bag to the victim's family in return of a receipt that would be attached to the investigation file. As the defendants (W. J. A.), (A. A.) and (S. M.) were not convinced by the aforementioned judgment, they asked for its annulment for the reasons stated in the petition of their lawyer (F. S. Kh) dated 07/04/2010. The defendants appealed the said decision as per the petition for cassation presented by their lawyer (N. R. R.) dated 07/07/2010. The Chief Prosecutor General requested in indictment no. 223/H. A./2010 dated 09/15/2010 to affirm all decisions issued in this case incriminating the defendants and determining their penalties and asked to refer to the decision no. 86 for year 1994 in the case of the defendant (S. M. K.) for not completing 20 years of age when he committed the crime. The Federal Court of Cassation decided on 06/27/2011 in the file no. 401/General Panel/2010 to affirm all decisions including the death penalty by hanging due to the cruelty and gravity of the crime. The lawyers (S. A. J.) and (M. M. H.) of the convicted (S. M. K.) called the Chief Prosecutor General to retry their client for the reasons stated in their statements dated 02/23/2012, and on 02/26/2012 the lawyer (S. A. J.) presented a petition of clarification asking for retrial. The Chief Prosecutor General asked in indictment no. 6/17/119/2012 dated 03/05/2012 to accept the retrial request for the reasons stated in the letter.

Decision:

After examination and deliberation of the General Panel of the Federal Court of Cassation, it was established that the request for retrial presented by the convicted (S. M. K.) was based on one of the reasons stipulated in article 270 of the Code of Criminal Procedure, since it was established according to the Identity of Personal Status (copy thereof) annexed to the case file that the defendant's name is (S. M. K.) and that he was born on 08/24/1989 whereas the letter of the Ministry of Justice/Office of the Most Senior Agent no. S/160 issued on 02/21/2012 (paragraph 7 thereof) stated that the above-mentioned convicted claimed before the judge supervising the execution of his death penalty sentence that he was called (S. K. M.) and that he was born on (1993). This obliged the judge to postpone the death penalty execution especially that such a claim requires further examination to identify the correct name of the defendant as stated in official legal documents. The General Panel of the Federal Court of Cassation hence decided, for fulfillment of retrial conditions, to accept the retrial petition and return the case to its Court to examine the claim and issue the legally required decisions in light of the new findings. The decision was issued on Jumada al-Awwal 1433 A.H. corresponding to

April 10, 2012 A.D., by agreement of all the panel members in accordance with the provisions of articles 270/4 and 275 of the Code of Criminal Procedure.

24) The Republic of Iraq

Federal Supreme Court

6/Federal/2010

The Federal Court was formed on 03/03/2010 presided by judge "M. M." and with the membership of judges "F. M. S", "J. N. H.", "A. M. B.", "M. S. N.", "A. S. T.", "M. Sh. Q. K.", and "H. A. T" empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

Plaintiff / "Kh. A. R." – Represented by his lawyer "A. M. H. H."

Defendant/ "R. M. N." – In addition to his position - Represented by his lawyer "M. H. D. M" legal expert in (C.R.)

Claim:

The plaintiff's lawyer claimed before this Court that the Council of Representatives had issued a law amending the Election Law no. 16 for 2005 and granting the Sabean component a quota of one seat for the province of Baghdad whereas it granted the Christian component a quota of five seats for the provinces of: Baghdad, Ninewa, Duhok and Erbil, considering that those provinces constitute one electoral division. Whereas his client pertain to the Sabean confession and is running for the parliamentary elections for the quota allocated for the Sabean component; whereas he was considered a political component by virtue of the ratification letter no. 306 on 11/16/2009 issued by the Independent High Electoral Commission (IHEC) and was accepted as a political component by virtue of the ratification letter no. 302 and is thus entitled to participate in the parliamentary elections; whereas the said law prejudiced his client through the allocation of a quota at the level of the Baghdad province alone and not within one electoral division at the level of Iraq, given that the Sabeans reside all over the country and this law would therefore deprive most of the Sabeans from their right to contribute to the election of the representative they find suitable for the seat allocated to the Sabean component at the Council of Representatives, and that this law is also in contradiction with the provisions of article 14 of the Constitution stipulating that "Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status" and thus it violates the principle of equality between persons of the Sabean component and their brothers of the Christian component; therefore, he instituted an action against the defendant in addition to his position in order to plead and obtain a judgment to cancel the determination of the Sabean component quota at the level of the province of Baghdad alone and render it within one electoral division at the level of Iraq

in order to achieve justice. After this lawsuit was recorded in accordance with the provisions of article 1, paragraph 3 of the Federal Supreme Court bylaws and the required procedures as per article 2, paragraph 2 thereof were completed, a date was set for the Court hearing which was attended by the plaintiff's attorney, lawyer "A. M. H. A" by virtue of his general proxy, as well as the defendant's attorney, Mr. "M. H. D." by virtue of his official general proxy no. 55 dated 05/11/2009 issued by the legal department of the Council of Representatives, and the open court in presence of the defendant was held. The plaintiff's lawyer reiterated the statements of the Writ of Summons and asked that a judgment in respect therewith be issued explaining that his client's claim is to consider Iraq one electoral division and hence all members of the Mandean Sabean confession would be allowed to vote for the candidate of their choice wherever they are on Iraqi territories. Therefore, he petitioned for the amendment of the Election Law in accordance with the Writ of Summons and in application of the provisions of article 14 of the Iraqi Constitution that laid the foundations for the rules enshrining the equality to which the plaintiff and his confession aspire, which consists in the equality between the Sabean confession and the other components forming the Iraqi people such as the Christian component. The defendant's lawyer responded reiterating the points of the statement of defense already submitted to the Court and dated 01/26/2010, wherein he requested the dismissal of the lawsuit on grounds that the plaintiff instituted his legal action in his personal capacity and that submitting his candidacy to the elections does not make him representative of this component and hence the dispute does not stand. The plaintiff himself clarified during his attendance of the hearing that the Sabeans are found in all Iraqi provinces especially southern ones, and a part of their community has moved to the provinces of Kurdistan, and that therefore, restricting the Sabean component's right to vote to Baghdad alone brings prejudice to his interests as candidate and at the same time deprives the Sabeans from exercising their right as one of the Iraqi components, and he presented a copy of the Annex to the Regulation no. 32 for year 1981 on the Welfare of the Religious Communities officially recognized in Iraq, among which the Sabean confession is listed. The plaintiff's attorney also submitted a statement of claims dated 03/01/2010 in response to the defendant's attorney statement of defense in which he stated that article 20 of the Constitution ensured the right to vote, to elect, and to nominate for all citizens and that his client is candidate to the 2010 elections within the Sabean component for pertaining to the Sabean confession and that he was deprived from fully exercising his right referred to in the wording of article 20 of the Constitution, because of Law no. 26 for 2009 amending the Election Law no. 16 for year 2005 and restricting the election of the Sabean component to Baghdad province only and therefore depriving him of benefitting from the votes of his Sabean electors in the other Iraqi provinces and outside Iraq. He also added that granting the Christian component the mentioned quota and considering the seats allocated to it as within one electoral division whereas the Sabean component is refused this right renders the dispute between his client and the defendant - in addition to his position- valid, considering that the aforementioned amending law violated the provisions of articles 14 and 20 of the Constitution. After giving his statement, such statement was added to the case

file at the Court registry and both litigating parties' attorneys reiterated their pleadings and claims and petitioned for the issuance of a judgment in respect therewith. The Court investigated the pleadings and claims of both parties' attorneys as well as their statements, and whereas it completed such investigation and examination, the Federal Supreme Court decided to announce the closure of the proceedings and pronounce its decision publicly.

Decision:

Upon examination and deliberation by the Federal Supreme Court, it was established that article 1 of Law no. 26 for the year 2009 amending the Election Law no. 16 for the year 2005 stipulated that "the following components shall be given a quota of the compensatory seats, provided it does not affect its current percentage in case they participate in other electoral national lists; the quotas shall be as follows:

e. The Christian component: five seats divided among the provinces of Baghdad, Ninewa, Kirkuk, Duhok and Erbil.

f. The Yazidi component: one seat in the province of Ninewa.

g. The Mandean Sabean component: one seat in the province of Baghdad.

h. The Shabaki component: one seat in the province of Ninewa."

Moreover, clause 5 of the same aforementioned article stipulated that "the seats allocated to the Christian component from the quota shall be calculated as related to one electoral division"; and whereas article 14 of the Constitution of the Republic of Iraq for year 2005 stipulated that "Iraqis are equal before the law without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sect, belief or opinion, or economic or social status"; and whereas article 1, paragraph 5 of Law no. 26 for the year 2009 amending the Election Law no. 16 for the year 2005 considered the seats allocated under the Christians quota as within one electoral division and such law did not grant this right to the Mandean Sabean confession but it restricted their right to vote and to nominate to the province of Baghdad alone; therefore, the said Law breached the principle of equality between Iraqis provided for under article 14 of the Constitution since the restriction of the Sabean component right to vote to the Baghdad province alone brings prejudice to the candidate as well as to the Sabean component since it deprives Sabeans in the other provinces from exercising their right as Sabean component in enjoying political rights, including the right to vote, to elect and to nominate, that are provided for under article 20 of the Constitution which stipulated that "the citizens, men and women, have the right to participate in public affairs and to enjoy political rights including the right to vote, to elect and to nominate" and whereas article 13, paragraph 2 thereof stipulated that "no law shall be enacted that contradicts this Constitution. Any text in any regional constitutions or any other legal text that contradicts it is deemed void" and

paragraph 1 of the same article stated that "this Constitution is the sublime and supreme law in Iraq and shall be binding in all parts of Iraq without exception."; therefore, the Court decided on the unconstitutionality of clause (c) of paragraph 3 of article 1 of the Law no. 26 for the year 2009 amending the Election Law no. 16 for the year 2005 for contradicting articles 14 and 20 of the Iraqi Constitution of the year 2005, and decided as well to notify the Council of Representatives to draw a new legal text that complies with the provisions of the said articles (14 and 20) of the Constitution by considering the seats allocated for the entire Sabean component as within one electoral division, provided this does not affect the procedures set for the election of the members of the Council of Representatives for the year 2010 since the said elections date is scheduled on 03/07/2010 and since the last legislative quarter of the current Council of Representatives ends on 03/15/2010. It decided as well as to impose on the defendant in addition to his position the proceedings expenses and lawyer fees of the plaintiff's attorney Mr. "A. M. H. H." amounting to the sum of ten thousand dinars. The decision was issued in presence of the defendant and by unanimous agreement of the panel in accordance with the provisions of articles 13, 14, 20, 93/1, and 94 of the Constitution and article 4/2 of the Federal Supreme Court Law no. 30 for the year 2005 and it was pronounced publicly on 03/03/2010.

25) The Republic of Iraq

Supreme Court Council

Presidency of the Federal Court of Appeal of Qadisiya

Qadisiya Criminal Court

The Criminal Court in Qadisiya was formed on 04/01/2012 presided by judge "H. A. J." and with membership of the two judges "T. H. H." and "H. J. A." empowered with the judicial authority in the name of the people. The Court issued its decision as follows:

Complainant // Public prosecution

Defendant // "A. A. S. Kh." - Represented by his appointed lawyer "A. R. Kh."

The Diwaniyah investigating judge referred the said defendant – by virtue of referral decision no. 170/Referral/2012 on 03/15/2012 – to be prosecuted in long proceedings according to decision no. 39 for year 1994 amended by decision no. 135 for year 1996. On the trial day, the Court was formed in the presence of the deputy public prosecutor "H. A. A.", the defendant was brought before the Court, which appointed him a lawyer to defend him, and an open trial was initiated in presence of the defendant. The defendant's identity and depositions were read and recorded, the referral decision was recited, and the charge was brought against the defendant in accordance with decision no. 39 for year

1994 amended by decision no. 135 for year 1996. The Court heard the defendant's response who pleaded innocent, then heard the pleadings of the deputy public prosecutor and the defense of the lawyer representing the defendant, then it heard the latter's last pleading, announced the closure of the hearing, and retired to issue the decision. The Court finally resumed the session again and pronounced its decision as follows:

Decision:

The facts of the case as shown in the preliminary and judicial investigation and the current trial are as follows: on 03/04/2012 and when the officers of the Narcotics Control Bureau were performing their job interrogating a suspect "H. M. A.", this suspect received a call from a certain person who is the defendant in the present case "A. A. S." who told him he wanted to purchase narcotic pills from him. One of the Narcotics Control Bureau officers answered him impersonating the suspect "H. M. A." and agreed with him on selling him the pills. The accused "A. A. S." was arrested after he reached Al-Moutaqaidin district in Diwaniyah region. In the interrogation process he claimed before the interrogating officer that he wanted to buy the pills for the purpose of taking them himself because of his divorce with his wife, whereas he denied before the Court of Inquiry being a drug addict and dealer, and reiterated such denial during his trial. Therefore, and based on the aforementioned and on the inexistence of evidence supporting the charges brought against the defendant in the matter of his dealing in narcotic pills or drugs and based on all the previous facts, the Court decided to rule on the annulment of the charge brought against the defendant "A. A. S.", to release him from detention for insufficiency of evidence against him unless he was wanted for another case, and to rule on paying lawyer fees to "A. R. Kh." Esq., amounting to the sum of fifty thousand dinars that shall be paid by the State treasury after the judgment earns the final degree a judgment in presence issued by unanimous agreement in accordance with article 182/c with possibility of appeal and discretionary appeal and was pronounced publicly on 04/01/2012.

26) Excerpts

<u>First – Applications Related to Non-Discrimination of Minorities in Iraq:</u>

1- Decision of the Federal Supreme Court no. 9/Federal/2008 on 11/24/2008 which stated that: "the composition of the Council of the Independent High Electoral Commission should ensure in its formation the representation of all components of the Iraqi people.)

Comment This lawsuit was filed before the Federal Court for non-representation of the Chaldeans and Assyrians in the Council of the Independent High Electoral Commission.

2- Decision of the Federal Supreme Court No. 15/Federal/2008 on 04/21/2008, which stated that:

"The Turkmens and the Syriac-speaking people in the province of Kirkuk are comprised within the concept of "density of population" stipulated in article 4, paragraph 4 of the Constitution."

Comment a- The lawsuit is filed before the Federal Supreme Court to claim the rights of the minorities in Iraq, namely: the Turkmens and the Syriac-speaking people.

b- Article 4, paragraph 4 of the Constitution provides for the following:

"The Turkmen language and Syriac language are two other official languages in the administrative units in which they represent density of population."

3- Decision of the Federal Supreme Court No. 72/Federal/2009 on 11/19/2009, which stated the following:

"The Iraqi Constitution did not distinguish between Iraqis residing in Iraq or outside it, but it required that the selection of the members of the Council of Representatives shall observe the representation of all components of the population and that the female representation quota shall constitute at least 25% of the number of its members."

Comment This decision came to confirm the non-discrimination in choosing the members of the Council of Representatives, whether the member was residing inside Iraq or abroad.

Second- Series of Decisions
Relating to the Right to Obtain the Iraqi Nationality

1- Decision No. 18/Federal/Cassation/2008 on 06/23/2008 issued by the Federal Supreme Court stating that: "The person born to an Iraqi father or to an Iraqi mother shall be considered by law Iraqi by birth, regardless of the other parent's nationality.)

Comment A person may obtain the Iraqi nationality either from his father or his mother, depending on the circumstances.

2- Decision No. 2/Federal/Cassation/2009 on 01/25/2009

"The person who is born to an Iraqi mother and a non-Iraqi father shall be considered Iraqi by law and shall be granted the Iraqi nationality regardless of the father's nationality."

3- Decision No. 2/Federal/Cassation/2009 on 01/25/2009

Issued by the Federal Supreme Court:

"The person who is born to an Iraqi mother is considered Iraqi by law and shall be granted the Iraqi nationality even if the father is not an Iraqi national."

4- Decision of the Federal Supreme Court No. 30/Federal/Cassation/2008 on 07/30/2008 that stated the following:

"The issued judgment granting the nationality to children born to an Iraqi mother, only recognizes their right to it and does not establish it. Their mother is consequently entitled to file a lawsuit to grant them the Iraqi nationality in her own capacity and not in addition to her guardianship."

Third- Decisions Relating to the Right to a Fair Trial

Decision of the Iraqi Federal Supreme Court No. /366/2008 Expanded Criminal Panel on 03/23/2009 that stated the following:

"Whereas evidence collected and brought against the accused consist in his confession during the investigation, which he later denied during the trial; whereas the medical report established the presence of bruises, wounds and burns in different parts of his body; and whereas the doubt is interpreted to the benefit of the accused and the confession is not consolidated by any other evidence or presumption; therefore the evidence is considered insufficient to convict him."

Decision of the Federal Court of Cassation/79/2007 Ordinary Panel, which stated that:

"The establishment that the accused was subjected to torture through the medical report that sustains such presumption, his retraction from the confession he made during the investigation, and the lack of issues arousing suspicions and distrust in his depositions and that render the same not suited for the institution of a sound judicial ruling especially that doubt is interpreted to the benefit of the accused."

Fourth- Judicial Decisions Relating to the Freedom of Movement and Travel

Decision of the Federal Supreme Court No. 24/Federal/2008 on 11/24/2008 that stated the following:

"The Constitution recognized that each Iraqi has freedom of movement and travel inside and outside Iraq without limitation or restriction and that such freedom shall not be restricted. The plaintiff also made the trip in his personal capacity and during the vacation of the Council of Representatives. Therefore, he does not have to notify the Council of Representatives of his journey, and the

Council of Representatives is not entitled to lift the parliamentary immunity of one of its members and to prevent him from traveling, unless by order of the judicial authority, and consequently, the lifting of the parliamentary immunity of the plaintiff by the Council and his prevention from travelling and from attending the Council of Representatives' sessions are procedures that contradict the provisions of the Constitution."

Decision of the Federal Supreme Court No. 4/Federal/Cassation/2006 on 03/29/2006 that stated the following:

"The prevention from travel is a restriction to the freedom of travel outside of Iraq and is considered a denial of fundamental rights ensured by laws."

Fifth- Decisions Relating to the Right to Own Property and Dispose of Real Estates

Decision of the Federal Supreme Court No. 18/Federal/Cassation/2006 on 07/19/2006 that stated the following:

"The decision of the mayor to refuse giving a construction permit under the claim that the real estate shall be expropriated in the future and without referring to justifiable legal grounds is an abuse of power."

Decision of the Federal Court No. 96/Federal/Cassation/2009 on 09/13/2009 that stated the following:

"The municipality's opposition to remove the prohibition of use after the expiry of the prescribed period has no legal basis."

Sixth- Decisions Relating to the Freedom of Expression

Including the **Decision of the Federal Court of Cassation No. 419/Civil/2009 on 05/06/2009** that stated the following:

"The article published in the "Al-Ettijah Al-Akhar" newspaper criticized the Independent High Electoral Commission and did not address its president specifically; it does not constitute therefore any attack on the reputation of the plaintiff, but is an article that expresses the opinion of its writer on the behavior of the High Electoral Commission, it does not violate public order and morals and is consistent with the freedom of opinion that is guaranteed by the Constitution."

We highlight in this regard that the Supreme Judicial Council, in appreciation of all members of the fourth power working in the Press and the Media, decided by virtue of the statement no. 81/1000/Q on 07/11/2010 to establish the court specialized in Press and Media cases, that examines the complaints and lawsuits related to the press and the media whether they are civil or criminal cases. An

experienced judge who is well aware of the role of the press and the media was appointed to this court - provided they are dealt with in a way that suits their status - in order to examine the complaints brought by or against them. This Court examined until this day 80 civil cases from which 59 were settled, as well as 146 criminal cases from which 88 were settled.

Appendix 3: Jordanian Jurisprudence

1)

The Jordanian High Court of Justice **Hashemite Kingdom of Jordan**

Ministry of Justice

Decision

Issued by the High Court of Justice, which has jurisdiction to undertake the trial and issue the judgment in the name of His Majesty the King of the Hashemite Kingdom of Jordan

King Abdullah II Bin Al-Hussein the glorified

Court panel presided by judge Dr. (M. R.)

Members: Judges (F. A.), (E. A. T.), (A. K. F.) and (M. T.)

Plaintiff: **(Z. M. A. F. S.)**

Represented by his lawyer (A. N.)

Defendant:
the Judicial Council represented by the President of the Judicial Council

Represented by the head of the Administrative Public Prosecution

The plaintiff's attorney instituted this legal action on 06/10/2007 to challenge the decision no. 44 for year 2007 dated 04/12/2007 issued by the defendant and which provides for transferring the plaintiff to provisional retirement as from 04/15/2007.

Grounds of the Contestation:

1- The contested decision violates the law in the form and in the substance and it was not established on sound legal grounds.

2- The contested decision is null or was issued by virtue of procedures that shall be considered null and by faulted constitution of the Judicial Council.

3- The contested decision comprises abuse of power.

And in the course of the open trial held in presence of the plaintiff's attorney and the head of the administrative public prosecution representing the

Defendant, the Writ of Summons was read as well as the Statement of Defense and the Statement in response thereto, the Court brought forward all evidence submitted in the case, and both parties presented their final depositions and pleadings.

Decision

Upon the perusal of the case documents, the examination and scrutiny thereof and after legal deliberation, we find,

based on what was established throughout the trial, from statements and other submitted evidence and arguments that the merits of the case consist in that the plaintiff was appointed as a third-degree judge on 01/05/2001.

On 04/12/2007 the defendant issued against the latter its decision no. 44/2007 to terminate his services as from 04/15/2007, what led the plaintiff to contest such decision.

In the substance and in the merits of the appeal, we find that article 16/b of the Law on the Independence of the Judiciary no. 15 for the year 2001, states that:

"The Council may transfer any judge to provisional retirement or terminate his services if the latter did not complete yet the required service term for transferring him to retirement."

Such article has given the Judicial Council composed of eleven judges who by nature of the positions they hold are at the summit of the Jordanian Judiciary and are the most experienced and knowledgeable in the statuses of the Judicial Authority, and enjoy the deepest understanding of the strict standards within the framework of which they should perform the judicial function, can look more keenly into the restrictions within the nature of the judicial function and the high values related thereto that dismiss any conjecture or suspicion, and from which stems the right to control it for the protection of the judicial function and under all circumstances so that the judges' rulings remain just at all times, and to prevent the weakening of their resolve to defend the right, as well as freedom, the persons and properties or to prevent the judges' deviation from doing what's

right and their undertaking of acts that undermine the awe-inspiring effect the Judicial authority has and affect its high station as this leads to decreasing the litigants' trust in those handling the judicial authority. This is because the judge's work cannot be compared to that of other officials and he shall not be excused for any abuse to the effective restrictions that govern his functions; the standards of conduct that apply to him should be firmer and more stringent whereas he shall be known for his good manners and conduct, holding on to his integrity and careful not to act in a way that prejudices it. He shall also abide by the provisions of the Code of Judicial Conduct issued by the Judicial Council on 12/19/2005 thus distancing the judicial work **from any suspicion or compromising situations that may stain his conduct** and thus entail the issuance of a ruling to disqualify the judge and proclaim him unfit to continue his functions. This is a condition that goes hand in hand with the said functions and to which the judge shall be subjected at all times as long as he is carrying out judicial work until his retirement or termination of services in case he no longer meets the conditions required for keeping his competences.

And whereas the Judicial Council found that the plaintiff is no longer fit to perform his judicial functions, it met upon convocation by its president by virtue of letter no. 463/1/2 dated 04/11/2007 and decided by virtue of his letter no. 464/1/2 dated 04/12/2007 to transfer the plaintiff to provisional retirement and the defendant issued his contested decision, a decision that the Council is entitled to issue without anyone having the authority to overrule its judgment as it exercises its authority in this regard at its own discretion with no judicial control over it as long as it is in compliance with the principle of legality and results from the Council's conscientious conviction.

And whereas the statement of the plaintiff's attorney in his pleading regarding the application of article 14 of the International Covenant on Civil and Political Rights that is effective as from 1967 is not applicable as we are not hereby holding a trial to demand that it be fair, independent and impartial and that it comprises defense guarantees, and whereas is not applicable as well the plea that the displacement and the termination of service took place on the same day, and that the decision affected almost 33 judges, transferring them to retirement or to provisional retirement, or dismissing them, such procedure being the object of the challenge, as the conscientious conviction of the Judicial Council - regarding the loss of competence in the judicial function of the plaintiff and the other judges comprised by this decision – did not emerge right at the time of issuance of the decision but rather it was formed before the displacement and before issuance of the decision since such matters were examined and deliberated beforehand by the Council in secret. This is how the Judicial Council monitors the work of the judges and is entitled to base and substantiate its decisions upon his impressions regarding actions committed by the judge and actions passed on by parties working in the judicial field related to the judge's conduct or highlighting weaknesses in his knowledge or intellectual capacities and of which it became convinced as true thus shaking the trust in him and ruining his reputation. The Judicial Council's decision is not related necessarily to a certain fact; it assesses

the overall status of the judge regarding his capacity to keep performing the judicial function and even his past actions. This is because what is taken into consideration upon assessing the status of the judge is the constant approach he adopted relating to the different aspects of his conduct, knowledge, understanding and performance and development of his work, especially that the history of the plaintiff is not without mistakes and debatable issues and therefore these appeals should be dismissed.

As for the statement of the plaintiff's attorney that he is defending –in this trial- the judges as the Judiciary itself and is not merely defending the plaintiff, such statement is dismissed as he only has the right to defend the plaintiff by virtue of his proxy and that the Constitution has enshrined the Judiciary as an independent body that does not need anyone to defend its independence as article 97 of the Jordanian Constitution provides for the following:

"Judges are independent, and in the exercise of their judicial functions they are subject to no authority other than that of the law."

The judiciary, as a profession, is the highest profession known to humanity; it aims at instituting justice. Judges are men who have a truth firmly rooted in their conscience; it consists in that no judgment is worthy of praise unless based on justice, that there is no justice without judgment and no judgment is valid and sound unless by instituting justice. Allah commanded his prophets to be just when he made them his successors on Earth and bequeathed them the institution of justice "We have already sent Our messengers with clear evidences and sent down with them the Scripture and the balance that the people may maintain [their affairs] in justice."

Allah the Almighty has spoken the truth.

For this purpose, and upon establishment of what is right, the judiciary will not be persuaded by any praise or lure, which therefore requires the dismissal of this argument. Shall not be considered valid as well the pleading that article 16 of the Law on the independence of the Judiciary violates the Constitution and it shall not be described as among the texts that were issued during the phase of the imposition of the martial law given that, by virtue of article 10/9 of the High Court of Justice Law no. 12 for year 1992, administrative decisions no longer have immunity from being contested as it provides for the following:

"Any final administrative decision, even if immunized by the law by virtue of which it was issued, can be contested."

We also find that the Jordanian Constitution had established a general principle under article 98 thereof in what concerns judges as it provided for the following: "Judges of the Civil and Sharia Courts shall be appointed and dismissed by a Royal Decree in accordance with the provisions of the law."
The Constitution thereby left the details of terminating the service of judges and

their transferring to provisional retirement to the law and hence the pleadings of the plaintiff's attorney in this concern shall be dismissed.

Also shall not be valid the pleading that transferring the plaintiff on 04/12/2007 to provisional retirement is in violation of the law given that he completed 14 years and a half of service whereas the period of the judicial service that allows his transfer to provisional retirement is his completion of 15 years of service pursuant to the provisions of article 175 of the Civil Service Regulation, and the plaintiff had practiced law for more than twelve years and that according to the provisions of article 14/h of the law on the independence of the Judiciary such duration shall be taken into consideration for lawyers.

2) Criminal Court of Cassation **Case No. : 755/2006**

Court Panel presided by judge (A. A.)

Members: Judges (A. B.), (R. H.), (F. H.), and (A. M.)

Appellant: - Deputy Prosecutor General/ Amman

Appellee: -A.

This appeal for cassation was filed on 05/07/2006 to contest the judgment issued by the Amman Criminal Court of Appeal in the case no. 378/2006 dated 04/09/2006 that consisted in dismissing the appeal and affirming the decision no. 13/2005 dated 07/24/2005 issued by the Amman Criminal Magistrate Court which consisted in ((rejecting the request of extradition of the appellee)) and remanded the case to the original Court.

The grounds of cassation consist in the following two grounds:

1- The Court of Appeal committed a mistake in the conclusion it reached when it decided to reject the request of extradition despite the fact that the condition of the appellee's extradition to the US authorities was fulfilled.

2- The contested decision violated the Law and the principles, and was not duly justified.

In consideration whereof, the appellant petitioned for the acceptance of the appeal in cassation, in form, and the dismissal of the contested decision, in substance.

On 06/08/2006, the deputy Chief Prosecutor General presented a written indictment, at the end of which he requested the acceptance of the appeal in cassation in form and substance, and the dismissal of the contested decision.

Decision:

After the examination and verification of the case and the deliberation, it was established that the Head of the Arab and International Police Department sent the letter no. 94/2867/12559 dated 01/01/2004 to the Judge of the Amman Criminal Magistrate Court and annexed thereto the circular of the Washington Interpol no. 41116645 dated 11/12/2004 stating that the US officially requested the temporary detention of (A. D.), also known as (A. A. E.) and (A. A. Kh. D.), born on 06/23/1963 in As-Salat/Jordan to extradite him to the United States of America for the charges of conspiring (one time) and stealing government properties (5 times); the request was recorded before the Amman Criminal Magistrate Court under no. 67/2004.

The Court examined the request and issued its decision dated 12/01/2004 rejecting the (extradition request) because the treaty concluded between the Hashemite Kingdom of Jordan and the United States of America did not go through its constitutional stages and was not approved by the National Assembly.

The Assistant Prosecutor General /Amman/ contested the aforementioned decision before the Amman Court of Appeal, which issued its decision no. 228/2005 dated 01/25/2005 annulling the appealed decision and remanding the case to its original Court for the purpose of contacting the competent parties and making sure whether, to the date on which the lawsuit was filed against the appellee, the treaty was approved or not.

After returning the case back to the Magistrate Court and recording it again under no. 13/2005, the Court applied the annulment decision and issued decision no. 11/24/2005 refusing the extradition request.

The Assistant Prosecutor General/Amman challenged the aforementioned decision before the Amman Court of Appeal which issued decision no. 378/2006 dated 04/09/2006 dismissing the appeal and affirming the appealed decision.

The Assistant Prosecutor General /Amman/ did not settle for the abovementioned decision of the Court of Appeal and filed the appeal in cassation for two grounds stated in his pleading.

As for the two grounds of cassation, in which the appellant considered the Court of Appeal was wrong for the conclusion it reached and which consisted in rejecting the extradition request although the terms of the extradition of the appellee (A.) to the US authorities were met.

Hence, we find that the treaty on the extradition of fugitives which was concluded between the government of the Hashemite Kingdom of Jordan and the US Government, did not go through all its constitutional stages and was not ratified by the National Assembly, because the treaties on the extradition of fugitives

are treaties that affect public and personal rights of Jordanian citizens and can only be enforced if approved by the National Assembly, as per article 33 of the Constitution, in accordance with the Jurisprudence of the Court of Cassation in many of its decisions.

Whereas the Court of Appeal reached this conclusion, it therefore applied the provisions of the Law in a sound manner; these 2 grounds do not apply to the contested judgment and should be dismissed.
Therefore, based on the above-mentioned, we decided to dismiss the appeal in cassation, to uphold the contested decision and to return the papers to the Magistrate Court.

Decision issued on 20 Jumada al-Thani 1427 A.H. corresponding to 07/17/2006

3)

The Hashemite Kingdom of Jordan

Ministry of Justice

Decision

Issued by the Court of Cassation empowered with the judicial authority to try and hand down judgments in the name of His Majesty, the King of the Hashemite Kingdom of Jordan

Abdullah II Bin Al- Hussein

The Panel of Judges was presided by Judge (M. R.)

and with the membership of Judges

"A. Al. S.", "A. A.", "A. Kh." and "D. A. Kh."

First Cassation:

Appellants: 1- B. M. M. Kh.
2- M. A. A. M. Kh.
3- A. Sh. M. A. Kh.
Their lawyers: B. S. T.
and H. B. F.
Appellee: - Public Right

Second Cassation:

Appellant: M. A. M. T.

His Lawyer: M. H.

Appellee: Public Right

Two appeals in cassation were filed in this case, the first on 06/12/2003 and the second on 06/15/2003, to challenge the judgment issued by the Criminal Court of Appeal in Amman on 02/24/2003 in the case no. 77/2003, and that consisted in dismissing both appeals and affirming the appealed decision issued by the Amman Criminal Court on 01/29/2003 in the case no. 1423/2001 consisting in (sentencing the appellant (M. A.) to temporary imprisonment with hard labor for one year and 8 months, charging him with the fees, sentencing the appellants B. and S. to hard labor for 2 years and a half and charging them with the fees, as well as sentencing the appellant A. to hard labor for one month and a half and charging him with the fees) and remanding the case to the Court that examined it initially.

The grounds of the first appeal in cassation are summarized as follows:

1- The contested decision was not legally and duly justified and contradicted with reality and the Law.

2- The Court of Appeal was wrong not to examine the depositions of the complainant "A. M. A." regarding the fact that when was at the Al Naser Police Station he saw the appellants being harshly beaten and he started shouting at the Police telling them he did not want to file a complaint because he was deeply hurt from the beating they were subjected to.

3- The appellants went to the Police by themselves showing no signs of beating -as proven in the evidence. When they entered the Police station they were brutally beaten as established in the medical reports.

4- The two Trial Courts were wrong to overlook the written statement presented by the plaintiff's son who is the only witness and who claimed that the appellants were innocent of this accusation.

5- In the diagnosis report, the diagnosticians did not confirm that "S." and "B." were the ones they saw but they were positive that they did not see the above-mentioned defendant Bassam.

6- The two Trial Courts were wrong to overlook and rule out the defense evidence that was conclusive.

7- No witness ascertained that the appellants committed this crime, even the plaintiffs in this case asked not to file a complaint against the appellants.

8- Prosecution evidence were based on guesswork, and the Criminal Court's conclusion, which stipulated that the confession preceded the beating was nothing but an inappropriate conclusion.

Based on the above, the appellants requested the approval of the appeal for cassation in form and the dismissal of the contested judgment in substance.

The grounds of the second appeal in cassation are summarized as follows:

1- Both the Court of Appeal and the Amman Criminal Court reached a wrong conclusion because the evidence presented in this case do not lead in any case to the result they reached.

2- The Court of Appeal was wrong to disregard what was established by the jurisprudence, the Judiciary and the Law, given that the length of the detention period (the period during which the defendant was detained by the Police) constituted an absolute presumption of the invalidity of his depositions, what formed a clear violation of the wording of article (49) of the Code of Criminal Procedure.

3- The Court was also wrong to say that the Court of First Instance indicated in its decision the reasons that made it take this confession into consideration; its significance and inference of the result is reasonable but what is wrong therein is that the confession is subject to the control and assessment of the Court as any other evidence.

4- The Court was also wrong to respond to the seventh ground excluding the grounds of the appeal, stating that it was a mere argument in order to reach a different result, as the Criminal Court did not apply the Law in a sound manner, especially the wording of article (80) of the Penal Code.

5- The two Trial Courts misapplied the Law, as the wording of (article 399) of the Penal Code stipulated that stealing is taking others' movable money without their consent; and whereas it was proven that the defendant M. (the appellant) was the son of the owner of the showroom and the showroom manager at the same time, the elements of the theft crime were not present in this regard, which made the contested decision dismissible.

6- The Trial Court was wrong not to apply the provisions of article (425/1) of the Penal Code; the mistake being that the defendant was the son of the showroom owner and thus he should be exempted from punishment as per the wording of article 425/1 of the Penal Code as the wording is conclusive and should be applied.

Therefore, the appellant requested that the appeal in cassation be accepted in

form and that the contested decision be repealed in substance.

On 07/14/2003, the deputy Chief Prosecutor General presented a written indictment, at the end of which he requested that the two cassation petitions be accepted in form and dismissed in substance and that the contested decision be affirmed.

The Decision

Upon examination and deliberation, we found that the General Prosecution transferred the defendants:
M. A. M. T.
S. A. A.
B. M. M. Kh.

before the Amman Criminal Court for the following charges:

1- Theft in violation of article 401 of the Penal Code in the case of the defendants 2 and 3.

2- Accessory in theft in violation of articles 401 and 80 in the case of the defendant 1.

3- Threats in violation of article 349 of the Penal Code in the case of the defendants 2 and 3.

4- Fabrication of crimes in violation of article 209 of the Penal Code in the case of all defendants.

The Amman Criminal Court referred the suspect A. Sh. M. Kh. to the same Court for the possession of money obtained from crime what constitutes; a violation of article 83 of the Penal Code.

The Amman Criminal Court examined the case and concluded the following in regard to the criminal fact (In the beginning of August 2001, the accused M. agreed with the accused (B. and S.) to go to the showroom and steal money therefrom using weapons. The accused M. ensured (B. and S.) he would make the proper arrangements so that the operation would look like a robbery; he showed them how to execute it and told them where the money was. He also explained that the showroom was covered by insurance, and that the owner would be therefore compensated. The accused M. accompanied (B. and S.) to a place near the showroom at around 10:30 pm. In preparation for the operation, M. entered the showroom while (B. and S.) went up to the roof. (B. and S.) were carrying a razor and a gun, covering their heads with black panty hose to hide their faces and wearing gloves to avoid leaving any fingerprints. While taking

the stairs up to the roof of the showroom, they were taken aback by the witness Alaa (Aa.) who was carrying a chair to the roof. They grabbed him, threatened him with the razor and the gun, pulled him to the landing of the stairs and left him there. They agreed with the accused M. to take the witness (A.) away. The defendant M. thus took the witness (A.) with him to fix his car light as he had arranged. During that time, (A.) received a phone call from his friends who asked him about the reason for (Aa.)'s delay. Hence, (A.) returned to the showroom to search for (Aa.) and the accused (B.) threatened him with the razor asking him to keep silent. (A.) then called out to the accused M. and (B.) grabbed his hand. The latter –A.- pushed (B.) who fell to the floor and ran to grab something to defend himself. At this point, the accused (S.) interfered and raised his gun against (A.), entered the showroom and stole the cash register that contained (550) Jordanian Dinars, (200) US Dollars and (312) Jordanian Dinars that the accused M. took from one of the drawers and placed in the cash register, in addition to checks and other papers. Upon exiting the showroom, the accused (B.) threatened M. by placing the razor on his neck and dragged him with them to make the witness (A.) believe that the robbery was against (M.)'s will. The 3 accused got into M.'s car and drove to Al Hashemi area).

The Criminal Court applied the Law to the facts and incriminated the accused (M.) for being accessory to robbery as per articles 401 and 80/2/A of the Penal Code and sentenced him to one year and eight months of imprisonment with hard labor after use of extenuating circumstances and acquitted him from the charge of fabrication of crimes. The Court also convicted the accused (B. and S.) for robbery as per article 401/1 of the Penal Code sentencing each of them to 2 years and a half of imprisonment with hard labor in addition to charging them with the fees after using discretionary extenuating circumstances, and acquitted them from the charge of fabrication of crimes. The Court incriminated the suspect (A.) with the charge attributed to him as per article 83 of the Penal Code and sentenced him to a month and a half of imprisonment and to the settlement of the fees and a ten Dinar fine as well as other fees after use of extenuating circumstances.

The accused (M. A. M. T.) refused this decision and challenged it in appeal. The accused (B. M. M. Kh.) and (S. A. A.) in addition to the suspect (A. Sh.) also rejected this decision and challenged it in appeal. Thus, the Amman Court of Appeal issued the judgment no. 77/2003 on 02/24/2003 ruling with the dismissal of the 2 appeals in substance and affirming the challenged decision.

The accused (B. and S.) and the suspect (A.) did not settle for this judgment and contested it in cassation for the grounds stated in the petition of cassation presented by their lawyer on 06/12/2003.

The accused (M.) also rejected the aforementioned judgment and challenged it in cassation for the grounds stated in the pleading presented by his lawyer on 06/15/2003.

Concerning the response to the grounds of cassation,

Concerning grounds 2, 3 and 8 of the first appeal in cassation and grounds 2, 3 and 4 of the second appeal in cassation, which all challenged the validity of the defendants' confessions before the Police since they were all subjected to severe beating as proven by the medical reports issued by the medical examiner following the request of the Prosecutor General. They were also detained at the Police station for about ten days before being transferred to the Prosecutor General, what caused their confessions to be affected by the physical and moral coercion they were subjected to.

Based on the aforementioned, we found that, in its decision, the Amman Criminal Court stipulated: (As for the defense's evidence which first consisted in the subjection of the accused to harm and torture before taking their depositions, the Court found that the accused were arrested according to administrative procedures after taking their depositions, that the depositions of the accused M. were taken in the morning of August 11, a few hours after the incident and the statements of the accused B. and S. were taken on August 11, the same day they came to the Police station, as they appeared before the Police (according to the record) at 6:00 pm and their depositions were taken several hours after their arrival as indicated in their statements.) The Court added: (as for the statement indicating that the accused were beaten and tortured and that there were bruises and marks thereof, it was established that the depositions of the accused were taken at the Police Station on the dates indicated therein, and that they were arrested by the Administrative Governor after their interrogation. Thus, none of the actions that took place after the interrogation should be taken into consideration in this case since their statements were taken before they were subjected to any violence or beating according to the medical reports issued in their concern. Hence, the evidence submitted by the defense failed to refute the facts proven to the Court as per the above.)

While examining the grounds of the two appeals, the Amman Court of Appeal affirmed the decision of the Amman Criminal Court and added: (Our Court finds that the Court of First Instance examined in its decision what was brought up by the appellants concerning this ground in terms of the medical reports issued in their concern and kept in the inquiry file, in an appropriate manner and that it indicated the grounds upon which it based its decision to disregard those reports; our Court upholds the decision of the Amman Criminal Court in this regard and affirms the conclusion its reached.)

Our Court also finds that, where the Trial Court was the only authority competent to evaluate the evidence including the confession of the accused, in accordance with the stipulations of article 147 of the Code of Criminal Procedure. Such evaluation is however dependent upon the validity of the reasoning and the rationality of things and if the evaluation lacked these two elements, it would be illegal and should be consequently scrutinized by the Court of Cassation; and since the contested judgment did not examine and discuss these facts, it lacked

valid significance and thus it should be challenged.

The accused were arrested on 08/11/2001 and transferred before the Prosecutor General on 08/20/2001. Their detainment in the Police Station for 9 days is considered, according to sound legal logic and reason, an evidence to the invalidity of their confession before the Police since the logic dictates that the accused be not detained by the Police for all this time and that they be referred immediately to the Prosecutor General if they made the confession voluntarily and by choice, or else what is the reason for this detention when the wording of article 100 of the Code of Criminal Procedure expressly compels the Judicial Police officer to listen to the depositions of the accused immediately and to transfer the latter before the competent Prosecutor General within 24 hours. The conclusion that is in compliance with logic and reason is that the accused confessed under beating and torture and that the Judicial Police officers detained them by virtue of an administrative arrest warrant until the torture marks disappear off their bodies; and the accused were transferred before the Prosecutor General after 9 days in detention.

The latter sent them to the forensic examiner upon their request and they obtained the medical reports that were kept in the inquiry file and that proved that the defendants were beaten and tortured.

Therefore, the available facts indicate that the circumstances in which these depositions were taken were not sound and valid according to the requirements of article 159 of the Code of Criminal Procedure. Consequently, relying on these depositions as evidence for the Prosecution to prove the charges against the accused is inconsistent with the Law and constitutes a violation thereof; the Court of Appeal should not have settled for this evidence and its contested decision should be repealed for these grounds.

Based on the above and without the need to look into the remainder of the grounds of the two appeals in cassations, we decide to repeal the contested judgment and to remit the papers to the Court of Appeal to reevaluate the evidence in light of the exclusion of illegal evidence and then issue the required decision.

Decision issued on 29 Ramadan 1424 A.H. corresponding to 11/23/2003

Member Member President

Member Member

Chief Court Clerk

Audited by A.A.

4)

The Jordanian Court of Cassation in its Criminal Capacity

Case no. 1339/2008

The ruling panel presided by Judge M. Kh.
And with membership of judges
"S. A. ,A. B.", "N. N.", "H. H.", "F. H.", "A. M." and "M. R."

Appellant: A. R.

Appellee: - Public Interest

On 08/06/2008, this appeal in cassation was filed to contest the judgment issued by the Amman Criminal Court of Appeal in the case no. ((17216/2001)) dated 05/11/2008, to dismiss the appeal and affirm the contested judgment no. ((645/2005)) dated 09/13/2007 that was issued by the Amman Criminal Court; the judgment stipulated the following:

1. Non-liability of the accused A. R. for the crime of false testimony that is attributed to him as it is one of the elements of the crime of slander in violation of article ((214/2)) of the Penal Code.

2. Incrimination of the accused A. R. for slander in violation of article ((210/2)) of the Penal Code.

Following the incrimination decision and in accordance with the provisions of article ((210/2)) of the Penal Code, the Court sentenced the criminal "A. R." to temporary imprisonment with hard labor for 3 years and payment of the relevant fees for the sentence period, and remanded the case to its initial Court.

The grounds of the appeal in cassation are summarized as follows: -

1. The Amman Criminal Court of Appeal was wrong, and violated the Law and the due procedures when it did not answer in details to each of the grounds of appeal presented by the appellant, thus breaching the rules and the Law as well as dozens of the decisions issued by the Court of Cassation.

2. The Amman Criminal Court and the Amman Court of Appeal were wrong and violated all rules and procedures and breached the Law in their decisions, as the Court of Cassation, by virtue of its decision no. ((271/2005)) provided for the annulment of all procedures that took place after ((03/08/2003)), including the decision no. (71/2003) upon which were based all the judgments that followed it, according to the decision no. (271/2003) issued by the Court of Cassation.

3. The Amman Criminal Court and the Amman Court of Appeal were wrong and violated all rules and procedures and breached the Law in their decisions because they were not consistent with reason, logic, conscience and sound provisions of the Law. If the complainant were not the lawyer F. K., this case would not have been filed in the first place, especially that my client did not commit the crime attributed to him because submitting information or a complaint is a constitutional right granted to all people as per article ((17)) of the Jordanian Constitution.

4. The Amman Criminal Court and Amman Court of Appeal were wrong and violated all rules and procedures and breached the Law because they pronounced their decisions without any proof as to the innocence of the complainant from the action attributed to him in the complaint filed for slander ((that is his innocence from the complaint filed by the appellant in the original case)) upon which the case of slander is based, especially that no Judicial decision was issued in this regard. Therefore, the question that should be brought up here is, whether or not it is acceptable to rule on the charge of false testimony –i.e. slander- before the competent Court first decides on the facts subject of the complaint.

5. The Court of Appeal misjudged and was wrong in page ((9)) of its decision when it stipulated that ((referring to the case file, the evidence presented therein and the judgment issued by the Court of Appeal under the no. ((637/2003)) dated 12/31/2003.

6. The Amman Criminal Court and the Court of Appeal were wrong and violated the Law by referring to the decision no. ((637/2003)) dated 12/31/2003 issued by the Court of Appeal.

7. The Amman Criminal Court and the Court of Appeal were wrong and violated the Law because the presumptive decision in this case as well as their decisions violated the Law, the reality and the truth.

8. The Court of Cassation was wrong and violated the Law in its decision no. ((268/2003)) issued on 04/11/2004 which consisted in dismissing the appeal in cassation and affirming the contested judgment.

9. The Court of Cassation was wrong and violated the Law in its decision no. ((271/2005)) issued on 04/12/2005.

10. The Court of Appeal misjudged, violated the rules and the Law and was wrong for dismissing the appeal and affirming the judgment no. ((645/2005)) issued by the Amman Criminal Court as this action is not consistent with reason, logic and the sound provisions of the Law.

11. The Amman Criminal Court and the Court of Appeal were wrong and violated the Law as they did not handle the knowledge issue correctly, for it was proven to them from the presented reports that the appellant had no knowledge about the false statement since all reports presented by the defendant in the inquiry case and in the criminal case proved he did not sign the convention according to the evidence, to the reports issued by experts in the American company specialized in examining documents and by the private criminal laboratory, and to the testimony of the experts recorded in this case.

12. The Court of Appeal misjudged, and violated the rules and the Law and was wrong for stating in page ((9)) of its decision that ((regarding the Court of First Instance's use of discretionary extenuating circumstances in its decision no. ((987/2002)) dated 12/22/2002, and whereas our Court had decided in its aforementioned judgment no. ((637/2003)) to annul the said challenged judgment and to remit the case to the Court of First Instance to reexamine its judgment since it lacked attenuating circumstances in favor of the defendant and it sentenced him to the lowest penalty allowed by Law and did not give him a heavier one,)) which is inconsistent with the Law and with reality.

13. The Amman Criminal Court was wrong and violated the rules and the Law in the wording of page ((6)) of the minutes of the trial in the session held on 03/23/2006, in which it refused to accept the written memorandum including my client's written and personal statements even though the Court allowed my client in the preceding session ((session of 03/09/2006)) to present his statements. Its refusal of the duly presented memorandum and of its accompanying documents is not consistent with the rules and the Law for it ignored the decision that the Court issued in the preceding session and that allowed my client to present his statements. The said refusal is also in violation with dozens of the decisions issued by the Court of Cassation, such as the decision of the Criminal Court of Cassation no. ((296/1999)) dated 05/16/1999.

14. The Amman Criminal Court was wrong and violated the rules and the Law in the wording of page ((18)) of the minutes of the trial in the session held on 04/10/2006 that stated the following ((…whereas the case was remitted by the Court of Appeal after the annulment of the judgment issued by this Court in view for a specific reason which is that the Court of First Instance granted the defendant discretionary extenuating circumstances without convincing justification and without a legal obligation, and whereas the annulment determined its purpose and its content was in compliance with…)) This statement is not consistent with the reality and the truth as decision no. ((735/2005)) dated 05/17/2005 issued by the Court of Appeal ordered the dismissal of the judgment and the annulment of all the procedures undertaken in the case as of 07/08/2003.

15. The Amman Criminal Court was wrong and violated the rules and the Law by referring to an indictment that is based on copies of documents that have no value or established origin, while at the same time it excluded the real and authentic recognized and duly approved exhibits which are the exhibits ((from N9 to N15)) available in the investigation case no. ((1731/2000)) and its derivatives, a copy of which is kept in this case file, only because the complainant is the lawyer F. K.

16. The Amman Criminal Court and the Court of Appeal were wrong and violated the rules and the Law and made a mistake by accepting the statements, memorandums and objections from the plaintiff's attorney and by not rejecting them, because they focus on affirming the accusation and interfere in the criminal part since the plaintiff is not entitled in the present case to tackle the criminal part as the case was filed by the Prosecutor General before the Amman Criminal Court and he attended all its sessions representing the Office of the General Prosecution and was fulfilling his duties duly. Consequently, the plaintiff's attorney is not entitled to take the role of the Prosecution to affirm the accusation.

17. Both Trial Courts were wrong and violated the rules and the Law and committed mistakes in their decisions that were based on the indictment no. ((6037/2000)) issued by the Prosecutor General on 03/18/2001, knowing that the Trial Courts were fully aware that the indictment was inconsistent with the Law, the reality and the truth.

18. The Amman Criminal Court was wrong and violated the Law and reality by stating in page 9 of its decision that ((the Court finds that the merits of the case that are established through its papers, and through the statements of the General Prosecution that were heard and presented therein…)). The above statement is not consistent with the reality and the truth as the Court did not hear any of the statements of the Prosecution except for the testimony of the complainant, the only witness of the Prosecution who was heard and whose testimony was challenged. It was an individual's personal testimony that was not free of personal interests

and intent and the invalidity of this witness' claim was established when he claimed that he had already filed a complaint against Judge N. D. J.; which was proven invalid through the decision no. ((1121/2001)) issued by the Court of Cassation on 02/12/2002.

19. The two Trial Courts were wrong and violated the rules and the Law and committed a mistake in their decisions that are inconsistent with jurisprudence.

20. The Amman Criminal Court was wrong to examine our consecutive memorandums for achieving justice between the litigants, as it violated the rules and the Law in all the procedures of this case favoring the complainant F. K. although the requirements of justice themselves sometimes compel the Court to reopen discussions again if it deemed necessary during deliberation to finalize an incomplete procedure or to clarify an objective mysterious issue. In this case, the opponents have the full right to present the claims and conditional defense pleadings provided that these rules observe openness and confrontation and which means that everything should take place in the presence of the litigants granting them the rights to oral statements in response.

21. The Amman Criminal Court was wrong and violated all rules and principles and breached the Law by issuing a judgment that was the first of its kind in the Jordanian Judiciary; if the complainant were not the lawyer "F. K.", this case would not have been initiated, especially that our client A. R. S. did not commit the offence attributed to him.

22. The Amman Criminal Court was wrong after taking the legal defense that we presented in our memorandum into consideration, and that was not tackled by the Court even though it was presented to it at a previous stage where it was found that the Prosecution referred to evidence that was inconsistent with the rules and the Law.

23. The Amman Criminal Court was wrong and violated the rules and the Law by examining the plea for the original evidence, which challenged the evidence presented by the Prosecution which ignored authentic and duly presented evidence, compelling the Trial Court to stop looking into this.

31. In addition to the above-mentioned, the previous Panel of the Amman Criminal Court misjudged and violated the Law since it didn't apply the devolving effect on all the case matters after the papers were returned annulled due to the Prosecution's challenge for appeal, which can re-expose all matters of the case before the Court of First Instance.

32. The previous Panel of the Amman Criminal Court and the Court of Appeal were both wrong and violated the Law because the decisions is-

sued in this case ((affirming that they emanated from null procedures)) whether by the Court of First Instance or by higher Courts do not restrict the re-examination of the issues of the case in light of the evidence and pleas presented by the defense and that were ignored, but rather require examining, weighing and favoring some evidence over others.

33. In consequence, the Amman Criminal Court was wrong and violated the rules and the Law by refusing to correct the physical damage that was caused to the accused upon writing the minutes of the trial and that prevented him from presenting his evidence that prove he did not commit slander against the complainant.

34. The two Trial Courts were wrong to ignore the forgery performed to the minutes of the trial since the previous panel summoned our client and read him the decision of the Court of Appeal while he did not appear before it as stated in the session of 06/24/2003; this forgery was not tackled in trial. Is this not an awkward behavior that confirms the doubt that the case is fabricated???

35. Alternately, the Trial Court was wrong especially after relying on the testimony of the only witness in this case, the complainant Faruq Al Kilani, since his depositions were not free of personal interests and intent. The invalidity of this witness' depositions was already proven, when he claimed he already filed a complaint against Judge Nour AL Din Jaradat, and this claim was proven invalid through the decision of the Court of Cassation no. ((1121/2002))

36. The Amman Criminal Court violated the Law and the rules by refusing to discuss the evidence presented by the appellant including hearing the depositions of the Prosecution witnesses and discussing them and the written evidence presented by the appellant to the General Prosecution or to the Trial Court, which both Trial Courts missed.

37. Your Court is the one empowered to examine the whole file of the case along with all additions thereto such as documents and papers, including criminal cases no. ((1034/2004 and 119/2004,)) according to which the defendant is tried for the same charge. The defendant had already requested to duly unify these cases, however the President of the Court decided otherwise.

Upon consideration whereof, the appellant's lawyer requests to appeal the appeal in cassation in form and to dismiss the contested decision

On 08/27/2008, the deputy Prosecutor General presented a written indictment requesting in its end that the filed cassation be accepted in form, that the cassation be dismissed in substance and that the contested decision be affirmed.

Decision:

Upon examination and deliberation the merits of this case, as indicated by its evidence, are summarized as follows:-

- N. Kh. and A. S. were partners in the companies:-

1. N. Kh. and A. S. for Residential Projects no. ((27633))
2. N. Kh. and A. S. and their Partners no. ((36665))
3. N. Kh. and A. S. no. ((29462))

- A written agreement was concluded on 02/15/1992 between the company N. and A. S. for Residential Projects and N. H. Kh. and featuring the signatures attributed to the partners N. and A.

- A disagreement occurred between the above-mentioned partners resulting in many lawsuits including the case filed by the partner A. on 02/25/1999 before the Amman Criminal Magistrate Court against the partner N., and in which he was charged with issuing a bad check; knowing that his case was initially registered under the no. ((964/1999)) and it now carries the no. ((1896/2000)).

- The lawyer F. K. in his position as the lawyer of the defendant N. in the aforementioned case presented the above-mentioned agreement as evidence in the defense of his client.

- The complainant in that case, A. S., denied having signed the aforementioned agreement and filed a complaint before the Amman Prosecutor General under the no. ((1731/2000,)) in which he attributed the offence of falsifying the agreement to the lawyer F. K. and the offence of using a forged document to the partner N. Investigation results proved that the agreement under study was not forged and that the signature attributed to the complainant A. was authentic.

- The lawyer F. K. filed the case no. ((6037/2000)) on 11/27/2000 before the Amman Prosecutor General against A. S. accusing him of the following:-

1. Slander in violation of article ((210/2)) of the Penal Code.

2 False testimony in violation of the provisions of article ((214/2)) of the Penal Code.

And the General Prosecution Office in Amman had transferred the defendant A. S. before the Amman Criminal Court as per the decision no. ((N/837/2001)) dated 04/26/2001. The defendant was accused of:-

1. Slander in violation of article ((210/2)) of the Penal Code.

2. False testimony in contradiction with the provisions of article ((214/2)) of the Penal Code.

The Amman Criminal Court decided, on 04/11/2002 in case no. ((598/2001)), to declare the non-liability of the defendant for the false testimony and incriminated him with slander in violation of the provisions of article ((210/2)) of the Penal Code sentencing him to temporary imprisonment with hard labor for 3 years taking into consideration his detention period and to the payment of court expenses. The defendant was also sentenced to pay the plaintiff the amount of five thousand one hundred Jordanian Dinars in addition to fees and expenses and the amount of 255 Jordanian Dinars as lawyers' fees.

The convicted and the deputy Prosecutor General in Amman did not settle for the decision and they filed the appeal. On 05/27/2002 and in the case no. ((358/2002)), the Amman Court of Appeal decided to annul the challenged judgment in compliance with the wording of article ((236/2)) of the Code of Criminal Procedure.

After remanding the case to the Amman Criminal Court and recording it again under the no. ((978/2002)), and following the annulment decision, the Court announced on 12/22/2002 the non-liability of the defendant for the offence of false testimony considering it is one of the elements of slander. The defendant was thus convicted for slander and sentenced to temporary imprisonment with hard labor for 3 years taking into consideration his detention period and to the payment of court expenses. As per article ((199/4)) of the Penal Code, his sentence was reduced to one year of imprisonment taking into consideration his detention period and to the payment of court expenses, he was also sentenced to pay the plaintiff the sum of five thousand one hundred Jordanian Dinars as a compensation.

The convicted /defendant and the deputy of the Prosecutor General in Amman did not accept the decision and challenged it in appeal. On 02/24/2003, in the case no. ((71/2003)) the Amman Court of appeal decided to:-

- Dismiss the appeal of the convicted/defendant in substance and to affirm the challenged judgment.

- Accept the appeal of the deputy Prosecutor General in substance, annul the appealed judgment for use of discretionary extenuating circumstances and remand the case to its initial Court to resume the proceedings in this issue only.

The convicted did not accept the decision no. ((7171/2002)) issued by the Court of Appeal dated 02/24/2003 and filed an appeal in cassation. The General Panel of the Court of Cassation decided on 07/27/2003 in the case no. ((552/2003)) to:-

- Repeal the contested decision:-

A. To charge the plaintiff to pay difference in the fees.
B. To avoid the confusion in the wording of the judgment.
C. To listen to the testimony of the witness "N. Kh."

- Dismiss the other grounds of the appeal in cassation.

After remanding the case to the Amman Court of Appeal and recording it again under the no. (637/2003)) on 12/31/2003, the above-mentioned Court decided the following:

- To dismiss the two appeals filed by the convicted accused who is prosecuted in a case of personal interest in substance, in terms of the incrimination and not in terms of the penalty and to affirm the judgment in the case of personal interest.

- Accepting the appeal of the deputy Prosecutor General concerning the extenuating circumstances and annulling the appealed decision in this issue only.

The convicted refused the decision of the Court of Appeal and challenged it in cassation. On 04/31/2004, in the cassation case no. ((248/2004)), the General Panel of the Court of Cassation decided to affirm the contested decision.

After the papers were remanded to the Criminal Court and recorded under the no. ((439/2003)) on 09/20/2004, the said Court decided to declare the non-liability of the accused for the misdemeanor of fabrication, and incriminated him for the crime of fabrication in violation of the provisions of article ((210//1)) of the Penal Code and sentenced him to temporary imprisonment with hard labor for 3 years taking into consideration his detention period and to the payment of court expenses.

The convicted did not accept this decision and challenged it. On 10/17/2004, in the case no. ((1287/2004)), the Court of Appeal dismissed his petition for appeal in form for non-settlement of the appeal fees.

The convicted did not accept the judgment and filed an appeal in cassation. On 04/12/2005, in the case no. ((271/2005)), the Court of Cassation decided to repeal the judgment no. ((1278/2004)) issued by the Court of Appeal as the decision no. ((439/2003)) of the Criminal Court was invalid. Upon remanding the case to the Court of Appeal and recording it under no. ((735/2005)) on 05/17/2005, the Court decided to annul the appealed judgment no. ((439/2003)) dated 09/20/2004.

The convicted did not accept the judgment of the Court of Appeal and filed for cassation. The Court of Cassation issued its decision in the case no. ((1241/2005)) on 12/01/2005, dismissing the petition for cassation and affirming the contested judgment.

After remanding the case to the Amman Criminal Court and recording it under the no. ((645/2005)) on 09/13/2007, the latter Court pronounced the accused innocent of the false testimony charge considering it one of the elements of the fabrication offense and convicted him with the latter offence in violation of the provisions of article ((210/2)) of the Penal Code sentencing him to temporary imprisonment with hard labor for 3 years taking into consideration his detention period and to the payment of court expenses.

The convict did not accept the decision no. ((645/2005)) of the Criminal Court preventing him from presenting his defense evidence, and thus he filed an appeal. On 05/01/2006, in the case no. ((672/2006,)) the Court of Appeal decided to dismiss the appeal in form.

The convicted did not accept the decision of the Court of Appeal and thus filed for cassation and on 10/09/2006, in the case no. 948/2006, the Court of Cassation dismissed the petition for cassation.

The convicted did not accept the decision of the Criminal Court in the case no. ((648/2006)) preventing him from presenting his defense evidence and filed the appeal. The Court of Appeal decided on 04/08/2007, in the case no. ((688/2007)), to dismiss the appeal in form.

The convicted refused the decision no. ((688/2007)) of the Court of Appeal and contested it before the Court of Cassation. On 06/04/2007 in the case no. ((625/2007)) the Court of Cassation dismissed the petition for cassation. The convicted did not accept the judgment issued by the Amman Criminal Court on 09/13/2007 in the case no. ((645/2005)) ((judgment in presence of the litigating parties or their representatives)) and filed the appeal. On 05/11/2008 in the case no. ((17216/2007,)) the Court of Appeal decided, to dismiss the appeal and to affirm the challenged judgment.

The convicted did not accept the decision of the Court of Appeal and petitioned for cassation.

The grounds of this appeal in cassation are:

Concerning the ground 34, the previous panel summoned the appellant and read him the decision of appeal in his absence in the session held on 06/24/2003. The minutes of the trial are official documents/ that cannot be challenged unless in case of falsification and in accordance with the manner that is stipulated by the Law. Therefore, what was stated in this ground is simply a statement that should be dismissed.

Concerning the ground 3, the right to resort to the Judiciary is a license that was granted to everyone equally by virtue of article ((101)) of the Constitution. The aforementioned shall only be valid if that permit is not used in ill-faith or as a means to commit a crime.

Concerning the grounds 10, 13, 20, 30, 31, 32 and 33 stating that the appellant was forbidden from presenting his statements and pleadings,

The appellant exhausted his right to testimony and pleading of defense when he reiterated his deposition before the Prosecutor General asking to consider his pleas before the Prosecution invalid and ended his plea of defense as stipulated in the minutes of the session that was held on 10/11/2001 in the criminal case no. ((598/2001)), which means that these grounds should be dismissed.

Concerning the grounds 4, 5, 6, 8, 9, 11, 16, 17, 18, 22, 24, 25, 26, 28, and 29, article ((210)) of the Penal Code requires that the following elements be available in order to establish the criminal liability in the offence of slander:-

1. Presenting a complaint or a written notification -by the accused of slander- to the Judicial Authority or any authority that has to notify the Judicial Authority.

2. Attributing to the accused a crime that was not committed.

3. The plaintiff or the informer being aware that the accused is innocent of what was attributed to him, and still filing the complaint or the anonymous complaint against him.

The judgment of this Court ordered the following:-

- The plaintiff's knowledge that the accused is innocent does not make it true and certain and thus it is necessary to establish evidence thereto and to tackle it in an independent manner.

- Preventing trial for lack of evidence is not sufficient in order to consider that the plaintiff fabricated the crime.

The Statement of the General Prosecution that was adopted by the Trial Court its decision consisted of:-

1. The plaintiff's testimony on page 10 of the minutes of the criminal case no. 598/2001.

2. The file of the inquiry case no. 6037/2000 ((M/1)) ((see the minutes of the session of 10/11/2001in the above-mentioned criminal case.))

Do not include:-

- The defendant's confession of committing the offence attributed to him.

- Any indication to the defendant as to the innocence of the complainant from what was attributed to him.

The decision to prevent the prosecution of the complainant issued by the Amman Prosecutor General on 06/28/2001 in the case no. 560/2001 by presenting the document during the expertise session with the knowledge of the expert (J. A.) thus constituted an evidence to the personal right case but not for the public interest case as it was not presented by the Prosecution according to the rules of law.

The knowledge element required for the establishment of the criminal liability of the accused was therefore missing.

In its judgment, the General Panel of this Court decided that the legal description of the physical actions that were proven against the defendant and that were established in this case is not final if the case is still being examined in Courts ((decision of the General Panel of the Criminal Court of Cassation no. 370/2006 and no. 99/2005 proving that the Amman Criminal Court's incrimination of the accused in its decision 978/2002 dated 12/22/2002 with slander that was affirmed by the decision of the Court of Appeal no. 637/2003 dated 12/31/2003 and by the decision of the General Panel of the Court of Cassation no. 268/2003 dated 04/11/2004 did not become final since the case is still being examined before the General Panel of the Court of Cassation. The knowledge element required for the establishment of the criminal liability of the accused for the offence of fabrication was missing in violation of the stipulations of the contested decision, thus it should be repealed.

We decided therefore to dismiss the aforementioned decision and to remand the case to the Criminal Court to take the appropriate legal measures.

Decision Rendered on Rabi al-Awwal 22, 1430 A.H. corresponding to March 3, 2009 A.D.

5)

Jordanian Court of Cassation - Petitory Action Panel presided by Judge A. A. **Case No. 1789/2006**

Members: Judges D. M. F., A. F., and M. M.

Appellant: American Life Insurance Company/ ALICO

Represented by: Attorney Y. F.

Appellee: J. S. M.

Represented by: Attorney N. A.

This appeal was filed on 03/02/2006 to contest the decision dated 01/08/2006 issued by Amman Court of Appeal- petitory action case no. 4270/2005 dismiss-

ing the two appeals and affirming the appealed decision issued by Amman Court of First Instance- petitory, case no. 90/2004 dated 09/12/2005 as to compelling the defendant to settling the amount of 1768.857 JOD for the benefit of the plaintiff in addition to the legal interest as from the date of filing the lawsuit and until full settlement, while imposing upon the plaintiff all fees, relative expenses and the sum of 304 JOD as attorney fees for the defendant's representative since the plaintiff had lost the major part of his lawsuit for he originally claimed the amount of 7657 JOD, and also compelling each party to settle the fees and expenses relevant to his appeal without ruling for any of the parties with lawyer fees as they both lost the appeal they filed.

The Two Grounds for Appeal in Cassation May be Summarized as Follows:

1- The Court of Appeal was wrong and in contradiction with the law in its decision appealed in cassation whereby it ruled for the appellee based on disputed statement considered evidence contrary to the provisions of article 34/2 of the Law on Evidence.

2- The Court was wrong and in contradiction with the law in applying the provisions of article 202 of the Civil Law with provides that the parties to the contract shall both execute their obligations in good faith.

For the above-mentioned grounds the appellant's attorney requests to accept the appeal in cassation in form and to repeal the appealed decision in substance, and on 04/19/2006 the appellee's attorney submitted a statement of defense at the end of which he requested to accept the statement and dismiss the appeal in cassation.

Decision

After examination and deliberation, and based on the submitted evidence, we find that the facts of the case may be summarized as follows: the plaintiff "J. S. M" had submitted a writ of summons before Amman Court of First Instance-petitory, case no. 90/2004 against the defendant American Life Insurance Company (ALICO) requesting the sum of (7857.140) JOD therefrom under the claim that he was insured at the said company by virtue of insurance policy no. (8156740) dated 07/20/1997 and insurance policy no. (8156742) dated 07/25/2004, that he was hospitalized several times for a total of forty days, and that he was claiming from the defendant the ad damnum amount as this sum is due by virtue of the aforementioned two insurance policies along with fees, expenses and attorney fees.

The Court of First Instance issued on 09/12/2005 a decision compelling the defendant to settle the amount of (1767.857) JOD for the benefit of the defendant in addition to the legal interest as from the date of filing the lawsuit and until full settlement, while imposing upon the plaintiff all fees, relative expenses and the sum of 304 JOD as attorney fees for the defendant's representative since the plaintiff had lost the major part of his lawsuit.

The defendant was not satisfied by this decision and therefore it challenged in appeal same as the plaintiff who also filed a separate appeal.

Amman Court of Appeal- petitory issued its decision in case no. 4270/2005 on 01/08/2006 to dismiss the two appeals, affirm the appealed decision, and compel each party to settle the fees and expenses relevant to his appeal without ruling for any of the parties with lawyer fees as they both lost the appeal they filed.

This defendant did not accept this decision and therefore it filed an appeal in cassation based on **the grounds listed in the petition for cassation submitted by its attorney on 03/02/2006.**

In Substance and in the Grounds of Cassation:

In the First Ground: it contests the appealed decision because it is based on disputed statement considered as evidence contrary to the provisions of article 24/2 of the Law on Evidence.

In this regard we find that both trial courts relied in the decision appealed in cassation on the expert report submitted by Dr. "A. M." and on the testimonies of Dr. "A. N." and Dr. "Ah. H." as to the medical reports they made regarding the plaintiff and did not rely on the sole testimony of Dr. "A. N.".

Whereas the Trial Court exercises discretionary power in assessing the value of the evidence and in prioritizing one evidence over another pursuant to the provisions of articles 33 and 34 of the Law on Evidence without any control thereon by the Court of Cassation in this issue and that as long as the results it reaches are sustained by evidence submitted in the case,

And as long as the expert report adopted by the Court and used as evidence sustaining its appealed decision fulfills all due legal conditions, therefore this ground should be dismissed.

In the Second Ground of Cassation: it pleads that the Court of Appeal contradicted the law in applying the provisions of article 202 of the Civil Law, which stipulates that each party shall execute his obligations in good faith, and that because the plaintiff had filed several claims which resulted in several lawsuits.
In this regard, we find that all people may have recourse to the Judiciary, which is protected from any interference in its affairs and this is a right guaranteed under article 101 of the Constitution.

Whereas the appellant did not submit any evidence sustaining the bad will of the plaintiff in his filing the lawsuit, the appealed decision is thus in compliance with the law and this ground should therefore be dismissed.

In consideration whereof, we hereby decide to dismiss the appeal in cassation, affirm the appealed decision and remand the case to its source.

Decision Rendered on Ramadan 11, 1427 A.H. corresponding to October 4, 2006 A.D.

6)

Jordanian Court of Cassation **Hashemite Kingdom of Jordan**
Ministry of Justice

Decision issued by the Court of Cassation empowered with the judicial authority to try and hand down judgments in the name of His Majesty the King of the Hashemite

Kingdom of Jordan, King Abdullah II Bin Al-Hussein

First Appeal:

Appellant: K. E. D. E. E. (S)

Appellee: A. D. Company, its Attorney (R. D.)

Second Appeal:

Appellants:

1. K. B. Sh. M Company

Responsibility on owner of the ship ((T.))

2. O. A. E. Sh. Company

3. O. A. H. A. Company

And their Attorneys (A. M. H. J), D. (E. M. H. J), (A. Gh.) and (M. G. Sh)

Appellees: A. D. T. M. Gh Company

Attorneys: (L. N.) and (R. D.)

Two appeals were submitted in the matter of this case on 5/30/2007, to contest the decision of Amman Court of Appeal No. 2836/2006 on 4/30/2007 including dismissing both appeals and approving the appealed decision issued by Amman Court of First Instance in both claims No. (1219/T/2005) and (447/T/2005) submitted in the petitory action No. ((1944/2005)) on 6/4/2006, and which decided to ((dismiss the two claims relating to the arbitration clause and postpone

taking a decision as to the fees, expenses and lawyer fees until the disposition of the initial case,)) as well as to send papers back to their source in order to proceed forward in the trial in substance, and to examine fees, expenses and lawyer fees when the final decision is pronounced.

Grounds of the First Appeal in Cassation may be summarized as follows:

1. ((International treaties have supremacy over domestic laws and shall have precedence to be applied in case of conflict)); Amman Court of Appeal was wrong while applying and interpreting the law, as it justified and based on its contested decision in answering the first ground of the appeal in cassation.

2. ((New York Agreement was ratified and has undergone all its judiciary and constitutional phases according to the norms; the Agreement does not breach Jordan's sovereignty nor does it affect the public and private rights of the Jordanians.))

Amman Court of Appeal was wrong in applying the law and interpreting the same when it justified and based on its contested decision while answering the second and third grounds of appeal in cassation.

3. ((New York Agreement has a direct effect in the application for being connected to procedural issues)). Amman Court of Appeal was wrong in applying the law and interpreting the same when it did not establish that New York Agreement has a direct effect in the application for being connected to procedural issues and that the application thereof on the facts of the case does not breach the law according to their Court's decisions.

4. ((United Nations Convention on the Carriage of Goods by Sea is effective and does not affect Jordan's sovereignty))

Both, the Court of Appeal and before it Amman Court of First Instance were wrong in implementing the law and in interpreting the same when they decided that the United Nations Convention on the Carriage of Goods by Sea is not effective for not being ratified by the National Assembly; they were also wrong when they considered that the United Nations Convention on the Carriage of Goods by Sea - to which Jordan acceded, and which was published in the official Gazette without the ratification thereof by the National Assembly - was not effective and does not prevail over the domestic laws since it affects Jordanians private rights.

5. ((Arbitration Law is a private law compared to Maritime Trade Law and has precedence to be applied over the latter law)); Amman Court of First Instance was wrong in applying the law and in interpreting the same when it didn't take into consideration that Arbitration Law No. ((31)) for year 2001 is a private law compared to Maritime Trade Law and has precedence to be applied over the same, and that the provisions of article ((215)) of the Maritime Trade Law shall not be applied when it is Arbitration Law No. ((31)) for year 2001 that is applicable.

6. The Court of Appeal was wrong when it didn't apply article ((9)) of Arbitration Law that stipulates the following: "Arbitration shall be permissible for only the natural or juridical person who has the right to use his rights and shall not be permissible in issues where conciliation is not an option."

In consideration whereof, the appellant requests to accept the appeal in form and repeal the appealed decision in substance.

On 6/27/2007 the agent of the appellant submitted an answer at the end of which he requested to accept the answer in form, to dismiss the appeal in form and substance and to affirm the appealed decision.

Grounds of the Second Appeal in Cassation may be summarized as follows:

1. The appellants argue that Amman Court of First Instance- Petitory clearly breached and ignored the provisions and rules of the International Law and International Treaties and Agreements – to which the Hashemite Kingdom of Jordan acceded and then ratified, on which the appellants (plaintiffs) based their case and sustained their claim to dismiss the original case for there exists an arbitration clause, and which include the United Nations Convention on the Carriage of Goods by Sea of 1978 (the Hamburg Rules), the New York Agreement related to acknowledging and implementing foreign arbitration decisions of 1958, the Vienna Convention on the Law of Treaties of 1969 - and doesn't comply as well with the provisions of the Jordanian Constitution, the Jordanian Civil Law, the Jordanian Arbitration Law, the Jordanian Code of Civil Procedure, the English law, as well as with the London Maritime Arbitrators Association Terms (LMAA Terms 2002.)

2. Amman Court of First Instance - Petitory committed a big mistake when it ruled on that the United Nations Convention on the Carriage of Goods by Sea to which Jordan acceded and which was published in the Official Gazette without being ratified by the National Assembly is not effective and does not have supremacy over the domestic law because it affects Jordanians private rights.

3. Amman Court of Appeal was wrong in affirming the decision of Amman Court of First Instance- Petitory in its interpretation of article (33) of the Jordanian Constitution, based on which the Court of Cassation and before it the Higher Council for the interpretation of the Constitution had decided to enforce the New York Agreement relating to arbitration decisions and implement the same.

4. Amman Court of Appeal was wrong in affirming the decision of Amman Court of First Instance- Petitory, when it decided to invalidate the arbitration clause mentioned in the bill of lading object of the present case in accordance with the provisions of article (215/B) of Maritime Trade Law stipulating that:

In spite of all legal provisions under any other law, shall be considered null each clause or agreement that breaches the competence of Jordanian Courts to examine disputes arising out of shipment documents or maritime transportation."

In consideration whereof, the appellants request to accept the appeal in form and to dismiss the appealed decision in substance. On 6/27/2007, the attorney of the appellee submitted a statement of defense at the end of which he requested to accept the answer in form, and in substance to dismiss the appeal in form and in substance and affirm the appealed decision.

Decision

After examination and deliberation, we find that the plaintiff Al Afak El Dawleya For Food (Al Afak international company for trade in food products), a limited liability company, had filed this lawsuit at Amman Court of First Instance- Petitory No. (2005/1944) against the defendants:

1- Owners of the ship (Sh.) K-B. Sh. K. L.

2- The lessee of the ship for the time period "S. Sh." – Singapore

3- The lessee of the ship "S. E. D. E. E. B." in his capacity of sugar seller

Notified via the ship agent A. Q. Company/ Amman/ Shmeisani

4- Shipowners' Protection and Indemnity Club "O. A. E. Sh. A. M. E. E."

5- O. A. E. Sh. A. S. L.

6- Counseling institution A. A. H. T.

Notified via their representative in Jordan Counseling Institution A. A. H. T.

To claim the sum of ((95,414)) USD or its equivalent in Jordanian Dinars amounting to ((674794)) JOD as fees. The lawsuit is based on the following grounds listed in the Statement of Claims:

1. Ship "Sh." docked at Aqaba port on 9/15/2004 shipped to the plaintiff (14,000) metric tons of Brazilian white sugar from Paranaguá port in Brazil according to the bills of lading from No. 1 to 14 Paranaguá on 8/10/2004.

2. When the goods reached Aqaba port and the plaintiff inspected it to make sure it is not damaged and acknowledged receiving the same, the said goods were found incomplete and damaged.

3. The Ship protection club (O. A. E.) agreed to test and inspect the goods jointly during the unloading and sorting of the merchandise and during the delivery of the same to the receiver/ plaintiff on the latter's trucks and in its warehouses in Aqaba and Amman. The joint inspection results came as follows:

((40,840)) sacks, some of them dirty and covered with rot and some of them smelling bad. In order to limit the loss, the receiver/ plaintiff provided workers to clean the sugar sacks from the outside as much as possible so their outer aspect looks good and re-exported the same to Iraq at a lower price.

((10,240)) partly rotten sacks without any apparent signs of rot; these were refilled in new smaller sacks and distributed in the local market.

((16,590)) sacks containing sugar that is partly stony; 30% of the content is also lumpy.

Other sacks that are damaged or that have shortage in their weight and that are not included in the above points as stated in the ship record.

4. Shipowners' Protection and Indemnity Club (O. A. E.) - through and by request of the sixth defendant - drafted, issued and delivered an acknowledgement letter to the plaintiff on December 23, 2004, in which it stated that the Protection Club was committed to pay any sum of money that does not exceed the amount of ((630,000)) USD agreed upon between the relevant parties or by virtue of a final decision issued by the court that is competent to examine the claim relevant to the damages incurred to the sacked sugar shipped according to the bills of lading ranging from no.1 to 14 on 8/10/2004 from Paranaguá.

5. The overall value of damages and losses - incurred by the shipment of sugar pursuant to the table and its accompanying documents sent to the representative of the Protection and Indemnity club in Jordan - amounts to ((950,414)) USD, divided as follows:

Piaster - Dinar	
173,978.400	Difference of the price of merchandise sold to Baghdad at ((180)) USD per ton – quantity ((4042)) tons
299,915.400	Costs of sorting ((14,044.8)) tons from 9/1/2004 till 12/15/2004
9,890.435	Difference of port storage costs
4941.600	Costs of repacking of ((1740)) tons
12,6403.200	Storage costs of ((14,044.8)) tons from 9/15/2004 till 12/15/2004

28,140.000	Loading and unloading costs
373,269.030	**Sum in Jordanian Dinars**
Dollars	
8,490	Scavenge value according to appendix of report no. ((12))
22,260	Shortage in the weight ((7402)) tons for ((300)) USD per ton
74,655	Lumpy and stony merchandise by ((30%)) ((16,590 sacks * 50 KG)) = 248,085 tons
43,538	Transportation costs of (14,044.8)) tons from the port to the private economic region
148,943	**Total sum in United States Dollars equivalent to (105,750)) Jordanian Dinars**

6. The defendants are jointly and severally liable for the shortage, damages and losses incurred to the plaintiff's shipment including the ceasing profit (lucrum cessans) amounting to the value mentioned in the ad damnum clause according to their contractual and judiciary responsibilities.

7. On 5/17/2005, the plaintiff sent the judicial warning no. 16229/2005 to the defendants requesting compensation for the damages incurred to the sugar shipment; even though they received the notice, the defendants unduly abstained still from settling the compensation, and hence the plaintiff had no other resort than to file this lawsuit.

Many claims were submitted during the proceedings and the Court of First Instance decided the following:

1. As for claim no. 1448/2005 submitted by the third defendant regarding the non-litigation, the Court decided to consider it one of the third defendant pleas and to include it in the case so it be resolved with the final decision.

2. As for the two claims:

- No. 1447/T/2005 submitted by the third defendant
- No. 1219/T/2005 submitted by the first, fourth and fifth defendants

Whereas the Court decided to include claim no. 1447/T/2005 in claim no. 1219/T/2005 and examine them both at the same time, and decided pursuant to the provisions of article ((109/A/B)) of the Code of Civil Procedure to suspend the proceedings so as to look into the above-mentioned claims, which object is the dismissal of lawsuit no. 1944/2005 for availability of an arbitration clause before instituting an action according to the provisions of article ((109)) of the Code of Civil Procedure.

The two claims may be summarized as follows: The appellee ((the plaintiff)) filed the lawsuit before the Court of First Instance- Petitory no. ((1944/2005)) against the appellants and others in order to claim the sum of ((950,414)) United States Dollars or its equivalent in Jordanian Dinars in compensation for the damages and the shortage in the weight of the merchandise shipped on board of the ship owned by the first appellant the company K. B. Sh. (owner of the ship T.) according to the bills of lading. To that, the parties to the transportation contract ((shipper and carrier)) agreed to apply the provisions of the charter party as it was mentioned in the bills of lading that all the terms, clauses and exceptions including the arbitration clause stipulated in the ship lease contract on 7/2/2004 shall apply to the bill of lading and shall be considered an integral part thereof:

- As per the provisions of articles ((10, 12, 27)) of Jordanian Arbitration Law No. 31 for year 2001.
- As per article ((24)) of the Civil Law.
- As per the provisions of New York Agreement related to foreign arbitration decisions and the implementation thereof, of 1958.
- As per the provisions of the United Nations Convention on the Carriage of Goods by Sea ((the Hamburg rules)).
- As per the provisions of the English Arbitration Law for year 1996.
- As per the provisions of International Brussels Convention of 1924, Arbitrators Association terms.

Thus, they requested the dismissal of the aforementioned petitory action before the commencement of the proceedings since there is an arbitration clause.

Whereas the Court of First Instance issued its decision on the two claims ((1219/T/2005)) and ((1447/T/2005)) relating to the petitory action no. ((1944/2005)) filed before the Court of First Instance:

4- Dismiss claim no. ((1219/T/2005)) relating to the arbitration clause.

5- Dismiss claim no. (1447/T/2005)) relating to the arbitration clause.

6- Postpone taking a decision as to the fees, legal expenses and lawyer fees until issuance of the final decision in the original action.

Whereas neither the appellant ((the third defendant)) nor the appellants ((first, fourth and fifth defendants)) accepted the decision as each of the parties challenged the decision for the grounds mentioned in their petitions for appeal and whereas Amman Court of Appeal issued its decision no. ((2836/2006)) issued in presence of the litigants on 4/30/2007 to dismiss both appeals, to affirm the appealed decision and send the papers back to their source to examine them in substance.

This decision was not accepted by the appellants (the first, fourth and fifth defendants in the original action) and thus they submitted a separate challenge to this decision same as the third defendant who also submitted a similar challenge each party though according to the grounds listed in its petition for appeal in cassation. The attorney of the appellee submitted as well an answer to the contestations submitted by the appealing parties.

In substance/ In the grounds of the two appeals in cassation/ challenge the rulings of the two trial courts for considering the agreed upon arbitration clause in the transportation contract between the shipper and carrier/ owner of the ship and the importer ((the plaintiff)) signed in Paris as null because it takes away the jurisdiction of the Jordanian courts and because the United Nations Convention on the Carriage of Goods by Sea of 1978 ((the Hamburg rules)) was not ratified. In this regard, article ((22)) of United Nations Convention on the Carriage of Goods by Sea of 1978, to which the Hashemite Kingdom of Jordan acceded and which was ratified by the Council of Ministers stipulated the following in its second paragraph:

((2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.))

Whereas it is established by the annexed bills of lading included with the papers of the plaintiff that all the terms, clauses and exceptions including the arbitration clause stipulated in the ship lease contract on 7/2/2004 shall apply to the bill of lading and shall be considered an integral part thereof,

Whereas in consideration whereof the arbitration clause in the bills of lading is applicable in the case pursuant to the provisions of article ((22/2)) of the aforementioned UN Convention,

And we find that article ((31)) of the charter party relevant to the ship transporting the sugar, signed in Paris on 7/2/2004 included an agreement as to referring all

disputes or ones related to the charter party to an arbitration panel held in London; this article also provided for how to choose the arbitrators and the umpire.

Whereas the plaintiff filed this lawsuit against the appellants and others to claim compensation for damages and the shortage in the weight of her merchandise resulting from the shipping and the grounds mentioned in its writ of summons.

Whereas the appellant party had submitted a claim to dismiss the plaintiff action for the existence of an arbitration clause and since the party that is competent to examine this dispute is an arbitration panel to be convened in London,

Whereas both trial courts decided to dismiss the claim on basis that the Hamburg rules cannot be applied to this claim since the Jordanian National Assembly did not ratify the United Nations International Convention on the Carriage of Goods by Sea and such Convention it did not complete all due constitutional stages.

Therefore, our court finds as to the claims of the appellant party that the provisions of Arbitration Law no. ((31)) for year 2001 following Law of Maritime Trade, which limited the jurisdiction to look into disputes and claims arising from maritime transportation contracts to the Jordanian Courts according to the provisions of article ((215)) of the said law, and that the Arbitration Law is a private law and it is the law that should be applied in compliance with the principle of conflict of laws stipulated in article 5 of the Civil Law, in consideration whereof we find that the jurisprudence by decision no. ((325/2002)) of our Court's general panel stipulates that private law shall have precedence to be applied over public law and that if the public law is issued after the private law, the latter shall be considered an exception thereto, however, if the private law is issued after the public law, it shall be considered as a restriction to the public law; we build on the aforementioned to state that the provisions of the public law shall not amend those of the private law unless by a special text…

However, we find that 2001 Arbitration Law is being applied to every mutually agreeable arbitration taking place in the Hashemite Kingdom of Jordan relating to a commercial or civil dispute between persons of public law or of private law; therefore the Arbitration Law is not applicable to arbitration cases taking place outside the Kingdom ((Cassation - Petitory no. 2233/2004)).

Whereas the arbitration agreement relating to the present case was concluded in Paris and since the arbitration panel shall meet in London, then the issue of domestic laws conflict should not be a matter of discussion in this case and we find that issuing a decision in the case is related to the extent to which it is possible to apply the provisions of the UN International Convention on the Carriage of Goods By Sea ((Hamburg Rules)) while article ((215)) of the Maritime Trade Law, expressly stipulates that litigations shall be examined strictly in the Courts of the Hashemite Kingdom despite any other agreement to the contrary and while article ((27)) of the Code of Civil Procedure, which vested the Civil Courts of the Hashemite Kingdom of Jordan with the power to hear civil cases.

Both jurisprudence and doctrine agree that international agreements concluded between countries prevail over the domestic laws of these countries and have precedence to be applied even if they are in conflict with their domestic laws. The implementation of international agreements and laws falls within the competence of the Judiciary and the litigants shall not be allowed to choose the agreement or law they want since this is a matter of public order and it is conditional on the international agreements and conventions' completion of all their constitutional stages in the country in which the dispute is being examined.

In order to establish whether the UN International Convention on the Carriage of Goods by Sea - to which Jordan acceded by virtue of a decision issued by the Council of Ministers, which was published in the Official Gazette no. ((4484)) on 4/16/2001, and which allows the conclusion of an agreement between the parties to refer any dispute relating to the carriage of goods to any other country chosen for this purpose - had completed its constitutional stages or not, and whether it needs the approval and ratification of the National Assembly in order to be effective, or not.

Therefore, by referring to the provisions of article ((33)) of the Jordanian Constitution, after its 1958 amendment and Constitution no. 1 for year 1958, we find that it stipulates the following:

1. The King declares war, concludes peace and ratifies treaties and agreements.

2. Treaties and agreements which involve financial commitments to the Treasury or affect the public or private rights of Jordanians shall not be valid unless approved by the National Assembly. In no circumstances shall any secret terms contained in any treaty or agreement be contrary to their overt terms.

Whereas the Higher Council for the interpretation of the Constitution had explained, in its decision no. ((1)) for 1962, what is meant by treaties and agreements mentioned in the said article and concluded that the term "treaty" means in general the agreements concluded between two or more countries whether relating to political, economic or other interests, while it refers in particular to important international agreements having a political character such as alliance treaties and such.

As for the instruments concluded between two or more countries not relating to politics, jurisprudence called it "agreement"; thus using the word ((agreements)) after the word ((treaties)) in article ((33)) above points out that the constitutional writer had respected the said definitions for the two words when he adopted and used them, and therefore the relevant agreements in this article are the agreements concluded between two or more countries not relating to political issues.

In consideration whereof, the agreements and treaties for the enforcement of which the Constitution requires they be ratified by the National Assembly are the following:

a- Agreements concluded between the Hashemite Kingdom of Jordan and other countries which involve financial commitments to the Treasury (such as loan agreements which incur some fees upon the Treasury such as interests or any other financial expenses)

b- Agreements concluded between the Hashemite Kingdom of Jordan and other countries and which affect the public or private rights of Jordanians.

Whereas what is meant by affecting these rights is the negative effect on Jordanians public or private rights - whether those provided for under Chapter Two (articles 5 to 23) of the Constitution or the other relevant affected rights - and that leads to impairing the public or private rights of the Jordanians.

Whereas article (215/B) of Maritime Trade Law stipulates that ((despite any provisions to the contrary, shall be considered null any condition or agreement that takes away the jurisdiction of the Jordanian Courts to look into disputes arising from maritime transportation or shipping documents)).

Whereas the agreement of a Jordanian natural or legal person outside the Hashemite Kingdom of Jordan with another foreign party on solving disputes that might arise between them in another foreign country by mutual consent and free will of both parties without any interference from any other party, is compliant with article (27) of Arbitration Law no. ((31)) for 2001 and neither affects the public and private rights of the Jordanians nor Jordan's sovereignty as long as the arbitrators decision is applied in accordance with the legal system in force in Jordan by ratifying or rejecting the said decision as per the national law of the Kingdom, namely the Law on Ratification of Foreign Decisions No. 8 for year 1952.

Therefore, Jordan's accession to the UN International Convention on the Carriage of Goods by Sea by approval and ratification thereof without passing by the National Assembly does not contradict the Constitution; to that we also find that the Hashemite Kingdom of Jordan acceded to the New York Agreement relating to arbitration decisions and ratified the same as published in the Official Gazette no. (3585) dated 11/16/88.

Whereas acknowledging arbitration decisions also necessarily encompasses the written agreements on which the parties willingly agree to refer the disputes that might have arisen/ might arise between them to arbitration according to the provisions of article 2 of this agreement ((The Book of International Trade Arbitration, Dr. Fawzi Sami, p. 41 edition 1997.))

Whereas our Court jurisprudence established that New York Agreement neither affects the public or private rights of the Jordanians nor the sovereignty of Jordan

on its territories, and that there is no need for it to be submitted for review and ratification by the National Assembly ((cassation-petitory no. 2233/2004 and no. 2996/99)).

Therefore, the arbitration agreement signed by the litigants in this action outside of Jordan in order for the arbitration to take place before an arbitration panel in London, does not contradict the Constitution and is in compliance with the international agreements to which the Kingdom acceded such as the New York Agreement and the Hamburg Rules which shall be applied as they prevail over the stipulations of article ((215/B)) of Jordan Maritime Trade Law.

Whereas, the appealed decision based itself in order to declare the nullity of the Charter Party on the interpretation of article ((33)) of the Constitution which was mentioned in the decision of Higher Council for the interpretation of the Constitution no. ((2)) for year 1955 that interpreted this article before the amendment thereof, therefore this interpretation of an annulled article cannot be considered applicable and hence the appealed decision would be in contradiction with the law and the grounds for appeal shall apply thereto.

Therefore, we decide to repeal the appealed decision and remand the lawsuit to its source in order to take the necessary measures.

Decision issued on Rabi al-Thani 2, 1428 A.H. corresponding to April 8, 2007 A.D.

7)

Jordanian Court of Cassation **Hashemite Kingdom of Jordan**
Ministry of Justice

Decision

Issued by the Court of Cassation empowered with the judicial authority to try and hand down judgments in the name of His Majesty the King of the Hashemite Kingdom of Jordan,

King Abdullah II Bin Al-Hussein

Appellant:

The public prosecutor of Jordan's State Security Court

Defendants:

1. M. N. A. N.
2. M. Y. A. M.

3. M. Y. A. M.
4. Y. A. H. M.
5. N. W. M. company represented by M. N. A. N.

On 11/27/2011 the appellant submitted this appeal in order to challenge the decision issued by the State Security Court on 11/22/2011 in case no. 1908/2010 which declared the appellants not responsible as to the charge of being accessory to fraud in contradiction with the provisions of articles 417 and 76 of the Penal Code and as per articles 3/a, 3/c/5 and 4/6/b of Economic Crimes Law repeated 4 times.

Claiming the petition for appeal be accepted in form and in substance and the appealed decision be repealed for the following grounds:

1. The State Security Court was wrong in continuing the case proceedings even though it became incompetent to examine the said case pursuant to the constitutional amendments of 2011 (article 101/2 of the Jordanian Constitution); the Court should have announced itself incompetent and should have remanded the case to the competent Civil Court.

2. The State Security Court was wrong when it disregarded the evidences submitted by the public prosecution and declared the suspects not responsible.

3. The State Security Court was wrong by not prosecuting the suspect (Y.) in the matter of the complaint submitted by the complainants (A.) and (W.) declaring that he had been prosecuted thereon before Amman Criminal Magistrates Court for the crime of issuing a bad check and that since the crime type and grounds for prosecution are different.

4. The decision is not justified enough and lacks further justifications and grounds.

The deputy prosecutor general requested in his final written statement no. 2/8/2011/1933 dated 12/7/2011 to accept the appeal in cassation in form and in substance, to repeal the appealed decision and to take the necessary legal measures.

Decision:
After examination and deliberation, we find that the State Security Court Prosecution had referred the suspects:

1. M. N. A. N.
2. M. Y. A. M.
3. M. Y. A. M.
4. Y. A. H. M.
5. N. W. M. company holder of the trade name

To be tried before the State Security Court for the following charges:

1. Accessory to fraud in contradiction with the provisions of articles 417 and 76 of the Penal Code and as per articles 3/a, 3/c/5, 4, and 6/b of Economic Crimes Law repeated 4 times.

2. Accessory to breach of trust in contradiction with the provisions of articles 422 and 76 of the Penal Code and as per articles 3/a, 3/c/5, 4 and 6/b of Economic Crimes Law repeated 4 times.

On 6/27/2011 in case no. 1908/2011, the State Security Court decided to dismiss the Public Interest lawsuit against the suspects for the charge of breach of trust attributed to them for being encompassed by the General Amnesty Law no. 10 for year 2011. On 11/22/2011the Court issued its appealed decision referred to in the beginning of the decision.

The Prosecutor General of the State Security Court did not accept the decision and therefore contested it by virtue of this appeal in cassation.

In the grounds of the appeal in cassation:

The First Ground:

As per examination of:

1. Article 99 of the Jordanian Constitution stipulating that there are (three categories of courts:

a. Civil Courts
b. Religious Courts
c. Special Courts

2. Article 100 of the Jordanian Constitution stipulating that:

((The establishment of the various courts, their categories, their divisions, their jurisdiction and their administration shall be by virtue of a special law, provided that such law provides for the establishment of a High Court of Justice.))

3. Paragraph 2 of article 101 of the Jordanian Constitution stipulating that:

(2. A Court shall not try a civilian in a criminal case but if all the judges are civilians, except for treason, spying, terrorism, drugs and money counterfeit crimes.))

4. Article 102 of the Jordanian Constitution stipulating that:

(The Civil Courts in the Hashemite Kingdom of Jordan shall have jurisdiction over all persons in all matters, civil and criminal, including cases brought by or

against the Government, except those matters in respect of which jurisdiction is vested in Religious or Special Courts in accordance with the provisions of the present Constitution or any other legislation in force.)

5. Paragraph 2 of article 128 of the Jordanian Constitution stipulating that:

(All laws, regulations and other legislative acts in force in the Hashemite Kingdom of Jordan on the date on which this Constitution comes into force shall continue to be in force until they are repealed or amended by the legislation issued thereunder and that within a maximum period of three years.)

6. Article 2 of the State Security Court Law no. 17 for year 1959 and its amendments stipulating that:

(In special circumstances, as required for the public interest, the Prime Minister may establish one Special Court or more, called State Security Court; each shall be composed of three civilian judges and/or military judges appointed by the Prime Minister upon the recommendation of the Minister of Justice for the civilian judges and of the Joint Chief of Staff for the military judges. The decision shall be published in the Official Gazette.)

7. Article 3 of the State Security Court Law stipulating that:

(a. The State Security Court shall be competent to examine the following offences which are contrary to the provisions of the following laws or any amendment thereof relating to these offences or other laws substitute thereto:

1....
2....
3....
4....
5....
6....
7.....
8....
9....
10....
11. Any other offence in connection with the country's economic security that the Prime Minister decides to refer thereto.

We find that the State Security Court is a special Court stipulated in article 99/3 of the Jordanian Constitution; it practices its judicial powers according to its law no. 17 of 1959 and the amendments thereof. The said law established this Court and determined its exact competences and authorities.

2011 Constitutional amendments did not take away the Court's competence to examine any of the offences within its jurisdiction stipulated in article 3 of State

Security Court Law no. 17 for year 1959 and the amendments thereof. However, it banned trying any civilian in a criminal court unless all the judges are civilians except in cases of treason, spying, terrorism, drugs and money counterfeit.

Therefore the State Security Court is competent to examine this case since the Jordanian Prime Minister had established this Court and strictly specified its competences by letter no. 19/11/19810 dated 10/26/2008 as per the authority vested upon him under article 3/a/11 of State Security Court Law no. 17 for year 1959.

2011 Constitutional amendments did not take away the Court's competence to examine any of the offences within its jurisdiction stipulated in article 3 of State Security Court Law no. 17 for year 1959 and the amendments thereof. However, it banned trying any civilian in a criminal court unless all the judges are civilians except in cases of treason, spying, terrorism, drugs and money counterfeit.

Therefore, the State Security Court is competent to examine this case because the Jordanian Prime Minister had referred the said case to this Court for being connected to the economic security of the country by virtue of letter no. 19/11/19810 dated 10/26/2008 as per the authorities vested upon him under article 3/a/11 of State Security Court Law no. 17 for year 1959.

However, the State Security Court - since the enforcement of 2011 constitutional amendments as from their date of publication in the Official Gazette on 10/1/2011 - should have examined the case by a panel of three civilian judges, and as it did not, all procedures namely the court proceedings as from the said date as well as the appealed decision shall be considered null for contradicting article 101/2 of the Jordanian Constitution.

Therefore, we decide to repeal the appealed decision and remand the case to its source to undertake the court proceedings according to the Law.

Decision issued on Rabi al-Awwal 1, 1433 A.H. corresponding to January 24, 2012 A.D.

8)
The Amman Court of Appeal **No.** 3861/2009

Presided by Judge M. M.

And with membership of Judges (D. A. A. H.) and (W. K.)

Appellants: 1- The Public Limited Company A. S. and W. (J. D.)

2- Dr. Nab…/ in his position as Editor- in-Chief in charge at S. D.
3- F…/ in his position as writer of the article that was published in S. D.

Appellee: The Public Interest

On 11/30/2008, the appellants filed this appeal to challenge decision no. 2385/2008 issued on 11/24/2008 by the Amman Criminal Court of First Instance that convicted the appellants for the violation of the provisions of articles 5 and 7/C of the Press and Publications Law and sentenced each of them to pay a fine amounting to five hundred Jordanian Dinars in addition to the fees.

The grounds of the appeal:

1- **The appealed decision is invalid for violating the provisions of article 41/A and C of the Press and Publications Law.**

2- **The Court made was wrong to convict the three accused (appellants) for the offence of violating the provisions of article 5 of the Press and Publications Law and to sentence them to pay a fine of five hundred Jordanian Dinars in addition to the fees.**

3- **The challenged decision violated the provisions of article 6 of the Press and Publications Law which provided for the freedom of the Press.**

4- **The Court was wrong to state that the journalist (F.) based his comment on false facts and information without asking for the opinion of the other concerned party to whom the news pertains.**

5- **However, the newspaper article by Journalist Fares Al Habashneh was concordant and compliant with the provisions of article 4 of the Press and Publications Law, and intended to preserve public duties and rights. The article did not violate or breach the freedom and inviolability of others' private life.**

6- **The Court was wrong to convict the accused and to sentence them to settle the fine, because they did not violate the provisions of the Press and Publications Law and because there was no criminal intent.**

The deputy Prosecutor General requested the dismissal of the appeal in form and in substance, and upon close examination we find that:

In form: **The appealed decision was issued on 11/24/2008 in the presence of the first accused and in the presence of the accused two and three or their representatives. The accused filed the appeal on 11/30/2008.**

Therefore, whereas the appeal was filed for the first time, the lawful excuse that justifies the absence of the accused two and three from trial sessions before the Court of First Instance is not required at this stage as per article 261/4 of the Code of Criminal Procedure. Thus we decided to accept the appeal of all the accused in form.

And in substance: We find that the General Prosecution attributed the following offences to the accused:

1) The violation of the provisions of articles 4 and 5 of the Press and Publications Law, as stipulated in article 41 of the same Law, in the case of the Company (A. S. and N.) (J. D.) and its Editor-in-Chief.

2) The violation of the provisions of articles 4, 5 and 7/C of the Press and Publications Law, as stipulated in article 41 of the same Law, in the case of the accused F.

3) Libel and slander in contradiction with article 188 of the Penal Code, as stipulated in article 189 of the same Code, in the case of all the accused.

The facts attributed to the accused are summarized in accordance with the wording of the indictment issued on 09/30/2007 in the investigation case no. 1242/2007 by the Prosecutor General of North Amman; the facts are therefore presented as follows: On 08/28/2007 **in its issue no. 14409**, the daily newspaper "S. D." published **an article that appeared on the first page with a title in bold saying (The S. File Referred to the Judiciary.) The defendant/ writer,** journalist (F. H.), had relied in his article on statements issued by the Minister of Agriculture concerning his affirmation that the preliminary results of the investigation regarding the status of the association T. T. A. (S.) will be referred to the Judiciary for examination and for the issuance of appropriate legal judgments against the association's abuses. The next day, (J. D.) published its issue no. 14410 dated 08/29/2007, featuring a refutation made by the Minister of Agriculture denying what was attributed to him in the subject of A, S.; the refutation was entitled (Minister of Agriculture Denies Claims Attributed to Him Regarding S.). Consequently, the association's representative filed a complaint against the accused before the Amman Prosecutor General saying that the expression "referred to the Judiciary" that appeared in the article published in J. D., constituted libel against the association and its contributors as the said article led to many inquiries from the association who wanted to know if the news published in the newspaper was true. The prosecution was initiated based on the aforementioned.

After the Amman Criminal Court of First Instance examined the case and completed the trial procedures therein, it decided to cease the action against the accused for the offences of libel, slander and contempt as well as for the violation of the provisions of article 4 of the Press and Publications Law. The Court convicted the accused for the offence of violating the provisions of article 5 of the Press and Publications Law, sentencing one of them to pay a fine amounting to 500 Jordanian Dinars. The accused (F. H.) was convicted for the violation of the wording of article 7/C of the Press and Publications Law and sentenced, as per article 47 of the same law, to pay a fine of one hundred Jordanian Dinars in addition to the fees; the penalties of (F. H.) were merged together and the most severe penalty was imposed on him, which is to pay a fine of five hundred Jordanian Dinars in addition to the fees.

The appellants were not satisfied with the appealed judgment that convicted them for the violation of the provisions of the Press and Publications Law (articles 5 and 7/C) and sentenced each of them to pay a fine of five hundred Jordanian Dinars; they challenged the said judgment in appeal before our Court for the grounds stated in the petition for appeal.

The grounds of the appeal are as follows:

Concerning the first ground which **consists in the Court of First Instance being wrong for violating the provisions of article 41/A and C of the Press and Publications Law that determined time limits for the end of the investigation and the issuance of the judgment; we found that the Court of First Instance conducted the trial procedures in accordance with the rules of law, and that the adjournment of the issuance of the judgment beyond the period determined by the Law was due to the procedures followed to summon the witness of the General Prosecution (A. A. Sh. A.) and the procedures of investigation which required hearing the testimony of the witnesses, bringing the documents then summoning the defendants.** Therefore, since exceeding time limits determined in the Publications Law whether for investigation or prosecution purposes do not entail annulment and since there is no annulment without a Law, this ground is rejected.

As for the appellant/ the Company A. S. and N. (D.), we find that the appealed decision convicted it considering it (as the Newspaper D.) for the offences of violating the provisions of articles 5 and 7 of the Publications Law although the above-mentioned Company is only the owner of the Newspaper (D.) represented by the second appellee/ the Editor-in-Chief; and since article 42/D of the Publications Law considered that the owner of the publication shall jointly and severally bear the civil liability for the personal rights entailed by the offences committed through the means of the newspaper, and that he shall not be held criminally liable unless it was established that he was an accessory to the offence or that he effectively interfered therein. Consequently, since there was nothing to prove that the Company A. S. and N., the owner of the newspaper (D.), participated or interfered in the offence attributed to the suspects and the Court of First Instance should have pronounced it non-liable for the offences attributed to it. However, since the Court of First Instance reached a different conclusion, its decision violated the Law in this regard.

As for the conclusion reached by the Court of First Instance consisting in the conviction of the appellants for the offences of violation of articles 5 and 7 of the Press and Publications Law, we found that the Court of First Instance based its conviction decision on the fact that the Editor-in-Chief's liability in publication offences committed through the means of his newspaper is in fact a liability presumed by the legislator; consequently, the Editor-in-Chief cannot dispose of this liability if he claims he did not have knowledge of the news or article and that he was absent during the publishing, because the legislator presumed that the latter checks every detail published in the newspaper and that, as per his

position, he has the authority to allow or forbid the publication according to the provisions of article 41 of the Publications Law.

The article published in the Newspaper (D.) by the defendant (F.) was proven incorrect through issue no. 14410 of the Newspaper (D.) that was published on the following day, including the Minister of Agriculture's refutation of what was attributed to him about the association T. (S.). Moreover, the defendant relied in his comment on false information and mere facts, and he published the article without asking for the opinion of the other concerned party. This action violated the obligations of the journalist and the ethics of journalism; and thus journalism as a whole did not observe the frame of its mission that consists in spreading awareness, intellect and culture, which means that the published material was in contradiction with the provisions of article 7 of the Press and Publications Law.

The aforementioned appeared in the Court of First Instance's justification of its conclusion convicting the appellants for the violation of articles 5 and 7 of the Press and Publications Law.

We found though that the legislator's presumption of the availability of criminal intent in publication crimes attributed to the Editor-in-Chief, as per article 41 of the Publications Law, is in reality a presumption that the Editor-in-Chief was certainly aware that the article was in contradiction with the Law, for the simple reason that the news was published, regardless of how many pages the newspaper was made of, and regardless of the diversity of its articles and the variety of their meanings, as article 41 of the Publications Law presumes that the Editor-in-Chief is informed about and aware of all its articles, news, comments and advertisements, and that he checks all its contents and examines well each part thereof; and thus he has to consider every expression it contains and to check the extent of its compliance with the provisions of the Law.

Hence, the above-mentioned article exempts the General Prosecution from its duty consisting in substantiating the offence attributed to the Editor-in-Chief along with its elements and components, transferring the burden of proving the refutation of the offence to the suspect, which is in contradiction with the rules set forth by virtue of the Public Criminal Laws of the State. Article 103 of the Jordanian Constitution compels courts to abide by this article since we find that the Penal Code determined the texts that regulate the Government's right or authority to impose penalties. The article also determines criminal actions, their elements and components in general, as well as the penalty that should be imposed on their perpetrator. As for the Code of Criminal Procedure, it determines the rules and procedures showing who to apply the Penal Code, including penal texts in different laws, and indicating how to substantiate the offence and impose penalties.

Whereas the wordings of the Penal and Criminal Procedure Codes that are considered general Laws of the State form a set of rules that reflect a comprehensive system that seeks the bases, upon which the preservation of human dignity

and fundamental rights are established, and prevents, through its guarantees, the misuse of penalties in ways that may deviate them from their goals. These 2 Laws protect individuals and society at the same time because they enable society to claim its right by penalizing those who disturb its security and order, they also provide the accused with guarantees that enable him to defend himself and ward off the accusations attributed to him.

Consequently, we find that the legislator's presumption of the availability of criminal intent in crimes of periodic publications and his consideration of the Editor-in- Chief as original perpetrator in a way that exempts the General Prosecution from proving the aforementioned, violates the presumption of innocence provided for in the Code of Criminal Procedure as article 147 thereof stipulates that the accused is innocent until proven guilty, and breaches the provisions of article 71 of the Penal Code which considered that the perpetrator of the offence is whomever committed the elements that constitute the offence or directly contributed in their execution, thus resulting in the violation of the limits separating the jurisdiction and tasks of each of the State's Authorities as determined by virtue of the Jordanian Constitution, since the competence that is granted by the Constitution to the Legislative Authority in this regard is to define criminal acts and the penalty of whoever commits such acts, while the work of the Judicial Authority consists in pursuing the perpetrator and verifying the establishment of the elements and components of the offence attributed to him, which results in the violation of the constitutional principle consisting in the separation of powers and of article 101 of the Jordanian Constitution which considered that Courts are protected from any interference in their affairs (in reference to decision no. 44 for 1967 issued by the Jordanian High Court of Justice.)

Hence, the fact that the Editor-in-Chief has the power to permit or prevent publishing is not sufficient to consider him an original perpetrator in crimes performed by others through the publication, especially in a newspaper that comprises multiple sections, each headed by a chief editor over whom the Editor-in-Chief holds real power. The role of the Editor-in-Chief is therefore restricted to facilitating the publishing procedure and thus he becomes an intervening party and not a perpetrator, and the publication of the aforementioned news may have resulted from neglect in verification, control and supervision and not from his intention to commit the offence.

Article 41, paragraph B, of the Press and Publications Law is thus inconsistent with the Jordanian Constitution (I refer to judgment no. 59 for 1997 issued by the Supreme Constitutional Court in the Republic of Egypt which also ruled with the non-constitutionality of the legal text that provided for the punishment of the newspaper's Editor-in-Chief considering him an original perpetrator.)

Whereas while exercising their powers, the Courts apply the provisions of the laws in force in accordance with article 103 of the Jordanian Constitution, in the event that a rule of law contradicts with another, the rule that is more suitable for application is the one that is consistent with the provisions of the Constitution

since the Constitution has supremacy over other laws; these laws shall therefore observe the Constitution and its provisions, be in harmony therewith and not violate its limits. It is therefore within the competence of the concerned Court to determine the legal wording that should be applied to the conflict, which means that examining the constitutionality of the legal wording and referring to the highest and most supreme Law fall within the core work of the courts (in reference to the decision of the Court of Cassation 74/85, 12/67 and 2766/98 and the decision of the High Court of Justice 157/71.)

Based on the above, the Court of First Instance should have abstained from applying article 41, paragraph B of the Press and Publications Law and should have looked into the extent to which the elements of the crimes attributed to the Editor-in-Chief were available, as per the general rules stipulated in the Penal Code and in the Code of Criminal Procedure, instead of considering his liability established and impossible to refute; and since the Court did not do the aforementioned and considered the Editor-in-Chief an original perpetrator without showing the elements of the crime attributed to him, its decision in this regard violated the Law.

Therefore, in reference to the news published on the first page of the newspaper D. in the issue no. 14409 dated 08/28/2007 and entitled "The S. File Referred to the Judiciary," it mentioned that the Minister of Agriculture Dr. M. Q. assured that the preliminary results of the investigation concerning the status of the association T. T. (S.) will be transferred to Judiciary for examination and issuance of appropriate legal penalties and judgments for the violations it (the association) committed; adding that the Cooperative Enterprise, the Board of Directors of which is chaired by (Q.), had contacted the Anti-Corruption Department and informed it of all the findings regarding the association (T.)…

The news published also on the first page of Ad-dustour Newspaper (The Constitution), issue no. 14410 dated 08/29/2007, included the Minister of Agriculture's refutation of what was attributed to him regarding (S.). The article revealed as well that the Minister declared he did not say what was attributed to him about the preliminary results of the investigation related to the status of the association being transferred to the Judiciary for examination.

Based on the above, we find that the topic tackled by the Newspaper has an important social character since its subject is of interest to the members of society and is related to public interest, especially that the documents reveal that the number of members of the concerned association exceeds one hundred thousand members. And whereas topics related to public interest are reviewed, monitored, discussed, scrutinized and criticized within the limits of the Law and whereas public interest is not restricted to those who assume public service positions but also covers civil society institutions including associations,

And whereas the fundamental fact tackled in the article is the presence of preliminary investigations on the association's status and that these investigations will

be transferred to the Judiciary for examination, which was proven following the investigatory statements of the complainant, the manager of the association T. T., before the Prosecutor General, which revealed that an investigation was conducted in the Province of the Capital by the Governor and that the assistant of the Governor recommended that meetings be held with the members of the association; the complainant added that the file of the association was later transferred to the competent judicial parties. The aforementioned was mentioned in an article issued by the Jordanian News Agency, publications of M. Newspaper on 06/09/2008, which reported an official saying that the case of the association (T.T.), also known as (S.), was transferred to the Amman Criminal Court of First Instance after the Prosecutor General of the Anti-Corruption Department decided to arrest 7 members of the association accusing them of being accessory to fraud as per the Economic Crimes Law.

The fact that the Minister of Agriculture denied having said what was attributed to him regarding the transfer of the preliminary results of the investigation about the status of the association to the Judiciary for examination does not mean that the news published in the Newspaper (D.) was not true, because confirming whether or not the Minister of Agriculture ascertained the news was not the essential fact that is the object of the article, since the essential fact consists in the existence of preliminary investigations about the work of the association that will be transferred to the Judiciary, which is a proven fact.

Consequently, since the approval for publishing does not require that the facts tackled in the news article be reported accurately and with full details and since it is enough that the fact included in the news article be true in itself and correctly related to the person it was attributed to, as long as there was no proof that the Newspaper fabricated false news and facts or distorted real facts, or that it showcased the real event in a different range or quality,

Hence, the news article does not contradict the provisions of article 5 of the Press and Publications Law that required observance of Truth and abstention from publishing anything that is not consistent with the principles of national responsibility and freedom, human rights, and the values of the Arab and Islamic Nation; and it does not violate the provisions of article 7 that determined the ethics and values of journalism either, considering them as binding for the journalist. The elements required by Law in order to substantiate the offences attributed to the suspects two and three are therefore not available in the act attributed to them.

Therefore, since the Court of First Instance reached a different result and decided to convict the suspects for the offences of violating article 5 and 7/C of the Press and Publications Law, its decision violated the Law and the grounds of the appeal were accepted.

Based on the aforementioned, we decided **to annul the challenged decision and to pronounce the non-liability of the appellants (the suspects) for the**

offences of violating articles 5 and 7 of the Press and Publications Law.
Decision issued after examination on 03/18/2009

Member **Member** **Presiding Judge**

9)
Amman Court of Appeal

No. 6692/2010

Misdemeanor

The Hashemite Kingdom of Jordan

Ministry of Justice

Announcement issued by the Court of Appeal empowered with the judicial authority to try and hand down judgments in the name of His Majesty, the King of the Hashemite Kingdom of Jordan

Abdullah II Bin Al Hussein

Presided by Judge D. M. T.
And with membership of Judges D. H. R. and M. Z.
First Appeal:

Appellant: The deputy Prosecutor General

Appellees: **1. Newspaper B.**
2. A. A. F. M.
3. A. A. M. A.

Second Appeal:

Appellants: **1. M. B. Z.**
2. President of M. B. (R. D. M.)

Appellees: **1. Newspaper B.**
2. A. A. F. M.
3. A. A. M. A.

Challenged Decision: Decision no. 843/2009 dated 10/14/2009 of the Amman Criminal Court of First Instance.

Grounds of the First Appeal:

1- The Court reached a wrong result and its decision was not justified with an adequate and valid legal explanation.

2- The Court reached a wrong result since the appellees' acts brought together all elements and factors of the offence attributed to them, and since the evidence presented by the Public Prosecution was legal, consistent and conclusive enough to convict them.

Grounds of the Second Appeal:

1- The conclusion reached by the Court of First Instance was unreasonable, unacceptable and inconsistent with the Code of Civil Procedure.

2- The Court was wrong in terms of its application of the amended Law no. 27 for 2007.

3- The Court of First instance concluded that the accusation of libel and slander was not present in the indictment.

4- The conclusion of the Court was inconsistent with the wording of article 15 of the Constitution.

5- The challenged decision was not justified in a valid and sound manner; it violated the provisions about justification in the Code of Criminal Procedure.

After examination, we find that:

A: In form: The challenged judgment was issued on 10/14/2009 and the appellant filed the first appeal against it on 10/25/2009 while the appellant party challenged it in the second appeal it filed against him on 12/29/2009. We decide to accept both appeals in form because the first appeal was filed within the legal period and the second was presented upon notification.

B: In Substance: We find that the appellees were transferred to the Amman Criminal Court of First Instance for the offence of violating the provisions of article 7 and 27 of the Press and Publications Law and articles no. 358, 359 and 360 of the Penal Code, in reference to the following:

The facts attributed to the appellees are summarized according to the indictment issued by the Prosecutor General of North Amman on 02/08/2006 in the investigation case no. 613/2005; the first defendant is a weekly newspaper and the defendants (A. A. M. A.) and (A.) are respectively the local affairs editor and the Editor-in-Chief who is in charge of the aforementioned newspaper. On 05/08/2005, the newspaper (B.) published on pages 1 and 6 of issue no. 29 an

article entitled (Serious Administrative and Financial Abuses by the President of B. Z.); the article revealed that the sum of 2,929 thousand Jordanian Dinars is being granted yearly to a slaughterhouse even though it can be leased for many fold the value of this sum. The decision was issued following the objection raised by the Audit Bureau and the Municipality Engineering Directorate. The article also related that an investor was exempted from paying the sum of 150 thousand Jordanian Dinars that was due to the fund of the (B.) with the help of one of the members of the (M. B.), and added that a petition was handed to the Prime Minister after it was signed by 4,000 citizens in (Z.) requesting that the president of the (B.) and the deputies of (M. Z.) be changed. In its issue no. 30 dated 05/15/2005, the same newspaper also published an article that appeared on page 7 thereof stating that (M. avoided answering and did not have a convincing excuse for the statements that appeared in B. regarding the report of abuses of the B.) The article also reported that (M.) held a press conference for daily newspapers in response to the news that appeared in (B.) assuring the validity of what was published and stating that the content of the articles tarnished the reputation of the plaintiffs -the council of (B. Z.) and (R. M.), the President of (B. Z.)- and constituted libel and slander against the plaintiffs, adding that the wording of the two articles violated the Press and Publications Law since the truth was not published in an honest and objective manner. Consequently, the case was filed and the prosecution took place.

After the prosecution procedures were finalized, the Amman Criminal Court of First Instance issued its decision no. 843/2009 dated 10/14/2009 ordering the following:

1- Declaring the first appellee non-liable for the offences attributed to it.

2- Modifying the qualification of the criminal case attributed to the appellees (A.) and (A.) starting from the violation of article 27 of the Press and Publications Law to the violation of article 5 of the Press and Publications Law, sentencing each of them to pay a fine of 25 Jordanian Dinars in addition to trial fees after convicting them in light of the modified qualification.

3- Convicting the appellee (A.) with the offence of libel in violation of article 359 of the Penal Code and sentencing him to pay a fine of 5 Jordanian Dinars in addition to the fees.

4- Declaring the appellees (A.) and (A.) non-liable for the offence of libel.

5- Imposing the heaviest penalty on the appellees (A.) and (A.) increasing the fine to 50 Jordanian Dinars in addition to the fees.

The Deputy Prosecutor General and the appellant party in the second appeal did not accept the judgment.

Concerning the grounds of the appeal, we find the following:

The grounds of the first appeal filed by the Deputy Prosecutor General: The findings reached by the Court are consistent with the evidence presented in the case since they are legal evidence that are suitable for building a judgment accordingly, and since the Court reached the aforementioned, its ruling would be consistent with the Law; we therefore approve them since the Court justified the aforementioned soundly and adequately in its appealed judgment and we do not find in the above-mentioned grounds of the appeal filed by the Deputy Prosecutor General anything that impugns or casts doubt on the validity of the appealed judgment, which means that the said grounds should be dismissed.

As for the grounds of the second appeal, we find what follows:

Regarding the first ground: It is general and vague and does not constitute a ground for the appeal since it did not reveal the defective aspect of the conclusion reached by the Court. We also add, as we stated in our response to the grounds of the appeal filed by the deputy Prosecutor General, that the findings reached by the Court are consistent with the evidence presented in this case; we therefore approve them since the Court justified them soundly, duly and adequately, which means that this ground should be dismissed.

Regarding the Second ground: It is focused on proving the Court wrong for applying the amended Law no. 27 for 2007. Referring to the wording of article 46 of the Press and Publications Law no. 8 for 1998, we find that the aforementioned article provided for penalizing whomever violates its provisions with paying a fine ranging between 3 thousand and 5 thousand Jordanian Dinars. As for the text amended by virtue of the Law no. 27 for 2007, it increased the penalty to 5 thousand Jordanian Dinars minimum. And whereas the incident subject of this complaint occurred in 2005, before the entry into force of the amended Law, the Law to be in force in this case shall therefore be the Law no. 8 for 1998; and whereas the Penal Code provides in article 6 thereof for the non-application of a Law that imposes a heavier penalty, the Court's application of Law no. 8 for 1998 is thus concordant with the Law. Consequently, we affirm the Court's judgment, which means that this ground should be dismissed.

Regarding the third ground, we find that: The rules of fair trial require that the Court abides by the use of personal and real actions, which means that the Court is limited to the people whose names are mentioned in the indictment and to the accusations attributed thereto. The Court is therefore forbidden from prosecuting someone for a charge that is not included in the indictment even if it has the right to modify the qualification of the criminal attributed to the suspect. Since the indictment did not mention the accusation attributed to the suspect, and since the indictment did not include the accusation of libel and slander, the decision of the Court not to examine the articles that were not tackled by the indictment is therefore consistent with the Law and reality, which means that this ground should be dismissed.

Finally, regarding the fourth and fifth grounds: We find that their stipulations are like a reiteration of the wordings of the aforementioned grounds. Therefore, in order to avoid repetition, we refer to what we mentioned above and add that the conclusion reached by the Court is in compliance with the evidence submitted in this case, which was justified in its judgment in an adequate, reasonable and acceptable way, which means that these grounds should be dismissed.

Hence, based on the above-mentioned, we decided to dismiss both appeals and to affirm the appealed judgment in substance, to charge the appellant party with the fees and expenses and to remand the case to its initial Court.

The decision was issued after examination on 09/13/2010

Member **Member** **Presiding Judge**

10) A Number of Judicial Decisions Related to Human Rights, Issued by the Jordanian Courts of Cassation and Appeal (Excerpts):

(1) Decision of the Jordanian High Court of Justice No. 43/1968 (Panel of Five Judges) Published on Page 59 of the Issue Dated 01/01/1969 of the Bar Association Magazine

The decision of the Municipal Council preventing the practice of selling vegetables and fruits in Al Husba Al Qadima, without preparing other shops for this purpose, is considered inconsistent with the provisions of the Constitution since even if the system of control and organization of public funds, crafts and industries in the region of the Irbid Municipality for 1968 allows the Municipal Council to issue decisions determining the locations of public markets and the types of merchandises and products that can be displayed there, in addition to dedicating some of them to one type of crafts or forbidding the practice of others therein. The exercise of this jurisdiction shall not be undertaken in a way that affects people's right to practice their work and professions as per the wording of article 23 of the Constitution.

(2) Decision of the Jordanian High Court of Justice No. 105/1984 (Panel of Five Judges), Published on Page 756 of the Issue Dated 01/01/1985 of the Bar Association Magazine

The Council for the Interpretation of Laws explained article 8 of the Jordanian Nationality Law stating that the wife of a Jordanian citizen can retain her foreign nationality by fulfilling the conditions stipulated in paragraph 2 of the said article and they require that she presents a written demand to the Minister of Interior within 2 years of her residence in the Kingdom. Hence, a foreigner who is married to a Jordanian man is Jordanian unless she presents a written demand to the Minister of Interior to retain her nationality within 2 years of her residence in Jordan; and as per article 9 of the Constitution, she cannot be deported from the Kingdom.

(3) Decision of the Jordanian High Court of Justice No. 115/1997 (Panel of Five Judges) Dated 07/20/1997, Published on Page 695 of the Issue Dated 01/01/1997 of the Judicial Magazine

Whereas the father of the plaintiff is a Jordanian national -as established in his file at the Passports Department- and holds passport no. 043468, and whereas the plaintiff was added to his father's passport on 10/12/1959 and obtained his own Jordanian passport no. 804112 dated 07/01/1976 and given that the papers did not include anything indicating that the plaintiff waived his Jordanian Nationality or that he was denaturalized, and since there was nothing that indicated he holds a Yemeni Passport and that he entered the country using the latter passport; instead, the papers prove that the plaintiff entered the country by virtue of an urgent travel document as per the letter of the Head of Civil Status and Passports Department that was addressed to the Minister of Interior; and whereas it is forbidden to deport a Jordanian from the Kingdom as per the provisions of article 9 of the Constitution, which stipulated in paragraph 1 that no Jordanian may be deported from the territory of the Kingdom, therefore the challenged decision issued by the first defendant/the Capital Governor was presented based on an invalid attribution, which means that this decision should be dismissed.

(4) Decision of the Amman Court of Appeal No. 36823/2010 (Tripartite Panel) Dated 10/19/2010, Adaleh Center Publications

Articles (24-27) of the Jordanian Constitution stipulated that the Constitution provided for the principle of separation of powers and article 97 of the Jordanian Constitution provided for the independence of the Judicial Power, (and that Judges are independent, and in the exercise of their judicial functions they are subject to no authority other than that of the Law); consequently, whereas the Judicial Power is independent from other powers and is equal to them since all powers emanate from the Constitution that created them, no Power has supremacy over the other, which leads to the fact that both Legislative and Executive Powers cannot set a law that is inconsistent with the Constitution and compel the Judicial Power to apply it. The non-abstention of the Courts from applying the law violating the Constitution is considered a participation in the violation of the Constitution and an impediment to its provisions. Jurisprudence agrees on that the Judiciary's control of the constitutionality of laws is an inevitable result of the Constitution's supremacy and rigidity. The Jordanian Constitution has precedence over the other laws that have to abide by the Constitution and its provisions, be in line with the same and never fall outside its limits; otherwise, the legislation issued in conflict therewith shall be considered unconstitutional, the penalty determined shall be inflicted and it shall not be implemented. Whereas the rule dictates that the Legislative Power is the authority that is in charge of legislation works and this rule should be observed unless a clear wording in the Constitution states otherwise; the Executive Power handles the execution works, it shall not interfere in the legislation unless by virtue of a wording in the Constitution providing for the aforementioned, and within the determined limits and restrictions for issuing legislations such as necessary legislations that should not

violate the Constitution and the legislations of emergencies and Martial Law. The Constitution is the source of all powers and it distributed the three Powers on the basis that each Power respects the principles stipulated by the Constitution. If the Legislative Power promulgates an unconstitutional legislation, it cannot force the Judicial Power to apply it and disregard the Constitution. When examining the cases presented before them, the Courts do not apply any legislation promulgated by a non-competent party or a legislation that is not in compliance with the wording of the Constitution or with its essence. In the application of legislations of different degrees, the Courts undertake to apply the higher legal rule when it conflicts with a lower legal rule. The control of the Judiciary over the constitutionality of Laws is part of its mission and the essence of its judicial work since the Judge's mission when ruling in a conflict is to know the quality of the Law to be applied. It is the duty of the Court to apply the higher legal rule, which is the Constitution when it is conflicting or contradicted by a lower-degree law, be it the ordinary or temporary Law, rules or regulations. Courts, in most of the countries of the world, in which the constitutional control has not been regulated by virtue of express legal texts, performed the control on the constitutionality of the laws without effective legal or constitutional texts giving them this competence considering this is part of the general principles that should be adopted in any country with a rigid Constitution, the amendment of which requires procedures different from the ones the Constitution sets for the amendment of ordinary laws. Consequently, whereas the Jordanian Constitution belongs to that type of constitutions which need procedures that are different from the ones to be applied for ordinary laws, thus the Jordanian Constitution has precedence over other different legal rules. In its meetings held in 1966 and 1967, the International Union of Judicial Officers approved the right of the Judiciary to control the constitutionality of the laws as the harmony and compliance of the laws with the provisions of the Constitution is the forefront of the cases that are of interest to the judges since the monitoring of the constitutionality of the laws is necessary and important to ensure the protection and safeguarding of fundamental human rights..

(5) Decision of the Jordanian Criminal Court of Cassation No. 51/1998 (Panel of Five Judges) Dated 03/23/1998, Published on Page 403 of the Issue No. 3 of the Judicial Magazine Dated 01/01/1998

If it was established without any reasonable doubt that the depositions of the appellant (accused) were taken under coercion and torture without his free will, then these depositions should be excluded from the evidence for being invalid. In the event that the testimony and depositions of the complainant were of a questionable validity, the judgment cannot be based upon them because doubt is always interpreted in favor of the defendant. The depositions of the complainant should therefore be ruled out from the list of evidence, thus leading to the dismissal of what was based upon them, which is the testimony of the witness who had heard it from the complainant whose testimony no longer stands, since ruling the testimony of the complainant out leads to the elimination of this witness' testimony that is based and related to it.

(6) Decision of the Jordanian Petitory Court of Cassation No. 230/1947 (Panel of Five Judges) Dated 11/13/1974, Published on Page 625 of the Issue Dated 01/01/1976 of the Bar Association Magazine

The right to resort to the Judiciary is a natural right of individuals that was established long ago prior to the establishment of the Law. Upon the promulgation of Human Rights, humans were given the authority to defend these rights. Therefore, the Law is forbidden from washing and diminishing the right to resort to the Judiciary. Article 101 of the Constitution stipulated that (Courts are open to everyone), which means that competences of the Courts should not be partially or totally taken away and all people are entitle to resort to it seeking Justice.

(7) Decision of the Magistrate Court No. 7658/1999 (Single Judge) Dated 12/26/1999, Adaleh Center Publications

Article 7 of the Jordanian Constitution stipulated that personal freedom shall be guaranteed; the above-mentioned includes freedom of the self which consists in the person's ability to deal with his affairs, maintain his dignity and existence, and recognize his inherent human rights; this freedom also comprises the freedom of movement consisting in the person's ability to move inside his country's territory freely and easily. And whereas the wording of paragraph 5 of article 389 of the Penal Code limits the personal liberty of the person, hinders his movement, and subjects him to be called to account for the mere suspicion of his presence in any public place or property for an illegal or improper purpose and obliges him to declare the reason for his presence or wandering in any public road or street to avoid being pursued in justice in the event he was found a suspect, it becomes clear that Paragraph 5 of article 389 of the Penal Code is in contradiction with the provisions of article 7 of the Constitution; and whereas looking into the extent of constitutionality of the law is part of the public order and the Court may perform it by its own initiative implementing the higher legal rule when it is in conflict with a lower legal rule since article (103) of the Jordanian Constitution compelled the Courts to exercise their competence in petitory and penal actions in accordance with the provisions of the laws in force; whereas the Constitution has precedence over all other laws, and since the supremacy of the Law requires that the supremacy of the Constitution be guaranteed, which means that the provisions of the Constitution are the provisions that should be applied when contradicting with ordinary laws, and whereas the expression 'personal liberty is respected' is mentioned in article 7 of the Constitution absolute and without any exception thereto, then any legal rule that impedes personal liberty or limits it shall be considered unconstitutional and should not be implemented.

(8) Decision of the Jordanian High Court of Justice No. 243/1997 (Panel of Five Judges) Dated 10/15/1997, Published on Page 551 of Issue No. 4 of the Judicial Magazine Dated 01/01/1997

Personal Freedom is guaranteed by virtue of article (7) of the Constitution. It is the essence of human life, a right determined for the individual that shall not

be restricted or diminished unless within the limits of the Law. The individual's right to acquire and renew a passport is part of the freedom of movement which is an aspect of the Personal Freedom which is guaranteed by virtue of article (7) of the Constitution and which is also one of the pillars upon which modern democracies are established. The Jordanian Law on Passports and Travel no. 2 for 1969 forbids the confiscation of a passport and the prevention from its renewal for any Jordanian national since every Jordanian has the right, as per article 3 of this Law, to have a passport; this right is derived from the Law and is not dependent upon the approval of any other party. The refusal of the Director of the Passports Department to renew the passport of the claimant without legal justification is in contradiction with the provisions of article 3 of the Law on Passports and Travel and violates article (7) of the Constitution.

(9) Decision of the Jordanian High Court of Justice No. 212/1997 (Panel of Five Judges) Dated 10/01/1997, Adaleh Center Publications

Article 18 of the Jordanian Nationality Law listed cases where it is allowed to lose the Jordanian nationality excluding the case where a Jordanian obtains another State's nationality since it is forbidden to denaturalize someone based on decisions issued by the Administration because the rule dictates that what the legislator issues by virtue of a law can only be amended by a law; it cannot be amended by a decision or by instructions. Consequently, since article 3 of the Jordanian Nationality Law no. 6 for 1954 guaranteed the right of the Jordanian national to acquire a passport, the425n the right of the claimant to the Jordanian Nationality is well established as he was born to a Jordanian father and obtained consecutive Jordanian passports. The decision to prevent the renewal of his passport violates his freedom of movement and travel, which is a right guaranteed in article (7) of the Constitution considering it is one of the aspects of Personal Freedom.

(10) Decision of the Jordanian Court of Appeal No. 45694/2009 (Tripartite Panel) Dated 03/25/2012

The journalist or author of the article should become aware that his activity leads to the disrespect of the freedoms of others and breaches the freedom of their private life; if the journalist or author of the article was not aware of the aforementioned fact, one of the elements of the criminal intent collapses leading to the collapse of the entire moral element. Upon applying the above-mentioned to the case and referring to the article published on 10/06/2008, we find the following:

1. The material was written as a news piece and not as an article.

2. The appellant's name was not indicated therein, it was mentioned in the form of the designation (private.)

3. The material was reported from a source in Sharia Courts.

4. The material showcased the opinions of lawyers specialized in Sharia cases.

Thus we find that its role was limited to transferring information, news and opinions to be circulated among the public; this right was stipulated in article (15) of the Jordanian Constitution that provided for the freedom of journalism within the limits of the Law. Articles (3, 4 and 6) also provided for the above-mentioned and stipulated that the freedom of the Press includes:

Informing citizens about events and ideas in all fields.

The right to obtain, to analyze, to deliberate, to publish, and to comment on the information and news that interest citizens from their different sources.

This right was also mentioned in article (19) of the International Covenant on Civil and Political Rights, and we find that the appellant's action is labeled under journalistic investigations as it is related to common good, which is a legal duty required by public interest.))

(11) Decision of the Jordanian Criminal Court of Cassation No. 2174/2011 (Panel of Five Judges) Dated 01/12/2012

Adaleh Center Publications

Decision of the Jordanian Criminal Court of Cassation No. 2174/2011 (Panel of Five Judges) Dated 01/12/2012)

Adaleh Center Publications

The party whose extradition is requested is a Jordanian citizen, and the party requesting the extradition is the United States of America, which concluded a bilateral Convention on extradition of criminals with the Hashemite Kingdom of Jordan, that was ratified and published in the Official Gazette in 1995; and it was established that the above-mentioned Convention was not presented to the National Assembly for ratification as required by the provisions of article (33) of the Jordanian Constitution; and the Convention concluded between the Government of the Hashemite Kingdom of Jordan and the US Government on extradition did not go through the required constitutional stages and was not ratified by the National Assembly because Conventions on extradition are conventions that hinder public and private rights of Jordanians and do not come into force unless approved by the National Assembly as per article (33) of the Constitution and according to the result reached by the jurisprudence of the Court of Cassation in many of its decisions.

(12) Decision of the Jordanian Court of Cassation (Penal) No. 1757/2011 (Panel of Five Judges) Dated 11/14/2011

Adaleh Center Publications

Decision of the Jordanian Court of Cassation (Penal) No. 1757/2011 (Panel of Five Judges) Dated 11/14/2011

Adaleh Center Publications

In the event the accused confesses before the Judicial Police after a period of time exceeding twenty four hours pursuant to article 100 of the Code of Criminal Procedure, the said confession shall be ruled out for being in contradiction with the law; the ruling out of the confession before the Judicial Police incurs the ruling out as well of the procedures following such confession and which consist in the testimony of the investigation officer who recorded the accused depositions and uncovered the proof as to the location of the robbery.

(13) Decision of Amman Court of Appeal No. 40096/2009 (Tripartite Panel) Dated 09/13/2009

Adaleh Center Publications

Decision of Amman Court of Appeal No. 40096/2009 (Tripartite Panel) Dated 09/13/2009

Adaleh Center Publications

1. The legislator tackled the criminal responsibility provisions regarding Media crimes under article 42 of the Press and Publications Law and the amendments thereof, which considers the author or the person who prepared the press material the original perpetrator of the press crime since he committed one of the acts that establish the crime considering he is the creator of the article, the person who signed it, or at least the person who submitted it to the editor-in-chief, what makes him the perpetrator of one of the acts that establish the crime. As for the editor-in-chief, he is penalized as well in his capacity of original perpetrator of the crimes committed by his newspaper as per his position, through which he undertakes the actual supervision of everything published in the newspaper; the legislator considered the said responsibility an exception to the general rules in criminal responsibility, which prohibit the accountability of a person except for the act that is established as his own. And whereas the description of periodic press publication applies to "Ad-dustour Newspaper" pursuant to article 2 of the Press and Publications Law, which stipulates that the owner of the newspaper shall not be considered criminally responsible for the crimes committed through the said newspaper and therefore the public prosecution should prove his being accessory to or an intervening party in the preparation of the press material. Whereas the public prosecution did not bring forth any evidence supporting the responsibil-

ity of Jordan Press and Publishing Company or proving that it interfered in or was accessory to the preparation of the press material, therefore, in this case, it shall not be considered responsible for the violation of the provisions of the Press and Publications Law and hence it shall be declared not responsible for the crime attributed thereto.

2. The elements of the crime violating the provisions of article 27 of the Press and Publications Law on the basis that it published a false story in the newspaper are the following:

1- The material element, which is established when the offender commits one of the acts stipulated in article 27 of the Press and Publications Law. In order to make the offender accountable for his acts, two elements shall be present; the first is related to the criminal activity and the second to the legal result.

The criminal activity consists in declaring facts or events that are current, new or old unknown to the public before they are published and presenting them as true, established and real.

As for the legal result stipulating that the Law had set as condition that the false news or data deceitfully attributed to others should be related to public interest or to the right of a certain person; then the material element is established when the offender commits the criminal activity as long as such activity brings damages to public interest or to a certain person.

2- The moral element; we find that this crime provided for under article 27 of the Press and Publications Law is not established unless by proof of the criminal intent of the offender in addition to the intent to make public. Such intent is established in the offender's will to commit the material activity through one of the publication means while knowing that he is publishing a false story, therefore the instigations for the establishment of the crime are no longer needed as it is sufficient to establish the general criminal intent of the offender.

In application whereof on the facts, we find that the suspect accepted to publish the story mentioning that the administration of Jerash Festival terminated the Golden Bridge corporation contract; however, it is necessary to prove that the published story is false and that the suspect knew that and published the false news on purpose. Through the examination of all evidence submitted in the present case, the story was proven to be false, and it was established that the reply and denial thereof had been published in the newspaper pursuant to the provisions of article 27 of the Press and Publications Law and that the publication of such story by the newspaper resulted from wrong interpretation by the newspaper's journalist. It was established through the aforementioned as well as through evidence provided by the defense and especially the interview conducted with the festival's director that the suspect was not aware that the news were false and

he did not publish it on purpose. Therefore, his ill will was not established, what makes the moral element inexistent and hence he should be declared not responsible since his act does not constitute in the present case a crime punishable by law.

(14) Decision of Amman Court of Appeal No. 13781/2009 (Tripartite Panel) Dated 03/22/2009

Adaleh Center Publications

Decision of Amman Court of Appeal No. 13781/2009 (Tripartite Panel) Dated 03/22/2009

Adaleh Center Publications

In article 15 of the Constitution, the State guaranteed the freedom of opinion and expression in "speech, in writing, or by means of photographic representation and other forms of expression, provided that such does not violate the law" and also stipulated that "freedom of the press and publications shall be ensured within the limits of the law". Article 7 of the Press and Publications Law No. 8 for 1998 stipulated that the journalist should respect equilibrium, objectivity and integrity in presenting the press material and paragraph (c) of article 46 thereof determined a penalty for every violation of the provisions of the Press and Publications Law that are not stipulated therein. Article 46/b of the said law, before amendment thereof by Law No. 24 for 2003, provided for the institution of public interest lawsuits in crimes of periodic publications against the editor-in-chief who is responsible as original perpetrator, and whereby the owner of the publication shall be responsible jointly and severally for the personal rights resulting from the said crimes in the matter of legal expenses without being subject to any criminal responsibility unless it was proven that he was accessory to or that he effectively intervened in the crime. The editor-in-chief's responsibility is one that is presumed based on his position in the newspaper; such responsibility accompanies him at all times since he normally and generally carries out his supervision role and even if he did not effectively supervise the publication of that issue, and his responsibility shall not be dismissed by the fact that he might have entrusted some of his competences to another person as long as he kept to himself the right to supervise the latter. This is because the legislator really aimed at establishing the presumption of the editor-in-chief's knowledge of what is published in the newspaper as well as of his permission of the said publishing, i.e. a legal presumption was established whereby he has knowledge of everything that is published by the newspaper he supervises, and hence his responsibility is presumed as a result of the presumption of the said knowledge. In order to determine if the sentences used in the article as well as the method of presentation and publication of the article are in violation of the freedom of opinion and of expression heeding the public interest and supporting the progress before the society, criticism shall be permissible when it fulfills all conditions for achieving a higher interest that has precedence over personal interest. Thus the elements of permissible criticism are available, namely: availability of an undisputed subject,

which can be criticized and which has a general importance for the public, and the said criticism should be connected to the fact upon which it bases itself and founds its arguments and from which it shall not be separated, and even if the criticism is conducted in good faith, which is achieved through two matters, the first consists in seeking public interest through the opinions it brings forth and the second in its belief in the veracity of the opinions it states. Whereas the article neither published the name of the complainant nor that of the school, and that it tackled problems that usually occur in many schools, presented facts of which the newspaper was notified through school teachers and upon a written complaint submitted by them, and despite the aforementioned neither mentioned the name of the school nor that of the director in addition to the fact that the director was questioned by the Minister of Education as a result of the complaint the teachers submitted to him that coincided with the publication of the article, and that the newspaper did not abstain either from publishing any response provided by the complainant or any other relevant party, and since abstaining from conducting an investigation with the director does not lead to shaking the equilibrium, objectivity and integrity in presenting the press material since the criticism came general and did not mention in particular the complainant or the school, and since such criticism may apply to any other school, does not go beyond the conditions for permissible criticism and is nothing but an exercise of freedom of opinion and expression that aims at achieving public interest and the well running of public institutions; therefore, the publishing of the article does not constitute a violation of the provisions of article 7 of the Press and Publications Law No. 8 for 1998, and hence it is necessary to declare that the suspect is not liable for the crime attributed to him.

Appendix 4: Moroccan Jurisprudence

Supreme Council Decision No. 2163 Dated 04/09/1997 Civil File No. 2171/1/4/95.

Physical Coercion: Inability to Settle – Precedence of the International Treaty Over Domestic Law.

If article 11 of the United Nations Charter dated 12/16/1966 relating to civil and political rights that was ratified by Morocco on 11/18/1979 provides for the inadmissibility of imprisoning someone merely on the ground of his inability to fulfill a contractual obligation, the decision did determine the period of the physical coercion for the debtor abstaining from such settlement but did not determine it in the case he was unable to settle, and therefore it is not in violation of the mentioned article.

In the name of His Majesty the King

The Supreme Council

After deliberation according to the Law,

In the first ground where, based on the case file documents and the appealed decision issued by the Court of Appeal in Taza on 11/14/1994 in case no. 553/94, we find that the respondent (A. M.) had submitted a letter stating that the petitioner (M. S.) leased his shop in Taza for a monthly rental amounting to 450 Moroccan Dirhams. However, since the first of May, "Al Fateh," 1989 and until 12/19/1991, (M. S.) refrained from fulfilling his obligations, what led (A. M.) to claim the issuance of an order compelling the debtor to settle the sum of 14,400 Moroccan Dirhams as rental and the sum of 1,440 Moroccan Dirhams as hygiene tax, and hence the Court of First Instance in Taza issued a judgment compelling the defendant to settle the amount of 14,235 Moroccan Dirhams as rental obligation for the period between May 1, 1989 and December 19, 1991 based on a monthly rental amounting to 450 Moroccan Dirhams in addition to Court expenses, and it determined the physical coercion period to one-year enforceable imprisonment time when he abstained from settling his dues as decided by the Court of Appeal.

Whereas the appellant pleads that the decision breached article 342 of Q. M. M. through the deletion of part of the sentence "and upon the report of the judge in charge of legal inquiry heard during the session" which ended at the word "not" therefore rendering the sentence fragmented and breaching the requirements of the mentioned article.

However, add to that the appealed decision included that the judge in charge of legal inquiry did not read his report by exemption of the presiding judge, and by non-opposition of the litigating parties and the added sentence was struck as article 342 of Q. M. M presumed to be breached had it been amended by virtue of Dahir 10/03/1993 that has immediate effect and therefore the issue of reading the report is no longer regulated by it and hence it does not breach any requirement therein and the ground is hence unfounded.

In the second ground:

Whereas the appellant complains that the decision violated the requirements of article 11 of New York covenant for 1966, published in the Official Gazette, issue no. 3225, dated 05/21/1980 stipulating that no one shall be imprisoned on the ground of inability to fulfill a contractual obligation; this covenant became binding and applicable, and therefore the challenged decision supporting the judgment of the First Instance Court that fixed the coercion period to one year did not base its judgment on sound legal grounds.

But whereas article 11 of the United Nations Charter dated 12/16/1966 relating to civil and political rights ratified by Morocco on 11/18/1979 stipulates that no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation, "therefore, the challenged decision -that affirmed the judgment of the First Instance Court that determined the period of physical coercion against the petitioner in the event he refrained from paying" and did not determine it in the case where the subject could not and was unable to pay - is not in violation of the mentioned article and the ground remains unfounded.

In the third ground:

Whereas the appellant complains that the decision lacks justification claiming he made clear in his petition for appeal that the lease relationship ended with the respondent after he emptied the shop on 01/30/1989 bringing forth a sale contract of the shop decoration; however, the challenged decision did not justify enough its response to the issues raised by the appellant and the Court had to use its investigative power in answer to the same through an investigation or addressing a warning to the petitioner to submit the original version of the contract. Such failure to do the same is considered a weakness in justification what renders its decision subject to repeal.

However, in addition to that the contract for selling the shop decoration referred to by the petitioner links the latter to the so called (L. B.) in the capacity of the first as seller of the decoration of the shop object of the dispute and the capacity of the second as buyer thereof; its effects remain limited to the parties thereto and do not exceed them to the respondent who shall not be considered party thereto and we shall not deduce therefrom that it ended the relation between the petitioner and the respondent and the appealed decision that adopted most of the same and deduced it from the case file documents making clear that "nothing

was found within the case file documents that supports the appellant's claim that the lease relation was terminated by the litigating parties, and since what was submitted by the appellant, namely a copy of the contract for the sale of the shop decoration cannot be considered proof for the termination of the lease relation; it concluded that this relation still stands between the parties with all its legal effects between the petitioner and respondent which comprise the rental dues" – such decision came sufficiently justified with no need for further investigation as long as the elements of adjudication in the case were all available and hence the ground shall be considered unfounded.

In consideration whereof,

The Supreme Council decided to reject the claim and charge the petitioner with the Court expenses; its decision was hereby rendered and announced in the open hearing held on the date mentioned above in the Regular Chamber at the seat of the Supreme Council in Rabat.

The ruling panel was composed of:

Head of the Chamber: President M. B.
Judge in charge of legal inquiry A. M., and Judges A. H. and M. A. B.

Public Prosecutor A. A.

Court Clerk Mrs. F. M.

2) On 04/14/2010, the Kenitra Court of First Instance examining personal status cases issued the following judgment:

Between: Public Prosecutor of the Kenitra Court of First Instance

And Mr. (E. A.)

Merits of the Case

The plaintiff submitted a statement exempted from fulfillment registered at the Court registry on 11/04/2009 whereby he stated that based on the Public Prosecutor of the Kenitra Court of Appeal dated 10/14/2009 accompanied by the letter of the Minister of Justice dated 07/24/2009, and based on the requirements of article 22 of the Bilateral French-Moroccan Agreement dated 08/10/1981, Mrs. (E. M.) in favor of whom a decision was reached by the Superior Court of First Instance in Creteil (France), and who was living at the defendant's house along with their children until she left him voluntarily and without giving him notice, what led him to resort to the French Police Department and submit a statement which enabled him to issue passports for his two sons and hence allowed him to fly them from their place of custody to the city of Kenitra. He kept the children and managed to

get compensations for their care, and on 11/29/2008 Mr. (E. A.) moved the children to Kenitra city thus breaching the agreement concluded with Mrs. (E. M.).

On 05/29/ 2009 Mrs. (E. M.) obtained the judgment no. 09/00/09 from the Superior Court of First Instance in Creteil (France) which awarded the custody of the children (A. M. A.) and (H. M. A.) to their mother; therefore the children's presence with their father in Kenitra city would be breaching the said judgment. As the defendant refrained from returning the children to their mother before the Judicial Police, the Public Prosecutor and in application of the Judicial Cooperation Agreement concluded between Morocco and France is hereby claiming the issuance of a judgment compelling Mr. (E. A.) to return the children (A. M. A.) and (H. M. A.) summarily to their mother, he also accompanied the petition with a copy of two judgments, the letter of the Minister of Justice, the letter of the Public Prosecutor of the Court of Kenitra, the letter of the French Ministry of Justice accompanied by two judgments and several other documents; and after examination of the case file in several sessions during which the summons sent to the defendant requesting he appears before the Court were returned since the shop was constantly closed; therefore it was decided to appoint a trustee over him in the last session on 04/07/2010 and it was decided to deliberate concerning the case file in order to pronounce a judgment thereon on the said date.

After deliberation,

In form: Whereas the case was filed fulfilling the duly required formalities.

In substance: Whereas the Public Prosecutor requested the issuance of a judgment compelling the defendant to return the children (A. M. A.) and (H. M. A.) to their mother (E. M.)

Whereas it was established through the accompanying documents that Mrs. (E. M.), mother of the two children, obtained the judgment no. 00555/09 from the Superior Court of First Instance in Creteil (France) on 07/06/2009 which awarded the custody of the children to her alone and determined visitation rights to their father, the defendant,

Whereas Morocco and France concluded an agreement on 08/10/1981 relating to the status of persons and families and to judicial cooperation, which was published in the Official Gazette by virtue of the Dahir (Royal Decree) dated 11/14/1986,

Whereas article 7 of the Agreement stipulated that the applicable law is that of the common domicile of the spouses, applicable also to issues related to child custody and alimony as per article 10 of the Agreement,

Whereas the case file reveals that the defendant, Mrs. (A. M.) and their two French-born children were effectively living in France on a usual basis until the defendant moved with the children to Morocco,

Whereas the defendant stated before the Judicial Police in the Public Prosecution file No. 22 N. Q. D. 09 dated 10/07/2009, that he used to live with Mrs. (A. M.) in France since 2004 in an effective and usual manner along with their two children, and that although he was currently in Morocco he still had business affairs in France that required tending to,

Whereas article 24 of the said Agreement stipulated that with regard to child custody, none of the two countries is entitled to reject the recognition or implementation of a judgment issued by the other country if the Court that delivered the judgment is that of the parents' common effective domicile or that of the residence of the parent with whom the child is usually living. Therefore we conclude that the judgment that awarded the mother the parental authority was issued by a competent court and according to the aforementioned Agreement our Court is not entitled to discuss it. The claim of the Public Prosecutor is hence founded on sound legal grounds.

Whereas the defendant should be charged with the court expenses,

And in application of articles 1 to 5, 30 to 50, 55 to 67 and 124 of the Code of Civil Procedure.
In consideration whereof,

The Court ruled in open hearing, in first instance and in the absence of the defendant on appointing a trustee over the latter.

In form: to accept the claim

In substance: to issue a judgment compelling Mr. (E. A.) to return the children (A. M. A.) and (H. M. A.) to their mother (E. M.) and charging him with the court expenses.

The judgment is hereby rendered on the day, month and year mentioned above and the Court was composed of:

3)

Kingdom of Morocco **Original Decision kept at the Court Registry**

Ministry of Justice **In Casablanca Court of Appeal**

Social Chamber **In the name of His Majesty, the King**

Decision No: Issued by the Casablanca Court of Appeal
Dated 05/17/2007
Civil Panel composed of:

Issued on 05/17/2007 **Presiding Judge: A. L.**

Judge in charge of legal inquiry: Ms. B. L.

On: **Judge: Ms. A. A.**

Case file no. registered at the Court of First Instance:

In the presence of Mr. (J. A.) representing the public prosecutor

The Following Decision:

Case file no. registered at the Court of Appeal:

Between "N. A." residing in 5382/

Appellant: Electing domicile at the office of Mr. J. Al. …., Attorney practicing in Casablanca

Appellee: **From one side, in his capacity of appellant**
And "A. H. S. Sh. M. company" represented by its attorney

At its social domicile no.
Electing domicile at the office of Ms. F. S.

Attorney practicing in Casablanca
And from another side, in his capacity of Appellee

File no. ……-…….

Upon the petition for appeal, the appealed judgment, both parties' deductions, the documents annexed to the case file, the report of the judge in charge of legal inquiry which wasn't read in the court hearing by exemption by the presiding judge and non-opposition of the parties, and upon the order issued to examine the case in the hearing duly notified and served to the litigating parties,

In application of the provisions of article 134 et seq. article 328 et seq. and article 429 of the Code of Civil Procedure, as well as the provisions of Dahir of 1948 and after hearing of the findings of the Public Prosecution and deliberation according to the Law,

In Form: Upon the statement of appeal, the statement of grounds for appeal dated 12/27/2005 submitted by Mr. "J. Al." the attorney of "N. A.", exempted from court fees, appealed by virtue of social judgment on 07/14/2005, in case no. 1259/41/2004, and whereby the defendant is requested to settle compensations for the benefit of the plaintiff for vacation and salary while rejecting the other claims relevant to the wrongful termination of employment on the presumption that the employee had left the job on her own initiative and was not arbitrarily dismissed. According to the case file, this judgment was not served to the

appellant; and since the appeal was filed within the legal period and in the due capacity and form, therefore it is accepted in form.

In Substance:

In the First Instance Stage: Whereas the merits of the case may be summarized, based on the appealed judgment and the other documents of the file, in that the plaintiff filed a lawsuit stating that she started working for the defendant as from November 1, 1989 in the position of administrative clerk with a monthly salary amounting to 4,145 Moroccan Dirhams, and that in mid March 2004 she was surprised to find her employer dismissing her from work without justification. She therefore requested the issuance of a judgment granting her a set of compensations detailed in the writ of summons. She included as well copies of statements of salary along with a statement of subscription at the National Social Security Fund and the report of the labor inspector… The employer replied through his attorney Ms. Fadila Sebti confirming that the plaintiff used to work for him since November 1989 and adding that she became negligent and started to come late to work. He then demoted her, changed his behavior towards her and asked her to work in archiving but she refused; hence the defendant decided to suspended her from work for three days as disciplinary penalty but she refused to receive the decision, resorted to the labor inspector, sent him a letter in registered mail dated 03/18/2004 and did not go back to work. Therefore, she was considered to have made the grave mistake of leaving work without justification, especially that the defendant had asked her to appear before the labor inspector so she goes back to her work but she abstained.

After an investigation was conducted by the Court of First Instance, and after the parties and the witnesses were heard, all relevant procedures completed and following hearing the employee's statement in which she insisted that the defendant tried to force her to sign a new contract with him which would make her lose her seniority at work, and declared not having received any letter from the employer and that she had no knowledge of the presumed suspension he mentioned, and after investigation and establishment that the plaintiff refused to carry out her work, which is considered a grave mistake especially that the employer had sent her a letter asking her to return to her work but she abstained therefrom after the 3-day disciplinary suspension; therefore the Court of First Instance issued the above mentioned judgment granting the employee compensation for salary and vacation and rejecting the other claims; this judgment was appealed by the employee.

In the Appeal Stage

Grounds of Appeal

Whereas the grounds of appeal submitted by the employee included that the decision reached by the Court of First Instance rejecting the claims for compensation resulting from wrongful termination of employment on the basis that the

employee left her work by her own initiative after she was subjected to a 3-day disciplinary suspension and that the justifications brought forth by the Court that the employer was entitled to carry out all procedures and changes

Case No. ….-….

in the work place are not based on sound grounds since she had been working at the company since 1989 in the position of administrative clerk with a salary of 4,145 Moroccan Dirhams but the employer forced her to sign a new employment contract in March 2004 and when she objected, the employer started pressuring and harassing her so that she either signs the new contract or quits her job. He demoted her to the archiving department, although her initial position was an administrative clerk. He also moved her office to the basement next to the restrooms, what caused her great harm and constituted an insult and an act of revenge against her what proves the case of provocation and harassment. She requested the annulment of the appealed decision in what it ruled as to rejecting her claim for compensations resulting from wrongful termination of employment, and the issuance of a new judgment granting her the compensations detailed in the writ of summons.

In the hearing of 03/06/2006, the company employing her gave its response through its attorney F. S. stating that the contract ensured and guaranteed her seniority, that her demotion to the archiving department was within her areas of competence, and that the employee after serving the 3-day disciplinary suspension penalty did not go back to work, thus requesting the Court to affirm the judgment issued by the Court of First Instance.

In the hearing of 06/08/2006, the Court of Appeal issued a decision to investigate the harassment allegations of the employee, which she brought forth before the Court of First Instance but came ambiguous, such as the act of assigning her an office near the restrooms in order to pressure her into signing the new contract or quitting the job, since the investigation conducted by the Court of First Instance was not clear and the Court did not have sufficient elements in order to rule on the present case.

In the investigation hearing dated 12/21/2006 attended by all the parties in addition to the interpreter of the employer who is a foreigner and does not speak the Arabic language, the employee declared that her employer forced her to sign a new contract but that she refused as it would make her lose her job seniority. She added that as a result, she was subjected to insults and harassments; they took away her phone and computer and relocated her office next to the restrooms in order to humiliate her. She mentioned as well that her employer (J. M.) and (Al.) used to walk into the restroom by passing in front of her to humiliate her intentionally. Her employer (J.) then started to place pornographic magazines and other irrelevant documents on her desk. She also noted that her employer used to grab her hand and subject her to sexual harassment whenever she tried to hand him work-related documents as **he used to deliberately touch her and**

hold her hand. When asked why she would not return to work, the employee replied that she would not out of fear of her employer's reprisal.

The employer "J. M." declared that the employee's allegations were not based on sound grounds since the company made no written contract with the employee but only concluded a verbal contract with her, that she refused to undertake the archiving work she was assigned, and that in the matter of the sexual harassment it was completely unfounded especially that the employee was a married woman. He denied as well her allegations that he used to place pornographic magazines on her desk and stated he did not replace the so-called "N." with another administrative clerk, when asked by the Court,

After hearing the witness "M. K." summoned by the employee, and after confirming his identity and that he fulfilled all requirements for eligible witnesses and took oath in Court, he declared he based his knowledge and testimony on that he worked for the company for 5 years and stated that the employee used to work as administrative clerk, that she was dedicated to her work, was in charge of welcoming the customers, coordinating the work and preparing documents, he mentioned as well that he always heard Mr. (M. J.) calling the employee (N.) saying (**you have beautiful hair, and your clothes are beautiful**) and that he did not know what used to happen each time she entered his office. When asked by the Court if the employer used to address such remarks to all his female employees, he denied and stated that the employer specifically addressed such remarks to the so-called Nadia alone and did not address them to the other administrative clerk who wore the hijab,

After hearing the witness "A. F. W." summoned by the employer and after confirming his identity and that he fulfilled all requirements for eligible witnesses and took oath in Court, he declared that he used to work with the employee at the company and that the employer ordered her to work in archiving but she refused, noting as well that he did not notice any unusual behavior.

Case No. …-….

After hearing the witness "H. Z.", and after confirming his identity and that he fulfilled all requirements for eligible witnesses and took oath in Court, he declared that he works for the company, and that the employee was assigned the archiving work at the basement but that she refused to undertake the work assigned to her; therefore the Court decided to close the investigation and ask from both parties to submit statements after the investigation,

The employee's attorney Mr. L. submitted two statements following the investigation stating that the employee was subjected to sexual harassment and to provocation through the deliberate touching of her hand and the compliments she was addressed stating she had beautiful hair and clothes, and that after her objection, her office was relocated to one nearing the restrooms and she was demoted from administrative clerk to an employee in archiving as response to her

refusal to sign the new contract and other things. The attorney also mentioned that the employer's plea that the harassment was brought forth for the first time before the Court of Appeal is not correct since the employee had raised it previously in her statement dated 06/30/2005 affirming that she was subjected to harassment and this is what she reiterated before the Court of Appeal especially that the examination before the Court of First Instance was carried out in open court sessions and before a lot of people, contrary to the examination carried out before the Court of Appeal in the office of the Judge in charge of legal inquiry, at which time the employee was able to confess the whole truth and declare that she was sexually harassed through the deliberate touching and holding of her hand and that the employer used to place pornographic magazines on her desk, what disturbed her psychologically and led her to refuse to go back to work when the labor inspector asked her to, hence rendering the acts committed by the employer and proven by the witness "M. K." falling under the grave mistakes stipulated in article 40 of the Labor Code and denounced by all international and national agreements that condemn this act to which women are subjected in their workplace by their employers including the Conventions No. 100 and No. 111 issued by the International Labor Organization, the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women, as well as all laws that do not discriminate between men and women and whereby if the employee was subjected to sexual harassment, her employer would have committed a grave mistake and she would have been subject to wrongful termination of employment and her invitation to return to her job would hence be unfounded.

Attorney "F. S." followed the investigation by submitting two statements whereby the employee was instituting the lawsuit in ill will, that she was claiming for the first time that "J. M." was sexually harassing her in order to drive her to quit her job and that her allegations were false and she could not prove them. As for the employer's remarks to the employee telling her that her hair was beautiful it was meant to keep Mrs. N.'s appearance suitable and appropriate for an administrative clerk, especially that she welcomes customers and should look presentable before them. The real merits of the case consist in that the responsible when he demanded that the employee works in the archiving department, she refused and he issued a 3-day disciplinary suspension penalty against her but she abstained from receiving the letter; this shows that the alleged termination of employment is not valid as supported by the testimonies of the witnesses heard in Court sessions and the employee would be the one who quit her job by her own initiative. On 05/03/2007, the Court deemed the case file ready and hence placed it for deliberation until the session of 05/17/2007.

After deliberation according to the Law,

Whereas, in her appeal, the appellant holds on to the grounds referred to above, Whereas the Court, after perusal of the case file, its accompanying documents, the judgment of the Court of First Instance, and whereas the employee filing the appeal argues that the said judgment is not sound in the part where it rejected the

claim for compensations resulting from wrongful termination of employment on the basis that she quit her job by her own initiative after she abstained from carrying out the work,

Whereas the employee pleads that she is an administrative clerk in charge of welcoming customers, and other responsibilities such as commercial cooperation and preparation of documents; however the employer, Mr. "J. M.", forced her to sign a new contract that would make her lose her seniority and so she refused and he began to harass her sexually what led him to demote her changing her position and placing her in the basement, he also put her office facing the restrooms and started placing thereon pornographic magazines and old documents, and she worked for a week in this capacity then resorted to the labor inspector

Case No. …-…

Whereas after examination of the investigation session dated 12/21/2006 and undertaken in the appeal, it was established that the employee used to work as administrative clerk by verbal contract since 1989 and the employer presented her a new contract to sign and she refused since it would make her lose her seniority. The employer did not deny this fact during the investigation session but he pleaded that the said contract did not impede her seniority, he also did not deny that she was reassigned to the archiving department without computer or phone through which she used to carry out her work, and he assured that her transfer was temporary denying that he was harassing her sexually after she refused to sign the contract,

Whereas it was established through the testimony of the witness "M. K." that the employee was working as administrative clerk, coordinator of commercial administration and that he was not present when she was fired but that when he used to work in the same company, he noticed that Mr. "J. M." used to address Mrs. N. with compliments such as (**you have beautiful hair, and your clothes are beautiful**) and mentioned that he did not know what used to happen when she entered his office, that Mrs. "J. M." did not address such words to any administrative clerk other than Mrs. N. who was the specific addressee, knowing that there was another administrative clerk and that he never addressed her with the same words; therefore the words with which she was addressed -as supported by the testimony of the witness- are in line with the employee's statements and what happens inside the employer's office such as his deliberate touching of her hand with the intention of harassing her in addition to the established compliments through the witness heard in court session and that she was a married woman and this fact would incur a lot of damages to her and would have negative repercussions on her family and her social environment,

Whereas the Court established through its discretionary power - which it exercises in assessing the witnesses testimonies it hears- and the discussions undertaken by the litigating parties that the plaintiff was evidently sexually harassed by her employer, and she has therefore the right to refuse to work and return to her

job as requested by her employer, regardless of the disciplinary penalty, whether it was effectively decided by the employer or not, or her return to work or her abstention which is no longer a matter of discussion here after she was sexually harassed in her workplace, what gives her the right to leave her job without giving notice to her employer with her being considered in circumstance of wrongful termination of employment and he would be the one who committed the grave mistake pursuant to national and international law,

Whereas the act of sexual harassment that the employee was subjected to is considered insulting and humiliating to women and an act of injustice towards her humanity, and Allah the Glorified and Exalted instigated not to harm women when He said (and not be abused) in verse 59 of Sura Al-'Ahzab. All laws, domestic and international, call for the protection of women from sexual harassment and discrimination at work, as raised by the employee's attorney who referred to international charters and conventions issued by the International Labor Organization, since Morocco, as internationally recognized, respects international legitimacy and human rights and has ratified several international charters and conventions. Article 5 of the Universal Declaration of Human Rights has condemned any act degrading to human dignity, and article 7 of the International Covenant on Economic, Social and Cultural Rights provided for the right of every person without discrimination to the enjoyment of just and favorable conditions of work. Also, the Convention on the Elimination of All Forms of Discrimination against Women, signed by Morocco in 1993 in Austria, confirmed in its preamble and in article 11 thereof the right of women to work without any discrimination based on gender, and provided for her health and moral protection. Conventions no. 100 and 111 issued by the International Labor Organization and signed by Morocco provided as well for the protection of working women and their right to be able to work without any discrimination based on gender, and to protect them from sexual harassment that might impede social growth and hinder the full development of the country,

Whereas the wrongful termination of employment is established in favor of the employee and therefore the annulment of the appealed judgment should be declared in the part where it rejected the claims for compensation as to notification, exemption, and arbitrary dismissal and another judgment should be issued ordering the settlement of compensations that should be calculated as follows.

File No. …-…

About the Notice

And whereas the case in question falls within the requirements of the Dahir (Royal Decree) of 1948 and whereas the judgment was issued on 03/15/2004 when the Moroccan Labor Code was not still enforced, the compensation that is therefore due for the notice as per the decision of 07/30/1951 equals a month of work which amounts to 4,500 Moroccan Dirhams, on the basis of a monthly salary of 4,500 Moroccan Dirhams, which was not objected to by the employer

during the inquiry session. However, according to article 3 of the Code of Civil Procedure the employee deserves what was requested in the petition for appeal, which is 4,145 Moroccan Dirhams.

About the Exemption

Whereas the employer did not contest the salary and the working period, and whereas the employee was employed from 1989 till March 2004 which means that she worked for the employer for the period of 15 years, and as per the decree of 08/14/1967 she deserves a severance pay calculated as follows: an hour's wage of 4,500/26/8=21.63 Moroccan Dirhams multiplied by the number of hours for a working seniority of 15 years equal to 2,160 hours = 46,720 Moroccan Dirhams.

About the Wrongful Termination of Employment

Whereas the employee worked for 15 years in return for a salary amounting to 4,500 Moroccan Dirhams, and considering the nature of her work and the current economic circumstances, and in application of article 754 of the Code of Obligations and Contracts and of as per the Court's discretionary power, the severance pay was set to 95,000 Moroccan Dirhams.

And whereas it should be affirmed barring the aforementioned and court expenses should be divided between the parties and the employee shall benefit from legal aid.

In consideration whereof,

The Court of Appeal ruled in open hearing and in the presence of all parties, and pronounced the final decision

In form: accepting the appeal.

In substance: dismissing the appealed judgment where it rejected the petition for compensation for the notice, the exemption and the wrongful termination of employment, and pronounced a new judgment ordering the compensation for the aforementioned.

For the notice: 4,145 Moroccan Dirhams

For the exemption: 46,720 Moroccan Dirhams

For the wrongful termination of employment: 95,000 Moroccan Dirhams

Affirming the provisions of the appealed judgment barring the aforementioned and divided the court expenses between the parties and the employee shall benefit from legal aid.

The judgment is hereby rendered on the day, month and year mentioned above in the Regular Chamber at the seat of the Court of Appeal in Casablanca without any change in the panel of judges during hearings.

Signatures

President **Judge in Charge of Legal Inquiry** **Court Clerk**

4)

Kingdom of Morocco

Ministry of Justice

Court of Appeal

Social Division

Decision no.:

Issued on 05/25/2006

Corresponding to:

Recorded in the Court Registry

At the Court of Appeal in Casablanca

In the Name of His Majesty, the King

The Court of Appeal in Casablanca issued

on **05/25/2006,**
ruling in social matters; it was formed of:

Mr.. **A. L.** **President**

Ms. /**B. L.** **Judge in Charge of Legal Inquiry**

Ms. **A. A.** **Judge**

In the presence of Mr. **representing the General Prosecution**

With the assistance of A. A. **Court Clerk**

File no. in the Court of First Instance:

File no. in the Court of Appeal:

The Following Decision:

H. W.

Residing in the Street of

Lawyer M. F.

Attorney practicing in Casablanca

From one side, in his capacity of appellant

Appellant:	The Company M. T. L. represented by its legal representative Lawyer A. T. Attorney practicing in Casablanca

And from another side, in his capacity of appellee

File no ...-...

Upon the petition for appeal, the appealed judgment, both parties' deductions, the documents annexed to the case file, the report of the judge in charge of legal inquiry which wasn't read in the court hearing by exemption by the presiding judge and non-opposition of the parties, and upon the order issued to examine the case in the hearing duly notified and served to the litigating parties,

In application of the provisions of article 134 et seq. article 328 et seq. and article 429 of the Code of Civil Procedure, as well as the provisions of the Law 65/99 on the Labor Code, and after hearing of the findings of the Public Prosecution and deliberation according to the Law,
In Form:

According to the petition for appeal, submitted by "F. M." the lawyer of H. on 06/30/2005, exempted from court fees, appealed by virtue of social judgment on 05/05/2005 in the case no. 11931/2004 and whereby the defendant is requested to settle the following amounts:

For vacation: 4,410.00 Moroccan Dirhams and to deliver the work certificate while rejecting the other claims

According to the case file, this judgment was not served,

And since the principal appeal was filed within the legal period and in the due capacity and form, therefore it is accepted in form.

In substance:

In First Instance Stage. Whereas the merits of the case may be summarized in the fact that the plaintiff filed a complaint indicating that he worked for the defendant from 06/30/1986 until his employment was wrongfully terminated on 11/13/2004 revealing that he used to earn a monthly salary of 2,070 Moroccan Dirhams, the plaintiff therefore requested the issuance of a judgment granting him the following compensations:

For the notice 5,000 Moroccan Dirhams
for the family allowances 6,000 Moroccan Dirhams
For the termination of employment 300,000 Moroccan Dirhams
for the vacation 5,000 Moroccan Dirhams

For the prejudice 88,264 Moroccan Dirhams
giving him the work certificate with along with compensation.

After the defendant responded, through its lawyer, that the worker was caught wearing socks produced by the company, which is forbidden by its bylaws, it addressed the worker a warning suspending him from work for 8 days. The latter did not return to work after the suspension period ended, and hence the claim of wrongful termination of employment is not legally confirmed.

And after the reconciliation attempt between both parties failed and the legal procedures before the Court of First Instance were over, the Court issued its above-mentioned decision that was challenged by the employee.

In the Appeal Stage

Grounds of Appeal

File no ...-...

The appellant challenged the Judgment of First Instance for the invalidity of the justification and for the contradictions in its different parts and because the judgment was not built on a legal basis as it was justified by one single ground consisting in the fact that the employee was caught wearing socks, which is a forbidden act, and that the notice was valid and the penalty not arbitrary, without presenting proof indicating he returned to work after the suspension period ended. The employee was wearing socks that are torn and fall under the second type of products not suitable for consumption, which was confirmed by the witness in the inquiry session, and the employer did not respect the legal procedures for labor contract termination and served no notice. The fact is that the employee protested over working overtime in return of normal working hours' fee, which means that what the employer did is a wrongful termination of employment; the plaintiff requested therefore that the judgment of first instance be dismissed and that a new judgment be issued considering the termination of employment was wrongful and granting him the compensations he claimed before the Court of First Instance.

In the hearing of 05/11/2006, the lawyer A. T. presented an answer reporting that the employee's petition for appeal has no ground since he was caught stealing socks produced by the employer that suspended him from work and the employee did not return to work after the suspension period was over, which meant that the wrongful termination was unfounded and he requested the Court to affirm the judgment issued by the Court of First Instance,

In the hearing of 05/11/2006, the Court considered the file was ready and placed it for deliberation until the hearing of 05/25/2006.

After the deliberation according to Law:

Whereas, in his appeal, the appellant holds on to the grounds referred to above, Whereas the Court, after perusal of the case file, its accompanying documents, established that H. W. used to work for the appellee/company from 06/30/1986 until 11/13/2004 in return of a monthly salary of 2,070 Moroccan Dirhams as per the work statement included in the file.

Whereas the employer pleaded that the employee committed a grave mistake by stealing and wearing one pair of socks owned and produced by the company; the employee pleaded that these torn socks that are not suitable for consumption are usually used by workers and fall under the second type of products. And whereas the employee denied having received the 8-day suspension notice and pleaded that the employer did not respect the formal procedures when it terminated his employment,

And whereas the employer presented the notice that it tried to serve to the employee and that was returned with a remark indicating the shop was closed,

And whereas it was established from the attempt of reconciliation that took place before the labor inspector and from the report issued by the department 1 L. S. B. that the employee referred to the inspector and that the employer refused to return him to work,

Whereas supposing the worker wore socks from the company that declared through its representative during the inquiry session that the worker did not know if the socks were suitable or not for consumption and that the witness saw the worker wearing these socks while leaving the mosque, such act is not considered however a major mistake and the employer should have respected the principle of gradual punishment stipulated in article 37 of the Labor Code. He should have respected as well the last paragraph of article 37 on the basis that the punishment imposed upon the worker is a third degree penalty (suspension for 8 days) and therefore it is appropriate to apply the provisions of article 26 of the Labor Code and allow the worker to defend himself,

File no …-…

In addition, the employer did not respect the formal procedures and did not declare that it had presented the dismissal letter to the worker to notify him of the mistakes attributed to him and allow him to defend himself according to the provisions of articles 62 and 63 of the Labor Code, whereas the worker respected the rules on the preliminary reconciliation and turned to the labor inspector. However, the latter failed to attend, as stated in the legal proceeding. The aforementioned was tackled by the International Convention no. 158 for year

1982 issued by the International Labor Organization as to the rules relating to the disciplinary dismissal and signed by Morocco on 10/07/1963. Therefore, the judgment of the Court of First Instance, whereby the plaintiff's claims relating to the notification, dismissal and prejudice were refused, should be annulled; and whereas the employee deserves compensations as follows,

For the Notice

Whereas in reference to the decree no. 2/04/469 issued on 12/29/2004 on notice period, we find that the employee was classified through the duties he used to perform in his position as worker and according to his seniority; that he worked for the employer for 18 years and that he is classified as employee; the latter deserves therefore a compensation equivalent to the pay of 2 months of work and he should be paid the sum of 4,140 Moroccan Dirhams.

For the Termination of Employment

Whereas by virtue of articles 52 and 53 of the Labor Code the employee working as per an employment agreement for an indefinite period deserves allowance compensation following the termination of his employment after working for 6 month for the same employer,
And whereas the employee worked for 18 years for the employer in return of a salary amounting to 2,070 Moroccan Dirhams, and whereas it was established that his employment was wrongfully terminated, he deserves a compensation as follows,

9.65 multiplied by 2,280= 22,686 Moroccan Dirhams

For the Prejudice

Whereas by virtue of article 41 of the Labor Code, the employee in the present case referred to the labor inspector to perform a preliminary reconciliation; however, no agreement was reached according to the report of reconciliation included in the file,

Whereas the employee has the right to claim a compensation for the prejudice as long as the reconciliation was not achieved in this case,

Whereas the labor Code determined the compensation with the salary of a month and a half of work for each year of employment provided it does not exceed the limit of 36 months; thus the compensation due in this case amounts to: 3,105 multiplied by 18 years= 55,890 Moroccan Dirhams,

Whereas regarding the claim of compensation for the loss of employment, this type of compensation is related to the termination of employment for economic or structural reasons or for closing the business as per article 66 of the Labor Code and does not apply to the current case,

And whereas it is required to divide the court expenses between both parties and to deduct the employee's cut as he benefits from legal aid,

In consideration whereof.

The Court of Appeal ruled in open hearing and in the presence of all parties, and pronounced the final decision,

File no ...-…

In Form: Accepting the appeal

In Substance: Annulling the challenged judgment where the Court refused the claim of compensation for the notice, for the termination of employment and for the prejudice, and sentencing again the employer/ the company M. T. L. to pay the employee the following compensations:

Affirming the remaining points of the challenged judgment and imposing the court expenses on both parties; the employee shall benefit from legal aid that will cover his part of the imposed expenses.
The judgment is hereby rendered on the day, month and year mentioned above in the Regular Chamber at the seat of the Court of Appeal in Casablanca without any change in the panel of judges during hearings,

Signatures

President **Judge in Charge of Legal Inquiry** **Court Clerk**

5)

Ministry of Freedoms and Justice

Casablanca Court of Appeal

Benslimane Court of First Instance

In the Name of his Majesty, the King and According to Law

On 06/19/2012

We, the Judge B. L. head of Benslimane Court of First Instance ruling in cases related to claims for obtainment of allocations from the Family Solidarity Fund, issued the following decision.

According to the requirements of the Dahir no. 191/10/1 issued on 7 Muharram 1432 (December 13, 2010) providing for the application of law no. 10/41, on the determination of the conditions and rules for benefiting from the Family Solidarity Fund.

According to the decree no. 2/11/195 issued on 7 Shawwal 1432 (September 6, 2011) providing for the application of the provisions of the above-mentioned Law,

According to the claim recorded before this Court Clerk on 06/12/2012 and submitted by Mrs. **"S. A.", daughter of Mohamed**, residing in … who holds the identity card TA 64368 and who was sentenced to receive an alimony on 01/17/2007 no. 29, file no. 296/2006, after the convicted **"A. H.", son of Mohamed**, residing in …, abstained from executing the aforementioned judgment binding him to pay an alimony as per the record of abstention and insolvency, suspending therefore the execution file no. 195 dated 12/18/2010. The plaintiff requested that the Court entitles her to benefit from the allocations of the Family Solidarity Fund given that she is the mother of two children (F. H.) and (Y. H.), divorced and in financial need,

Based on the following documents attached to the request:

- A copy of the judgment no. 29, file no. 296/2006 issued by the Court of First Instance in Benslimane on 01/17/2007, determining child support for the two above-mentioned children.

- A copy of the judgment of divorce due to marital discord, also issued on 01/17/2007.

- The report dated 12/18/2010 subject of execution file no. 195/2009.

- The two Birth Certificates of the children, certificate no. 12 for 1994, Municipality of Benslimane and certificate no. 279 for 1998, Municipality of Benslimane.

- Attestation of joint living dated 06/01/2012.

- School attestation for the female child F. dated 05/02/2012.

- Certificate of poverty, no. 113 on 06/06/2012.

- Tax exemption certificate dated 05/22/2012.

- Tax exemption certificate dated 05/22/2012.

Whereas the above-mentioned judgment defined the beneficiaries of child support:

+ F. H. born on 01/01/1994

+ Y. H. born on 08/23/1998

Alimony was fixed to 250 Moroccan Dirhams per month for each child.

And whereas the maximum limit set for the allocations granted by the Family Solidarity Fund is fixed to (350) Moroccan Dirhams per month for every beneficiary provided that the total amount dedicated for the members of one family does not exceed (1050) Moroccan Dirhams per month as per the requirements of article 4 of the aforementioned decree.

And whereas the scope of the benefit from the allocations of the Family Solidarity Fund only covers alimony amounts for the period subsequent to the submission of the claim as per the requirements of article 3 of the Law.

In consideration whereof,

We accept the claim.

And order the allocation of a fixed amount from the Fund to the beneficiary "S. A.", daughter of Mohamed, on behalf of the above-mentioned children, limited to the total amount of 500 Moroccan Dirhams per month starting 06/12/2012, date of the request. We order the execution of this decision upon showing the original copy and without serving notice and the possibility to refer back to us in case of any problem.

The judgment is hereby rendered on the day, month and year mentioned above.

Signatures.

6)

The Kingdom of Morocco	**Original decision kept at the Court**	
Ministry	**Registry**	
	In Casablanca Court of Appeal	
Social Chamber:	Casablanca Court of Appeal issued	
Decision no.	on 01/23/2006	
	Civil Panel composed of:	
Issued on:	Mr./ **A. B.**	**President**
	Ms./ **B. L.**	**Judge in Charge of Legal Inquiry**
Corresponding to: 01/23/2006	Ms./ **A. S.**	**Judge**

Case file no. registered at the Court of First Instance:

722/41/2004

In the presence of Mr. **Representing the General Prosecution**

And with the assistance of Mr. "R. D." **Clerk**

The following decision:

Appellant: Between the Company M. E. A. in the person of its Chairperson and having its social headquarters … electing domicile at the office of Mr. "A. H.",

Appellee:

Attorney practicing in Casablanca

From one side, in his capacity of appellant "B. S." residing in B…

electing domicile at the office Mr. "A. S."

Attorney practicing in Casablanca

And from another side, in his capacity of appellee

Upon the petition for appeal, the appealed judgment, both parties' deductions, the documents annexed to the case file, the report of the judge in charge of legal inquiry which was read in the court hearing by exemption by the presiding judge and non-opposition of the parties, and upon the order issued to examine the case in the hearing duly notified and served to the litigating parties,

In application of the provisions of article 134 et seq. article 328 et seq. and article 429 of the Code of Civil Procedure, as well as the provisions of the decision of October 23, 1948 and after hearing the conclusions of the General Prosecution and after deliberating according to Law,

In Form: Upon the statement of appeal, submitted by the Company "M. E. A." lawyer Azim Al Hassan on 06/19/2005, exempted from court fees, ap pealed by virtue of social judgment on 05/18/2005 in the case no. 722/41/2004 and whereby the defendant is requested to settle the following amounts:

- For the notice 5,607.10 Moroccan Dirhams For the vacation 2,978.82 Moroccan Dirhams
- For the exemption 20,541.39 Moroccan Dirhams

- Delivering him the work certificate under the penalty of paying a fine amounting to 50 Moroccan Dirhams, and dismissing the other claims

- For the termination of employment 100,928.00 Moroccan Dirhams

The appellant was notified about the judgment as per the notice of 06/20/2005, this judgment was also subject to an incidental appeal on a point of law by the lawyer "A. S." representing "B. S."

And since the principal appeal was filed within the legal period and in the due capacity and form, therefore it is accepted in form and requires therefore accepting the incidental appeal on a point of law.

In substance:

In the First Instance Stage. Whereas the merits of the case may be summarized, based on the appealed judgment and the other documents of the file, in that the plaintiff filed a lawsuit stating that she started working for the defendant as from 11/19/1992 and until her employment was wrongfully terminated on 04/16/2004 revealing that she used to earn a monthly wage of 5,957.87 Moroccan Dirhams, the plaintiff therefore requested the issuance of a judgment granting him the following compensations:

For the notice 5,957.78 Moroccan Dirhams for the rest of the salary 29,789.35 Moroccan Dirhams

For the exemption 32,993.28 Moroccan Dirhams For the vacation 2,978.82 Moroccan

Dirhams

For the wrongful termination of employment 500,000.00 and delivering her the work certificate with determination of a fine amounting to 500 Moroccan Dirhams for each day of delay in paying the salary of one month amounting 5,957.87

File no …-…

After the defendant answered that the plaintiff skipped work without legal justification and travelled to France and presented medical evidence out of courtesy stating she was pregnant. The defendant added that the plaintiff returned to work after 4 months of absence on 02/04/2004; the employee replied that her absence was due to an illness caused by her pregnancy and her situation adding that she presented medical evidence proving she was ill and absent until she gave birth. The employer considered that the presented evidence were exaggerated and decided to terminate her employment,

After the reconciliation attempt between both parties failed and the procedures before the Court of First Instance ended, the Court issued its above-mentioned

judgment that is appealed originally by the employer and appealed on a point of law by the employee.

In the Appeal Stage

The Grounds of Appeal

Concerning the Principal Appeal

Whereas the grounds of the principal appeal stated that the judgment of First Instance Court was invalid as it considered that the employee was victim of a wrongful termination of employment and did not justify or discuss the effective reasons and considered that the employer's dismissal of the employee was a wrongful termination of employment; the fact is that the employee was absent from work for 3 days and sent a fax claiming that she has contracted a disease because of her pregnancy without presenting any evidence of difficulties she was facing. The employee gave birth to a baby girl on 08/04/2003; thus she was absent for 16 weeks before delivery, which violated article 152 of the Labor Code. The decision of the Court of First Instance ordering the compensation of the employee for the notice and the exemption is still legally unfounded because the legislator calculated them without discretion; the Court also ordered that the employee be compensated for the vacation, but the latter had already taken her vacation. The rest of the compensations are inappropriate and inconsistent with the Law. The appellant party requested the annulment of the re quirements of the judgment of the Court of First Instance and the dismissal of the claim.

Concerning the Incidental Appeal on a Point of Law

Whereas the grounds of the incidental appeal on a point of law were invalid in terms of the determination of the compensations that were not proportionate to the prejudice that befell her, the appellant requested that they be increased to the limits required in the statement of appeal.

The appellant answered in response to the statement of the principal appeal stating that she returned to work after giving birth but was surprised to receive the letter of termination of employment, knowing that the Company received the medical evidence regarding the illness that resulted from her pregnancy; requesting that the principal appeal be dismissed. As for the salary, she presented the work statement to the Court revealing that she used to earn a monthly salary of 5,601.10 Moroccan Dirhams and requested that the Court issue its decision in accordance with the statement of appeal.

The file was examined in the hearing of 01/09/2006 that was attended by both parties that confirmed the above; the Court considered the file ready and placed it for deliberation until the hearing of 01/23/2006

File no …-…

After deliberation according to the Law

In Form

Accept both the principal appeal and the incidental appeal on a point of law for fulfilling the formal conditions required by Law

In Substance

Whereas the appellant in the principal appeal and the appellant in the incidental appeal on a point of law hold on to the grounds referred to above,

Whereas the Court, after perusal of the case file, its accompanying documents and the inquiry conducting in the First Instance stage, established that the employee was pregnant and contracted an illness which resulted from her pregnancy, and that she travelled to France consequently and sent a fax to the Company in addition to medical evidence explaining her disease and her situation, which the employer did not deny…

And whereas the Labor Code does not apply to this case considering that the termination of employment took place before the Code of Labor entered into force on 06/08/2004.

Whereas the company's pleas claiming that the medical evidence provided –of which it acknowledged receipt- were presented for mere courtesy purposes and exaggerated did not constitute serious arguments, knowing that the employee reported back to work after childbirth and recovery and worked for 15 days before receiving the letter of dismissal.

Whereas protecting working women from dismissal on the grounds of pregnancy, childbirth or any health condition resulting therefrom, is a conditional right supported by national and international systems providing for human rights protection; knowing that the employee in the current case was dismissed 15 days after reporting back to work following childbirth, which means that the employment contract was continued after her return, and the employee's dismissal without any misconduct from her side constituted an arbitrary termination of employment requiring indemnification.

Whereas the plea presented by the employer stating that the employee took her vacation cannot be substantiated by the case file and whereas the employer is the party in charge of proving it, and whereas the employee/appellant in the incidental appeal on a point of law pleaded that the compensations were not proportionate to the prejudice that befell her and whereas all the requested compensations are objective and legal, as well as proportionate to the prejudice that befell her, which requires that the judgment of the First Instance Court be affirmed.

File no …-…

In consideration whereof,

The Court of Appeal ruled in public and in the presence of all parties, and pronounced a final judgment

In Form:

Accepting the principal appeal and the incidental appeal on a point of Law

In Substance: Affirming the judgment of the Court of First Instance

And charging each appellant with the court expenses of his challenge and the employee shall benefit from legal aid.

The judgment is hereby rendered on the day, month and year mentioned above in the Regular Chamber at the seat of the Court of Appeal in Casablanca without any change in the panel of judges during hearings.

Signatures

7) Excerpts of decisions issued by Moroccan Courts:

1) The case of Mr. M. concerning the registration of French lawyers in the Bar Association, in which the Council of the Bar Association in Casablanca refused to register Mr. M. for a new term under the pretext that he does not speak Arabic, which became by virtue of the Law of January 26, 1965 the only official language to be used before Moroccan courts. Rabat Court of Appeal issued an important judgment in this case when the judge annulled the refusal judgment based on the international agreement concluded between Morocco and France on October 2, 1957 and its additional protocol dated May 20, 1965. The Supreme Court Council also supported this position in the decision issued on the first of October 1976 assuring that not knowing the language of the two countries does not prevent the registration of a French or Moroccan lawyer on one of the rolls of lawyers in the two countries; it shall be sufficient that the French lawyer, who does not speak Arabic, appoints a colleague who speaks the language in all unwritten stages.

2) The case of "F. K." of French nationality, which registration in Casablanca Bar as trainee was refused under the claim that she does not speak Arabic and cannot therefore practice the profession in Morocco after the issuance of the Justice Arabization Law of 1965; Rabat Court of Appeal considered that the only applicable requirements in Mrs. (K.) request are those of article 23 of the Dahir issued on May 19, 1959 that regulates the law profession in Morocco and that provides in paragraph 3 thereof for the priority to apply the judicial agreement concluded between Morocco and France and the additional protocol of 1965. The

Court of Appeal responded to the request of Mrs. Cazalas giving precedence to the requirements of the International Convention over the Domestic Law.

3) The Sharia Chamber of Casablanca Court of Appeal examining personal status cases stated the following in its justification of decision no. 1413 issued on 05/23/2007: "Whereas the international treaty is a special law having precedence over national law, being in this case Personal Status Law and Family Law, which are public laws, and that according to the principle of supremacy of these treaties over the national law confirmed by the Supreme Council in its Decision No. 754 dated 05/19/1999 in the commercial file no. 4356/1990 published in the Supreme Court Council Magazine Issue no. 56." The aforementioned reveals that the principle of supremacy of international conventions over the national law including the Family Law is applied.
4) In the decision of the Supreme Court Council no. 61 dated 02/13/1992, the Administrative Chamber considered international treaties legal sources that should be respected and therefore no administrative decisions can be rendered in violation of the provisions of an international treaty; this entails the necessity of their cancellation for being illegitimate.

5) The judgment of Al-Hoceima Court of First Instance issued on 02/22/2007 in the file no. 14/2007: "… whereas the right of children to pursue their studies is one of the major rights that the father and mother should fulfill and are stipulated in the Constitution and all international charters."

6) The judgment of Tangier Court of First Instance issued on 11/26/2009 in the file no. 2495/08: "… whereas paragraph 1 of article 3 of the Convention on the Rights of the Child that was adopted by the General Assembly of the United Nations on November 20, 1989 and ratified by Morocco on 06/21/1993, stipulates that the Judiciary must take the best interest of the child into consideration when examining child-related disputes.

Article 10, paragraph 2, of the above-mentioned Convention stipulates that the child whose parents reside in different States shall have the right to maintain on a regular basis, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law…"

7) The judgment of Tangier Court of First Instance in the file no. 616/1607/2009: "… and whereas, in cases of child custody the Court observes all actual and legal facts and conditions that seek the best interest of the child as such interest is the pivot of the special provisions related to the child, pursuant to the Convention on the Rights of the Child dated November 20, 1989 and to which Morocco acceded on 06/21/1993…"

Appendix 5: The Palestinian Jurisprudence

1) The decision issued by the High Court of Justice in Ramallah that is empowered with the judicial authority to try and hand down judgments in the name of the Arab Palestinian people.

Ruling Panel: presided by Judge (S. S.) and with the membership of Judges (E. N. D.) and (F. A. S.)

The plaintiffs- 1) (A. Y. A.)
2) (S. D. Y. A.)
The defendants: 1) (W.) in addition to his position
2) (N. A.) in addition to his position
3) (J. E. A.) represented by …

The plaintiffs filed their claim against the defendants through their lawyers requesting the issuance of a preliminary decision binding the defendants to reveal the grounds for their detention and the continuity of the same and then the issuance of a decision ordering their immediate release and the cancelation of the arrest decision with all procedures resulting therefrom.

The case is based on the following grounds:

On 05/01/2008, the Palestinian (J. E. A.) arrested the two plaintiffs in their residence in the village of Bidya.

The plaintiffs' brothers and relatives tried to visit them many times but were not allowed.

3) The detention of the plaintiffs was illegal and violated the Law and the Basic Law, in addition to that (J. E. A.) is a military body and has no right to detain civilians.

4) The continuation of the plaintiffs' detention causes them major prejudice and constitutes a violation of their rights, which are guaranteed by the laws in force. The two plaintiffs were not brought before the General Prosecution and competent Courts so far, what reveals that they are dealt with illegally and are being subject to psychological pressure and physical coercion.

The two plaintiffs' lawyers hence requested based on the aforementioned the issuance of a preliminary decision against the defendant binding him to reveal the grounds for the detention and the continuation thereof as well as the issuance of a decision ordering their immediate release.

Based on the evidence submitted in the session of 05/19/2008 and on the clarifications of the plaintiffs' lawyer, a temporary decision was issued compelling

the defendant to declare the grounds preventing the issuance of the requested decision and to duly present a statement of defense in case of refusal thereof.

In the session dated 05/26/2008 set for the examination of the case, the Prosecutor General repeated the statement of defense that included his request to issue the decision in compliance with the Law, and submitted the three documents (A/1) to the Court concluding his evidence with the aforementioned. As for the plaintiffs' lawyer, he settled for the evidence he presented when he received the temporary decision and he plead for the immediate release of his clients.

Trial

After the examination and review of the writ of summons, the facts hereinto and the submitted documents according to which both parties consisting in the lawyer of the plaintiffs and the representative of the defendant party (R. N. A.) pleaded, we establish - without denial thereof by defendant representative- that the plaintiffs were arrested by (J. E. A. F.) on 05/01/2008 in their residence in the village of Bidya, were forbidden many times from being visited, and that the plaintiffs are still under arrest and detention, that have not been brought before the Public Prosecution and the competent Courts, and that they are facing psychological and physical pressure in the location of their detention.

The President of (N. A.) in his position of representative of the defendant party responded with a statement of defense requesting the issuance of a decision that is in compliance with the Law.

While reviewing the provisions of Law including the Basic Law (Constitution), we find that article 10 thereof stipulated that basic human rights and freedoms shall be binding and respected and that article (11) stipulated that personal freedom is a natural right, and shall be guaranteed and protected adding that it is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of, any person, except by judicial order in accordance with the provisions of law. Article (11) also stipulated that the Law shall specify the period of pre-arrest detention adding that imprisonment or detention shall only be permitted in places that are subject to laws related to the organization of prisons.

Article 101 of the said Law stipulated that (Military courts shall be established by special laws. Such courts shall not have any jurisdiction beyond military affairs.)

The Code of Criminal Procedure No. 3 for year 2001 that is applied in Palestinian Civil Courts over all Palestinians with the exception of those excluded by virtue of a special wording such as the military and their affairs since it included in articles related to procedures of arrest, search, launching of investigations, interrogation, detention and pre-arrest detention several provisions that comprised restrictions and guarantees that shall enshrine and apply the requirements provided for under the Basic Law in its aforementioned articles; it also

stipulated that the violation of these provisions leads to termination in some cases and to imposition of a penalty against offenders in other cases.

Based on the aforementioned, we find that the party that arrested, detained and extended the detention of the plaintiffs operates under a private Law and has a defined jurisdiction that it cannot outstrip and beyond the limits of which it does not have the power to act, such limits being the military frame. And whereas the plaintiffs are civilians and we have no proof that they are related to any military affair whatsoever, then the practice of the third defendant -consisting in detaining them and extending such detention for a period that is originally in violation with the Law- is a practice that breaches the rules of competence, which fall under public order and should not be breached by virtue of the Constitution and the Law.

And whereas the decision to detain the plaintiffs shall be considered null in the present case for being issued by a non-competent party, and that it does not incur any effects since it is completely null.

The Court decided to:

Dismiss the case filed against defendant one and two since they neither issued nor participated in the challenged decision.

Accept the case in substance against the defendant three, and rule with the annulment of the decision and/or the procedure consisting in detaining the plaintiffs and all that incurs thereby.

Immediately release the plaintiffs from their place of detention.

Decision issued and publicly rendered in the name of the Arab Palestinian people in the presence of the plaintiff's lawyer and the President of (N. A.) representing the defendant party. The decision was hereby announced on 06/02/2008.

2) The decision issued by the High Court of Justice held in Ramallah, and that is empowered with the judicial authority to try and hand down judgments in the name of the Arab Palestinian people.

Plaintiff: (H. H. S. A.)/ Central Prison of Nablus

Its lawyer Mr. (A. H. S. A.)

Defendants:

1- (M. N.) in addition to his position.

2- Director of (S. N.) in addition to his position.

3- (W. D.) in addition to his position.

4- (N. A.) in addition to his position.

Procedures

On 09/06/2005, the plaintiff filed this action through his lawyer against the defendants to challenge the decision of (M. N.) on 06/07/2005 that stipulated the continuation of the detention of the plaintiff (H. H. S. A.) following the orders of the aforementioned governor.

The case is based on the following grounds:

1- The challenged decision is defective for misuse of power.

2- The challenged decision is in violation of the Law.

3- The challenged decision constitutes a violation of the Judicial Power and is in flagrant contradiction with Courts decisions.

In consideration whereof, the plaintiff requested to:

1- Determine a session date and issue a temporary decision to grant the defendants the legal term that obstructs the release of the plaintiff and/or issue an immediate release decision of the plaintiff.

2- Cancel the challenged decision after trial and immediately release the plaintiff.

3- Charge the defendants with fees and expenses in addition to lawyer fees.

And after listening to the depositions of the plaintiff's lawyer in a public preliminary session, the Court decided on 09/11/2005 to issue a temporary decision and address the defendants a memorandum requesting they declare the grounds affirming the challenged decision or those preventing the issuance of the requested decision object of the claim.

On 09/24/2005, the President of (N. A.) presented a statement of defense at the end of which he requested the dismissal of the case.

On the trial day, both parties appeared before the Court and the President of (N. A.) repeated the statement of defense, the Court listened to the depositions and pleadings of both parties and then each party repeated his depositions and demands presented in the case.

Trial

After examination and deliberation,

It was established that the plaintiff filed this claim through his lawyer to challenge the decision of (M. N.) dated 06/07/2005 consisting in the continuation of the plaintiff's detention time following the orders of the said governor and asking to cancel the challenged decision for the reasons provided for in the writ of summons.

To start with the first plea raised by the President of (N. A.) that the case should be dismissed in form against the defendants two, three and four, whom neither issued nor participated in the issuance of the challenged decision; the Court found after examination of the case that the challenged decision was issued by the first defendant (M. N.) and that the defendants two, three and four neither issued nor participated in issuing the said contested decision. And whereas the annulment case is filed against the source of the administrative decision, therefore defendants two, three and four are not antagonists of the plaintiff in this case, and hence this case should be dismissed in form when it comes to them.

Whereas for the second plea raised by the Public Prosecution in the case requiring its dismissal in substance for the failure of the plaintiff's lawyer to present the challenged decision. In light of administrative jurisprudence and doctrine, the failure to attach a copy of the challenged decision to the writ of summon does not entail the dismissal of the case; moreover, explanations written by the director of (S. N.) on the back of the petition presented by the plaintiff's lawyer on 08/13/2005 (document A/2) declare that the plaintiff is detained by (M. N.), and therefore this requires the dismissal of the Public Prosecution plea.

In substance and after referring to the case file, we find that the plaintiff had been arrested under the investigative case no. 24/2005, was transferred to Nablus Court of First Instance criminal case no. 78/2005 and that he was under arrest since 01/12/2005 for attempted murder and robbery; he was bailed out on 06/06/2005 until his trial date (document A/3). (M. N.) decided however on 06/07/2005 to detain him in Nablus prison even though Nablus Court of First Instance is the competent Court that has jurisdiction to arrest or release him since the case was remanded to it under no. 78/2005.

After referring to the Law, we find that article 11/1 of the Basic Law stipulated that personal freedom is a natural right, shall be guaranteed and may not be violated..

Also, paragraph 2 of the same article stipulated that "it is unlawful to arrest, search, imprison, restrict the freedom, or prevent the movement of, any person, except by judicial order in accordance with the provisions of law… etc."

Article (98) of the Basic Law stipulated that "Judges shall be independent and shall not be subject to any authority other than the authority of the law while exercising their duties. No other authority may interfere in the judiciary or in judicial affairs."

Article (106) of the same law stipulated as well that "Judicial rulings shall be implemented. Refraining from or obstructing the implementation of a judicial ruling in any manner whatsoever shall be considered a crime carrying a penalty of imprisonment or dismissal from position if the accused individual is a public official or assigned to public service. The aggrieved party may file a case directly to the competent court and the National Authority shall guarantee a fair remedy for him"

Article (3) of the Law on the Establishment of Civil Courts no. (5) for year 2001 provided for:
1- Civil Courts in Palestine examine all disputes and crimes with the exception of those excluded by a special wording of Law; the power of Law is exercised on all people.

2- The rules of competence of Courts are set and the latters exercise their competence according to the Law.

The Law of Judicial Authority no. 1 for 2002, which is the basic law for the Judiciary, had determined peremptory rules preventing interference in judicial affairs in order to protect the judicial power from the interference of the executive power in the competence and independence of the Judiciary. Article (1) of the same Law provided for one of these rules stipulating that "the judicial power is independent and it is forbidden to interfere in judiciary or in justice affairs."

Article (2) also stipulated that "judges shall be independent and shall not be subject to any authority other than the authority of the law."

Article (14) of the same law stipulated under title 'Jurisdiction of Courts' that "Civil Courts examine all disputes and crimes with the exception of those excluded by a special wording of Law; the power of Law is exercised on all people."

Article (82) of the same Law also stipulated that "judicial rulings shall be implemented. Refraining from or obstructing the implementation of a judicial ruling in any manner whatsoever shall be considered a crime carrying a penalty of imprisonment or dismissal from position if the accused individual is a public official or assigned to public service… etc."

The Code of Criminal Procedure No. (3) for year 2001 determined the rules and restrictions that prevent exceeding the basic Human Rights stipulated by international and regional declarations and conventions protecting Human Rights. As per the provisions of articles 117 and 119 of the above-mentioned Law, the Police and the Public Prosecution cannot detain or arrest any person for a period exceeding 48 hours, any detention exceeding this period shall fall under the competency of Courts.

Article 120/4 of the same law determined a peremptory rule whereby "it is forbidden under any circumstance that the detention period stipulated in this article's

paragraphs exceeds 6 months or that the accused is not immediately released unless he was transferred to the competent Court for his prosecution."

As for article (121) of the same law, it stipulated that "it is forbidden to issue an order to arrest any accused in his absence, unless the judge is convinced based on medical facts that the accused cannot be brought before him because of his illness."

According to chapter 8 of the above-mentioned Code of Criminal Procedure, which is the chapter dedicated for the release on bail, it is possible to submit a claim for the reexamination of the issued order on the release request to the Court that issued the order in cases stipulated in article (134) of the Law. The Public Prosecution, the detained or the convict may appeal the release or detention decisions through a claim submitted to the court competent in examining the appeal; they can also submit a claim to the President of the Supreme Court to reexamine any issued order of release or continuation of detention. The Court of Cassation also has the right to impose control over such decisions.

Jurisprudence established that abstaining from executing judicial decisions is a violation of the Constitution because the Judicial Authority is independent from the Executive Authority, and hence the abstention of the Executive Authority from executing the judicial decision is a violation to the principle of separation of powers, where such abstention would be considered a questioning of the judicial decision that makes it lose its binding force imposed by Law since respecting Courts' decisions requires their execution even if they are wrong.

The Executive Authority is forbidden from imposing control over Courts' procedures and decisions; Law experts agreed that preventing the Executive Authority from interfering in cases examined before Courts is one of the most important factors strengthening the principle of independence of the Judiciary and its respect by everyone. The Executive Authority should be prevented from interfering even if the judge committed a mistake in the execution of the Law during trial proceedings; the right way to avoid such a mistake and fix would be through the legal challenging of these decisions and not through the interference of the Executive Authority in Courts' procedures and decisions.

And whereas the first defendant (M. N.) kept the plaintiff detained in Nablus Prison despite the issuance of a decision to release him on bail by Nablus Court of First Instance, therefore the defendant would have abstained from executing a judicial decision that should be implemented hence violating the principle of separation of powers and committing an aggression against the Judicial Authority. His decision in this regard became void with no effect whatsoever and hence the grounds for appeal are valid as to the appealed decision, what requires the cancelation of the decision.

In consideration whereof,

The Court decided to

1- Dismiss the case against the defendants two, three and four in form.

2- Cancel the appealed decision and issue an order to Nablus Prison to release the plaintiff immediately unless he was arrested or convicted for another offence.

The decision was hereby issued, recited and announced in public on 10/30/2005.

3) Decision issued by Jerusalem Court of Appeal in Ramallah that is empowered with the judicial authority to try and hand down judgments in the name of the Arab Palestinian people.

Ruling Panel: Presided by Judge (T. T.) with the membership of Judges (A. A.) and (T. B.)

Appellant: (A. M.) represented by his Lawyer (M. H.)/Ramallah

Appellee: The Public Interest

The appellant filed this appeal to challenge the decision issued by Jericho Court of First Instance dated 11/10/2010 as to refusing the appellant's release.

The appeal shall be accepted in whole as the appealed decision violates the Law especially article 121 of the Code of Criminal Procedure in force as well as the investigation procedures.

The appeal was accepted in form in the session dated 12/06/2010 held in open court; the appellant's lawyer repeated his petition for appeal while the Public Prosecutor refuted it. On the session dated 12/14/2010 and upon the change of the Ruling Panel, it was decided to resume the proceedings as from where reached by the former panel; the Public Prosecutor requested to adopt his pleading before the Court of First Instance as a pleading before the Court of Appeal describing the charge as dangerous and the appellant's lawyer adopted, on the session dated 12/06/2010, the petition for appeal as his pleading before the Court of Appeal.

Court

After the examination and deliberation and in substance, it is necessary first to indicate the grounds of appeal referring to important and delicate legal points in this context regarding the nullity of detention procedures against the appellant.

In reference to the wording of article 121 of the Code of Criminal Procedure in force, it is forbidden to issue an arrest warrant against any accused in his absence,

unless the judge was convinced, by virtue of medical reports that the accused cannot be brought before him due to illness.

Whereas the nullity of procedures affecting the decision, the essence of procedure and work, the substantial and formal requirements of this work in addition to the types of annulment, and following the legislator's desire to diminish the grounds of nullity and he differentiated between nullity and non-existence, and also referred to the holder of the capacity in clinging to nullity, and as to the waving and renouncement of the same, the correction thereof or as to its effects and as to turning the null procedure into a valid one, as to diminishing the null act then as to the procedure nullity effect over preceding procedures, and as to distinguishing between nullity as penalty and each of the waiving and the consideration of the procedure as non-existent and the procedure affecting the judgment as independent based on the grounds related to the violation of the law, to the wrong application of the law and to the wrong interpretation of the law, all this require the differentiation between the said grounds and the legislator's intention regarding the procedure affecting the substance and the litigation not the Law and the procedures.

With reference to the definition of nullity as a procedural penalty resulting in the violation of Law provisions related to any essential procedure and leading to the prevention of this procedure's legal effect. The penalty is imposed by a specified authority as a result of the violation of a procedural rule requiring it; it is only applied over a (procedure), which is an act that incurs by law certain effects that consist in the launching of the criminal case and its transfer from a certain stage to another until its closure upon issuance of a conclusive judgment thereon. Nullity can either be legal or substantive. The legal nullity is determined by a legal text, i.e. there is no nullity unless by virtue of a legal text. The substantive nullity results from the violation of essential rules of the Procedural Code and emanates from the Trial Judge. The nullity falls under 2 types, namely: the absolute and the relative.

The absolute nullity is the non compliance with the provisions of the Law that aim to achieve the public interest, the nullity is therefore related to the public order and it is called absolute nullity when it applies to issues related to the formation of Courts, their jurisdiction and the rules related to the freedom of defense and to the presence of the lawyer with the defendant in criminal cases as stipulated by Law as these incur absolute nullity.

Relative nullity results from the non compliance with rules related to the interest of the litigating parties such as rules of inspection, interrogation, arrest and detention. Violating these rules results in nullity; it is a relative nullity that is terminated by an explicit or implicit renunciation and that is relevant to non-essential procedures even though they are provided for by Law under article 121 related to the extension of detention, the guidance, the counseling and the examination of the case file in the absence of the defendant since the right to defense is an enshrined right. When the defendant was originally detained

and was ordered to appear before the judge, his presence was required by virtue of article 121 as per the detention order, but the said article provided however for an exception allowing his absence due to illness. Aren't the security issues and situation under the occupation of a criminal entity - that neither respects the Law and the other considerations nor any type of human rights - stronger grounds that prevent defendants from attending the trial than health–related grounds? The question to be asked here is if the legislator considered health issues an exception but ordered the arrest of the defendant for being absent under force majeure, should not this condition be considered a ground for exception especially that preserving the human life has precedence over sticking to matters that remain relative in comparison with reality?

This is because extending the detention in the absence of the accused does not actually affect his right to defense before the Court; it is a temporary measure until the completion of the investigation and the other undertaken procedures preceding the trial. The present case is a crime of premeditated murder as indicated by the Public Prosecution and the victim's family did not grant the appellant a grace period safeguar ding him from the other tribe's retaliation, which means that his release would endanger his life. We, Ramallah or Jerusalem Court of Appeal, issued many decisions relating to article 121 answering about nullity, its provisions and its nature. The legislator uses peremptory statements to express nullity; nullity shall be enforced if tackled by the legislator in a legal text or a peremptory wording requiring the same for he would have in this case determined the importance of the measure. Article 121 stipulated that it shall be forbidden but then the legislator mentioned an exception thereto if the judge was convinced otherwise based on the condition of the detained; hence the detainee could not have been brought before Court due to obstruction by the occupation and non-coordination, which are stronger grounds than the exception stipulated in the aforementioned article.

As to the grounds related to the procedures in Ramallah Court of First Instance consisting in the violations of these procedures by the Public Prosecution, such issue cannot be legally examined in the framework of examination of a release case and the substance of the case and that appeal shall not be tackled through trial.

Whereas the appellant's own good and preserving his life are more important than any standard and interpretation, there is no ground therefore to release him and endanger his life…

Therefore, and whereas in this context there were some procedures in violation with the Law, this shall not be considered absolute nullity requiring the annulment of all procedures and the issuance of a release judgment in this case because the null procedure that is corrected on a later stage becomes valid in the legal sense.

In consideration whereof, and after examination of the decision of Jericho Court of First Instance as to its description and detailing of the grounds for rejecting

the release of the appellant on bail based on its jurisdiction as per article 138/2 of the Law, and according to evidence and arguments justifying the result it reached in this regard hence requiring the dismissal of the appeal.

Therefore,

We decided to dismiss the appeal in substance, affirm the appealed decision and remand the case to the Court of First Instance to undertake the trial according to Law fast and without delays.

And whereas the decision was prepared and ratified by the Court Panel, which listened to the pleadings and prepared the decision, and as per the provisions of article 169 of the Code of Civil and Commercial Procedure, the decision was recited by the Court Panel affixing its signatures hereunder.

The judgment was issued and publicly recited in the name of the Arab Palestinian people on 12/21/2010.

4) Decision issued by the Palestinian High Court of Justice in Ramallah that is empowered with the judicial authority to try and hand down judgments in the name of the Arab Palestinian people.

Ruling Panel: presided by Judge/(A. A. Sh.)

With the membership of Judges/(A. A. Gh.) and (R. Z.)

Plaintiffs:

1. The lawyer (M. J. H.) in his personal capacity (blind) in addition to being the President of Ramallah branch of the General Union of Disabled Palestinians- Ramallah.

2. (J. M.) in his personal capacity (physically disabled) in addition to being the treasurer of the General Union of Disabled Palestinians- Ramallah.

Their Lawyers (M. Kh.) and (B. K.)- Ramallah.

Defendants:

1. (W. Sh. E.) in addition to his position.

2. (W. H. M.) in addition to his position.

3. (M. W. F.)

Procedures

On 04/05/2005, the plaintiffs filed this lawsuit through their lawyers to contest the defendants' abstention from taking the necessary legal and administrative measures required for the enforcement of the Law on the Rights of the Disabled No. (4) for year 1999 in the matter of the accessibility to public places for persons with disabilities as stipulated in Chapter 3, articles 12 to 15, of this Law. The appeal was based on the fact that municipalities were disregarding construction violations related to the accessibility to public places for persons with disabilities, which is considered a breach of the wording of the said Law and non compliance with the circulars issued by (W. H. M.).

For the above-mentioned ground, the plaintiffs hereby requested the issuance of a preliminary decision as well as a memorandum against the defendants compelling them to declare the grounds requiring and preventing the application of the Law, and in consequence binding them to apply the Law and its executive regulation and charging the defendants with fees and expenses in addition to lawyers' fees.

Court

After hearing of the plaintiff's lawyer statements in a preliminary open court session and after examination of the evidence presented in the claim, it was decided as per the provisions of articles (286, 287 and 288) of the Code of Civil and Commercial Procedure for year 2001 to issue a temporary decision and address a memorandum to the defendants compelling them to declare the grounds requiring the non-application of Law and preventing the issuance of the requested decision in the claim, so that if the defendants were opposed to the issuance of a final decision they should present a statement of defense within 8 days as from the notification date, and the determination of Monday dated 05/23/2005 as date for the examination of the case, and the serving and submittal to the defendants and the Public Prosecutor of a copy of the case petition along with its accompanying documents, and the temporary decision and the session date.

Decision issued, and publicly recited and pronounced on 04/20/2005.

5) Decision issued by the High Court of Justice in Ramallah that is empowered with the judicial authority to try and hand down judgments in the name of the Arab Palestinian people.

Ruling Panel: presided by the deputy Head of the High Court, Judge/ (A. A. Sh.)

With the membership of Judges/ (A. Gh.) and (E. N.)

Plaintiffs:

The lawyer (M. J. Sh) in his personal capacity (blind) in addition to being the

President of Ramallah branch of the General Union of Disabled Palestinians- Ramallah

(J. M.) in his personal capacity (physically disabled) in addition to being the treasurer of the General Union of Disabled Palestinians- Ramallah

Represented by their lawyers (M. Kh.) and (B. K.)- Ramallah

Defendants:

1. (W. Sh. E.) in addition to his position.

2. (W. H. M.) in addition to his position.

3. (M. W. F.)

Procedures

On 04/05/2005, the plaintiffs filed this lawsuit through their lawyers to contest the defendants' abstention from taking the necessary legal and administrative measures required for the enforcement of the Law on the Rights of the Disabled No. (4) for year 1999 in the matter of the accessibility to public places for persons with disabilities as stipulated in articles 12 to 15 of the said Law.

In the preliminary open court session of 04/20/2005, the Court issued a temporary decision as per the provisions of articles (286, 287 and 288) of the Code of Civil and Commercial Procedure calling the defendants to declare the grounds for the non-application of the Law or preventing the issuance of the requested decision object of the claim; if the defendants desired to oppose the issuance of a final decision, they had to submit a statement of defense within the legal period.

On 05/23/2005, the Public Prosecutor of Ramallah submitted a statement of defense requesting the dismissal of the case for having no sound legal grounds.

The Public Prosecutor repeated his statement of defense in the open trial and both parties made their pleadings after one another according to the law; the Public Prosecutor requested to dismiss the case whereas the plaintiff's lawyer requested to issue the decision compelling the defendants to execute the provisions of the Law.

Court

After examination, deliberation, perusal of all documents and hearing of the pleadings, and whereas the Law on the Rights of Disabled No. (4) for year 1999 was issued on 08/09/1999 and published in the Official Gazette "The Palestinian Facts" (Al Waqae' Al Filastiniya) on 10/10/1999, and that article (20) of the above-mentioned law stipulated that (all competent parties each in its competence

shall apply the provisions of this Law that shall come into force as from the date of its publication in the Official Gazette), whereas article (12) of Chapter 3 thereof related to the accessibility to public places for the persons with disabilities stipulated that the said accessibility aims at providing a suitable environment for the disabled that guarantees them ease and independence in movement and safety in public places and article (13) stipulated that:

1) Accessibility is essential for concerned parties unless it:

A- Threatens the historical and archeological side of the public place.

B- Endangers the security and safety of the public place.

C- Costs more than 15% of the value of the public place.

2) In the cases mentioned in the above paragraphs A, B and C, the concerned parties shall find suitable alternatives that guarantee the accessibility to public places for the persons with disabilities.

Article (14) stipulated that the Ministry of Education and Higher Education shall provide an environment that suits the accessibility needs of the disabled in schools, colleges and universities.

Article 15 stipulated that the Ministry of Local Government, in cooperation with concerned parties shall handle the responsibility of compelling governmental and private parties to respect the technical, architectural, and constructions specifications and conditions that should be available in old and new public facilities and buildings to give better access to the persons with disabilities.

Article 19 of the said Law stipulated that the Cabinet shall issue the regulations for the execution of the provisions of this Law.

And whereas the legislation aims to protect, regulate, control or fix an existing reality that is not an intellectual luxury or a work of art and is not intended for its own sake.

Whereas the High Court of Justice is competent to examine the administrative parties' refusal to or abstention from undertaking any decision required according to the Law or the regulations in force.

Whereas the Basic Law included in its preamble a set of rules and developed constitutional procedures regarding the guarantee of different public and private freedoms and rights in order to achieve justice and equality for all people without discrimination.

Whereas article 1 of the Basic Law stipulated that basic human rights and freedoms are binding and should not be violated. The Palestinian National Authority

shall seek without delay to accede to international and regional declarations and conventions that protect human rights.

Whereas article 22/2 of the aforementioned Law stipulated that maintaining the welfare of families of martyrs, prisoners of war, the injured and the disabled is a duty that shall be regulated by law. The National Authority shall guarantee these persons education, health and social insurance.

Whereas human dignity is an inherent right to all human beings, and whereas persons with disabilities have the right to take all necessary measures enabling them to achieve maximum individual autonomy and independence and facilitate their participation and integration into society, the aforementioned is only guaranteed by the Law through its rules and provisions especially as the number of the persons with disabilities increased mostly among young people.
And whereas the defendants did not submit any valid justification for their opposition to the issuance of a final decision or to the application of accessibility provisions stipulated in the Law and the executive regulation.

The Court decided to compel the defendants to execute the provisions of articles 12 to 15 of the Law on the Rights of the Disabled related to the accessibility to public places as well as apply the executive regulation as to the aforementioned matter and take all decisions and measures ensuring the aforementioned and achieving the application of the provisions of the above-mentioned articles.

The decision was issued and publicly recited in the presence of the plaintiff's lawyer and the Public Prosecutor; it was announced on 09/06/2005.

Appendix 6: International Human Rights Treaties and their Ratification Status by the Arab Countries Under Study

The Arab Countries under study ratified international and regional human rights treaties in different time frames and had different orientations in this regard. Based on available information taken from official websites, the most important of which is the United Nations website that publishes international treaties in addition to the website of the High Commissioner of the United Nations for Human Rights, we managed to draw a map for the status of ratification for each of the countries under study and which we collected from the following two official websites:

http://treaties.un.org

www.arabhumanrights.org

1) Algeria

A. The International Covenant on Economic, Social and Cultural Rights: Algeria acceded to this Covenant in 1989 and made interpretative declarations on articles 1, 8 and 13 paragraphs 3, 4 and 14.

B. The International Covenant on Civil and Political Rights: Algeria acceded to this Covenant in 1989 and made interpretative declarations on articles 1, 22 and 23 paragraph 4.

C. The Convention on the Elimination of All Forms of Discrimination against Women: Algeria acceded to this Convention in 1996 and made reservations on articles 2, 9, 15, 16 and 29. Algeria withdrew its reservation on article 9, paragraph 2, in 2008.

D. The Convention on the Rights of the Child: Algeria ratified it in 1992 and made interpretative declarations on articles 13 and 14, paragraphs 1 and 2, in addition to articles 16 and 17.

E. The African Charter on Human and Peoples' Rights, ratified by Algeria in 1987.

F. The Arab Charter on Human Rights, ratified by Algeria in 2006.

2) Iraq

A. The International Covenant on Economic, Social and Cultural Rights: Iraq acceded to this Covenant in 1971 and made some reservations thereto.

B. The International Covenant on Civil and Political Rights: Iraq acceded to this Covenant in 1971 and made some reservations thereto.

C. The Convention on the Elimination of All Forms of Discrimination against Women: Iraq acceded to this Convention in 1986 and made reservations on article 2, paragraphs 6 and 7, and articles 9, and 14, paragraph 1, in addition to articles 16 and 29, paragraph 1.

D. The Convention on the Rights of the Child: Iraq acceded to this Convention in1994 and made reservations on article 14, paragraph 1.

E. The Arab Charter on Human Rights: It was not ratified by Iraq.

3) Jordan

A. The International Covenant on Economic, Social and Cultural Rights: Jordan acceded to this Covenant in 1975.

B. The International Covenant on Civil and Political Rights: Jordan acceded to this Covenant in 1975.

C. The Convention on the Elimination of All Forms of Discrimination against Women: Jordan acceded to this Convention in 1992 and made reservations on article 9, paragraph 2, article 15, paragraph 4, and article 29 thereof.

D. The Convention on the Rights of the Child: Jordan acceded to this Convention in 1991 and made reservations on articles 14, 20, and 21.

E. The Arab Charter on Human Rights: ratified by Jordan in 2004.

4) Morocco

A. The International Covenant on Economic, Social and Cultural Rights: Morocco acceded to this Covenant in 1979.
B. The International Covenant on Civil and Political Rights: Morocco acceded to this Covenant in 1979.
C. The Convention on the Elimination of All Forms of Discrimination against Women: Morocco acceded to this Convention in 1993 and made interpretative declarations on articles 2, 15, paragraph 4, and article 29.
D. The Convention on the Rights of the Child: Morocco acceded to this Convention in 1993 and made an interpretative declaration on article 14, paragraph 1.
E. The African Charter on Human and Peoples' Rights: it was not ratified by Morocco.
F. The Arab Charter on Human Rights: approved by Morocco in 2004.

5) Palestine

Since Palestine is not recognized as a State in International Law, it did not ratify the above-mentioned conventions but provided for them under the Palestinian Basic Law.

Appendix 7: Judicial Regulation in the Arab Countries Under Study

The Judicial Authority in each country is regulated according to the country's particularities; there is an inclination though to adopt the system of duality of the Judiciary, which means to have an ordinary judiciary (justice) and an administrative judiciary. We will showcase the aforementioned in what follows:

1) Algeria

Algeria adopts the system of duality of the Judiciary and Algerian Courts are divided into degrees. Ordinary Courts (justice) consist in:

Courts of First Instance that are the judicial party that has general jurisdiction, judicial councils that are the Courts of Appeal, and the Supreme Court, which is the Procedural Court.

As for the Administrative Judiciary, it is divided into first degree administrative courts and the State Council.

A Court of Dispute was also created since the adoption of the duality of the Judiciary in 1996.

2) Iraq

The Judiciary in Iraq, which is a federal State, is a federal judiciary formed of: the Supreme Judicial Council, the Supreme Federal Court and the Federal Court of Cassation.

As for the Iraqi Courts, they are divided into 3 types: exceptional courts, special courts (such as the Labor Court) and ordinary courts that are divided into 3 types:

- Civil Courts consisting in: the Court of First Instance, the Personal Status Court and the Court of Appeal.

- Criminal Courts consisting in: the Court of Misdemeanors, the Criminal Court and the Court of Cassation.

- Administrative Courts that examine disputes in which the Administration is party.

3) Jordan

There are Civil Courts, Sharia Courts and Special Courts in Jordan. We will only tackle the first type though.

Civil Courts are divided into:

- Courts of First Degree consisting in: the Magistrate Courts and the Courts of First Instance.

- Courts of Second Degree, which are the Courts of Appeal.

- The Court of Cassation, which is the highest court degree and is considered a Procedural Court.

- The High Court of Justice, which is the administrative judiciary.

4) Morocco

Morocco Courts also have different degrees starting with Courts of First Instance, then Courts of Appeal and ending with the highest degree court, which is the Supreme Court that is a Procedural Court.

The Administrative Judiciary is represented by the Administrative Courts as first degree courts and the Administrative Courts of Appeal.

5) Palestine

Palestinian Courts are divided into: Civil Courts, Sharia Courts and Special Courts.

We will only tackle hereinafter the Civil Courts, without the other two types. Civil Courts consist in Courts of First Instance that are judicial parties of general jurisdiction, Courts of Appeal that are courts of second degree and the Court of Cassation that is a Procedural Court.

As for the Administrative Judiciary, it is represented by the High Court of Justice.

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