# POLITICAL RIGHTS

# IN THE

# CONTEMPORARY ARAB LEGAL ORDER

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A thesis submitted

by

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## D E D I C A T I O N

*"... Even if you deny us everything else, you cannot take away the fact that we are human beings, that we too thirst for liberty and hope one day to recover a fitting place in the concert of nations; ... Even assuming that you can deny us everything, you cannot rob us of our right to live - and life and liberty are one and the same."*

Ahmad Lutfi al-Sayyed
(1872-1963)

I dedicate this humble work to all those striving for freedom and progress.

# PREFACE

The contradiction between the general acceptance of internationally recognised basic human rights and the conditions of political life in most Arab countries led me to undertake this study of the ability of the legal order to protect political human rights. Violation of the rule of law has led naturally to suppression of the people's rights and freedoms. Governments, be they monarchist or republican, conservative or radical, have been criticised by one of the leading intellectual figures of contemporary Arab world:

*"Common sense tells us that we have no interest in seizing the rights of the individual and turning them over to a government in which we have no share and over which we can exercise no control."*

Ahmad Lutfi al-Sayyed

Naturally, as an Arab advocate, I have aimed to present an independent, accurate and balanced picture of the contemporary position of political human rights in that region, nevertheless, I am personally responsible for any consequences of this standpoint as well as any controversial opinions in what follows.

Some inconsistencies have inevitably occurred in the use of quotations and different translations. Translations of the Qur'an are from The Koran, (N.J.Dawood, 1983), for Constitutions, historical and ideological documents, I have drawn heavily on Constitutions of the Countries of the World (A.Blaustein and G.Flanz), the document sections of the Middle East Journal, and The Arab States and the Arab League (Muhammad Khalil, 1962), which was of great help in several parts of the research.

In the case of other national legislation, it is important to note that translations of provisions are largely drawn from the States Periodic Reports under article forty of the International Covenant on Civil and Political Rights, as well as the Reports submitted by States Parties under Article nine of the International Convention on the Elimination of All Forms of Racial Discrimination, and the Reports prepared by the International Labour Organisation Committee of Experts and the Committee on Freedom of Association.

The provisions of the African Charter on Human and People's Rights are taken from a translation supplied by the Organization of African Unity, while the translation of the draft Arab Covenant on Arab Human Rights is the author's responsibility. Likewise, any inaccuracies in translation in the text or Courts' merits, especially in the section dealing with constitutionality in Chapter Three, are the responsibility of the author.

For information on administrative practices in Arab countries, the reader is directed to reports prepared by non-governmental organizations, such as Amnesty International, Article 19, International Commission of Jurists, Minority Rights Group and Index on Censorship.

## A C K N O W L E D G E M E N T S

In writing this thesis I am inevitably indebted to far more people and organizations, institutions than can be thanked adequately in a preface. I would like to single out the following for special thanks :

Professor J. Grant the Dean of the Law Faculty and head of the Department of Public International Law for his encouragement, supervision and valuable remarks; Mr. William Skinner, of Bank of Scotland for his helpful assistance during the last three years; grateful acknowledgement is also made to my father and brother.

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The helpful staff of Glasgow University Library, Edinburgh University Main Library and the Faculty of Law. The Centre for Human Rights, United Nations Office at Geneva. In particular, the U.N. Documentation Department staff of the Mitchell Library, Glasgow, for their patience and assistance with U.N. material.

I also want to thank a number of friends, colleagues and students with whom I discussed my thoughts while arriving at some of my conclusions. The final conclusions are mine, for which I alone am responsible.

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Summary

International legal standards in respect of political human rights are established through analysis of key texts and the interpretative work of international bodies, making possible an analysis of political life in Arab countries from a legal perspective.

A brief historical survey of the emerging legal order highlights the effect of the Ottoman and colonial periods on Arab political development, as well as the impact of Arab nationalism on the developing constitutional order. The phenomena of nationalism and identification with nationalist aspirations as vital legitimising factors for political forces in and out of power areillustrated, along with the role of the military in relation to radical nationalist movements.

The emerging constitutional order and its response to political change are examined as essential background both to the assessment of the efficacy of the Arab legal order in protecting political human rights and the question of how legislators tried to achieve the twin goals of reform and legality. The impact of ideology on the supreme legal text of each state is examined along with the constitutional path to independence in North Africa, highlighting the new order's recognition of principles of the rule of law, in particular, the revolutionary legislators' approach to the principle of legality. The extent and nature of constitutional review, a vital factor in the efficacy of the legal order in upholding constitutional provisions, is assessed in an examination of the range of approaches to control of constitutionality, focusing on the Egyptian experience.

The degree of recognition of political rights within Arab legislation, at the constitutional level, in legislation which regulates the scope of their exercise, and finally in light of the restrictions which may be imposed on them, is evaluated in the light of the criteria identified earlier.

Recommendations for legal reform at a number of levels are made, including proposed amendment of Constiutions and other legislation, focusing on principles of legality in general and protection of political rights in particular. Additional recommendations are made concerning Arab governments' activities with regard to international and regional human rights instruments.

# I N T R O D U C T I O N

"The last 30 years have witnessed the complete disappearance of democratic freedoms in the Arab world. This suppression of democracy has been justified in various ways and under different pretexts. It sometimes was justified by the need to build socialism and to pursue economic development, sometimes by the need to establish Arab unity, and at other times by the requirements of defending independence and in the name of struggle against Israel, when in fact none of these objectives could be achieved without democracy. Democracy and the fundamental freedoms it implies are not merely means of achieving vital goals, but constitute a fundamental goal in themselves. Freedom is a supreme value for all Arabs because they are deprived of it. The Arab people are deprived of the freedom of thought and expression, of the right to participate in decision-making; they are exposed to imprisonment, torture and murder - including collective murder; their honour is trampled upon, their highest values violated; and silence and submission are imposed upon them everywhere. The Arab people are today desperate and without hope, without faith in themselves or in their regimes ... Authority in the Arab countries is today based on intimidation, subjugation, and cooptation. This has led to confusion in values and standards, to the absence of critical thought, to the decline of reason. Thus the single, closed viewpoint has dominated, putting an end to intellectual and political diversity and rendering mass movements and popular organizations useless and impotent. Cultural and intellectual life, as a result, have been effectively destroyed in the Arab world. The participants in this conference strongly emphasize the necessity of securing basic human rights for the Arab people, particularly the rights of individual freedom and personal belief, of freedom of thought and expression, and of political participation, including the right to form political organizations and workers' unions. We also stress the need to insure the rights of women and minorities, and to safeguard the independence of the judiciary. The conference participants underscore the need to allow a democratic society to emerge in all Arab countries, a democracy rooted in popular participation, expressed in freely-formed political parties, and based in sovereign law and the power of the people, the only true source of power and legitimacy, to elect their own representatives."

-Hammamat, April 3, 1983
[ Signed by ] [1]

The stagnation of political life in the Arab world is a well-known and well-documented phenomenon. This study will examine the proposition that the contemporary Arab legal order is unable to provide a framework in which political rights may be freely exercised, in order to permit Arab states and peoples to shift from their present position to a stage of effective and stable development.

Michael Hudson describes the problems of Arab political life as a *"crisis of legitimacy"*. He identifies *"a complex set of historical, social, and cultural conditions, aggravated by imperialism and modernization"*, as a part of this problem,[2] and constitutions and codes of law too, reflect the complex set of circumstances from which the contemporary legal order emerged.

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1. In these words, Arab intellectuals, meeting in 1983 at the Hammamat cultural center in Tunis, described "the crisis of human rights and democratic freedoms in the Arab world". The participants in this conference failed to secure an Arab venue for their second meeting due to the refusal of several Arab governments including Egypt, Kuwait and Jordan. At the meeting, which took place in Limassol, Cyprus, a permanent Organization for the Protection of Human Rights in the Arab World was set up to monitor human rights violations.
Hammamat Declaration, Merip Reports, January 1984, p. 23.
2. Michael C. Hudson, Arab politics : the search for legitimacy London, 1977 p. x

The failure of the contemporary legal order to provide a secure framework for political life may be found within the legal order itself, with limitations and weaknesses in legal texts as well as both the diminishing of the principles of the rule of law, and administrative practices. Even where the legal order gives expression to political freedoms, it is unable to provide the mechanism by which they may be freely exercised.

The legacies of the past as well as the contemporary effects of secular[3] and religious ideology have contributed to the weakness of legal protection of political freedoms, which is also undermined by the suspension of the normal legal order in favour of states of emergency. Most serious and far-reaching is the use of the legal order as the tool of Governments in the maintenance of authority, clear in the use of law and constitutional institutions to control political life.

Two principal assumptions run throughout this study. The first is that to be effective in sustaining political participation, the legal order must be based on the principles of the rule of law, and give expression to political freedoms, such as the rights to associate freely and to take part in decision-making. According to the preamble of the Universal Declaration of Human Rights, *"it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."* In other words, political liberty must be preserved and safeguarded by the law in order to allow political development. The implication, found elsewhere in international human rights instruments, is that human rights are best safeguarded in a *"just and democratic society"*, sustained through the rule of law.[4]

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3. Principles of *"socialist legality"* seem to have been widely adopted in the postcolonial radical republics of the region. The doctrine of *"revolutionary legality"* (the use of the coercive power of the State against bourgeois and capitalist elements) was first proclaimed by Lenin after the revolution of 1917, and in 1936, Stalin proclaimed the new Soviet Constitution, and principle of *"socialist legality"*, the doctrine which allowed the Soviet state not only to retain, but to strengthen the law, previously dismissed as a bourgeois tool, as a means of state control. Andrei Vyshinsky, the principal exponent of *"socialist legality"*, described law as a socialist normative order, a tool in the struggle to achieve socialism in the face of the capitalist threat. However, Vyshinsky's legal thought was little more than a front for the Soviet leadership, who wished to retain the coercive machinery of the state for their own ends.

A recent evaluation of *"socialist legality"* may be found in Richard Kinsey "Karl Renner on socialist legality" in David Sugarman (ed.), Legality, ideology and the state, 1983 pp.11-42.

The revolutionary Constitutions of most radical republics use the terminology of socialist doctrine, with provisions which draw heavily on socialist models. Despite the use of socialist terminology, most Arab Constitutions also stress that states derive their democracy and socialism from the Arab heritage and the spirit of Islam.

4. Although at the national level, the concept of the Rule of Law may stand for an important legal doctrine : that government should be conducted according to law, the actions of governments should have legal authority and legal form, disputes being settled by judicial decision, internationally, lawyers have sought to extend the meaning of the Rule of Law beyond the simple principle of legality. The Rule of Law has been described as a dynamic concept which should be used to protect and enhance political and civil rights.

The International Commission of Jurists Declaration of Delhi enumerated traditional elements / ...

The second assumption emphasises that without the establishment of a political and legal framework based on the rule of law which allows the people to express their aspirations, it will continue to be impossible for states to achieve their goals for development, as events confirm that without adequate protection of human rights, whether civil or political, no real development can be achieved or sustained.

Despite the point of view that the fragile structures of many developing countries might oblige States to impose restrictions on political freedoms to prevent disintegration, nevertheless, national legislation must conform to minimum standards. While it may be argued that the demands of development in Arab countries might justify an extension of the scope of regulatory powers, nevertheless, the legislative and judicial authorities must not, under any circumstances, be weakened in their powers nor stripped of their right to exercise effective checks on executive acts, in order to ensure respect for the rule of law and human rights.

A dominant theme in Arab countries since independence has been the desire for development of the population's conditions, long denied them by Ottoman and European colonialism. If Governments are to be able to so move their societies as to achieve this goal, they must address what has been accurately described as *"the complete disappearance of democratic freedoms in the Arab world"*, in an effort to overcome the political instability and incoherence which has marked the post-independence era in the region.

This thesis will argue that reform and legality must go hand in hand, and the degree of development achieved will depend upon the success of balancing these two necessities.

... in the Rule of Law as adequate controls of Executive abuse of power, essentials of fair criminal procedure, independence of the judiciary. In addition, it stressed the need for the democratic organisation of the legislature, safeguards for freedom of belief, speech and assembly, and safeguards against legislation discriminating against minority groups.
International Commission of Jurists The Rule of Law and human rights : principles and definitions, 1966.

The effect of the contemporary Arab legal order on human rights has received little attention despite the increased concern of international bodies.[5]

In general, it must be said that there have been few documentary studies of the contemporary Arab legal order,[6] which continues to make it difficult not only to find readily available source material, but also for researchers to stimulate and develop debate based on critical examination of the problems, allowing a shift from solely political analysis by traditionalist and moderate alike. With a few exceptions,[7] studies on Middle Eastern law by Western scholars tend to concentrate almost exclusively on the *Shari'ah* (Islamic law).[8] The lack of comprehensive studies of modern Middle Eastern law has been pointed out along with *"the great need for comparative and socio-historical studies in this field"*.[9] Work on the contemporary Arab legal order has tended to focus on the emerging national legal systems of individual countries, and reflects the varying stages of their development, as S.H. Amin points out in the introduction to his Middle East Legal Systems

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5. For example, Amnesty International has submitted information under the UN procedure for confidentially reviewing communications about human rights violations, stating that the evidence revealed warranting UN investigation in Libya, (Report 1985, p.330)
The intervention of the representative of the Arab Lawyers Union at the 39th Session of the United Nations Subcommission on the Prevention of Discrimination and Protection of Minorities in 1987.
Review of International Commission of Jurists 39/87 pp.33-35.
The participants in the Hammamat Declaration of 1983, meeting in Limassol later that year called on all Arab governments *"to acknowledge human rights and freedoms specified in the UDHR"*. They called for the defence of all individuals whose human rights are violated, demanding that all political prisoners in the Arab countries be released or immediately brought to trial, that all illegal courts and emergency legislation be abolished, and the illegal activity of the security forces be ended.
Merip Reports January 1984 14 1 23.
6. For example, Helen Miller Davis, Constitutions, Electoral Laws, Treaties in the Near and Middle East, 1953; Muhammad Khalil, The Arab states and the Arab League : a documentary record. 2 vols. 1962; Herbert Liebesny, The Law of the Near and Middle East, 1975; Abid A. Al-Marayati, Middle eastern constitutions and electoral laws, New York, 1968; Saba Habachi "Law, Bench and Bar in Arab lands" Journal of the International Commission of Jurists, 1959; Hisham B. Sharabi, Nationalism and revolution in the Arab world, 1966 (part two contains documentary material, including statements, ideological documents and excerpts from Constitutions).
7. For example, Herbert Liebesny The Law of the Near and Middle East, 1975, "Comparative legal history : its role in analysis of Islamic and modern Middle Eastern legal institutions" in American Journal of Comparative Law, 38, 1972;
8. As Herbert Liebesny, whose The Law of the Near and Middle East (1975) is one of the few comprehensive contemporary studies, writes *"comprehensive discussions of Islamic law are available ... while no such comprehensive presentations exist for legal developments since the early nineteenth century"*.
Herbert Liebesny The Law of the Near and Middle East, 1975, p.ix.
For example, N.J. Coulson, A history of Islamic law, 1964; J.N.D. Anderson Law reform in the Muslim world, 1976, "Modern trends in Islam : legal reform and modernisation in the Middle East" International Comparative Law Quarterly 20, no.1, 1971, pp.1-21, M. Cherif Bassiouni "Protection of diplomats under Islamic law" American Journal of International Law Vol 74 1980 pp.609f; Herbert Liebesny "Stability and change in Islamic law" Middle East Journal, 21, 1967, pp.16-34; Cyriac Pullapilly, Islam in the contemporary world, 1980; Joseph Schacht, "Islamic law in contemporary states" American Journal of Comparative Law 8, 1959 pp.133-47.
9. Enid Hill "Comparative and historical study of modern Middle Eastern law" in American Journal of Comparative Law, 26, 1978, pp.279-307.

(1985).[10]

Studies on Arab political life are more numerous,[11] though they naturally utilise the methodology of political science analysis, and often display marked ideological perspectives.[12] Their value for the present thesis lies in their focus on the development of Arab political culture in the post-colonial era.

Approaches to problems relating to human rights in the region have focused on the question of the compatibility of modern human rights with Islamic doctrine,[13] emphasising the western origin of human rights law. Likewise, studies of the relation of Muslims to international human rights law are dominated by western cultural superiority, and views of international law from theological or ideological perspectives.

Writers who have examined the human rights question from the perspective of international legal principles have been satisified to describe positive aspects of the Arab legal order's recognition of basic human rights[14] or participation in international instruments,[15] without critical analysis of the factors which inhibit effective protection of these rights in the region.

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10. Other recent works by Amin examine the developing legal systems of the Gulf, for example, International and legal problems of the Gulf (1981); Law and justice in contemporary Yemen (1987).
11. For example, Bruce Borthwick Comparative politics of the Middle East : an introduction, 1980; Michael Hudson Arab politics : the search for legitimacy, 1977; Local politics and development in the Middle East, Louis J. Cantori and Iliya Harik (eds), 1984; Islam and politics in the modern Middle East, Metin Heber and Raphael Israeli (eds), 1984; Contemporary Arab political thought Anouar Abdel-Malek (ed.), 1983; I. William Zartman, Government and politics in North Africa, 1963; Charles F. Gallagher The United States and North Africa, 1963; Government and politics of the contemporary Middle East, Tareq Y. Ismael (ed), 1970; Peter Mansfield, The Middle East and North Africa : a political and economic survey, 1973;
12. Studies of the Arab world often display the assumptions of western and eastern ideological perspectives. For example, Samir Amin The Arab nation : nationalism and class struggle, 1978; Rachid Tlemcani, State and revolution in Algeria, 1986.
13. For example, L. Adegbite "Human rights in Islamic law" Journal of Islamic and Comparative Law, 1977 7 pp1-12; Maqbul Ilahi Malik "The concept of human rights in Islamic jurisprudence" Human Rights Quarterly 3.3 Summer 1981 pp56-67; Abdul Aziz Said "Precept and practice of human rights in Islam" Universal Human Rights, 1, 1979, p.63f; Zafrulla Khan Islam and human rights, 1967; Abul A'la Mawdudi Human rights in Islam, 2nd ed., 1980; David Hollenbach "Human rights and religious faith in the Middle East : reflections of a Christian theologian" Human Rights Quarterly 4.3 1982 pp94-109; Edward Mortimer "Islam and human rights" Index on Censorship 5 1983 p5f Adda B. Bozeman The Future of Law in a multicultural world, 1971; James Dudley "Human rights practices in the Arab states ; the modern impact of Shari'a values, Georgia Journal of international and comparative law 1982, 12, pp.55-93;
14. U. Al-Salih €"Human rights and guarantees : a comparative study of the Gulf states Constitutions, the Universal Declarations and origins of these rights in Islam"Å (Arabic) Journal of Gulf and Arabian Peninsula Studies 5, no.18, 1979, pp.37-81; A. Shaban, €"Civil rights in Arab Constitutions, part 1"Å (Arabic) *Shu'un Arabiyyah* 49, 1987, pp.211-29; M. Lassaker €"Les garanties des droits des individus dans la legislation ..."Å (Arabic) *Revue Algerienne des sciences juridiques, economiques et politiques* 1982 19 pp.528-562.
15. E. Al-Deen €"The law and treaties on human rights"Å (Arabic) Revue egyptienne de droit international 39, 1983, pp.265-310; I.B. Al-Sheikh €"Egyptian view on the International Covenant on Civil and Political Rights"Å (Arabic) *Revue egyptienne de droit international* 39, 1983, pp.311-28 & €"The implementation by Egypt of the International Convention for the Elimination of All Forms of Racial Discrimination"Å (Arabic) *Revue egyptienne de droit international* 38, 1982, pp.103-118.

Previous approaches, by individual and organization alike, have tended to focus on individual countries or specific issues. Notable exceptions include the Arab Lawyers Union who have called on many occasions for the rule of law to be upheld throughout the Arab legal order.[16] Individual contributors include Jamil Husayn, whose approach, in calling for the establishment of an Arab Court of Human Rights,[17] also encompasses the legal order as a whole, as does the approach of Muhammad Usfur, who has written on the need for an Arab Bill of Human Rights.[18] By contrast, Omar Bendourou's article on political rights in Morocco demonstrates the more common tendency of focusing on a single country.[19] The contributions of non-governmental organizations also focus on particular issues.[20]

One of the assumptions of this thesis is that the Arab legal order can be examined as a whole, in respect of the limitations imposed on free political life. In all Arab countries, whether radical or conservative, the common theme of restriction in political life may be observed. While accepting the description of contemporary Arab legal systems as "nation-bound", this thesis assumes that Arab countries share common characteristics and deficiencies in respect of legal support for free political life. Thus the subject under examination is "the contemporary Arab legal order". An important approach throughout the study will be the attempt to identify common phenomena and draw broad conclusions about the ability of the emerging legal order, in conservative or radical state alike, to provide a secure framework, upheld by the rule of law, in which political freedoms may be enjoyed.

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16. See, for example, A. Youssoufi "Human rights in Arab countries", the text of an intervention made by the organization at the 39th Session of the UN Subcommission on the Prevention of Discrimination and Protection of Minorities in 1987. Reproduced in Review of the International Commission of Jurists, 39, 1987.
17. Jamil Husayn ["Human rights in the Arab homeland : obstacles and applications"] (Arabic) *al-Mustaqbal al-Arabi* 1984 6 62; Jamil Husayn ["In favour of the establishment of an Arab Court for Arab Human Rights"] (Arabic) *al-Mustaqbal al-Arabi* April 1983; ["Democracy and Arab human rights"] (Arabic) *al-Mustaqbal al-Arabi* January 1983.
18. Muhammad Usfur ["An Arab bill of human rights : a fateful national necessity"] (Arabic) *al-Mustaqbal al-Arabi*, September 1983.
19. Omar Bendourou "The exercise of political freedoms in Morocco" Review of the International Commission of Jurists, 40, 1988.
20. For example, studies prepared by AI, Article 19, MRG, ICJ. Studies prepared by the Minority Rights Group include reports on The Kurds (1985); The Palestinians (1987); Lebanon : a conflict of minorities (Rev ed. 1986); Migrant workers in the Gulf (1985). Amnesty studies include : Violations of human rights in the Libyan Arab Jamahiriya (1984); Egypt : violations of human rights (1983) and Egypt : update to 1983 report (1984); Political killings by governments (1983); Report and recommendations of an AI Mission to the Government of the Republic of Iraq (1983); Report from AI to the Government of the Syrian Arab Republic (1983); Report of an AI Mission to the Kingdom of Morocco (1981); Torture in the eighties (1984); Syria : torture by the security forces (1987). In addition, the yearbooks and newsletters contain information on North African and Middle Eastern countries. Article 19 has prepared studies on freedom of information and expression in Iraq (1987) and Tunisia (1987). Its yearbook, "Information, freedom and censorship" also contains material from Arab countries. Material on freedom of information in the region may also be found in Index on Censorship. The International Commission of Jurists has prepared, for example, States of Emergency : their impact on human rights : A study prepared by the International Commission of Jurists, 1983, p287; Raja Shehada, The West Bank and the rule of law : a study, [Geneva], 1980.

International legal standards, drawn from human rights instruments, the case law of international organs and special studies carried out under the direction of the UN,[21] will be heavily used throughout the study. These standards will serve as tools in identifying and clarifying issues in political life from a legal perspective. It must be said that the broader question of the validity and efficacy of international human rights law is beyond the scope of the present study. For this reason too, the examination of political human rights in international law is far from exhaustive, since the intention is to use international human rights standards simply as the criteria by which to measure and evaluate the scope of political freedoms within the contemporary Arab legal order. That the standards upheld by international texts are acceptable to Arab Governments as a measure of human rights is assumed in the light of the participation by the majority of Arab countries in international human rights instruments.[22]

The subject under examination must be restricted on grounds of time and place. In terms of time, the focus will be on the contemporary legal order, though the thesis also examines historical elements which have shaped the emerging legal order.

In terms of place, the study will exclude states passing through extreme political change and armed conflict, such as Sudan, Mauretania, North Yemen, West Sahara and the Occupied Territories. Unfortunately, Lebanon too is beyond the scope of the present study, due to the continuing civil war. Although the crisis of Lebanon could illustrate important aspects of the Arab legal order, the complexity and rapidly changing nature of the political situation make a detailed study of the contemporary legal order impossible. The states chosen illustrate a sufficiently wide range of political and legal structures to enable certain conclusions to be drawn about the Arab legal order in general. Clearly, this study represents no more than preliminary work in a field which requires much further research.

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21. For example : Question of the human rights of persons subjected to any form of detention or imprisonment : Report of the working group on enforced or involuntary disappearances (1981); Question of the realisation in all countries of the economic, social and cultural rights contained in the UDHR and the Economic and Social Covenant, and Study of special problems which the developing countries face in their efforts to achieve these human rights, including : Popular participation in its various forms as an important factor in development and in the full realisation of human rights (1975); Question of the violation of human rights and fundamental freedoms in any part of the world with particular reference to colonial and other dependent countries and territories : Summary or arbitrary executions : report by Special Rapporteur (1984); Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency (1982); Study on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, (1981); The individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights : a contribution to the freedom of the individual under law. Study prepared by the Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities (1980).

22. See page 176.

The aim of **the first chapter** is to establish the definitions and principles which will make possible an analysis of political life in the Arab countries, from the perspective of positive international legal standards. Therefore, its starting point is the instruments which set out the minimum standards recognised by the international community, examining the texts in the Universal Declaration, the International Covenants, and in the case of association, International Labour Organization Conventions. The next stage draws on interpretation of the instruments, apparent in the interpretative work of the Human Rights Committee and the ILO Committee on Freedom of Association. Since each organ also carries out a quasi-judicial role, their findings and case law are utilised. International case law is supplemented by the findings of regional organs. Regional instruments are also the subject of a comparative review, aiming to identify similarities and differences in approach, both with respect to the global standard, and in order to highlight the regional perspective.[23]

Since the guarantees of political rights are subject to derogation in time of crisis, it is of vital importance to examine the issue of state of emergency in international law, again through international legal provisions, supplemented by the case law of international bodies, and special studies. While some aspects of the adoption and use of temporary emergency provisions are common to both international and national legislation, they differ in important respects, and therefore are the subject of separate examination in this study. The present section concentrates on the international provisions which define and regulate the adoption and use of emergency measures, in this case, of derogation from certain obligations assumed under international law. The aim in this section, as in the Chapter as a whole, is to establish a clear picture of the international legal standards, with a view to using some of the principles thereby distinguished in Chapter Four.

**The second chapter**, a brief survey of the emerging legal order in the nineteenth and twentieth centuries, highlights the main issues and common factors significant for understanding the effect of the past on the contemporary Arab legal order, though it does not contain a detailed examination of the history of every country. The chapter focuses firstly on the legacies of the Ottoman and colonial periods and their effect on Arab political development, and secondly, on the emergence of Arab nationalism and its impact on the contemporary legal order.

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23. Making use of the African Charter on Human and People's Rights and the Arab Covenant on Human Rights.

The first part surveys the implications of Ottoman rule insofar as it shaped administrative and political organization, in order to provide the background for an examination of European colonialism in the region, identifying elements which led to European colonial expansion, and highlighting the different underlying philosophies and aims of the three colonial Powers who shared in the colonization of North Africa and the Arab Middle East. The different approach of each Power and the policies it adopted are examined with a view to drawing some conclusions about the impact of colonial rule, focusing on its effect on political life, the creation of the political order, and the impact on constitutional life which laid the ground for the growth radical of nationalist movements.

The second section focuses on the implications of the growth of nationalism which is inextricably linked to the emergence of the contemporary Arab order. Nationalism in the Arab context, as we will see, has a particular character, since it may be defined in religious terms, or in terms of the secular ideologies of socialism and pan-Arabism. This section examines both tendencies in their historical context, and how they interact. Since nationalism and identification with nationalist aspirations remain vital legitimising factors for political forces in and out of power, the next section illustrates the legitimising role of nationalism in a number of contemporary radical regimes. This section is followed by an examination of the role of the military in relation to radical nationalist movements, which enables us to draw some conclusions about the role of the military in the wider context of the contemporary political and legal order.

One of the principal concerns of the **third chapter** is to examine the emerging constitutional order and the impact of the transitional character of the contemporary Arab political order on the legal order, reflected, for example, in the constitutional framework. It is essential, as a background to assessing the efficacy of the Arab legal order in protecting political human rights to examine how the legislator tried to achieve the twin goals of reform and legality.

The first section focuses on the impact of the ideologies which shape the legal order. In this section, the concern is to examine the degree of effect of the ideological framework on the supreme legal text of each state. The second section reviews the constitutional path to independence in North Africa, highlighting the recognition of the new constitutional order of principles of the rule of law. Continuing political change has naturally affected legal systems in the region, and this section also examines the revolutionary legislators' approach to the principle of legality. The focus moves next to the role of minorities in the contemporary legal order, briefly reviewing the position of some minorities in the region, and the response of the contemporary legal

order to the minority question, with special attention to a legislative approach to a minority seeking autonomy. Finally, this section reviews the recognition within the emerging constitutional order of principles of the rule of law, including a review of the relationship between domestic and international law.

Since a vital factor in the efficacy of the legal order in upholding constitutional provisions is the extent and nature of constitutional review, the third section examines the range of approaches to control of constitutionality within the contemporary order, focusing on the Egyptian experience of developing judicial control.

The final section examines the Arab legislative response to state of emergency, reviewing the legislation which regulates the imposition and conduct of a state of public emergency. With state of emergency in force in a number of countries for a long period, its impact on the legal order's ability to uphold aspects of the rule of law and political life is evaluated, with reference to discussions between certain governments and the Human Rights Committee, in the light of the principles established in Chapter One.

**Chapter four** examines the degree of recognition of political rights within Arab legislation, at the constitutional level, in legislation which regulates the scope of their exercise, and finally in light of the restrictions which may be imposed on them. These are evaluated in the light of the criteria identified in the first chapter.

In the first section, the focus is on freedom of opinion, expression and information, and the second examines the position of the right to assembly and association, including the right to form and join trade unions. Finally, the third section focusses on the right to political participation, reviewing the mechanism of participation in a number of countries, as well as electoral law and provisions which regulate public service.

**Chapter five** briefly summarises and concludes the thesis before going on to make recommendations for legal reform at a number of levels. The recommendations include suggested amendment of constitutions and other legislation, focusing on the principles of legality in general and the protection of political rights in particular. The Chapter ends with recommendations in respect of Arab governments' activities with regard to international and regional human rights instruments.

# C H A P T E R  O N E

## LEGAL ANALYSIS OF POLITICAL HUMAN RIGHTS IN THE LIGHT OF THE INTERNATIONAL INSTRUMENTS AND CASE LAW

# INTRODUCTION

There is a deep and fundamental link between the right of freedom of opinion and expression, described by the UN General Assembly as *"the touchstone of all the freedoms to which the United Nations is concerned"*,[1] and the political life of the nation. Since, in many countries, power is exercised in the name of the people and the words of the Universal Declaration, *"the will of the people ÆisÅ the basis of authority of government"*, it is essential that this will finds free expression through the mechanism of ongoing participation in the political process. In this respect, freedom of opinion and expression must be extended to cover freedom of information, which is the foundation of any degree of true participation in political life by the population, and the cornerstone of democracy.

The right to freedom of assembly is one of the manifestations of the right of freedom of expression in today's world. Organised demonstrations are used as a means of expression, of gathering support for various causes and increasingly making public feelings known. Several instruments and resolutions confirm the importance of the inter-relation between these rights, nationally[2] as well as internationally. For example, the International Labour Conference has pointed out that the essential role played by employers' and workers' organizations in promoting human rights in the field of employment and labour could not have been achieved without the right of assembly and the freedom of opinion and expression, emphasising that these *"... constitute civil liberties which are essential for the normal exercise of trade union rights..."*.[3]

While the right of the individual to freedom of opinion and expression can manifest itself in political participation on an individual basis, there is no doubt that political parties and other groups have the major and effective role to play in organised political life. Whether in or out of power, political parties are in a unique position to convert hopes into concrete proposals in accordance with the people's aspirations.

The world today is characterised by the existence of different socio-economic and political systems,[4] in which trade unions play differing roles according to the different systems in which they operate, where they may play an important role in labour relations, ensuring respect for the rights of workers, playing their part in labour agreements and in conciliation in disputes. They serve also as channels of expression and organs of mediation between public authorities and citizens.

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1. G.A. Res. 59, A/64/Add.1 (1946) p.95.
2. The new Netherlands Constitution of 1983 recognises explicitly the value of organised demonstrations, describing the right of demonstration as a fundamental right alongside freedom of assembly and association.
E/CN.4/1984/12 Annex, para.21
3. International Labour Conference, Resolution concerning trade union rights and their relation to civil liberties, adopted at the 54th Session, 1970
4. A Study by UNRISD has highlighted the importance of such factors as rural or ethnic origin, socio-economic class and religious affiliation, among others, in restricting the level of political participation in several parts of the world.
UNRISD/79/C.14

Finally, they may play an important role in the framing of development policies.[5]

Stable political life is reflected in a process of review and confirmation through the mechanism of periodic elections to the organs of government. No other process gives true expression to the will of the nation, which is the normal basis of legitimate government, or provides a mechanism of accountability of government to people.

All these rights underlie the democratic process as they permit and encourage supervision of governments, and their protection has been seen as the criteria by which we judge whether a government is democratic, since *"they can be recognised and enjoyed only in democracies and there can be no democracy in any real sense without them. Their recognition and enjoyment is therefore a test of whether the government of a country is democratic."*[6] The Universal Declaration of Human Rights itself takes democracy as a vital factor in safeguarding the rights of individuals, in article 29, where restrictions on individuals' rights are prescribed *"in the exercise of his rights and freedoms ... and the general welfare in a democratic society."*

The methodology in this Chapter is examining separately, but adopting the same approach, legal texts, the supervision of associated organs and case law associated with the three rights, internationally and regionally. Each part begins with a detailed examination of the legal provisions contained in the instruments: at the international level, using the *travaux preparatoires* of the International Covenant on Civil and Political Rights, and at the regional level, making a comparative study of the provisions of the European, American and African instruments, and taking account of the proposed Arab Covenant. At each level, case law is examined to clarify the international legal understanding of the issues involved, before passing to the work of the supervisory bodies. At the international level, the focus is on the work of the Human Rights Committee, and to a lesser extent, the ILO bodies, the Committee on Freedom of Association, the Commission of Conciliation and Fact-Finding and the Committee of Experts, while at the regional level, the main focus will be on the findings of the European Commission and Court.

For each right, the corresponding article in the Covenant (and in the case of trade union rights, ILO Conventions 87 and 98) is examined in detail, identifying the separate elements of the freedoms protected, and examining the scope and extent of possible restrictions separately. The main examination of restrictions for the sake of public order, national security, public interest and so on occurs within the examination of article 19 of the Covenant and is not repeated for articles 21 and 22, since these articles share identical or similar wording.

5. For example, the preamble of the Constitution of the ILO declares *"recognition of the principle of freedom of association"* to be a means of improving conditions of labour and of establishing peace.
6. John P. Humphry "Political and related rights" in Theodor Meron (ed.) Human rights in international law : legal and policy issues Vol.1 1984, p.172.

While some aspects of the adoption and use of temporary emergency provisions are common to both international and national legislation, they differ in important respects, and therefore are the subject of separate examination in this study. The present section concentrates on the international provisions which define and regulate the adoption and use of emergency measures, in this case, of derogation from obligations assumed under international law. The aim is to establish a clear picture of the international legal understanding of aspects of the concept of state of emergency, with a view to using some of the principles thereby distinguished in a later section. The starting point at this stage is the Political Covenant as the instrument which allows and regulates these situations. As before, the methodology is to examine separately, but adopting the same approach, legislation and supervision associated with the state of emergency internationally and regionally. Each part begins with a detailed examination of the instruments, at both levels, examining case law to clarify the international legal understanding, including the work of the supervisory bodies. In the analysis of this issue, the approach adopted is that of the Special Rapporteur who prepared the *Study of the Implications for Human Rights of Recent Developments Concerning Situations known as States of Siege or Emergency*,[7] who identified in the international understanding procedural and substantive guarantees, as well as the implementation of surveillance.

7. Study of the Implications for Human Rights of Recent Developments Concerning Situations known as States of Siege or Emergency E/CN.4/Sub.2/1982/15 of 27th July 1982.

# SECTION ONE

# FREEDOM OF OPINION AND EXPRESSION

The freedoms of opinion and of expression are among the rights safeguarded in the international and regional[8] instruments for their importance and fundamental value, acknowledged by all legal cultures.[9] Another instrument, the Constitution of UNESCO, confirms the belief of States Parties *"in the unrestricted pursuit of objective truth, and in the free exchange of ideas and knowledge"*.

Article 19 of the Universal Declaration, and of the Political Covenant both recognise the right to hold opinions without interference, as well as the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers. The structure of article 19 in both the Declaration and the Covenant follows a similar pattern : it begins with an explicit statement of the right and then goes on to elaborate some of the elements of the right. The Covenant goes on to set the acceptable restriction on its practice, while the Universal Declaration contains no restriction within the article, but only the general restriction of article 29 which applies throughout the Declaration.

Thus the articles begin by stating the right of freedom of opinion,[10] then go on to specify freedom of expression and the accompanying

8. At the regional level, protection of these rights found its place in the American Declaration and Convention, the African Charter and the European Convention, and the draft Arab Human Rights Covenant.

9. This freedom has long been recognised in several legal traditions and retains its position today. As early as 1688, the English Bill of Rights proclaimed : *"that the freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."* The right of the ordinary citizen was first provided in 1789, when the French *Declaration des droits de l'homme et du citoyen* proclaimed both the right, and the responsibility which accompanies its exercise : *"The unrestrained communication of thoughts or opinions being one of the most precious rights of man, every citizen may speak, write and publish freely, provided he be responsible for the abuse of this liberty in the cases determined by law."*. In 1791, the First Amendment of the United States Constitution echoed the French Declaration : *"Congress shall make no law ... abridging the freedom of speech, or of the Press ...."*.

Soviet theorists consider freedom of speech and of the Press to be *"among the most important political freedoms."* For example, the Soviet Constitution of 1936, in article 125, provides : *"In conformity with the interests of the working people and in order to strengthen the socialist system, the citizens of the U.S.S.R. are guaranteed by law : (a) freedom of speech; (b) freedom of the Press; ... These civil rights are ensured by placing at the disposal of the working people and their organisation printing presses, stocks of paper, ... communications facilities, and other materials requisite for the exercise of these rights"*, and these freedoms have been upheld by later Constitutions.

Freedom of opinion and expression is among the rights underlying Islamic law, and the principles are confirmed by the *Shari'ah* translated in the Universal Islamic Declaration of Human Rights, in article xii. Various constitutional and legal systems translate Islamic doctrines in different ways, for example, the Constitution of the Islamic Republic of Iran, which is one of the most recent Constitutions to draw heavily on Islamic jurisprudence in formulating positive law. The Constitution provides for freedom of opinion in article 23, which provides that *"the control of opinions shall be prohibited and no one may be ... censured for his opinions"*, and for freedom of expression in article 24, which states : *"The Press and publications shall be free to write what they will unless the matter is detrimental to the principles of Islam or the rights of the people. The courts shall decide on the application of this article."*

10. Protection of freedom of opinion is provided for explicitly in the American Declaration of the Rights and Duties of Man, the draft of the Arab Human Rights Covenant and the European Convention, where it is described as a component of freedom of expression. In the American Convention on Human Rights, it is implicitly protected by article 12 which protects freedom of thought. The African Charter on Human and Peoples' Rights does not explicitly protect the right of freedom of opinion, though it could be argued that this may be implicit in its protection of the right of every individual to express and disseminate his opinions.

right of freedom of information.[11] In the Political Covenant, the limitation is described in terms of the *"special duties and responsibilities"* carried in the exercise of the right, and the restrictions on its practice are stated in general terms.[12]

In the *travaux preparatoires* of the Political Covenant, it was noted that these two rights differ in character: the first is *"a private matter ... of the mind"*, whereas the second is a public matter *"which should be subject to legal as well as moral constraint"*. For this reason, the Committee decided to treat the rights separately.[13]

Originally, the paragraph dealing with freedom of opinion had contained the phrase *"without interference by governmental action"*.[14] Although it was argued both that the article should seek to protect the individual only from governmental restriction on the right, and that the individual should be free from all forms of interference, in the event, the phrase with wider meaning was adopted.[15]

During discussion, the content of freedom of expression was found to include both the right to express and to receive ideas and information. Though the latter might not immediately appear to be part of the right to freedom of expression, nevertheless, the value of that right is meaningless without the corresponding right to receive information.[16]

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11. The American Declaration provides for the right to freedom of expression and dissemination of ideas, and the American Convention similarly protects freedom of expression and freedom to impart information and ideas of all kinds. The two American instruments, unlike the others, provide explicitly that freedom of expression may be enjoyed through any media, with the Convention specifying *"orally, in writing, in print, in the form of art, or through any medium of one's choice"*. The African Charter provides for the right to express and disseminate opinions, while the draft Arab Covenant safeguards the right to express ideas orally.

The European Convention provides for the right of freedom of expression, and freedom to impart information and ideas. The European Convention, like the American Convention states that the right may be exercised *"regardless of frontiers"*, while the other instruments contain no such provision. The European Convention alone specifies within the basic statement of the right of expression that it shall be free from *"interference by public authority"*.

The African Charter provides only that every individual has the right to receive information, while the right is not included in the draft Arab Human Rights Covenant. Like the American Convention, the European Convention provides that the right of freedom of expression includes freedom to receive and impart information and ideas.

12. Cf., article 10/1 of the European Convention which, though it guarantees the right of individuals and sets forth the freedoms included in this right, nevertheless sets out extensive grounds on which interference with these rights is permitted, while paragragh 10/2, sets further conditions, that they must be *"prescribed by law and are necessary in a democratic society ..."*

13. United Nations Official Records of the General Assembly, 10th session, Annexes 20th September - 20th December 1955 Agenda item 28 (part 2) p.51 para. 120.

14. cf., EHR article 10 (1) which states *"without interference by public authority"*

15. United Nations Official Records of the General Assembly, 10th session, Annexes 20th September - 20th December 1955 Agenda item 28 (part 2) p.51 para. 125.

16. Although the principle of freedom of information is reflected in regional and global human rights treaties, efforts to sponsor a treaty on freedom of information failed in the 1950s. More recent efforts include UNESCO's conference in 1980 on the MacBride Commission Report *"Many Voices, One World"*, aiming to promote *"a new world information and communication order"*, based on such principles as removal of internal and external obstacles to a free flow and wider and better balanced dissemination of information and ideas, freedom of the Press and information, freedom of journalists and all professionals in the communications media, respect for the right of all peoples to participate in international exchanges of information on the basis of equality, justice and mutual benefit and respect for the right of the public and of individuals to have access to information sources and to participate actively in the communications process.
Information, freedom and censorship Article 19 world report, 1988, pp.321-2.

In both the Universal Declaration and Political Covenant, there is consent to the practice of this right *"regardless of frontiers"*.[17] With regard to what one should be able *"to seek, impart and receive"*, a wide formulation of *"information and ideas of all kinds"* was adopted.

As to the media of the expression,[18] original forms of the draft had included the phrases *"legally operated visual and auditory devices"* and *"duly licensed visual or auditory devices"*.[19] These phrases were objected to on the grounds that they *"were susceptible of arbitrary*[20] *interpretation and application which might throttle channels of communication."* Again, a wide formulation was adopted.[21]

As for the interpretation of article 19 of the Political Covenant, the Human Rights Committee has pointed out that the right contained in paragraph 1, to *"hold opinions without interference"* is an absolute and *"unqualified right"* which may not be restricted under any circumstances except within the terms of article 4 of the Political Covenant, and that paragraph 2 includes the right not only to *"impart information and ideas of all kinds"*, but also freedom to *"seek"* and *"receive"* them *"regardless of frontiers"* and in whatever medium, *"either orally, in writing or in print, in the form of art, or through any other media of his choice"*.[22]

17. Again, the European Convention, like the American, states that the right may be exercised *"regardless of frontiers"*, while other regional instruments contain no such provision. It also specifies within the basic statement of the right to receive information and ideas that it shall be free from *"interference by public authority"*, however it goes on to provide that the state may require the regulatory licensing of broadcasting enterprises.
18. Once again, the two American instruments, unlike the others, provide explicitly that freedom of information may be enjoyed through any media. Though the European Convention, article 10, does not contain a phrase specifying the permissible media of expression as in the Covenant, nevertheless case law from several courts on this point indicates that freedom to circulate ideas in paper-back books, leaflets and circulars has been upheld as freedom of expression.
19. This seems to have been drawn from the European Convention on Human Rights, article 10, which contains the sentence *"This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."*
20. The meaning of the term *"arbitrary"* will be discussed in detail in the next section within the general restriction on political rights.
21. United Nations Official Records of the General Assembly, 10th session, Annexes 20th September - 20th December 1955 Agenda item 28 (part 2) p.51, para. 126.
22. Report of the Human Rights Committee, General Assembly, Official Records: Thirty-Fifth Session, Supplement No.40 (A/35/40), p.29.

Since political rights - as any other - carry with them responsibilities and obligations, they are subject to limitation and restriction, with the aim of striking the balance between the individual's right and the rights of the community as a whole.[23] The restrictions which the international provisions contain fall into three categories, directly or indirectly imposing limitations or restrictions on rights. These are : provisions of a general character authorising limitations or restrictions on the rights for general reasons; provisions recognising a particular right or freedom, expressly stipulating the limitation or restriction to be imposed therein in certain circumstances; other provisions of a general nature limiting the application of restrictions authorised under the provisions of other articles. For example, article 5 of the Political Covenant, like article 30 of the Universal Declaration, sets an explicit and binding interpretative rule in the sense of an absolute guarantee of the substance of human rights, since it prohibits any unreasonable limitation, restriction or even interpretation of these rights.

Since human rights taken together constitute an objective scale of values, any acts directed against this scale of values do not deserve the protection afforded by national, regional or international instruments. At the regional level, article 17 of the European Convention provides an example by denying : *"... for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein"*. The article goes on to set the scope of their limitations *"... to a greater extent than is provided for in the Convention"*. It is important to recall the views expressed by the Commission in the *Lawless Case*[24] highlighting the purpose for which rights are exercised, when it quoted the *travaux preparatoires* of article 17 declaring that the general purpose of the article is *"to prevent totalitarian regimes from exploiting in their own interest the principles enunciated by the Convention. It does not seem to us to follow, that in order to achieve that purpose, it is really necessary to take away every one of the rights and freedoms contained in the Convention ..."*. Thus, the principle is that no one should be able to invoke the provisions of the Convention *"to engage in acts aimed at the destruction of rights and freedoms."*[25] The purpose of such a provision is to safeguard these rights, by and through the protection of the free functioning of democratic institutions.

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23. The Universal Declaration contains no limitation on the practice of these rights, other than the general restriction in article 29. However, as the article 19 of the Political Covenant states, *"the exercise of the rights of freedom of opinion and expression ... carries with it special duties and responsibilities. It may therefore be subject to certain restrictions ..."*.
United Nations Official Records of the General Assembly, 10th session, Annexes 20th September - 20th December 1955 Agenda item 28 (part 2) p.51, para. 127.

24. *"Lawless Case"* Publications of the European Court of Human Rights Series B : Pleadings, Oral Arguments and Documents, Strasbourg, 1960-61, pp.400, 402.

25. The Court upheld that the same article *"cannot be used to deprive an individual of his rights and freedoms permanently merely because at some given moment he displayed totalitarian convictions and acted consequently"*.
*"De Becker"* Case Publications of the European Court of Human Rights, Series B: Pleadings, Oral Arguments and Documents, Strasbourg, 1962, pp.137-138.

A study on the Limitations on Human Rights according to international provisions has emphasised that in general, restrictions or limitations must be legal, in accordance with the law, and *"necessary in a democratic society"*.[26] They should be justified by specific reasons, including recognition and respect for the rights of others, public order, public security, national security, public health or safety.[27]

Though states may impose restriction, they are not obliged to do so, and any legislative limitation of human rights requires constitutional authorisation. Regional interpretation confirms that protection of freedom is the general rule, while its restriction is an exception. Limitations should not be resorted to except for the purposes for which they are prescribed and should not remain in force longer than the minimum period for which they are required.

Thus, the starting point in examining the scope of these freedoms is the norms which impose limitations on them or any other conditions which in practice might affect the exercise of rights. These rules and norms should be *"determined by law"*, *"prescribed by law"*,[28] *"established by law"*, *"in accordance with the law"*[29] or *"provided by law"*.

In this connection, it is important that the principle of publication be fully observed by states. By extension, any law which limits or restricts this principle is considered not only to undermine principles of legality, but to be an unjust law, whose maintenance is an abuse of power.

Similarly, at the regional and national level, the European legislator stressed the importance of legality of legislation, both in form and in substance, in the Convention and its first and fourth Protocols.[30]

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26. Final Report on the Study of the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under article 29 of the Universal Declaration of Human Rights Agenda item 8 E/CN.4/Sub.2/432/Rev.1 and Add.1-7.

27. For example, though the African Charter specifies that the exercise of the right of freedom of expression must be according to law, and the American and European Conventions along with the draft Arab Human Rights Covenant specify that restriction of the exercise of the right must be according to law, the European Convention alone provides that restrictions should also be *"necessary in a democratic society"*.

28. *"Prescribed by law"* implies that legislation should be accessible to the citizen, (for example, Silver v. United Kingdom), and that it should be clear enough to enable the citizen to regulate his behaviour accordingly, (for example, Sunday Times v. United Kingdom).

29. The Human Rights Committee considered that the phrase *"in accordance with the law"* in article 13 of the Covenant refers to provisions of domestic law, which *"must in themselves be compatible with the provisions of the Covenant"*. The Committee considers that interpretation of domestic law is *"essentially a matter for the courts and authorities of the State party concerned. It is not within the powers or functions of the Committee to evaluate whether the competent authorities of the State party in question have interpreted and applied the domestic law correctly ... unless it is established that they have not interpreted it and applied it in good faith or that it is evident that there has been an abuse of power"*.
Communication no.58/1979, 9th April 1981 (twelfth session)
Human Rights Committee, Selected Decisions Under The Optional Protocol, 1985 pp.82-3.

30. According to the European instruments, if the following conditions are met, limitations or restrictions are permitted : the first condition is that the limitations or restrictions must be legal; they must be *"in accordance with the law"* (article 8/2 of the Convention and article 2 para.3, 4 of Protocol No.4Å, *"prescribed by law"* (articles 9/2, 10/2 and 11/2 of the ConventionÅ, or **"subject to the conditions provided for by law and by the general principles of international law"** (article 1 of the first Protocol to the ConventionÅ.

An indication of the extent of this legality is found in the Commission's view that *"in accordance with the law"*, in the Convention, refers to the *"Rule of Law"*[31] or principle of legality in addition to domestic law.[32]
A clear statement of the Court's view of *"law"* is found in the *"Malone Case"*, where it stated that though referring primarily to domestic law, it also includes other requirments relating to the quality of the law, requiring compatibility with the rule of law. The requirements are "accessibility" and "foreseeability" : the citizen must have adequate indication as to the legal rules applicable in a particular case, and he must be able, if necessary, with legal advice, to foresee, to a degree reasonable in the circumstances, the consequences of a given action. The Court went on to state that *"there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities ... especially where* ***a power of the Executive is exercised in secret, the risks of arbitrariness are evident"***.[33]

The questions which arise from the requirement of legality revolve around the nature of the legislation itself, the organs available, and what is the concrete interpretation of a law which imposes restrictions or limitations which could be described as ***"arbitrary"***, ***"unlawful"*** or even ***"unjust"***. In this connection, it must be said that the assessment

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31. The Israeli Supreme Court considered that refusing the petition against the administrative action of the minister would constitute reduction of *"the principle of the rule of law in this country to a mere platitude. The fundamental meaning of this principle is that limitations ... may be imposed by law, ie., by the opinion of society as reflected in the laws enacted by its representative legislature, and not by the executive authority whose duty is merely to enforce the imposition of these limitations according to such laws. The rule embodied in the principle considers that the liberties of the individual cannot be limited or denied by an official or minister just because he thinks - perhaps justly - that such a course is for the benefit of the state. It is his duty to convince the legislature that such limitations are necessary, and only after having obtained its consent may he proceed to put the limitations into effect"*.
Sheib v. Minister of Defence (1951), Selected judgements of the Supreme Court of Israel
Final Report on the Study of the Individual's Duties to the Community ...
E/CN.4/Sub.2/432/Rev.2 p.84.

32. *Silver et al v. United Kingdom* Application no.5947/72 Report of the Commission, 11th October 1980.
In this case, the Court, considering that Prison Rules relating tp prisoners' correspondence cannot be regarded as law, found that a breach of articles 8 and 13 had occurred.
European Court of Human Rights Series A, Judgement of March 25th 1983.

33. Paragraph 68 of the Court's judgement goes on to state that legislation conferring discretion must indicate its scope and the manner of its exercise with sufficient clarity, to give the individual adequate protection against arbitrary interference.
*"Malone Case"* European Court of Human Rights, Judgement 2nd August 1984, paras. 66-68
In 1963, the Human Rights Commission adopted some definitions for the purpose of the *Study of the Right of Everyone to be Free from Arbitrary Arrest, Detention and Exile* where the term *"arbitrary"* in this phrase means : (a) *"on grounds or in accordance with procedures other than those established by law"*, or (b) *"under the provisions of a law the basic purpose of which is incompatible with respect for the right to liberty and security of person"*.
Two views of meaning of *"arbitrary"* emerged during the *travaux preparatoires* of article 9 of the UDHR : one that *"arbitrary"* should be replaced by *"except in the cases and according to the procedure prescribed by prior legislation"*, while the other, more comprehensive and a better safeguard, pointed out that an arrest or detention might be perfectly legal but nevertheless arbitrary.
Study of the right of everyone to be free from arbitrary arrest, detention and exile, p.6.
During drafting of Article 9 of the Political Covenant, the views were expressed that *"arbitrary"* meant *"illegal"* or *"unjust"* or *"both illegal and unjust"*.
E/CN.4/SR.47, paragraph 43.
When the Third Committee of the General Assembly discussed this paragraph the views were expressed that arbitrary arrest or detention was that which was carried out *"without any legal grounds"* or *"contrary to law"* or according to a law which was in itself *"unjust"* or *"incompatible with the dignity of the human person"* or *"incompatible with the respect for the right to liberty and security / ...*

of national authorities in fixing the limits which may be imposed on these rights cannot be ignored, since the Political Covenant and other instruments allow States a margin of appreciation, which in turn remains subject to review by the competent national authority and to surveillance and supervision at both the regional[34] and international levels.

Some clarification of the further qualification included in article 29 of the Universal Declaration and articles 21 and 22 of the Political Covenant, that restrictions be *"necessary in a democratic society"* may be drawn from the findings of the European Commission in the *Handyside Case*. Taking as its model of democratic society the member States Parties to the European Convention, the Commission considered that limitations on rights were required to support the needs or objectives of a democratic society.[35] The Court,[36] has found that although individual rights must occasionally be subordinated to those of a group, democracy does not mean simply that the views of a majority

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*of person*".

In the light of these varying definitions of the term arbitrary it is clear that the term is more comprehensive in scope as well as meaning than "*illegal*". While for example, an arrest which is illegal is arbitrary, it is not the case that an arbitrary arrest must be illegal. It may be perfectly legal but unjust, and therefore arbitrary. This was, substantially, the conclusion of the Committee in the *Study on the Right of Everyone to Be Free from Arbitrary Arrest, Detention and Exile*. The Committee also considered this definition corroborated by article 29, paragraph 2 of the UDHR.

Study of the right of everyone to be free from arbitrary arrest, detention and exile, 1964, p.7.

One can argue that, for example, the Uruguayan *Institutional Act No.4* of 1 September 1976, where "*The Executive Power, exercising the powers conferred on it by the institutionalization of the revolutionary process*" has issued the following "*Decrees: Art.1. The following shall be prohibited, for a term of fifteen years, from engaging in any of the activities of a political nature authorized by the Constitution of the Republic, including the vote ..*", which is unjust and therefore arbitrary.

Communications no.28/1978 & 33/1978. Human Rights Committee, Selected Decisions .. 1985, pp.57-8,63-5.

In Iraq, Law no.78 of 1977, by which "*the President of the Republic may decide on the publication of laws, resolutions, texts of treaties, agreements, instructions and special numbers of al-Waqai al-Iraqiya* (Official Gazette), *if the supreme interests of the State require so ... the President of the Republic may decide on the non-publication of laws, resolutions and regulations which concern the security of the State or which have nothing of public interest in their provisions*", must also be reagrded as susceptible to abuse, again illustrating the potential for arbitrary Executive acts.

34. At the regional level the European Commission has frequently concluded that, in cases in which it is established that a public authority has interfered with the exercise of the rights and freedoms guaranteed by the European Convention, it has not only the right but also the duty to examine the question whether such interference, be it legislative or otherwise, is consistent with the terms of the relevant provisions of the Convention.

35. The Commission's findings focused on the right to freedom of expression, which, in a democratic society involves a balance between the wishes of the individual and the good of the majority. In the Commission's view, democratic societies approach the problem from the point of view of the *individual's* right and the undesirability of restricting this. Thus, democratic societies, including member states of the European Convention, restrict freedom of expression in respect of libellous, blasphemous, seditious or obscene publications. The fact that legal codes in member states restrict the freedom in respect of indecent or obscene publications is also regarded as an indication of the need for such restrictions in a democratic society.

"*Handyside Case*" European Court of Human Rights Series B, vol.22 1976 (Strasbourg, 1979), pp.44-46

In De Becker v. Belgium, the European Commission expressed the opinion that paragraphs (e),(f) and (g) of article 123 sexies of the Belgian Criminal Code were not fully justified in the light of the Convention, whether they were regarded as instituting criminal penalties or as preventive measures relating to public safety, since the deprivation of freedom of expression for which they provided in other than political matters was imposed rigidly and for life, without regard to the possibility of mitigating that punishment if, in time, national moral and public order were restored and the maintenance in force of that particular disability ceased to be a measure "*necessary in a democratic society*" within the meaning of the article.

"*De Becker Case*" European Court of Human Rights Series B, 1962, pp.167f. See also, the Report of the Commission in *Torsten Leander v. Sweden* (17th May 1985) Application no. 9248/81.

36. *James, Young and Webster v. United Kingdom* (7601/76; 7806/77) Judgement 13 August 1981.

must always prevail. The balance must be achieved which ensures the fair treatment of minorities and avoids abuse of a dominant position.

The Court has also considered, in the *"Handyside Case"*, that although the national authorities have the right to assess the necessity for interference, the *"margin of appreciation"*, its decisions are subject to review. The scope of the *"margin of appreciation"* varies according to the nature of the aims being pursued in restricting an individual right. Further, a restriction on a right cannot be regarded as *"necessary in a democratic society"* if it is not proportionate to the legitimate aim pursued.[37]

However, this requirement would remain meaningless if this prescription were not qualified in the text as well as in effect, as states could then avoid their national and international obligations by promulgating laws or otherwise limiting individual or the community rights, despite recognition in the supreme law. The International Labour Organization, in tackling this requirement of legality, specified more explicitly than other instruments the need for just and fair legislation and administrative policy, in Convention 87, *"the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention"*.

Restrictions in respect of the rights and reputations of others are based on the principles that : firstly, the individual must be protected against the violation of his right by others, and secondly, that the individual should not undermine the rights of others, by abuse of his right. Restriction to protect the reputation of others clearly refers primarily, if not exclusively, to freedom of expression. For example, laws concerning defamation or incitement to racial hatred are clearly intended to strike the balance between the individual's right to freedom of expression and the rights of the community. The *"Mephisto"* case illustrates the interpretation of the German Federal Constitutional Court of restriction on the grounds of the reputation of others.[38]

It is notable that article 19, unlike the other articles in the Political Covenant, outlines not only the right it seeks to protect but also the duties which accompany its exercise.[39] During its drafting, there was

37. For example, in *"G. v the Federal Republic of Germany"*, the Commission considered that "precisely because of the cardinal importance to be attached to the preservation of the rule of law and the democratic system, the Convention requires a clearly established need for any interference with the rights it guarantees" before it can be justified on that basis. *"This is especially true in the context of freedom of expression which is the cornerstone of the principles of democracy and human rights protected by the Convention"*.
Report of the European Commission of 11th May 1984, para.110.

38. The Court decision of 24th February 1971, on the question of whether distribution of Klaus Mann's *"Mephisto, the novel of a career"* constituted a serious encroachment on the private life of Gustav Grundgens and his adopted son, as protected by article 1, para.1 of the Basic Law, so as to justify a court order prohibiting the reproduction, marketing and publication of the novel, irrespective of the freedom of artistic expression guaranteed under the Basic Law, was that *"a clash between the guarantee of artistic freedom - which in itself is free from any limitation - and the constitutionally protected right to privacy should be resolved by reference to the scale of values contained in the Basic Law."*
The Individual's Duties to the Community ... E/CN.4/Sub.2/432/Rev.2Â, pp.80-81

39. Two views were expressed during drafting: one, that this article should not be an exception to the general principle that the Covenant sets forth rights to be guaranteed and protected, rather than laying duties on individuals; the other, that the right was *"a precious heritage as well* / ...

some disagreement about how restrictions should be written into the article, as some believed that the limitation clause should be brief and of general nature, on the grounds that a list of specific restrictions would be better incorporated into a convention on freedom of information, since such a list would be too long for inclusion in the Political Covenant.[40]

The draft adopted confirms that governments prefer instruments of a general nature, whose vagueness permits interpretation of these obligations in line with their ideological views[41] a feature which limits

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... *as a dangerous instrument*", and that because of the influence of the modern media, its special nature should be emphasised. The latter view prevailed, and the phrase "*special duties and responsibilities*" was incorporated into the article.

At the regional level, neither the American Declaration nor the African Charter specify any restriction on the exercise of these rights. The draft Arab Human Rights Covenant imposes restriction only on the grounds of protecting the rights of others. The American Convention however, while specifying that the exercise of the right shall be subject to no prior censorship (except for that expressly provided in article 13, para.4), specifies the grounds on which subsequent liability may be imposed. The grounds include respect for the rights or reputations of others and the protection of national security, public order, or public health or morals. Article 13 goes on to specify, in para.3, some means by which the exercise of the right *may not be restricted*.

The European Convention stipulates that the exercise of these freedoms carries with it duties and responsibilities. It therefore specifies that it may be subject to "*formalities, conditions, restrictions or penalties*" on more extensive grounds than are specified in the American Convention. The additional grounds include the interests of territorial integrity, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.

In view of the provision mentioning the impartiality of the judiciary, in Sunday Times v. United Kingdom the Court affirmed both the freedom of the media to report matters of public interest and the right of the public to receive such information. The Attorney General had sought and obtained an injunction (upheld by the House of Lords) on the grounds that, in publishing information about the facts of the case against the Distillers company before the case was settled, the newspaper would be in contempt of court. The case was brought by the Sunday Times to the Commission, alleging that the injunction against them obtained by the Attorney General and upheld by the House of Lords, was an infringement of their right to freedom of expression. The Commission held the opinion that there had been an infringement of article 10, and this view was upheld by the Court, because the restriction was not considered "*necessary in a democratic society for maintaining the authority of the judiciary*"

It is worthwhile to note the views of the Law Lords in upholding the injunction. Three Law Lords agreed on the principle that issues which are the subject of court proceedings should not be tried in advance by the newspapers, while two considered that pressure which might influence a person to abandon or settle his case was intolerable. All agreed that the article was in contempt because it posed an unacceptable threat to the administration of justice.

European Court of Human Rights Series A, vol.30. Strasbourg, 1979.

40. They argued that no list could be comprehensive because of the different political and legal systems which exist, and therefore a working common formula was an urgent necessity. Those in favour of specific limitations however thought that a general formula was "*susceptible of arbitrary interpretation and application*", and that if the Covenant were to be an acceptable legal document, restrictions in the article should be phrased in unambiguous language. They also argued that a wider degree of freedom would be ensured if restrictions were given in detail. Suggestions for specific limitations included: (a) matters which must remain secret in the interests of national safety; (b) expressions which invite persons to alter by violence the system of government; (c) expressions which directly incite persons to commit criminal acts; (d) expressions which are obscene; (e) expressions injurious to the fair conduct of legal proceedings; (f) infringements of literary or artistic rights; (g) expressions about other persons, natural or legal, which defame their reputations or are otherwise injurious to them without benefiting the public; (h) the systematic diffusion of deliberately false or distorted reports which undermine friendly relations between peoples and States; (i) disclosure of professional secrets; (j) disclosure arising out of marital or professional relations; (k) expressions about public authorities and high personages; (l) communications with foreign governments; (m) blasphemous or treasonable statements. These seem to have been drawn from the work of the Third Committee on the text of the draft Convention on Freedom of Information in 1959-60.

United Nations Official Records of the General Assembly, 10th session, Annexes 20th September - 20th December 1955 Agenda item 28 (part 2) p.51, para. 128.

41. In the light of restrictions on the grounds of "*respect for the rights and reputations of others*" and even for the "*protection of national security, or of public order*", a member of the Human Rights Committee has commented that the imposition of the death penalty for an insult to the President / ...

the effectiveness of international human rights instruments.[42] Another is the vagueness of the clause which provides that restrictions on the right of freedom of expression should be only *"as are provided by law and are necessary (1) for respect of the rights and reputations of others, (2) for the protection of national security, or of public order (ordre public), or of public health or morals"*.

The Human Rights Committee has commented, in the light of articles of a Press Code, that to extend the concept of defamation to include an established body, *"would seem to prevent any criticism of the actions of governmental organs or bodies ..."*.[43] Unless otherwise justified on the grounds mentioned in the article such as, in the interests of national security, this clearly represents unreasonable restriction on the right.[44] Another comment has been made in the light of a constitutional provision which refers to *"supervision and constructive criticism ... that will safeguard the soundness of the domestic and nationalist structure and*

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... of the Republic is *"difficult to justify in the light of the Covenant"*.
CCPR/C/SR.746 of 22nd July 1987, p.2.

In addition, the comment has been made that a regulation in the Penal Code, according to which defamation constitutes *"any public allegations or imputation concerning a fact which impugned the honour or reputation of a person or an established body"* could be interpreted as meaning that any criticism of, for example, the functioning of a Parliament or a bill under consideration would be deemed an offence. It is important to point out that although the Covenant permits restrictions on the grounds of protecting the rights or reputations of others, the word *"others"* should not be taken to mean a legal entity, government body or the State itself.
CCPR/C/SR.715 of 11th July 1987, p.5.

In many countries, restriction on the right of freedom of expression among others, may be imposed on grounds such as being *"prejudicial to the spirit of national unity"*. Other terms used may be seen in an Act which regulates censorship, forbidding the propagation of *"reactionary ideas, chauvinism, racism or regionalism, 'defeatist' ideas or ideas serving imperialism, zionism and their supporters, or ideas which did not serve the objectives, interests and aspirations of the masses"*
CCPR/C/SR.748 of 22 July 1987, p.5.

Members of the Committee have questioned which organs are competent to interpret such terms, since there is clearly a risk that such a vaguely worded restriction might lead to abuse.
Report of the Human Rights Committee, General Assembly, Official Records: Thirty-ninth Session, Supplement No.40 (A/39/40), p.57.

42. As I argued in my previous research, *"certain governments wish their obligations to go so far and no further"*.
The Arab human rights position in the light of international law pp.39-40, and conclusion, p.xi.
Examples include reservations by Iraq on the Optional Protocol and United Kingdom for the rights of members of the colonies and dependencies, as well as the United States of America to the compulsory jurisdiction of the International Court of Justice till recent times.
At the regional level the European Commission has frequently concluded that even though a State has a certain *"margin of appreciation"* in fixing the limits which may be imposed on freedom of expression, nevertheless in cases where a public authority has interfered beyond this margin, the Commission has the right of supervision. The concept of margin of appreciation will be part of the examination of state of emergency.

43. The Press Code goes on to stipulate that defamation constitutes any public allegation or imputation concerning a fact, directly or by reproducing such allegations or such imputations, even if the defamation was expressed with an element of doubt or if it was directed against a person or an established body that was not expressly named, but that could be identified. To extend the concept of defamation to defamation of an established body, *"would seem to prevent any criticism of the actions of governmental organs or bodies. If a scrupulous and ethical journalist disseminated information which proved to be false, perhaps because the authorities had refused to give him the correct information, that might constitute dissemination of false information ..."*.
CCPR/C/SR.715 of 11th July 1987, p.5.

44. The work of the Third Committee on the text of the draft Convention on Freedom of Information in 1959-60 indicate that restrictions *"shall not be deemed to justify the imposition by any state of prior censorship of news, comments and political opinions, and may not be used as grounds for restricting the right to criticise the government"*.
Quoted in United Nations Study of Discrimination in the matter of political rights, 1962, p.18

*will strengthen the socialist system"*. The Committee, while accepting that the right of freedom of expression may be limited in the legitimate interests of the community, itself undertakes to determine whether national legislation restricting the exercise of rights transgresses the limits laid down by the Political Covenant.[45].

As for the interpretation of article 19 of the Political Covenant, the Committee has commented that the right contained in paragraph 1, to *"hold opinions without interference"* is an absolute and *"unqualified right"* which may not be restricted under any circumstances except within the terms of article 4 of Political Covenant[46], and that paragraph 2, includes the right not only to *"impart information and ideas of all kinds"*, but also freedom to *"seek"* and *"receive"* them *"regardless of frontiers"* and in whatever medium, *"either orally, in writing or in print, in the form of art, or through any other media of his choice"*.[47]

The Committee has considered the possible harmful effect of imposing restrictions on the exercise of the right in the light of the duties and responsibilities it carries. In its General Comment, it reiterated that certain restrictions might be acceptable if they relate either to the interests of other persons[48] or to those of the community as a whole, on condition that they do not jeopardise the right itself.[49]

In any case, in order to evaluate the position of this right, the criteria to be applied is not only whether the right to freedom of opinion and expression is guaranteed in the Constitution or law of a State, but also in examining the rules which define the scope of the freedom or which set forth restrictions[50] as well as any other conditions which in practice affect the exercise of the right,[51] including constitutional institutions

45. CCPR/C/SR.26 of 18th August 1977, p.6.
46. Report of the Human Rights Committee, General Assembly, Official Records: 35th Session, Supplement No.40 (A/35/40), p.29.
47. See General Comments under Article 40, Paragraph 4, of the Covenant adopted by the Committee at its 461st and 464th meetings (19th session) held on 27 and 29 July 1983.
CCPR/C/12/Add.2 of 24th August 1983, p.2, paras.1-2.
48. The European Commission upheld this principle, by finding that an Act promulgated by the Federal Republic of Germany on 9 July 1953, on the dissemination of publications liable to corrupt young people, in no way exceeded a certain margin of appreciation or constituted restrictions on freedom of expression as authorized under article 10/2 of the European Convention, since, first, they were prescribed by a law and, secondly, they constituted measures necessary for the protection of morals of young people.
The Council of Europe communication of 12 January 1976.
Comments relating to limitations on the exercise of certain human rights and fundamental freedoms, to the Special Rapporteur.
In contrast, the European Court's consideration of the *Handyside Case* extends the protection of the right not only to favourably received or inoffensive ideas or information, but even to those which may offend, shock or disturb. The publisher of *"The Little Red Schoolbook"* was convicted under the Obscene Publications Acts, but pursued his right to freedom of expression to the European Court.
49. CCPR/C/12/Add.2 of 24th August 1983, p.2, para.4.
50. Mr Tarnopolsky has commented that the Human Rights Committee is less concerned with the provisions of Constitutions and other laws which set forth fundamental freedoms than with the laws which restrict those freedoms, since *"those laws indicate the actual extent of freedoms ..."*. The Committee's concern is whether such restrictions are in keeping with the Covenant.
CCPR/C/SR.327 of 9th November 1981, p.10.
51. The Committee has expressed the opinion that the right is violated when, under a country's Military Penal Code, persons may be detained, charged, and convicted for subversive association or assistance to subversive associations apparently on no basis other than their *political views* and connections, since the government concerned has submitted no evidence to show that this was / ...

which review legislation and monitor administrative practice. As the Committee rightly put it, it is the *"interplay between the principle of freedom of expression and such limitations and restrictions which determine the actual scope of the individual's right"*.[52]

In this connection, the *ILO Committee on Freedom of Association* has stressed the necessity of freedom of opinion and expression to other rights as well, since it attaches importance to the right to express thoughts freely, as an integral part of the freedom which trade union organizations should enjoy, considering that the right to express opinions through the press or otherwise is one of the essential elements of trade union rights, and that the right would be seriously undermined if the administrative authorities decided to interfere by, for example, censorship of means of communications and publications of associations' views.[53]

Another issue affecting freedom of opinion and expression is the obligation undertaken under article 20 of the Political Covenant, according to which States Parties must adopt certain legislative measures restricting the right of freedom of expression, where it might constitute advocacy of hatred or discrimination or propaganda for war.[54]

The Committee considered that these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, in the light of the *"special duties and responsibilities"* it carries. States' obligation under paragraph 1 extends to all forms of propaganda, whether threatening or resulting in an act of aggression or threat to peace contrary to the U.N. Charter, while paragraph 2 outlaws any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such advocacy or propaganda has aims which are external or internal to the State concerned. Naturally these conditions do not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence. The Committee suggested that relevant national legislation must confirm that such activities are contrary to public policy, and provide for appropriate sanction in the case of

... necessary for any of the purposes specified in the article. It also considers that it is violated when the real grounds for such prosecution are that the person concerned has taken part in trade union activities, or *spread information* about such activities.
Burgos v. Uruguay Communication no.52/1979 29th July 1981 (13th session)
Weinberger v. Uruguay Communication no.28/1978 29th October 1980 (11th session)
Human Rights Committee Selected decisions under the Otional Protocol, 1985 (CCPR/C/OP/1), pp.88-92, pp.57-60.

52. CCPR/C/12/Add.2 of 24th August 1983, p.2, para.4.

53. See in this respect : ILO Committee on Freedom of Association, 241th and 131st Reports, Cases No.1021, para.124, 683, para.201.

54. For example, see the Human Rights Committee's consideration of State report (CCPR/C/1/Add.45) and (CCPR/C/37/Add.3) with regard to *"the extensive powers granted to the Censorship Committee"* under Act No. 64 of 1973, which instituted censorship for certain documents and films, and forbidden to propagate *"reactionary ideas, chauvinism, racism or regionalism, 'defeatist' ideas or ideas serving imperialism, zionism and their supporters, or ideas which did not serve the objectives, interests and aspirations of the masses"*.
CCPR/C/SR.748 of 22 July 1987, p.5.

violation. The *travaux preparatoires* for article 19 indicate that a clause specifying that freedom of expression should not be *"exploited for war propaganda, for incitement to hatred among peoples, for racial discrimination and for dissemination of slanderous rumours"* was rejected along with a proposal that the freedom should be subject to *"such restrictions as were necessary for the maintenance of peace and good relations among States"* on the grounds that they were susceptible of misinterpretation and further, might give grounds for the establishment of a system of censorship.[55]

During the drafting of the Political Covenant, it was realised, though not acted upon, that the wording of general restrictions of the rights protected by a number of articles was similar, but not uniform. Since articles 19, 21 and 22[56] each contain the term *"public order (ordre public)"*, and since they are often used as the grounds for legal restriction of the exercise of these political rights, it is particularly important to illustrate the international legal understanding of these concepts and their concrete interpretation. It is vital because the efficacy of the instruments may be undermined on these grounds, particularly in developing countries, where the national understanding of concepts such as *"public order"* or *"public interest"* *"national security"* and so on, might be subject to widely differing interpretation which might in turn lead to unlawful or unjust restrictions. However, neither in the drafting of the Covenant nor in consideration of the provisions of the Political Covenant by the Human Rights Committee has there been an attempt to define precisely the proper scope of exceptions, although their possible effect is of the greatest significance in assessing *"how much freedom ÆisÅ left to individual once those exceptions had been applied"*.[57]

The use of the expressions *"public order"* and *"ordre public"* led to extensive discussions during drafting of these articles. It was suggested at the time, that the use of these terms in the limitation clauses might create uncertainty and give rise to far-reaching derogations from the rights which the articles guarantee. However, the proposal that the term public order should be replaced by the English legal concept, the prevention of public disorder, was not adopted.[58]

It may be noted that the English expression *"public order"* does not have the same meaning as the French term *"ordre public"* as far as the two legal concepts in civil law and common law countries are concerned.

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55. CCPR/C/SR.26 of 18th August 1977, p.6
56. The grounds could be: *"national security or of public order (ordre public), or of public health or morals"* (article 19); *"national security or public safety, or public order (ordre public), the protection of public health or morals"* (21); *"national security or public safety, or public order (ordre public), the protection of public health or morals"* (22).
57. A member of the Human Rights Committee has commented that *"the concepts of 'public order' or 'national security' might be interpreted somewhat differently in different countries"*. CCPR/C/SR.103 of 3rd August 1978, p.7
58. United Nations. General Assembly, 10th session, 20th September 1955. Official Records Annexes - Agenda item 28 (part 2), p.52, para. 132.

While the English term, in common law countries, means the absence of public disorder,[59] the French term, in civil law countries, is a legal concept used as a basis for negating or restricting private agreements, the exercise of police power or the application of foreign law, and in general, regulating and balancing the relationship between the administration and the public.

The common law equivalent of *"ordre public"* is *"public policy"*, rather than *"public order"*. The right likely to be restricted on the grounds of public order (or public safety[60]) is that of freedom of assembly. There is a clearly a danger that the right to hold peaceful meetings and demonstrations is subject in some societies to prohibitions and limitations which would not be permissible in a democratic society. Limitation of freedom of assembly on these grounds tends to be expressed through regulations or police powers to supervise demonstrations or processions and take action should public order or public safety be threatened. Clearly, police powers in this respect should be organised by law in advance and only exercised in the manner intended. Police powers, for example, to prevent the obstruction of traffic should not be used to impede political demonstrations.

The Report on Limitations on Human Rights has rightly stressed the difficulty in establishing a precise definition of the concept of public order in the international context, since the world legal order encompasses several interpretations, and even within a given society it is not an unchanging concept.[61] By reviewing some governments' comments relating to limitations on the exercise of rights, one may see aspects of these difficulties. For example, within the Soviet Socialist Republics, the relation between the socialist state and citizen is *"... imbued with a spirit of mutual respect, trust and co-operation, as well as mutual responsibility ... In possible conflict between social and personal interests, the conscientious citizen will give preference to social interests"*.[62] The provisions of article 36 of the Iraqi Provisional Constitution seem to be interpreting the concept of *ordre public*, when they prohibit any activity that runs counter to the objectives of the people, while the term public order has been used in the Pakistani Constitution, in its general meaning, not necessarily the absence of

59. English common law regulates assembly according to aspects of *"public order"*, namely, breach of the peace, riot and *"unlawful assembly"*. As regards riot, a definition of the term is derived from Field v. Metropolitan Police District Receiver, where *"necessary elements"* of riot were found to comprise : *"(a) a number of persons, three at least; (b) common purpose; (c) execution or inception of the common purpose; (d) an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; (e) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage"*.

60. *"Public safety"*, as a ground for restriction of individual rights, has been defined by the Moroccan government as : *"... intended to ensure, within the country the public peace, social harmony and respect for the decisions of the public authorities"*.
The Individual's Duties to the Community ... E/CN.4/Sub.2/432/Rev.2, p.87.

61. Final Report of the Study of the Individual's Duties to the Community ... E/CN.4/Sub.2/432/Rev.1 and Add.1-7.

62. The replies of the Governments of the Byelorussian Soviet Socialist Republic, the Ukrainian and the Union of Soviet Socialist Republic are identical in relation to this point.

disorder. According to the High Court of Lahore, a man may commit an act which may not cause disorder, but which may adversely affect human safety. The term covers the concepts of protection of persons and property, the safety of human life, public peace and tranquillity.[63]

The Supreme Court of India has emphasised that contravention of law must affect the community or the public at large before it can be said to affect public order, which includes acts which disturb public tranquillity and are breaches of the peace, but not acts disturbing only the serenity of others.[64]

The Federal Republic of Germany declined to say whether the expressions public order and *ordre public*, given equal status in the Political Covenant, are completely identical, though it stated that in any event, *ordre public* should not be interpreted as an abstract concept but in the light of the purpose of the right which is restricted by the reference to *ordre public*. It went on to confirm that only a democratic society provides adequate guarantees that the permissible reasons for limitations are not misused to oppress persons or suppress opinion and meetings, making reference to the permissibility of various limitations on rights in *"democratic societies"*[65]. West Germany also commented, with regard to the terms public interest, national or public security and public order *(ordre public)*, that these concepts *"... are only too easily confounded in a dictatorially governed society with an interest in maintaining a dictatorship"*.

The Special Rapporteur suggests as a definition of public order : *"the sum of the rules which ensured the security of a society or the set of fundamental principles in which the interests of a given society were founded, violation of which might imply only partial illegality of a legal act or foreign law, the application of which was permitted in the national territory."*[66]

The study goes on to mention the qualification included in the comment of the Federal Republic of Germany.[67]

*"National security"*, according to the Moroccan government, relates to *"measures enacted with a view to safeguarding territorial integrity and national independence against any external threat"*.[68] Likewise, in

63. The Individual's Duties to the Community ... E/CN.4/Sub.2/432/Rev.2 pp.84, 89.
64. Lohia v. State of Bihar [1966] 1 SCR 709 and Madhu Limaye v. Sub-Divisional Magistrate, Monghyr [1971] 2 SCR 711.
65. The Individual's Duties to the Community ... E/CN.4/Sub.2/432/Rev.2, pp.79-81.
66. This definition seems to be drawn largely from the comment of the Moroccan government on limitations on the exercise and fundamental freedoms, collected during preparation of the Study. This definition provides that public order is : *"the whole set of fundamental principles on which the supreme interests of a given society are founded, which can be neither evaded or modified, but violation of which may imply only partial illegality of a legal act or foreign law, the application of which is requested in the national territory"*.
Ibid, p.87.
67. The Special Rapporteur adds : *"the nature of the legal rules which for reasons of morality or essential security were necessary in a social relation, public order or ordre public should, however be interpreted not as an abstract concept but in the light of the purpose of the human rights concerned which were restricted by the reference to public order"*.
Ibid, p.79-81.
68. Ibid, p.86-88.

Pakistan, the term national security is used in connection with the security of the State as a whole, being *"menaced by any activity prejudicial to the existence of the State".*[69]

These definitions indicate that the issue of national security, as grounds for restriction of rights may be regarded as similar in scope to the circumstances giving rise to the imposition of a state of emergency. Since this issue will be examined in the last section of this chapter, at this stage it is sufficient to indicate that several of the principles elaborated there apply to the imposition of restrictions on the grounds of national security in normal times, in particular, the principles of exceptional threat and proportionality. Above all, it is important to note that, as the Human Rights Committee pointed out in its General Comment on article 19 of the Covenant, restrictions should not *"put in jeopardy the right itself".*[70] The European Commission too, has confirmed that restrictions may not be applied in a sense that completely suppresses the freedom, but only insofar as is necessary for preserving the values which the instrument enumerates and protects.[71]

In several countries, restriction on the right of freedom of expression among others, may be imposed on grounds such as being *"prejudicial to the spirit of national unity"*, and members of the Human Rights Committee have questioned which organs are competent to interpret such terms,[72] since there is clearly a risk that such a vaguely worded restriction might lead to abuse.[73]

It is only in the Universal Declaration and the International Covenant on Economic and Social Rights in article 4, that *"general welfare"* constitutes a basis for imposing limitations on human rights. Apart from the exemptions in the event of a public emergency provided by article 4, the Political Covenant does not contain a comparable general clause. This is significant within this research in the light of the fact that this term might be used to restrict the practice of human rights because of its vagueness and *"... the concomitant danger of abuse"* it carries with it, since it is not clear what human rights in this Covenant could be

69. Ibid, p. 88-89.
70. General Comments under article 40, paragraph 4, of the Covenant adopted by the Committee at its 461st and 464th meetings (nineteenth session) 27th and 29th July 1983 (CCPR/C/21/Add.2) 24th August 1983, p. 2.
71. In Handyside v. United Kingdom, the Commission, considering the relationship of a restrictive clause to the right which it qualifies, found that it was that of an exception to a general rule. In other words, the protection of the freedom is the general rule, while the restriction is an exception. The restriction may not be used to suppress completely the freedom, but only to the extent necessary for preserving the values protected by the provision.
*"Handyside Case"* European Court of Human Rights Series B, vol. 22 1976 (Strasbourg, 1979), p. 43, para. 137.
72. Other terms may be seen in an Act regulating censorship, forbidding the propagation of *"reactionary ideas, chauvinism, racism or regionalism, 'defeatist' ideas or ideas serving imperialism, zionism and their supporters, or ideas which did not serve the objectives, interests and aspirations of the masses".*
CCPR/C/SR.748 of 22 July 1987, p. 5.
73. Report of the Human Rights Committee, General Assembly, Official Records: 39th Session, Supp. No. 40 (A/39/40), p. 57.

restricted for the widely used term in developing countries and transitional societies of *"economic and social development"*.[74]

So far as the protection of *"public health"* is concerned, it is notable that the Political Covenant provides, in several articles, for imposing restrictions for the protection of the health of the community.[75] However, public health in the sense of articles 19, 21 and 22 of the Covenant would seem likely to refer to the spread of infectious disease, for example, which might constitute a reason for restricting free assembly, or regulation of health information. At the regional level, the European Commission has also pointed out that the term *"protection of health"* according to article 8/2 of the European Convention covers not only the general protection of the health of a community as a whole, but also the protection of individual members of the community.

The European Commission's consideration could shed light on another important aspect of this topic when it notes that other rights might be subject to restrictions which - in accordance with the law - constituted measures necessary in a democratic society for the protection of public health or morals.[76]

With regard to limitations or restrictions on moral grounds, the Commission has also expressed the view that the term *"protection of health or morals"* according to the same article of the Convention, covers not only the general protection of the morals of a community as a whole,[77] but also the protection of individual members of the community, and like the term *"health"* covers both the psychological as

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74. This interpretation is shared by the Food and Agriculture Organization, which suggests that such criteria could be invoked to justify restrictions on individuals' right to own property imposed by legislative and other measures taken by the authority *"with a view to promoting or protecting the interests of the community, in particular for furthering economic and social development"*.
The Individual's duties to the community ... , E/CN.4/Sub.2/432/Rev.2, p.97.

75. Though the preamble of the Constitution of the World Health Organization defines *"health"* as *"a state of complete physical, mental and social well-being and not merely the absence of diseases or infirmity"*.

76. The European Commission considered that the expression *"protection of health"* might reasonably apply to measures taken for the prevention of disease in cattle. It was in the interest of the community and consequently, necessary in a modern society, that appropriate measures to that end, including affiliation with the health service, should be taken by the Government. There was therefore no violation of article 9 of the Convention and the application was accordingly declared inadmissible as being manifestly ill-founded. In the case in point, article 4 of the Netherlands Act of 1952 relating to the prevention of tuberculosis in cattle, which makes it mandatory for cattle farmers to be affiliated with the health service, does not violate article 9 of the European Convention, as was alleged by an applicant. He maintained that article 4 of the above-mentioned Act placed him in a situation in which his religious conscience as a member of the Netherlands Reformed Church conflicted with the general obligations imposed on cattle farmers. The Commission considered in this respect that the right to freedom of religion might be subject to restrictions.
Quoted in The Individual's Duties to the Community ... E/CN.4/Sub.2/432/Rev.2, 1983, p.101.
Another example is *X v. United Kingdom*, Application no. 7992/77, where the Commission accepted the requirement of all motor-cyclists to wear a crash-helmet, including those whose religion requires them to wear a turban, as justified on the ground of protection of health.

77. For example, the Federal Republic of Germany has commented that : *"as individuals do not live in isolation, they must not only respect the rights and freedoms of others. but also take into account the generally accepted moral code"*.

well as the physical well-being. It is clear that the substance of public morals differs from one community to another[78] and in the various regions of the world, being subject in addition to the process of change.[79]

Limitations on human rights in regard to morals therefore, must be restricted because of the danger of abuse of such vague terms.

In general, the observation could be made that these terms in the articles are both inconsistent and not sufficiently precise to be used as a basis for restriction of the rights. In the present development of international institutions to supervise individual states' interpretation of the provisions of human rights law, the use of such terms does little to safeguard the protection of the individual's rights against governments which may seize several pretexts to restrict further the rights of their opponents.[80] Concepts such as *"public order"*, *"national security"*, *"democratic society"*, *"public safety"* and *"morality"* have meaning only within a particular ideological and theoretical context.

The Human Rights Committee has considered that restrictions on such grounds as *"the compatibility of such enjoyment with the ideological principles and foundations of the political system and its prevailing plans and programmes"* incompatible with the provisions of the Covenant, since they could be used to justify the imposition of measures contradicting its spirit.[81] In particular, the description *"democratic society"* has been applied to a wide range of political systems, encompassing a system of parties, proportional representation, one-man one-vote, direct popular democracy and constitutional monarchy.[82]

78. As an example from the Muslim community, restrictions on the grounds of *"public morality"* in Pakistan are governed by the *"Principles of policy"* set out in the Constitution of 1976, according to which the State is required, in respect of Muslims, to promote collective observance of Islamic moral standards. The Pakistani government's response to the Study on The Individual's Duties to the Community gives as examples, the elimination of prostitution, gambling and obscenity, prohibited according to Islamic principles.
E/CN.4/Sub.2/432/Rev.2, p.87.

79. This is confirmed by the findings of the European Commission in the Handyside Case, where it noted that it is impossible to impose uniform standards of morality within the European Community, but that moral standards prevailing in any country must be considered in order to determine whether the action taken was necessary to protect those standards. The Court confirmed that a uniform European conception of morals cannot be found in the domestic law of European states. The views of their respective laws of the requirement of morals varies in time and in place.
*"Handyside Case"* European Court of Human Rights Series B, vol.22 1976 (Strasbourg, 1979), p.46, para.154.

80. Report of the Human Rights Committee, General Assembly, Official Records: Thirty-Fifth Session, Supplement No.40 (A/35/40), p.26.
See also CCPR/C/SR.26 p.3, para.10.

81. According to Unesco's reply to the Study on the Individual's Duties to the Community ...
E/CN.4/Sub.2/432/Rev.2, p.99.

82. According to the Moroccan reply *"there was no need to require in the Constitution that limitations on human rights should be permissible only within a democratic society, since under article 1, of the Moroccan Constitution, 'Morocco is a constitutional, democratic and social monarchy'"*.
The Individual's Duties to the Community ... E/CN.4/Sub.2/432/Rev.2, p.87.

# SECTION TWO

# THE RIGHTS OF ASSEMBLY, ASSOCIATION AND TRADE UNIONS

## FREEDOM OF ASSEMBLY AND ASSOCIATION

The rights of assembly[83] and association[84] are to be found in international and regional instruments,[85] particularly those of the International Labour Organization.[86]

Beginning with the UN Covenants, and the Universal Declaration, while the Universal Declaration combines the right of assembly with the closely related right of association, in the *travaux preparatoires* of the Political Covenant the rights of assembly and association were divided between two articles.

Although there was general agreement that the right of peaceful assembly should be included in the Political Covenant, elements constituting that right were the subject of discussion, concerned with whether freedom to hold assemblies, meetings, processions and demonstrations were part of the right.[87]

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83. Liberal thought has long recognised the right of assembly as a means of expression. In 1791, the First Amendment of the United States Constitution provided : *"Congress shall make no law ... abridging ... the right of the people to assemble"*.
Soviet theorists consider freedom of assembly to be among the most important political freedoms. For example, the Soviet Constitution of 1977 provides, in article 50, provides : *"In accordance with interests of the people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom ... of assembly, meetings, street processions and demonstrations. The exercise of these political freedoms is ensured by putting public buildings, streets and squares, at the disposal of the working people and their organizations ..."*.
All the regional instruments save the African Charter protect the right to assemble peacefully, and the American Convention adds *"without arms"*, while the African Charter simply specifies the right to assemble freely.

84. The right of association is safeguarded by the Soviet Constitution, subject to the ideological context of Communism, according to article 51, which provides that, *"in accordance with the aims of building Communism, citizens of the USSR have the right to associate in public organizations that promote their political activity and initiative and the satisfaction of their various interests. Public organizations are guaranteed conditions for successfully performing the functions defined in their rules."*
Islam too, recognises the right to associate and contemporary interpretations may be found in the Islamic Declaration of Human Rights, which provides that : *"(a) Every person is entitled to participate individually and collectively in the religious, social, cultural and political life of his community and to establish institutions and agencies meant to enjoin what is right (ma'roof) and to prevent what is wrong (munkar). (b) Every person is entitled to strive for the establishment of institutions whereunder an enjoyment of these rights would be made possible. Collectively, the community is obliged to establish conditions so as to allow its members full development of their personalities"*, and the Constitution of the Islamic Republic of Iran, in article 26, which states : *"Parties, associations, political groups and trade unions and Islamic or recognised religious minorities, societies shall be free, provided that they do not violate the principles of independence, liberty, national unity and Islamic standards and the foundations of the Islamic republic. No person shall be forbidden or forced to participate in any of these."*

85. For example, article 8 of ICESR, article 22 of ICCPR and ILO Conventions nos. 11, 84, 87, 91, 94, 98, 135, 149. At the regional level, protection of this right found its place in the American Declaration and Convention, the African Charter and the European Convention, and the draft Declaration of Arab Human Rights.

86. For example, the preamble of the Constitution of the ILO declares *"recognition of the principle of freedom of association"* to be a means of improving conditions of labour and of establishing peace.

87. Some argued that the right might not include the right to hold processions in public places. This represents a restrictive view of the content of the right of peaceful assembly, since several Constitutions emphasise the right of peaceful demonstration. For example, the Soviet Constitution of 1977, in article 50, safeguards the right of assembly, specifying street processions and demonstrations, putting *"the streets and squares at the disposal of the working people and their organizations"*.
The American Declaration alone among the regional instruments provides clarification, when it specfies *"in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature"*.

Discussion also focused on the protection of the exercise of this right from governmental interference. The consensus was that the individual should be protected from all kinds of interference in the enjoyment of this right. The form of wording eventually adopted in the Covenant was the subject of some debate, since the question was raised of whether it was a right which should be granted under the Political Covenant or whether it was a fundamental right which should be recognised by States Parties. The latter view prevailed, and it was felt that this article need not contain the explicit requirement that the right be recognised by law, as we saw in article 20, since this was implied for all the rights in the Covenant by article 2.

The *travaux preparatoires* record several views as to the nature and scope of restrictions on this right. One view was that the qualification *"necessary in a democratic society"* should be added to any restriction allowed on the exercise of the right. The proponent of this view argued that protection of this right cannot be effective outwith the framework of a democratic society. To the objection that *"democracy"* might be understood differently in various countries, the answer was given that a democratic country might be characterised by its respect for the principles of the U.N. Charter, the Universal Declaration, and the Covenants. The phrase *"necessary in a democratic society"* was finally adopted.[88] In this connection, it must be emphasised that since freedom of assembly is considered to be *"a major part of the political and social life of any country,"*[89] one would have expected article 21, in regard to the use of the phrase *"in conformity with the law"* to be in line with the phrase used in article 22 of the Political Covenant, where it is specified that restrictions on the right of association should be *"prescribed by law"*.[90] The former is a vague term,[91] particularly in relation to the national legislation of certain states where the legal order cannot be described as in conformity with the basic requirements of international standards. This wording may allow administrative abuse, since it could leave the Executive with wider powers, opening the door for interpretation of the term *"in conformity with the law"*, since restriction on the right would not necessarily require prior legislation.

88. GAOR Annexes 20th September - 20th December 1955, p.54, para. 143.
Both the European and the American Conventions also specify that restrictions should be *"necessary in a democratic society"*.

89. The European Commission, furthermore, considered it in the *"Greek Case"* *"... an essential part of the activities of political parties..."* and furthermore, *"... in the conduct of elections under Article 3 of the First Protocol, which are to ensure the free expression of the opinion of the people"*.
Yearbook of the European Court of Human Rights, 12, 1969, pp.170-171, Report of the Commission, para.392

90. Although, the American Declaration does not restrict the exercise of this right, all the other instruments specify that restrictions must be by law and *"necessary"*, though there is a distinction, as in the Covenant, in that the European and the African provide that restrictions must be *"prescribed by"* and *"provided by"* law, while the American Convention, like the Covenant, provides for restriction *"in conformity with the law"*.

91. One can say that the characteristic vagueness of those concepts - despite their justification - gave rise to fears that they might lead to abuse if not further defined. It was suggested that the words *"reasonable and"* should precede *"necessary"*, but this was not adopted.

The restrictions in article 22 represent a more precise safeguard of the right since the rule is that everyone should have the right to assemble peacefully and the exception is the restriction, which should be clearly and explicitly *prescribed* by the legislature.

Some thought that only one fundamental restriction should be incorporated in the article, that: *"All the activities of societies, unions and other organisations of a fascist or anti-democratic nature shall be forbidden by law, subject to penalty."* This opinion was, rightly, in favour of emphasising and assuring that this right be recognised in the interests of democracy. It was pointed out that were the right of peaceful assembly to be exercised by anti-democratic groups all the rights recognised in the Covenant might be jeopardized. Although it was argued that denying certain groups freedom of assembly on account of their opinions would be contrary to the principles of freedom of opinion and expression, it was rightly pointed out that terms such as *"fascist"* or *"anti-democratic"*[92] are not clearly defined and might lead to abuse. If any group's activities became a public danger, laws concerning public order, national security and the rights of others could be applied to safeguard the public interest.

The Freedom of Association Committee in emphasising these basic principles, has considered in several cases that the right to assemble is a fundamental element of trade union rights,[93] and thus that the authorities should not interfere in the exercise of the right of trade union assembly in a way which could restrict the right, such as in the case of holding meetings. The lawful exercise of this right should be protected from any arbitrary presence of the public authorities, the need for previous authorisation and control by the authorities.

The Committee has considered that *"although the right to hold trade union meetings is a basic requisite of freedom of association, the organisations concerned must observe the general provisions relating to public meetings, which are applicable to all."* The Committee has considered that the qualifications enjoyed by this sector of the population could become the subject of restrictions by the authority concerned with the maintenance of public order, to decide in the exercise of its *"corresponding powers whether meetings may in certain special circumstances, endanger public order and security and to take the necessary steps."* This exceptional power again should not be used to suppress the right, that is to say that if the authorities for example,

92. As in the case of national legislation, where terms such as anti-democratic, Zionist, imperialist, reactionary.....(Subversive) could lead to confusion and abuse.
As during the discussions of articles 18 and 19, which was summarised above, the terms used in the list of limitations again raised doubts about the abuse of such vague concepts by States. Proposals were made to replace the term *"public order"* with the phrase *"prevention of disorder"*, following the European Convention, and to add another ground to the list of restrictions *"in the general interest"*. Both were rejected.

93. *"Freedom of assembly for trade union purposes constitutes one of the fundamental elements of trade union rights."*
2nd Report, Case No. 21, para. 23; 7th Report, Case No. 56, para. 67; 14th Report, Case No. 104, para. 102.

decided to prohibit the meeting held in a public place, the authority should allow the meeting to take place somewhere where there would be no fear of disturbances, thereby maintaining the right of freedom of assembly.[94]

The European Commission has considered the right to peaceful assembly a *fundamental right and one of the foundations of a democratic society*, and found that, while public demonstrations may require prior authorisation, a complete ban on all demonstrations cannot be justified according to the Covention. A less complete ban on public processions in a capital city for a limited period may be justified if it is believed that serious disorder cannot be prevented by less strict measures.[95]

As we saw, the Universal Declaration combines the right to assemble and the right to association in a single article. The right to form and to join trade unions is provided in article 23, paragraph 4. The Covenant, by contrast, divides assembly and association between two articles, but includes trade union rights as an aspect of the right of association.

In a pattern familiar from article 19, article 22 in the Political Covenant begins with an explicit statement of the right and then goes on to an aspect of it, namely the right to form and to join trade unions. The article goes on to set the acceptable limitation and restriction on its practice. As we saw, the article in the Universal Declaration contains no specific restriction, but only the general restriction of articles 2 and 29 which apply to all the rights. The right to association is recognised in regional instruments, including the European Social Charter,[96] in which the term *"association"* refers to a grouping of a specific nature and with a certain function.[97]

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94. The Committee held the view that *"Workers' and employers' organisations should have the right to hold congresses without previous authorisation and to draw up their agendas in full freedom."*
4th Report, Case No.38, para.180; 204th Report, Case No.962, para.254 and 255

95. *Christians against Racism and Fascism v. United Kingdom* Application no.8440/78.

96. All state the right to freedom of association, but only the American instruments go on to specify the scope of possible groupings. Each specifies the permissible purposes of associations as political, economic, religious, social, cultural and labor, while the Declaration adds *"professional"* and the Convention adds *"ideological"* and *"sports"*. In addition, both instruments add a phrase extending the scope of the article : the Convention adds *"or other purposes"*, the Declaration *"or other nature"*. Thus, these instruments contain no limitation on the scope of associations. In contrast, the African Charter states that an individual may only exercise the right *"provided he abides by the law"*.

97. It should be a voluntary grouping pursuing certain common goals. The European Commission has commented on the article in the European Convention, which is substantially the same as that in the Covenant, that the term *"association"* should be understood as referring to private organizations, and that a public institution cannot be regarded as an association in this sense.
The Court's judgement in *Association X v. Sweden* was that the right of association was not violated by the government if they compelled all medical practitioners to join a professional organization, formed by or under the law, the object of which was in the general interest, to protect the health of the community. The right was not violated because this organization was not an association in the sense of the article, and the doctors remained free to form and to join associations of their choice to protect their professional interests.
*Association X v. Sweden* Application no.6094/73
Additionally, one can say that the contractual relationship between employer and employee cannot be an association in the sense of article 22.
*Young, James & Webster v. United Kingdom* Applications 7601/76 and 7806/77 Report: 14 December 1979.
The Commission did not consider a medical organization formed by the State to ensure the observance of medical ethics an association because of its legal nature and public functions.
*Le Compte, Van Leuven and De Meyer v. Belgium* Applications 6878/75 and 7238/75

It seems that the European Convention and the Covenant include the right to form and to join trade unions as a special aspect of the right of freedom of association. The European Commission has observed that there is no legal distinction between the *"freedom"* and the *"right"* in this context, and so the right to freedom of association is the overall concept and the right to form and to join trade unions is an element in that concept, and not a separate right.[98]

The *travaux preparatoires* of the Political Covenant indicate that there was some debate about whether article 22 should make a cross-reference to the ILO Convention concerning Freedom of Association, (ILO 87). Some argued that it was not necessary, since according to an established principle of international law, the two treaties would each bind States Parties, thus a State Party to the Convention would continue to be bound by the obligations it assumes on signature and ratification of the Covenant, although in the event the proposed cross-reference was adopted.

Substantial differences in the rights led the drafters of the Political Covenant to give each an article, unlike the Universal Declaration , which combined the rights of assembly and association in a single article. It was agreed that the exercise of this right should contain the freedom of choice as to *forming* associations as well as *joining* them. The sentence *"No one may be compelled to join an association"*, contained in article 20 of the UDHR, was rejected, since, although it stressed an important aspect of freedom of association, it was felt that its application might not always be in the interests of trade unions.[99] Clearly this represents a weakening of the legal protection of freedom of choice which would have been provided had the provision from the Declaration been retained. The right to choose not to join an association as well as the right of joining are equally important. The importance of safeguarding freedom of choice may be illustrated by instruments, including ILO 87, which emphasises workers' and employers' rights to form and join organizations *"of their own choosing"*, and by the case law of supervisory[100] and judicial bodies.

In the case Young, James & Webster v. United Kingdom,[101] the issue

98. *Young, James & Webster v. United Kingdom* Applications 7601/76 and 7806/77 Report: 14 December 1979.

99. General Assembly Official Records Annexes 20th September - 20th December 1955, p.56, para 145.

100. The Human Rights Committee in reviewing States reports under article 40, occasionally commented on apparent contradictions between national legislation and the provisions of ILO Conventions, where the country concerned has acceded to the ILO instrument. In particular, it has commented on the single trade union structure found in several countries which contradicts the provisions in ILO Convention 87 protecting the right of freedom of choice in forming and joining trade unions, for example, CCPR/C/SR.500 of 4th April 1984, p.6.

101. In this case, the Court considered the issue of whether article 11 of the Covention was breached when 3 employees were threatened with dismissal by British Rail, when they refused to join a trade union, following a *"closed shop"* agreement between British Rail and railways unions.

The Court commented that one of the purposes of freedom of association as guaranteed by article 11 is the protection of articles 9 & 10 of the Convention, that is, freedom of thought and conscience, and freedom of opinion and expression. Therefore, they considered that to compel someone to join an association contrary to his convictions *"strikes at the very substance"* of this right.

*Young, James & Webster v. United Kingdom* Applications 7601/76 and 7806/77 Report: 14 December 1979.

was raised of whether article 11 guarantees not only the positive right to form and to join trade unions, but also, by implication, the right not to be compelled to join an association or a union. The Court recalled that the right to form and join trade unions is a special aspect of freedom of association, adding that the notion of *freedom* implies some measure of *freedom of choice* as to its exercise.

The Court commented that although during the drafting of Convention article 11 - as during drafting of the Covenant, article 22 - the sentence *"No one may be compelled to belong to an association"* was deliberately omitted from the article, the negative side of the protection of the right could not be dismissed. The Court emphasised that it was not its intention to review the system of the closed shop in respect of the Convention, but to examine the effects of that system on the applicants in the present case. In this negative sense of the article, the breach of the right was considered to be clear. However the Court assumed that the negative aspect of the freedom of association was not guaranteed by article 11 on the same footing as the positive, and therefore held that compulsion to join a trade union may not *always* breach the Convention. The Court's view was that a threat of dismissal constitutes a serious form of compulsion which *"strikes at the very substance of the freedom"* guaranteed by article 11, and so there was an interference with the freedoms of the applicants. The Court also mentioned another aspect of the limitation of the applicants' freedom of choice as regards the unions they could join of their own choice, saying : *"the individual does not enjoy the right to freedom of association if in reality the freedom of action or choice which remains available to him is either non-existent or so reduced as to be of no practical value"*.

The African Charter, alone among the regional instruments, provides that no one shall be compelled to join an association, though it is subject to an obligation not found in any other regional instrument, *"the obligation of solidarity"*, provided for in article 29. This duty of *"solidarity"* is not clearly defined and thus represents a serious threat to the enjoyment of this right, opening the door to abuse. Although this instrument is the only text besides the Universal Declaration which explicitly protects the right not to be compelled to join an association, the protection is seriously undermined by the vague *"obligation of solidarity"*.

During drafting, there was some discussion as to whether it was necessary specifically to mention the right to form and to join trade unions in the draft Political Covenant, since it was recalled that article 8 of the draft Economic Covenant dealt with this right. It was felt that if the right to form and to join trade unions were mentioned in both Covenants, then this right would be subject to two sets of restrictions. On the other hand, it was pointed out that if this right were not mentioned in the draft Covenant, a misconception about the nature of the right might arise, namely, that it was economic and social rather than civil. Therefore, this right was incorporated in article 22.

This is important for the reasons put forward in the *travaux preparatoires* but in my opinion, the final form of the article serves two purposes : conserving civil protection of the right, and since ideological influence might lead states to ratify only one Covenant, this right could remain protected in both.

Concerning the phrase *"for the protection of his interests"*, the view was expressed that such a general formulation was preferable to that used in the draft Economic Covenant, *"for the protection of his economic and social interests"*, since trade unions are not exclusively concerned with economic interests,[102] but have also a vital role to play in securing civil rights for their members.[103] As in article 21, though it was suggested that the phrase *"governmental interference"* be incorporated in the article, a wider formulation, protecting the right against *any* interference was rightly preferred.[104]

The articles which specify the right to form and to join trade unions in the regional instruments vary quite widely[105] in their scope, and the detail in which they outline related rights, such as the right to collective bargaining and the right to strike. This is natural in the light of the differing purposes of the instruments: the American Declaration and Convention, like the European Convention, are simply statements of rights to be safeguarded, while the European Social Charter sets out to provide conditions in which such rights may be exercised. As such the first group of instruments simply sets out legal rights to be respected and ensured, while the European Social Charter binds Contracting Parties to take steps to attain conditions in which rights may be enjoyed. Thus, the European Social Charter contains provisions dealing with such issues as the right to consultation, collective bargaining, conciliation and arbitration, and the right to strike, while the other instruments contain no such detailed provisions.

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102. The Soviet Constitution of 1977, for example, broadens the scope of trade union activity to encompass *"managing state and public affairs, and in deciding political, economic, social and cultural matters."*

103. For example, the Solidarity trade union in Poland, and the National Union of Mineworkers in South Africa. A much broader formulation of the scope of union activity is envisaged by ILO Convention no.87, in article 10, which defines organization in the sense of the instrument *"any organisation of workers or of employers for furthering and defending the interests of workers or of employers"*.

104. Article 1 of ILO Convention 98 provides for the protection of workers and trade union leaders against acts of anti-union discrimination on any grounds. Paragraph 2 (a) protects against acts calculated to : *"make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership"* and (b) : *"cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities ..."*

Article 2 establishes that workers' and employers' organizations shall enjoy adequate protection against acts of interference by one another, described as being *"designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations or to support workers' organizations by financial or other means, with the object of placing such organizations under the control of employers or employers' organizations"*.

105. The American instruments contain least detail about the right to form and to join trade unions, since this right is not explicitly granted, but appears only as an aspect of the right of association, which as mentioned, may be for purposes of *"professional, labor union or other nature"* in the American Declaration, or *"economic, labor ... or other purposes"* in the American Convention.

Like ILO 87 and 98,[106] it confines the protection of the right to employers and employees, although only this article explicitly extends the right beyond national to international organisations. This instrument stresses the purpose of association as *"for the protection of their economic and social interests"*.

The article protecting trade union rights in the European Convention, like the article in the Political Covenant, is wider in scope than that in the European Social Charter, since the article in the Convention provides that anyone may form and join trade unions *"for the protection of his interests"*, while the Social Charter restricts the purpose to *"economic and social interests"*.

This mirrors the difference between the two international Covenants, where one implicitly extends the scope of trade union protection to the area of civil and political rights whereas the other restricts its scope to the area of social and economic rights.

Restrictions on the right of association[107] in the Political Covenant are, in general, the same as those included in article 21, with the exception that the phrase *"imposed in conformity with the law"* was replaced with the phrase *"prescribed by law"*. Therefore, imposition of restriction on this right is more tightly controlled than on the right of assembly.

106. ILO Convention No.98 protects the rights of workers and employers to organize, not to be discriminated against by acts of anti-union nature, and against interference in each other's affairs, (articles 1 & 2). It also promotes voluntary collective bargaining, in article 4, which provides that "*measures appropriate to national conditions*" shall be taken to encourage and promote the development and use of machinery for voluntary negotiation between employers and employers' organisations and workers' organizations to regulate terms and conditions of employment "*by means of collective agreements*". In providing that measures should be taken by governments in this respect, the autonomy of such machinery and organisations is implied, and should be protected from governmental interference through, for example, restrictive legislation on collective bargaining or the effects of governmental economic policy measures.

107. The regional instruments vary in the scope of restrictions which may be imposed on the right of association, since the American Declaration does not restrict its exercise, while the American Convention and the European Convention specify that restrictions must be by law and "*necessary*", though as with assembly, there is a distinction, in that the European Convention provides that restrictions must be "*prescribed by law*", while the American Convention provides for restriction "*established by law*". Both the European and the American Conventions specify also "*necessary in a democratic society*".

The limitation on the exercise of the right of freedom of association is unlike the limitation on the right of assembly in that it specifies particular groups in society, and explicitly restricts their exercise of this right.[108] Some argued, in the *travaux preparatoires*, that there were no grounds for additional restriction with regard to certain groups, such as, the armed forces, police and administrative personnel, save perhaps, a restriction on the right to strike, since a general limitation in the interests of national security, public order and so on, would be sufficient.

Others, however, argued that such provisions were to be found in the domestic law of many states and that it should not be regarded as denying this right to certain groups, but merely limiting their choice of association and the extent to which they may participate in union activities. A general restriction on the rights of members of the armed forces and the police, but not administrative staff[109], was incorporated in the article.[110] Articles in the European Convention and the American Convention specify that the rights of particular groups may be additionally restricted. In this respect, the American Convention is close to the Political Covenant though the American instrument goes beyond restriction to allowing deprivation of these groups of their exercise of the right. The European Convention again goes further than the Covenant in including a third category, *"members of the administration of the state"*. The European Social Charter, like ILO Conventions no.87 and 98, leaves the task of regulating the exercise of the right of association by the police and armed forces to national laws or regulations.

This restriction on the right of certain categories must be viewed with some concern, since although when used in the public interest it should not unduly restrict the right, in certain countries, where the scope of *"public service"* is extremely wide,[111] it might be misused to restrict the rights of large sections of the population. It is also of concern that the police and security forces may not be allowed to participate in free trade union activities or in those of some kind of professional associations, since in countries where state organs may be involved in the use of illegal means against, for example, political opposition, a free trade union or professional organization could provide a stronger safeguard for human rights than individuals who would otherwise be subject to threats and coercion.

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108. These instruments provide restrictions on the grounds of national security, public safety, public health, public morals, and the rights and freedoms of others. As before, the European Convention adds *"from the prevention of disorder or crime"*, which is equivalent to *"public order"* in the American Convention.
109. cf. European Convention on Human Rights article 11, para.2, which allows *"the imposition of lawful restrictions on the exercise of these rights by members ... of the administration of the State"*.
110. GAOR Annexes 20th September - 20th December 1955, p.56, para 151.
111. This point has been discussed by the ILO Committee on Freedom of Association who have stressed, as we will see, that the scope of *"public service"* must not be unreasonably wide.

In view of the fact that the Political Covenant explicitly mentions the groups whose exercise of the right of association may be lawfully restricted, the Human Rights Committee has questioned from time to time the extension of restriction to other categories, for example, in the case of an Act regulating political parties, which stipulates that citizens *"have the right to form political parties provided that ... their membership is not restricted to a particular social class, category, sect or geographical area ..."*. In this case, a member of the Committee questioned whether this would restrict the right, for example, of farmers to form a political movement.[112] In addition, a member has commented that a law restricting the right of association on the ground that it is *"designed to impair ... the monarchical form of the state"* is not justified under any of the restrictions in article 22, unless such an association would be a threat to national security, bearing in mind that the Political Covenant is neutral on questions of ideology and forms of state or government.[113]

As for the right to form and to join trade unions, the Human Rights Committee has held, in its judicial capacity, that article 22, paragraph 1 was violated in connection with article 19, paragraphs 1 and 2, in a case where a trade union leader was detained and tortured, and convicted of unspecified *"subversive activities"* under the Military Penal Code, *"because **Lopez Burgos** has suffered persecution for his trade union activities"*.[114]

Restrictions envisaged by ILO Convention no.87 on the rights of workers and employers are twofold : that in exercising their rights, they shall respect *"the law of the land"*; and that the rights of only certain groups may be restricted by the authorities. As in the Political Covenant, these are the armed forces and the police, but unlike the Political Covenant, the Convention stipulates that the extent of the exercise of the rights of these groups shall be *"determined by national laws or regulations"*. Balanced against these possible restrictions as we saw, is the provision that *"the law of the land" should not itself be such as to impair, nor should it be applied so as to impair* the rights protected in the Convention. Likewise, article 3, para.2 provides that the public authority should refrain from any interference in the enjoyment of the right.

ILO Convention 87, unlike other international instruments, does not explicitly envisage the possibility of restriction on any discriminatory grounds - since the fundamental principles and guarantees of civil liberties are already enshrined in all international instruments including the ILO Constitution on the one hand, and the rights and guarantees provided for in every aspect of freedom of association can be neither

112. CCPR/C/SR.499 of 6th April 1984, p.7.
113. CCPR/C/SR.327 of 9th November 1981, p.11.
114. Communication no.52/1979 29th July 1981.
Human Rights Committee, Selected Decisions under the Optional Protocol (Second to sixteenth sessions), 1985 (CCPR/C/OP/1A.

exercised nor enjoyed without respect for basic human rights on the other. Thus, the Convention contains no article providing explicitly the principle of non-discrimination, with the only restriction envisaged that of article 9, on the armed forces and police. The provision in article 2, that the rights may be exercised *"without distinction whatsoever"*, has been understood to include workers in private industries, and public servants. Any discrimination against the rights of categories of workers such as public servants[115], managerial staff, non-nationals and agricultural workers[116] is contrary to the Convention. During the *travaux preparatoires*, it was made clear that the right of workers should be guaranteed *"without discrimination as to race"*, and this is confirmed by the case law of the Freedom of Association Committee.[117]

With regard to discrimination on the grounds of political affiliation or activities, the ILO Committee has considered that measures taken under national law, whereby an individual is deprived of his right to become or remain a trade union member on the grounds that he professes certain political opinions, or engages in legitimate political activities in a manner unconnected with his participation in an occupational organization would constitute an infringement of the right to organize, as specified in article 2 of the Convention. The Committee stated that workers should have the right, without discrimination on the basis of political opinion, to join the union of their choice.[118]

Finally, the right to public assembly and association should not be restricted or impeded except within the limits examined, otherwise these restrictions or limitations are considered to run contrary to the provisions of the Covenants and ILO Conventions, and in such cases the exercise of administrative authorities in any State requires urgent judicial review and amendment.[119]

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115. *"The denial of the right of publicly employed workers to set up trade unions, as may privately employed workers, with the result that their 'associations' do not enjoy the same advantages and privileges as do 'trade unions', involves discrimination in the case of government-employed workers and their organizations, as compared with privately-employed workers and their organizations. Such a situation gives rise to the question of compatibility of these distinctions with article 2 of Convention no. 87, according to which workers 'without distinction whatsoever' shall have the right to establish and join organizations of their own choosing without previous authorisation, as well as with article 3 and 8(2) of the Convention."* 48th Report, Case No. 193, para. 52.

116. *"A law which lays down that not less than 60% of the members of a trade union must be literate is incompatible with the principle established in Convention no. 87 according to which workers, without distinction whatsoever have the right to establish organisations of their own choosing. Article 1 of Convention no. 11 confirms this principle and lays down that each Member of the ILO which ratifies this Convention undertakes to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers."* 24th Report, Case No. 144, para. 237.

117. *"A law which removes the right of African workers to establish trade unions which can register and participate in the industrial councils which may be set up for the purpose of negotiating agreements and settling disputes which constitutes a form of discrimination is inconsistent with the principle accepted in the majority of countries and embodied in the Convention adopted by the ILO that workers without distinction whatsoever should have the right to establish and subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorisation ...".* 15th Report, Case No. 102, para. 141.

118. *"Workers should have the right, without distinction whatsoever - in particular without discrimination of any kind on the basis of political opinion - to join the organisation of their own choosing."* 125th Report, Case No. 638, para. 25.

119. Freedom of Association and Collective Bargaining : General Survey by the Committee of Experts on the Application of Conventions and Recommendations. International Labour Conference, 69th, 1983, pp. 21-22.

The International Covenant on Economic, Social and Cultural Rights provides, in article 8, for the right to form and join trade unions in terms which are similar and at times identical to provisions found in the ILO Convention no.87. For example, the Economic Covenant secures, in article 8 (a), *"the right of everyone to form trade unions and to join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests,"* while article 2 of the ILO Convention protects the rights of workers and employers to establish and to join (subject only to the rules of the organization) organizations of their choice, without previous authorisation.[120]

As we saw, in the comparison of the two Covenants, the article in the Economic Covenant, which specifies the role of trade unions as *"the promotion and protection of ... economic and social interests"* is comparatively restrictive, unlike the ILO Convention, which in its definition of *"organization"* in article 10, broadens its scope to *"furthering and defending the interests of workers or of employers"*.

The Economic Covenant goes on to secure the right of trade unions to establish national federations and confederations and the right to form or join international trade-union organizations, which corresponds to article 5 of the ILO Convention which provides that organizations should be free to establish and join federations, and to affiliate with international organizations.

Again, the Economic Covenant safeguards :

*"the right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others"*,

while the ILO Convention provides, in article 3, that organizations should have the right to draw up constitutions and rules, that they should be free to elect their representatives and organise their administration and activities, formulating their own programmes, and in article 4, that organizations should be protected against dissolution or suspension by the public authorities.

Finally, in paragraph 1 of article 8, the Economic Covenant secures : *"the right to strike, provided that it is exercised in conformity with the laws of the particular country"*, while the ILO Convention protects this right implicitly in article 3, we shall see the legal interpretation of this provision in the following section.

Both instruments provide for the imposition of lawful restrictions on the rights of certain categories of workers, and the Economic Covenant contains a cross-reference to the ILO Convention.

120. Article 2 provides : *"Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorisation."*

Since the rights safeguarded by the two instruments are similar in intent and wording, and since more case law is available for the ILO Convention through the work of the Committee on Freedom of Association, the examination of the international legal understanding of the right to form and to join trade unions focuses on this instrument, and its interpretation by ILO bodies.

The main element in which the Economic Covenant and the Convention differ is in the extent of lawful restriction which may be imposed by governments on the rights safeguarded in the instruments.

As we saw, article 2 of the ILO Convention protects the rights of workers and employers to establish and to join organizations of their choice, without previous authorisation. Besides this first component, the Convention has three other aims : that organizations should have the right to draw up constitutions and rules, that they should be free to elect their representatives and organise their administration and activities, formulating their own programmes; that organizations should be protected against dissolution or suspension by the public authorities; and that organization should be free to establish and join federations, and to affiliate with international organizations. The Convention contains a broad implementation article, which states in positive terms, the duty of Member States to take *"all necessary and appropriate measures"* to ensure the free exercise of the right to organise.[121]

As we saw, article 2 provides that workers and employers have the right to establish organisations *"without previous authorization"*. In the *travaux preparatoires* of the Convention, it was felt that countries should remain free to establish formalities in law as appropriate to ensure the normal functioning of industrial organisations. Formalities imposed by national law concerning the constitution and operation of workers' and employers' organizations are not incompatible with the Convention, as long as they do not impair the guarantees it specifies. Since these formalities may be linked to the acquisition of legal personality, requirements for this should not impair the right to establish organizations according to article 2.[122]

One of the requirements may be that the rules of or other details about the organization be filed with the public authority.

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121. *"In its report to the 1948 International Labour Conference the Committee on Freedom of Association and Industrial Relations declared that 'the States would remain free to provide such formalities in their legislation as appeared appropriate to ensure the normal functioning of industrial organisations'. Consequently, the formalities prescribed by national regulations concerning the constitution and functioning of workers' and employers' organizations are compatible with the provisions of that Convention, provided, of course, that the provisions in such regulations do not infringe the guarantees laid down in Convention no. 87."*
For example, 1st Report, Case No. 4 para. 47. No. 696 para. 13.

122. *"In one case where a long period had elapsed between the request for recognition of legal personality and the obtaining of such recognition, the Committee recalled that, while it is true that the founder of a trade union must comply with the formalities prescribed by legislation, these formalities should not be of such a nature as to hamper freedom to form organizations."*
For example, 128th Report, Case No. 675 para. 20.

Another requirement may be registration with the appropriate public body. Ordinarily, this would not infringe the Convention, but clearly if registration was refused for a reason incompatible with the aims of the Convention, this *would* violate the Convention. The rules of registration should, of course, be clear, and the procedure of registration should not be unreasonably prolonged. A necessary safeguard against unlawful or arbitrary decisions is a litigation process through which trade unions may appeal to an independent court against an administrative decision regarding registration. Objectivity is best ensured through judicial process, rather than through an appeal to another administrative body.[123]

As we saw, article 2 of the Convention provides for the right of workers and employers to establish and to join organizations *of their own choosing*. Implied in this is the free determination of the structure and membership of trade unions. Certain legal restrictions may be incompatible with the Convention, for example, where questions arise over the minimum number of persons[124] and restriction of membership on grounds of branch of activity of the organization.[125] Regulations which stipulate that different organizations must be established for each category of public servant, for example, are incompatible with the provision. Where governments favour or discriminate against particular unions, this is considered to inhibit workers' and employers' freedom of choice.[126] Discrimination on the grounds of political opinion which restricts the right of workers to join organizations of their own choosing also violates the Convention.[127]

As far as the rights guaranteed by the Convention are concerned, there is grave cause for concern in countries where the law imposes a single trade union system at all levels, and prohibits pluralism locally and nationally. Only one national trade union may be established for each category of workers, or for each region.

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123. "*The Committee has drawn attention ... to the principle that appeals against the refusal or cancellation of registration of organizations by trade union registrars should lie to the courts (and not to the executive or administrative authority).*"
For example, 47th Report, Case No. 194, para. 111; 58th Report, Case No. 251, para. 611

124. The figure must be reasonable so that this restriction does not impair the establishment of organizations.
"*The Committee has recalled that the establishment of a trade union may be considerably hindered or even rendered impossible when legislation fixes the minimum number of members of a trade union at obviously too high a figure, as is the case, for example, where legislation requires that a works union must have at least fifty founder members.*"
For example, 48th Report, Case No. 191, para. 72.
The Committee has considered that the requirement of a minimum number of twenty members fixed by legislation does not seem excessive and therefore does not in itself constitute an obstacle to the formation of a trade union.
For example, 90th Report, Case No. 335, para. 194.

125. If this restriction is stipulated, then such organizations must be free to join federations or confederations of their own choosing.

126. Freedom of Association and collective bargaining : general survey by the Committee of Experts on the application of conventions and recommendations, ILO Conference 69th session, 1983, p. 49

127. "*Workers should have the right, without distinction whatsoever - in particular without discrimination of any kind on the basis of political opinion - to join the organisation of their own choosing.*"
For example, 125th Report, Case No. 638, para. 25.

Such organizations are often compelled to join a single national confederation, designated by law. Such systems may be linked to different socio-economic and political principles,[128] though the imposition of such a system may be achieved through explicit legislation or through a set of provisions.

Such law makes it impossible to establish other organizations to represent workers' interests, which is a clear violation of the provision in article 2 that organizations should be of workers' and employers' own choosing.[129] Likewise, an obligation to federate with a single national federation in order to operate lawfully constitutes a further violation of articles 5 and 6, as we will see.

The widespread practice, in cases where the single trade union system operates, of linking trade unions to the ruling party[130] violates the principle of freedom of choice, (as does the single trade union system in general) as well as the important principles governing the political activities of unions. While it was never the intention of the Convention to make diversity of unions an obligation, nevertheless the possibility of diversity must be safeguarded.[131] Voluntary association in a single organization is quite acceptable, while laws or practices which impose such an association clearly violate the Convention. The Committee has pointed out that even where a *de facto* monopoly exists as a consequence of voluntary action by workers, this should not be institutionalized, and the freedom of workers to form additional organizations must be safeguarded.[132] The rights of workers who do not wish to join existing trade unions should be protected. The unity of trade unions which is imposed by law, a common tendency in Arab countries, clearly violates the principles of the Convention.

Article 3 of Convention 87 recognises the following : organizations should have the right to draw up constitutions and rules; the right to

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128. This is the case in several Arab countries, including Egypt, Syria, Iraq, Libya, Kuwait, Yemen.

129. " *... in view of the fact that measures of a political nature may have an indirect effect on the exercise of trade union rights, the Committee drew attention to the views which it has expressed with regard, first, to the principle that workers, without distinction whatsoever, should have the right to join organisations of their own choosing and, secondly, to the importance of due process in cases in which measures of a political nature may indirectly affect the exercise of trade union rights.* "
For example, 12th Report, Case No.63, para.276.

130. For example, in Libya, Syria, Algeria, Egypt.

131. *"The Committee has stressed that, while both workers and employers generally have an interest in preventing the multiplicity of the number of competing organizations, consideration does not in itself seem sufficient to justify direct or indirect intervention by the state, and that, while it fully understands a government's desire to promote a strong trade union movement, trade union unity imposed by the government runs counter to the principles of Convention no.87."*
For example, 149th Report, Case No.732, para.37.

132. *"The Committee has recalled that, while it may be to the advantage of workers to avoid a multiplicity of trade union organisations, unification of the trade union movement imposed through state intervention by legislative means runs counter to the principle, embodied in article 2 and 11 of Convention no.87. The Committee of Experts of the ILO on the Application of Conventions and Recommendations has emphasised on this question that 'there is a fundamental difference with respect to the guarantees of freedom of association and protection of the right to organise, between a situation in which a trade union monopoly is instituted or maintained by legislation and the factual situations which are found to exist in certain countries in which all the trade union organizations join together voluntarily in a single federation or confederation without this being the direct or indirect result of legislative provisions applicable to trade unions and to the establishment of / ...*

elect representatives in full freedom; the right to organise their administration and activities; the right to formulate their own programmes, without interference. Legislation regulating trade unions may contain detailed provisions on such aspects as eligibility for office, election, management of funds and so on. While such regulations may be in the interests of trade union members, they may in some cases restrict the right in a way contrary to the Convention.

Although there may be a requirement that rules comply with a national statutory requirement, the principle that unions should be free to draw up their own constitutions and rules remains important.[133] Requirements governing eligibility to stand for office in organizations include : occupational requirements, nationality, political views or activities, penal record and re-election.

In the opinion of the Committee, such provisions may prevent qualified persons from carrying out union duties, for example, a requirement of a number of years in a particular occupation may disqualify an individual from holding office.[134] This would infringe the right safeguarded by the Convention. The rights of migrant workers might be infringed by strict requirements of nationality in eligibility.

In the view of the Committee, *solely* political grounds for restriction on eligibility may infringe the Convention,[135] though clearly, if political grounds were coupled with a threat to security or subversion, then the

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*... trade union organisations. The fact that workers and employers generally find it in their interests to avoid a multiplication of the number of competing organizations does not, in fact, appear sufficient to justify direct or indirect intervention by the state, and, especially intervention by the state by means of legislation.' ... the Committee has drawn attention to the fact that it is more desirable in such cases for a government to seek to encourage trade unions to join together voluntarily to form strong and united organisations than to impose upon them by legislation a compulsory unification which deprives the workers of the free exercise of their right of association and thus runs counter to the principles which are embodied in the international labour conventions relating to freedom of association."*

For example, 67th Report, Case No. 303 paras. 260 & 264.

133. *"A requirement that union rules shall comply with national statutory requirements does not constitute a violation of the principle that workers' organizations should have the right to draw up their constitutions and rules in full freedom, if such statutory requirements themselves do not infringe the principle of freedom of association and if approval of the rules by the competent authority is not within the discretionary powers of such authority."*

For example, 65th Report, Case No. 266, para. 29.

*"Where the approval of union rules is within the discretionary powers of a competent authority this is not compatible with the generally accepted principle that workers' organizations should have the right to draw up their constitutions and rules in full freedom."*

For example, 58th Report, Case No. 168, para. 78.

134. *"Provisions that require that trade union leaders should, at the time of their election, have been engaged in the occupation or trade for more than a year are not in harmony with the Convention."*

For example, 129th Report, Case No. 514, para. 113.

135. *"The Committee took the view that a law is contrary to the principles of freedom of association when a trade unionist can be barred from union office and membership, because in the view of the Minister, his activities might further the interests of communism."*

For example, 85th Report, Cases Nos. 300, 311 & 32, paras. 107 & 109.

*"A law which debars from trade union office for a period of ten years 'any person taking part in political activities of a communist character' and which list a number of legal presumptions whereby any person can be held to be 'responsible for taking part in political activities of a communist character' could involve a violation of the principle laid down in Convention no. 87, which states that employers' and workers' organizations have the right 'to elect their representatives in full freedom, to organize their administration and activities' and that 'the public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof'."*

For example, 24th Report, Case No. 146, para. 273.

Convention would not necessarily be infringed.

The Committee has considered that laws which disqualify persons from standing on the grounds of any conviction, may infringe the Convention, since convictions which have not called into question the integrity of the person concerned should not debar a person from standing for trade union office. Legislation imposing such a restriction is considered incompatible with the principles of freedom of association.[136]

With regard to legislation regulating in detail the election procedures of trade unions, this may be incompatible with the rights in the Convention since it may limit the free exercise of the right by unions, and may even open the door for interference by public authorities in the voting process.[137] The Committee has considered that provisions which allow the intervention of public authorities in the voting process, even though this may be with good intent, may allow interference incompatible with the Convention. Impartial supervision provided by a competent judicial body is considered preferable.[138] Likewise, in the opinion of the Committee, in order to avoid violation of the Convention, the dismissal of trade union officers should be through and subject to a competent judicial body.[139]

With regard to the right of organizations to organise their own administration, the Committee considers that although the general principle is that organizations should be free to administer their own affairs, the Convention does not exclude the possibility of external control where there is reason to believe that the law or the organization's rules have been violated.[140] Legislation allowing the public authority entire discretion to investigate the internal affairs of a

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136. *"The Committee has pointed out that conviction, on account of offences the nature of which is not such as to be prejudicial to the proper exercise of official trade union functions, should not constitute grounds for disqualification for trade union office and that any legislation providing for disqualification for any type of criminal offence might be regarded as inconsistent with the principles of freedom of association."*
For example, 133rd Report, Case No. 668, para. 298.

137. *"The following provisions are incompatible with the right to hold free elections, namely, those which involve interference by the public authorities in various stages of the electoral process, beginning with the obligation to submit the candidates' names beforehand to the Ministry of Labour, together with personal particulars, continuing with the presence of a representative of the Ministry of Labour or the civil or military authorities at the elections and culminating with the approval of the elections by ministerial decision, without which they are invalid."*
For example, 86th Report, Case No. 451, paras. 135 & 136.

138. *"Control of union elections should rest with the judicial authorities."*
For example, 143rd Report, Case No. 771, para. 117.

139. *"The removal from trade union office of trade union leaders ... should be effected through the courts."*
For example, 128th Report, Case No. 651, para. 56.
*"In the Committee's opinion, it is of paramount importance that measures for the dismissal, suspension or disqualification of trade union officials as a penalty provided by law should not become enforceable except on the basis of a firm sentence on the part of the competent judicial authority ..."*
For example, 114th Report, Case No. 510, para. 62.

140. *"The principles established in article 3 of Convention no. 87 do not prevent the control of the internal acts of a trade union if those internal acts violate legal provisions or rules. Nevertheless, in order to guarantee an impartial and objective procedure, this control should be exercised by the relevant judicial authority."*
For example, 73rd Report, Case No. 348, para. 114.

union would however violate the Convention.[141]

The complete freedom, according to the Convention, of trade unions to organise their activities and formulate programmes may in practice be restricted by legislation which severely controls union involvement in political activity, ranging from a complete ban on any political activity to establishing close links between trade unions and the ruling party, considered incompatible with the Convention.[142]

With respect to the right to strike[143], the Committee considers this one of the essential means available to workers to promote and protect their economic and social interests.[144] Right to strike may be prohibited directly by legislation or indirectly through legislation which provides that disputes must be settled through compulsory arbitration leading to a final binding decision, for example, by a Labour Court, or by a decision at the discretion of the public authority. The law may impose reasonable conditions, including the fulfilment of certain procedures, to make a strike lawful, which may not conflict with the Convention.[145] Restrictions on the right to strike may be related to a particular category, for example, government employees, or imposed in the light of the purpose of the strike or the methods used.

The Committee's view is that the right to strike of public or essential service workers may become meaningless if public or essential service is defined broadly. The Committee has stated that the restriction should be

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141. *"Legislation which accords to the Minister the right, in his entire discretion, to investigate the internal affairs of a trade union merely if he considers it necessary in the public interest, is not in conformity with the principles that workers' organizations should have the right to organize their administration and activities without any interference on the part of the public authorities which would restrict this right or impede the lawful exercise thereof."*
For example, 95th Report, Case No. 448, paras. 143, 145.

142. The International Labour Conference in Resolution 1952 Concerning the Independence of the Trade Union Movement stated that trade union relations with political parties, or trade union political action should not compromise the continuance of the trade union movement.
*"If trade unions are prohibited in general terms from engaging in any political activities, this may raise difficulties by reason of the fact that the interpretation given to the relevant provisions in practice may change at any moment and considerably restrict the possibility of action of the organizations. It would therefore seem that states should be able without prohibiting in general terms political activities of occupational organizations, to entrust to the judicial authorities the task of repressing abuses which might, in certain cases, be committed by organizations ... ."*
For example, 84th Report, Case No. 423, para. 77.
Likewise, the Committee has reaffirmed the principle expressed by International Conference in Resolution Concerning the Independence of the Trade Union Movement that *" ... governments should not attempt to transform the trade union movement into an instrument for the pursuance of political aims, nor should they attempt to interfere with the normal functions of a trade union movement because of its freely established relationship with a political party."*
For example, 21st Report, Case No. 19, para. 29.

143. The right to strike is provided explicitly by article 8 of the Economic and Social Covenant, and as we will see, in the European Social Charter.

144. According to the Freedom of Association Committee, the right to strike by workers and their organizations is generally recognised as a legitimate means of defending their occupational interests. *"The right to strike is one of the essential means through which workers and their organizations may promote and defend their occupational interests."*
For example, 2nd Report, Case No. 28, para. 68.

145. *"It is necessary for the conditions that have to be fulfilled, under the law, in order to render a strike lawful, to be reasonable and in any event not such as to place a substantial limitation in the means of action open to trade union organizations."*
For example, 37th Report, Case No. 170, para. 41.

confined to public employees acting as agents of the authority, or to services the interruption of which would endanger life, personal safety or health of the whole or part of the community.[146] If strikes are restricted or prohibited, guarantees must be provided to protect the interests of workers who lack this defence, through impartial and swift arbitration procedures.[147] With regard to the purposes, the Committee considers that the possibility of strike action in protest against government's economic and social policies does fall within the scope of the Convention, while strikes for purely political reasons do not.[148]

Article 4 of Convention 87 provides that organizations should be protected against dissolution or suspension by the public authorities. Thus, a law or decree suspending or dissolving an organization constitutes an administrative measure contrary to the same article, and likewise incompatible with article 8.

Cancellation would fall into the same category.[149] The safeguard of the right protected by article 4 requires more than a right of appeal against an administrative decision.[150] Decisions should not enforced before an appeal may be lodged or prior to confirmation by the judicial authority. Again, a simple right of appeal does not safeguard this principle, for example, where the public authority has a discretionary power in reaching such a decision. The Committee on Freedom of Association, on examining the practice of several countries, considered that dissolution of workers' and employers' organizations should be carried out by the judicial authority, which alone guarantees the right of defence. This applies even during a state of emergency,[151] as we will see in more detail in the discussion of the effect of state of emergency on human rights protection in international law.

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146. Freedom of Association and collective bargaining : general survey by the Committee of Experts on the application of conventions and recommendations, ILO Conference 69th session, 1983, p.66

147. The Committee has emphasised the importance which it attaches, where strikes are prohibited or subject to restrictions, to ensuring adequate guarantees to safeguard to the full the interests of the workers thus deprived of an essential means of defending their occupational interests, and has pointed out that the restriction should be accompanied by adequate impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage.
For example, 60th Report, Case No.274, para.266.

148. *"The Committee has taken the view that strikes of a purely political nature and strikes decided systematically long before the negotiations take place, do not fall within the scope of the principles of freedom of association."*
For example, 139th Report, Cases Nos.737 to 744, para.124.

149. According to the Freedom of Association Committee, legislation which accords to the Minister the power to order the cancellation of the registration of a trade union in his entire discretion and without any right of appeal to the courts, is contrary to the principles of freedom of association.
For example, 95th Report, Case No.448, paras.143 & 145.

150. *"If the principle that an occupational association may not be subject to suspension or dissolution by administrative decision is to be properly applied, it is not sufficient for the law to grant the right of appeal against such administrative decisions, but that the latter should not take effect until the expiry of the statutory period for lodging an appeal or until the confirmation of such decisions by a judicial authority."*
For example, 74th Report, Case No.363, para.224, Case No.308, para.86.

151. The Committee has pointed out that any measures of suspension or dissolution by administrative authority, when taken during an emergency situation, should be accompanied by normal judicial safeguards, including the right of appeal to the courts against such dissolution or suspension.
For example, 31st Report, Case No.683, para.200.

The right of organizations to establish and join federations and confederations, and to affiliate with international organizations is safeguarded in article 5 of the Convention,[152] which implies that organizations should be allowed to form federations free from restrictions based on occupation or geographical area, thus law which requires an unreasonable minimum number of trade unions to establish federations, or which prevents federations of unions which represent different occupations is incompatible with the Convention, as is a requirement for prior authorisation of such a federation. The Committee has pointed out that laws, often associated with the provisions we examined leading to a single-union system, which allow the establishment of only one federation for an occupation or region, or a single national confederation also violate the Convention.[153]

As before, the rights of certain workers' and employers' unions to form federations and confederations may be restricted by law, and in some cases, this may violate the Convention.[154]

Restrictions which may be imposed by countries on the activities of higher-level organizations include restriction on the right to strike or to bargain collectively. Such restriction may hamper the development of industrial relations, at the expense of small or weak unions, and is incompatible with article 5 of the Convention. Restrictions such as making affiliation to international organizations subject to prior authorisation[155] or preventing national bodies from receiving funds from outside the country are considered by the Committee to be prejudicial to the guarantees provided in article 5, since the right implies the opportunity for national organizations to benefit from affiliation with international organizations.[156]

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152. Article 6 provides that the safeguards provided in articles 2, 3 and 4 also apply to bodies established under this provision.

153. 85th Report, Case No. 274, para. 286.

154. According to the Freedom of Association Committee, while the prohibition of a single trade union catering for industrial and agricultural workers is not necessarily contrary to the Convention, a government's refusal to permit agricultural unions to affiliate with a national centre of workers' organizations comprising industrial unions is incompatible with article 5 of the Convention.
For example, 108th Report, Case No. 506, para. 226.

155. According to the Freedom of Association Committee, legislation which requires the obtaining of government permission for the international affiliation of a trade union is incompatible with the principle of free and voluntary affiliation of trade unions with international organizations.
For example, 6th Report, Case No. 50, para. 854.

156. The Committee has considered that legislation prohibiting the acceptance by a national trade union of financial assistance from an international organization of workers to which it is affiliated would violate the principles concerning the right to affiliate with international organizations of workers, and that legislation which provides for the banning of any and all organizations where there is evidence that they are under the influence or direction of any outside source and also for the banning of any and all organizations where there is evidence that they receive financial assistance or other benefits from any outside source unless such financial assistance or other benefits be approved by and channelled through government, is incompatible with the principles set out in article 5 of Convention no. 87 in so far as these provisions apply to the right of trade unions to affiliate with international workers' organizations.
For example, 148th Report, Case No. 794, para. 22.

# SECTION THREE

# THE RIGHT OF POLITICAL PARTICIPATION

Though the phrase *"democratic society"* appears only once (in article 29) in the Universal Declaration, it is implicit throughout this text, as in the other instruments which secure political human rights, that they are exercised and may be enjoyed only within the framework of a democratic society.[157] Article 29 makes explicit the principle that human rights are subject to restriction *inter alia* for the purpose of securing general welfare in a *democratic society*.

The meaning of the term *"democracy"* has been the subject of much debate, though it has been used more or less consistently to mean a form of government in which the *demos* or *"people"* rule.[158] Though the term *demos* is usually translated as *"the people"*, it is clear that in classical Athens, this term was in fact more restrictive than this translation implies.[159] The restriction on the definition of the term *"the people"* has continued throughout every manifestation of democracy, until the present day. Throughout history, restrictions have been based on citizenship, sex, colour, status and wealth. Contemporary liberal political thought continues to maintain restrictions on democracy, though nowadays, restriction is more likely to be only on the grounds of citizenship and residence, age and legal capacity.

The mechanism of democracy has evolved from that of the Athenian *polis* of the fifth century B.C.,[160] through western[161] and eastern

157. In the *travaux preparatoires* of the Universal Declaration, René Cassin stated that he did not consider that article 27 of the draft Declaration, which mentioned *"democratic society"*, occupied a sufficiently prominent position, suggesting that a more suitable position would have been immediately after the preamble. This would give due prominence to the principle in the Declaration affirming that law could have no other source than the will of the people.
General Assembly Official Records Third Session, Part 1, Third Committee, p.62.

158. Jack Lively has listed the range of meanings of *"rule of the people"* as: (1) That all should govern, in the sense that all should be involved in legislating, in deciding on general policy, in applying laws and in governmental administration; (2) That all should be personally involved in crucial decision making, that is to say in deciding general laws and matters of general policy;(3) That rulers should be accountable to the ruled; they should, in other words, be obliged to justify their actions to the ruled and be removable by the ruled; (4) That rulers should be accountable to the representatives of the ruled; (5) That rulers should be chosen by the ruled; (6) That rulers should be chosen by the representatives of the ruled; (7) That rulers should act in the interests of the ruled.
Jack Lively, Democracy, 1975, p.30.

159. Athenian citizens alone were eligible to participate by voting and holding public office. Citizens, in this context, excluded women, slaves and metics (resident aliens).

160. J.K. Davies Democracy and classical Greece, 1978, chs.2-4

161. The question of the mechanism of democracy was examined by Rousseau in his discussion of the principle of the *"general will"*, and in particular the composition of the legislature, which raised the issue of the relationship between the government and people, in particular, the people's participation in government.
In his view, the Constitution was based on the supremacy of parliament : all laws might be revoked or enacted by the legislature, and the decision of the majority in the legislature was to be binding on all. The legislature, he seems at times to argue, is an assembly of the whole people, based on the classical Athenian model : *"Sovereignty does not admit of representation ... deputies of the people are not and cannot be its representatives; they are merely its stewards and can carry through no definitive acts."* At other times, this is rejected as impracticable and unreliable, there being no guarantee that the assembly's decision *"would be the expression of the general will"*, therefore, he suggested, a *"well-intentioned"* government should act according to the general will.
Jean-Jacques Rousseau The Social Contract and other discourses, 1973, pp.89-250.

political thought[162] to the contemporary systems which range from *"liberal"* or *"western"* to *"peoples'"* or *"socialist"* democracy.[163]

The definitions submitted by the government of Senegal for the study on *The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration*, help to clarify the distinct nature of *"liberal"* democracy and *"people's"* democracy. The former is characterised as permitting the existence of more than one ideology and party, with emphasis placed on the vote and elections for power contested by the various parties. *"People's"* democracies are described as societies in which the means of production are socialised. Such societies, homogeneous by force of circumstances, have a single ideology represented by one party, and elections, since not contested, are described as *"unanimous"*.[164] Several Arab countries have adopted the latter system.

Jack Lively has identified three elements, corresponding to factors in the international legal provision,[165] which allow a measure to be made of the degree of democracy in a given political community. These are : the extent to which all constituent groups are incorporated in the

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162. According to the Islamic Council, political power is neither valid nor exercisable except by and on behalf of the community, through the process of *Shura* (mutual consultation). No one may arrogate to himself the right to rule by personal discretion, since it is the obligation and the right of every Muslim to participate in the political process, and political authority is to be entrusted to those who are the true representatives of the nation. Political power, whether legislative, executive or judicial may only be exercised within the Islamic context.
The Constitution of the Islamic Republic of Iran provides for political participation, or *Shura*, in article 58, which provides that : *"Legislative power shall be exercised through the Majlis which shall be a consultative assembly of representatives elected by the people."*

163. *"Socialist democracy"* is characterised as granting to the workers the widest rights and liberties on the basis of equality, without discrimination. These rights are assured and guaranteed by the socialist structure and by the society as a whole, with which the individual is indissolubly linked in all fields and spheres of his activity.
Information supplied by the Soviet Union to the Special Rapporteur who prepared the study on the individual's duties to the community.
The Individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights, 1983 E/CN.4/Sub.2/432/Rev.2, p.93
Article 2 of the Soviet Constitution stresses that all power in the USSR belongs to the people, who exercise State power through Soviets of People's Deputies, which constitute the political foundation of the Constitution of the USSR. The powers of the People's Deputies, and the relation between electors and deputies are specified in the Constitution. Article 113 guarantees the right of public organizations to participate in the administration of state affairs, which grants these organizations, through their all-union bodies, the right to initiate legislation in the Supreme Soviet. The right of individuals to take part in the conduct of public affairs is also guaranteed in the Constitution. Elsewhere in the eastern bloc, in Yugoslavia, for example, the principle of *"socialist self-management"* is enshrined in the Constitution, and it is applied in the political sphere and all other aspects of socio-economic relations. A network of self-management institutions has been established which involves every individual in the running of labour associations, local communities and central political and economic organs.

164. Ibid, pp.89-90

165. The first, the extent to which all constituent groups are involved corresponds to *"without unreasonable restrictions"* in para. (a) of article 25 of the Covenant; the extent to which governmental decisions are subject to popular control corresponds to the requirement for periodic elections, as we will see, while the opportunity to participate in public administration clearly corresponds to para. (c) of the article.
Jack Lively, Democracy, 1975, p.51

decision-making process[166]; the extent to which governmental decisions are subject to popular control; the degree to which ordinary citizens may participate in public administration. In the light of these qualifications, the Special Rapporteur characterises democratic systems as guaranteeing the right of everyone to participate in political life at the local and national level through free elections, enabling each people to choose freely and periodically its own government and recognising the activities of pluralist political institutions.[167] This definition is in conformity both with the texts of international instruments and their interpretation by international organs, such as the Human Rights Committee, and will therefore be adopted throughout this study in examination of political participation.

The right to political participation is to be found in the Universal Declaration which expresses the importance of the right of all citizens to participate, freely and actively, in the affairs of their political order. The text states explicitly that *"the will of the people shall be the basis of authority of government"*, implying that the exercise of the right is envisaged within a democratic structure.

The *travaux preparatoires* indicate agreement that the draft Political Covenant should contain an article enshrining political rights to translate the principles of article 21 of the Declaration into a legal obligation. Ways proposed included one text emphasising the obligations of the state - *"every citizen shall be guaranteed by the state ... the right and the opportunity ..."*.[168] However, an alternative stressing the right of the individual - *"every citizen shall have ... the right and the opportunity ..."*, was adopted in article 25.[169]

According to international texts,[170] including the Political Covenant, the right of taking part in the conduct of public affairs should be practised *"either directly or through freely chosen representatives"*. Some proposed that a direct role should be the general rule, but the majority considered both direct and indirect suffrage admissible.

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166. This principle is in line with the Human Rights Committee's interpretation that the exclusion of any group from the governing process on political grounds is incompatible with the democratic principles embodied in international instruments.

167. The Individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights, 1983 E/CN.4/Sub.2/432/Rev.2, p.128

168. United Nations General Assembly Official Records Annexes 20 September - 20 December 1955 p.59, para.171

169. Article 23 of the draft Covenant contained the phrase *"to take part in the conduct of public affairs"*. A more specific formula *"to take part in the government of the State"* comparable to the phrase in the Universal Declaration *"to take part in the government of his country"* was not adopted.

170. Although the American Declaration and Convention, the African Charter, European Convention and its First Protocol provide protection of the right to take part in the conduct of public affairs, directly or indirectly, without unreasonable restrictions, the wording of the provisions differs as to the degree of citizen participation, whether directly, by referendum, or through representatives.

While the American Declaration and Convention, and the African Charter contain the recognition of the right of everyone to participate in the government of his country, this is not explicitly provided by the European Convention itself, nor by the article in the First Protocol to the Convention, which sets out conditions for the election of the legislature.

Each article which provides this right specifies that the mechanism of political participation may be direct or indirect, as in the American Convention and African Charter, through *"freely chosen representatives"*.

The proposed Arab Covenant does not contain any direct reference to this right.

Most modern states provide for direct participation through referenda, though the rule is that participation is indirect, through petitions or mass meetings for example, with the people's authority tending to be exercised through representatives. Indirect participation through representatives is in line with the international principle as long as they are able to exercise power in the state. However, where real power is held by an individual such as an hereditary ruler, or ruling group not chosen by the people, and the proposals, decisions and legislation put forward by the elected representatives may be vetoed, the people cannot be considered to exercise their political rights. Equally, when no representative assembly exists or no mechanism for change of leadership is available, the people must be considered unable to exercise political rights.

With regard to the right to vote and to be elected, the *travaux preparatoires* of the Covenant show that there was a more specific proposal that *"every citizen shall have the right to vote and to be elected to all organs of authority"*, but the proposal was rejected because in most countries, not all organs of authority are elective.

Neither article 21 of the Universal Declaration nor article 25 of the Political Covenant specify whether election to public office should be by direct or indirect vote. The comment may be made that the indirect mechanism, in which votes are cast for members of an elective body who in turn select candidates, may not truly represent the voters' will.

The requirement of the article that elections be periodic, is intended to ensure that persons who have lost the confidence of the electors should not remain in office. Elections should be held with sufficient frequency to allow the electorate to play an effective role by exercising control over their representatives. As we saw above, this may be regarded as a measure of the degree of democracy within any political system.

It goes without saying that elections held to choose representatives must be *"genuine"*, but this requirement extends to any public consultation, by referendum, for example. *"Genuine"* in this context, means that the will of the people is honestly and accurately ascertained. An election may not be described as genuine if there has been dishonesty, corruption or coercion, whether by the electors, the candidates or the authorities. Electoral laws governing the procedures, conditions and safeguards of the electoral process are the mechanism by which genuine elections are ensured. An important element in securing genuine elections is the principle of secrecy in voting, which guards against coercion or intimidation.

With respect to the requirement that election must be *"by universal and equal suffrage"*, the *travaux preparatoires* indicate that the opinion was expressed that the word *"universal"* was unnecessary in view of the introductory wording *"every citizen..."*, and the term *"equal"* was again redundant in view of the provisions of article 2 concerning non-discrimination. However, the majority considered that the principle of *"universal and equal suffrage"* was important, while leaving countries

free to regulate their own elections, so the wording was retained. Regional instruments regulate the right in similar terms.[171]

Bearing in mind that this thesis examines the political rights of a population who, as we will see in the next Chapter, have only comparatively recently achieved independence, the question may be raised of whether universal and equal suffrage should be granted immediately in this context, or introduced gradually because of the comparative political immaturity of the population. Such an approach must be rejected, since it is contemplated neither by article 21 of the Universal Declaration nor article 25 of the Political Covenant. Furthermore, in the light of the Declaration by the General Assembly of the United Nations on the granting of independence to colonial countries and peoples,[172] where it is stated, *inter alia*, that *"inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence"* and steps are to be taken immediately to transfer all powers to the peoples of territories not yet independent, it is quite clear that the General Assembly does not regard political or educational development as acceptable grounds for restricting the exercise of political rights by all peoples.

*"Equal suffrage"* implies *"one man, one vote"*, that all should participate on equal terms and each vote should have the same weight. Regulations which establish the voting system, electoral boundaries, counting and proclamation of votes have a vital role to play, since failure in any of these mechanisms undermines the genuineness of elections. Arbitrary establishment of electoral district boundaries, for example, may distort the true expression of the will of the people.[173]

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171. In all regional instruments, the right belongs to citizens alone, though the European Convention is explicit in allowing States to restrict the political activity of aliens, and the American Declaration goes further in stating that *"It is the duty of every person to refrain from taking part in political activities which are restricted exclusively to the citizens of the state in which he is an alien."* Otherwise, the only restriction placed on the right appears in the American Convention, where restrictions are specified on the grounds of age, residence, language, education, civil and mental capacity or criminal convictions. Only the American instruments explicitly protect the right to vote and be elected. Along with the article in the First Protocol to the European Convention, they provide that elections be genuine and periodic, though other terms such as *"honest"*, *"free"* and *"at reasonable intervals"* are used. They provide that elections be held by secret ballot, and both the American Convention and the Protocol to the European Convention specify that the elections should ensure the free expression of the *"will of the voters"* (American Convention) or *"the opinion of the people"* (Protocol to the European Convention). Neither the African Charter nor the proposed Arab Covenant contain provisions specifying the conditions of elections, while the American Declaration alone contains the right of petition. The European article specifies that it is the people's choice of the legislature which should be ensured. This article seems to be giving legal expression to the belief outlined in the preamble of the European Convention that fundamental freedoms are best safeguarded by *"effective political democracy"*. The European Commission has stated, in the *Greek case*, that the article in the Protocol *"presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of a democratic society"*.
Yearbook of the European Commission on Human Rights 12, p.179.

172. Resolution 1514 (XV) quoted in United Nations Study of Discrimination in the Matter of Political Rights, 1962, p.11.

173. The American Supreme Court's judgement in *Baker v Carr* (1962) established the principle that the courts are competent to decide in apportionment cases, giving rise to a number of other cases in which federal and state courts have ruled on unfair apportionment.
Discussed in Journal of International Commission of Jurists IV, 1-2 1963, pp.323-7.

No international or regional legal provision specifies a particular system of voting,[174] but the necessity to ensure the free expression of the will of the electors is the criterion to judge whether the election is *"genuine"*. In its interpretation of article 3 of the First Protocol to the European Convention in a case where it was claimed that only a system of proportional representation could secure the right expressed in the article,[175] the Commission explained that *"free expression of the opinion of the people"* primarily means that elections cannot be held under any form of pressure in the choice of one or more candidates, and that in this choice, the elector must not be unduly induced to vote for one party or another. In addition, the word *"choice"*[176] means that different political parties must be assured a reasonable opportunity to present their candidates at elections.

Genuine elections imply freedom of choice, to ensure that free expression of the will of the electors may take place. This principle was applied by the European Commission, in the *Greek case*, when it found that banning of political parties violated this right.[177] However, this does not imply that all such bans violate the right, since parties whose programmes are to undermine the freedoms of others secured in international law have been considered an exception. The Commission, in consideration of an application by the German Communist Party, quoted from preparatory work for the Convention the statement that : *"the object was to prevent adherents to totalitarian doctrines from exploiting the rights guaranteed by the Convention for the purpose of destroying human rights"*.[178] This is parallel to a restriction that might be placed

174. The European Human Rights Commission has found that the article in the Protocol to the European Convention does not impose a particular kind of electoral system, ensuring that the total number of votes cast for each candidate or group is reflected in the composition of the legislative assembly.
*X v United Kingdom* Application no. 7140/75.

175. In *X v United Kingdom*, a candidate for parliament complained that *"he was deprived of his right to a just and fair representation of his opinion in the House of Commons by virtue of the 'first past the post' electoral system which existed in the United Kingdom"* and contended that only an electoral system which contained at least an element of proportional representation could ensure conformity with the article in the European Convention.

176. The Commission adopted the same notion with regard to the word *"choice"* in this article, as had the Court in their consideration of *"freedom of choice"* in the right of association. See above.

177. Yearbook of the European Court of Human Rights 1, p. 224.

178. The German Communist Party applied to the European Court on the grounds that its rights under articles 9, 10 and 11 of the Convention were violated by the declaration of the German Federal Constitutional Court that it was anti-constitutional, its dissolution and seizure of its property. The Commission agreed that the aims of the Party were incompatible with the Convention, since it sought to establish a communist society by means of a proletarian revolution and the dictatorship of the proletariat. Therefore, even if it sought power by constitutional means, dictatorship would be incompatible with the Convention, by involving the suppression of a number of rights.
The Irish government also invoked article 17 of the Convention in the *Lawless case*, claiming that Lawless, since supporting the aims of the IRA, was not entitled to rely on articles 5, 6, 7 or any of the rights in the Convention. However, the Commission expressed the view that article 17 was not applicable, that the aim of article 17 was to prevent totalitarian groups exploiting the rights safeguarded by the Convention, but that to achieve this aim, it was not necessary to deprive those persons of all the rights in the Convention. Thus, a person engaging in subversive activities does not thereby lose the right to a fair trial, for example, according to article 6, while he *would* lose political rights, such as those of organising political meetings or associations, since the criterion upheld by the Commission is that *"no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms"*.
Yearbook of the European Court of Human Rights, 4, p. 438

on the right contained in article 25 of the Political Covenant on the grounds that it was incompatible with article 5.

The meaning of the phrase *"without unreasonable restriction"*[179] in article 25 of the Political Covenant has been clarified to some extent by the findings of the Human Rights Committee in the *Weinburger v. Uruguay* case, where it expressed the view that article 25 is violated by a national decree which prohibits, for a term of 15 years, the participation *"in any of the activities of a political nature ..."* by certain persons.[180] The Committee commented that it could not see why, even in a state of emergency, to restore peace and order, it should be necessary to deprive all candidates of some political groups at certain elections of all future political rights, for a period as long as fifteen years.

It is of particular importance to this thesis, to point out the serious implications of the State's penal policy in either developing or retarding the political life of its community, deepening the crisis of representation and further alienating citizenly feelings. The Committee, in *Weinburger v. Uruguay*, has expressed its awareness of the fact that under national legislation of several countries, there is a tendency that *"criminal offenders"* may in many cases be deprived of all or certain political rights. Although the Political Covenant merely prohibits *"unreasonable"* restrictions in article 25, nevertheless, in no case may a person be subjected to such sanctions solely because of his or her political opinion in line with articles 2 (paragraph 1) and 26. Furthermore, the Committee stated that *"... in the circumstances of the present case there is no justification for such a deprivation of all political rights for a period of 15 years."*[181]

The Committee has commented on a statement made by a State Party under article 40 of the Political Covenant, that the enjoyment of the rights proclaimed therein was subject, inter alia, to *"the compatibility of such enjoyment with the ideological principles and foundations of the political system and its prevailing plans and programmes"*[182], that the provision was not compatible with the Political Covenant, and could be

179. During drafting of the article, a proposal was made that a clause abolishing *"property, educational or other qualifications"* which restricted electoral rights be included. Since, in many countries, certain categories of persons are denied the right to vote, and the right to public office and access to public service are subject to certain restrictions, including citizenship, nationality and age, the clause *"without unreasonable restrictions"* was adopted.

180. *"They are : (1) candidates for elective office at certain elections on the list of Marxist or pro-Marxist political parties or groups which were declared illegal by decrees made some time after those elections; (2) candidates for elective office at those elections on the lists of political organisations which were "electorally associated" with those parties or groups, "under the same coincidental or joint slogan or subslogan"; (3) "tried for crimes against the nation"; (4) "tried for offences against the public administration committed during the exercise of their political functions".*
Provisions of Institutional Act No.4 of 1st September 1976, quoted in Human Rights Committee Selected Decisions under the Optional Protocol (Second to sixteenth sessions), 1985, p.42

181. Weinburger v. Uruguay ibid. pp.57-60

182. See the initial report (CCPR/C/1/Add.45 of 8th June 1979)

used to apply harsh measures in contradiction with its provisions.[183] With particular reference to the right to participate in political life, a member of the Committee has commented that to exclude persons from the political process on political grounds would be a violation of the principle of equality provided in the Covenant.[184]

European case law also provides clarification of the *"reasonableness"* of restrictions on the exercise of political rights, based on the criterion we saw above, that such restrictions must not interfere with *"the free expression of the opinion of the people"*. The European Commission has found that conditions commonly imposed on the right include citizenship, residence[185] and age.[186]

The Commission has held that a law depriving persons convicted of *"uncitizenlike conduct"* from practising their political rights is not a violation of the principle in the Protocol to the European Convention,[187] and that prevention of convicted prisoners from voting does not affect the *"free expression of the opinion of the people"*, and therefore does not violate the Protocol.[188] It has confirmed that deprivation of individuals' rights of voting or participating in elections on the grounds of incompatibility with article 17 of the European Convention is not a violation of their rights.[189]

183. Report of the Human Rights Committee, General Assembly, Official Records: Thirty-Fifth Session, Supplement No. 40 (A/35/40), p. 26.

184. The exclusion of *"all individuals who adopted a political, economic or intellectual position that was hostile to the Revolution and its programme ... from the democracy"* may be seen as a clear violation of the principle of access without unreasonable restrictions to the political process. CCPR/C/SR.748 of 21st July 1987, p. 10.

185. The Commission has also found that requirements of residence applied to this right were not unreasonable, considering that reasons might be: 1. the assumption that a non-resident citizen is less directly or continuously interested in, and has less day-to-day knowledge of, its problems; 2. the impracticability for parliamentary candidates to present the different electoral issues to citizens abroad so as to secure the free expression of opinion; 3. the need to prevent electoral fraud, the danger of which is increased in controlled postal votes; 4. the link between the right of representation and the parliamentary vote and the obligation to pay taxes. Application no. 7566/76 p. 121.

186. In the case of *X, Y and Z v. Belgium*, the Commission considered that the minimum age of 25 years for those wishing to stand for election cannot be regarded as unreasonable or arbitrary. *X, Y & Z v Belgium*, Application no. 7566/76.

187. The Commission upheld a law depriving persons convicted of uncitizenlike conduct during the Second World War of their right to vote for life, since the purpose of the law was to prevent persons who had grossly misused their right to participate in public life in war-time from misusing their rights in future. *X v Netherlands*, Application no. 6573/74 p. 87.

188. *X v Federal Republic of Germany*, Application no. 2728/66, p. 38; *X v Federal Republic of Germany*, 4984/71 p. 28.

189. *Glimmerveen & Hagenbeek v Netherlands*, Applications 8348/78 and 8406/78 p. 187.

During drafting of the Political Covenant, the provisions concerning the right of access to public service on general terms of equality did not give rise to much debate, save for the question of the qualifications required : a proposal was made that every citizen should have political rights *"irrespective of race, colour, national origin, social position, property status, social origin, language, religion or sex"*, but this was rejected, and the clause *"without any of the distinctions mentioned in article 2 of this Covenant"* was adopted.

Discrimination in access to elective public service occurs when a candidate who meets other legal requirements, such as those based on nationality, residence, age and requirements of the office, is excluded solely on the grounds specified in article 2 of the Political Covenant.

Non-discrimination in the context of public employment means that such employees be chosen impartially and without regard to their political belief. It has been noted that the filling of high-level *"policy-making"* posts by candidates who share the political views of the administration in power is not deemed to be discriminatory, though problems arise from the absence of objective criteria to determine which posts may be regarded as *"policy-making"*.[190]

Remedy for alleged discrimination in acess to both elective and appointive public office should be made available, according to article 2, paragraph 3 of the Covenant. Although, in the first instance, recourse may be made to administrative organs, ultimately the appeal should be made to the judiciary.

Regional instruments safeguard the right of access to public service on general terms of equality,[191] and go on to mention political duties. Both the American Declaration and the African Charter specify such duties, with the American instrument stating the duty to vote and to hold public office, while the African Charter, in article 29, specifies the duties of service to the national community and preservation and strengthening of *"social and national solidarity"*. The concept of the duty of the citizen to the community, which finds expression in article 29 of the Universal Declaration, is to be found within the legal order of many developing countries, in particular those Arab countries which have adopted radical political programmes, as we will see in Chapter 4.[192]

190. United Nations Study of Discrimination in the Matter of Political Rights, 1962, p.13

191. In the regional instruments, only the African Charter and the American Convention protect the right of access to public service. Like the Political Covenant, in the American Convention, it is subject to *"general conditions of equality"*, while the African Charter guarantees the right to all citizens. The proposed Arab Covenant guarantees the right of every national to have access to public service in his country.

192. For example, in Iraq, the Provisional Constitution stipulates that : *"Public office is a sacred trust and a social service based on faithful and conscious devotion to the interests, rights and freedoms of the masses in accordance with the provisions of the Constitution and the law."*

# SECTION FOUR

# STATE OF EMERGENCY IN INTERNATIONAL LAW

This section examines the provisions according to which the obligation of States Parties to international human rights instruments to safeguard and ensure the rights we have examined, and others, may be modified in time of crisis, for example, when a State adopts special powers and takes legislative steps to restrict those rights in the name of the protection of its community.[193] The scope of state of emergency situations is wide, for example, the term is used to cover natural disasters, *force majeure* events, political crises or other threats to the nation. The characteristic they share is their exceptional and temporary nature. In the present discussion, the focus will be on measures of a temporary character, taken to deal with a situation having a political nature, involving a threat to the nation. While it is true that a crisis situation may also result from international or non-international armed conflict and wars of national liberation, and it is the case that these elements are present in the Middle East today, since these situations are more properly the subject of humanitarian law and not the main focus of concern in the present research, the concentration will be on situations of internal disorder or crisis, of a political nature.

International human rights instruments acknowledge the existence of such exceptional circumstances by containing provisions which allow States Parties to derogate from obligations undertaken under international law, but this concession to States represents an exception, and so the adoption and use of the measures of derogation which the instruments envisage are specified and regulated by the instruments themselves. While some aspects of the adoption and use of temporary emergency provisions are common to both international and national legislation, they differ in important respects, and therefore are the subject of separate examination in this study.

The present section concentrates on the international provisions which define and regulate the adoption and use of emergency measures, in this case, of derogation from obligations assumed under international law,[194] with the aim of establishing a clear picture of the international legal understanding of the concept of state of emergency in the strictly defined sense already mentioned, with a view to using some of the principles thereby distinguished in a later section, as a measure both of the content of national legislation regulating the use of emergency powers, and of the extent to which certain governments meet their international obligations, as well as assessing the effect of the use of emergency powers on the legal order in general, and the human rights protected by international law in particular.

193. The name given to these circumstances varies from country to country : the situation may be described as state of emergency, state of siege, imposition of martial law and so on. Since, in general, these situations could be categorised as *"state of emergency"*, only this term will be used in this discussion.

194. This analysis adopts the approach of the *Study of the Implications for Human Rights of Recent Developments Concerning Situations known as States of Siege or Emergency*, which identified in the international understanding procedural and substantive guarantees, as well as the implementation of surveillance. They comprise the principles of proclamation, notification, exceptional threat, proportionality, non-discrimination, inalienability of certain rights.

The view was expressed, during the *travaux preparatoires* of article 4 of the Covenant,[195] that a provision allowing for derogation from the obligations imposed by the Political Covenant was unnecessary, by those who argued for a general limitation clause on all the rights, as well as those who considered that the circumstances for which the article was designed, and the rights to which it might apply were sufficiently controlled by the limitations contained in several other articles.[196] It was also considered that such an article might lead to complex problems in interpretation and give rise to abuse. The view which eventually prevailed was that it was necessary in the Political Covenant to foresee conditions of emergency during which states would be forced to restrict certain rights. It was argued that in war-time, for example, States could not be strictly bound by all the obligations assumed under a convention. Other times of extraordinary danger or crisis should also be envisaged, when derogation from certain obligations might be essential for both the safety of the people and the existence of the nation.

These situations were not adequately covered by the restrictions which appeared in several articles of the Political Covenant. Nor, it was felt, could this be achieved in a general limitations clause.

It was considered important that States Parties were not left free to decide for themselves when and how to exercise emergency powers, in order to avoid States abusing their obligations under the Political Covenant.[197] Therefore, article 4 of the Political Covenant as adopted requires the state of emergency to be officially proclaimed in order to reduce the number of *de facto* situations. The importance of this principle also lies in the international legislature's intention to draw the attention of States to respect the procedure normally outlined in their domestic legislation. The view was expressed, in the *travaux preparatoires*, that the existence of a public emergency should be *"officially proclaimed"* by the state concerned. Proclamation was considered an essential guarantee, to prevent states from derogating arbitrarily from their obligations. It was noted that in most countries a public emergency could be declared only under conditions defined by law, and that this guarantee would be lost unless the international instrument retained the requirement of public proclamation.

195. UN General Assembly Official Records, 10th session 20 September - 20 December 1955 Annexes General problems relating to the draft Covenants p.7f.
196. It was felt that the concept of *"national security"* or of *"public order"* in several articles would suffice for situations which might arise in time of war or national emergency. In addition, those specified limitations appeared only in the articles where they were considered *"indispensable"*, while a general clause might be misused to justify wider restrictions.
197. UN General Assembly Official Records, 10th session 20 September - 20 December 1955 Annexes, p.20

It seems that the principle of proclamation was not encoded by the legislator in the regional instruments,[198] nevertheless case law at this level appears to take it into account.[199]

Another important principle examined during the *travaux preparatoires* was the principle of notification,[200] when some expressed the opinion that the importance of the fact of derogation from the obligations of the Covenant justified the publication of notifications to the U.N. by the Secretary-General. This proposal was rejected on the grounds that it might be dangerous to allow to States which were not parties the opportunity to express opinions on how States Parties were fulfilling their obligations under the Political Covenant. In spite of the political implications of this suggestion, had it been adopted it would clearly represent an additional safeguard of the rights secured in the Political Covenant. On the other hand, it might have had the undesirable effect of inhibiting States from fulfilling the obligation at all, or even from ratifying the Political Covenant.

198. None of the regional instruments seems to take explicit account of the principle of proclamation, since neither the American Convention, Declaration nor the European Convention, the European Charter nor the African Charter require States Parties officially to proclaim the existence of state of emergency.

199. For example, in the merits in the *Lawless case*, the European Court considered "*that the principle of proclamation, however justified it might be for preventive purposes, should not constitute a prerequisite for the control of the competent bodies.*"
Yearbook of the European Convention on Human Rights, 4, pp.482f (para.47)

200. At the regional level, States Parties to the European Convention and Charter, and the American Convention undertake the obligation to inform the Secretary-General of their respective organisations of the measures taken under emergency powers. Only the American instrument is explicit that this information will be communicated to States Parties, while the European instruments do not mention notification to Contracting Parties. However, this deficiency was rectified in practice by a resolution of the Council of Ministers, which gave the Secretary-General this role. Thus, both the American and the European Convention remain equal in terms of practice in their compatability with the Covenant in this respect.
Resolution (56) 16 of 26th September 1956 relating to the interpretation of article 15, para. 3 of the Convention.
Again, in determining the object and the extent of notification procedure, unlike the American instrument, neither the European Convention nor the Charter specifies that notification should take place immediately, though in practice the Commission and the Court, in the Lawless case, considered that this formality included "*a time element*" as an important factor to be taken into account.
Yearbook of the European Convention on Human Rights, 4 Judgement of 1st July 1961
The two European instruments require the State Party availing itself of such derogation to continue informing the Secretary General of the Council fully of the "*measures*" and "*the reasons*", until the time when the provisions of the Convention are once more being "*fully executed*", while the American Convention merely requires Parties to the Convention to inform other States Parties through the Secretary General of the Organization of American States of the reasons, the suspended provisions and the proposed date for their termination. The European obligation to continue to inform the Secretary-General does not appear in other regional instruments, or in the Covenant.
The European Convention again goes further than other regional instruments in requiring states to inform the Secretary-General of the nature of the measures taken, and the reasons for them.
The normal practice of the Council of Europe is as follows : a *note verbale* is sent to the Secretary-General briefly outlining the nature of the political crisis, a list of provisions to be restricted or suspended, if applicable, the expected period of derogation and its geographical extent; the Secretary-General acknowledges receipt; he then notifies the derogation to other States Parties via a copy of the *note verbale*; he transmits a copy of the note for information to the President of the Commission, the Court and the Parliamentary Assembly.

An additional guarantee containing a strict procedure for cases of derogations was suggested, though not adopted. It was put forward that this might be done by requiring States to submit information on the circumstances which had led to the suspension of provisions of the Covenant to the Committee or another suitable organ which would decide the compatibility of such action with the Covenant provisions.

This procedure, had it been adopted, would have provided an additional safeguard for supervision of States' actions in the light of the Political Covenant, though its successful operation would of course depend on States complying with the requirement to notify derogations to the United Nations. In practice, as we shall see, the Human Rights Committee has, on occasion, commented on the legality of derogations, though their right to do so is not made explicit in article 4 or article 40 of the Political Covenant. However, according to article 4, the legal fact remains that States which find themselves exercising such power and derogating from certain obligations should observe the principle of notification, by informing the other States Parties immediately, through the Secretary-General. The evaluation of that notification depends again on the object as well as the extent, since both elements are very important in determining the nature of that procedure, as to which provisions the State intended to derogate from, the reasons and the date by which it was actuated and when it intends to terminate such derogation.

The only kind of emergency situation envisaged in article 4 of the Political Covenant is a *"public emergency"*. According to paragraph 1, this occurs only when *"the life of the nation"* is threatened, and only when its existence has been *"officially proclaimed"*.

From the *travaux preparatoires* it is clear that many other proposals were considered.[201] The intention was to provide an indication of the kind of public emergency during which a state would be entitled to make derogations from obligations assumed under the Political Covenant. The wording adopted reflects the view that the extent of the public emergency should be such as to threaten the life of the nation as a whole.[202] Although it was recognised that the outbreak of war constituted one of the most serious emergencies threatening the nation, it was felt that the Political Covenant should not envisage the possibility of war, even by implication, since one of the principal aims of the United Nations was to prevent war. Some felt, however, that *"public emergency"* was too restrictive a term; it would not cover natural disasters, for example, which almost always justified derogation from at least some of the obligations assumed under the Political Covenant.

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201. These included the expressions *"in time of war or other public emergency"*, *"in time of war or other public emergency threatening the interests of the people"* and *"in the case of a state of emergency officially proclaimed by the authorities or in the case of public disaster"*. Also suggested were *"public emergency threatening the security, safety and general welfare of the people"* and *"in case of exceptional danger made evident by public act or public disaster"*.
General Assembly Official Records 10th session 20 September - 20 December 1955 Annexes

202. As we will see, this formulation is based on both the provision in the European Convention, and the case law of the European Court and Commission.

It was considered that the qualification *"which threatens the life of the nation"* would make it clear as to whether the provision referred to all or some of the people, although it was suggested that a reference to *"the interests of the people"* was more appropriate and that such a phrase would also prohibit governments from acting against the interests of their people. The final text of the article cannot be understood outwith the legal boundaries, that is, the circumstances invoked must constitute an exceptional public danger threatening the existence of the nation.

At the regional level, unlike the Covenant, the instruments mention time of war and threat to the sovereignty of the state as grounds for the imposition of state of emergency.[203]

Examination of the international legal understanding of the meaning of *"exceptional threat"*, for example, on the basis of the criteria generally applied by the Human Rights Committee in considering the reports of governments as well as the findings of regional organs, comprises several elements. Firstly, the threat must be present or imminent, and the use of derogation is subject to a time-limit.[204] Secondly, the threat must be such that normal measures no longer suffice to maintain public order, and the situation must affect the whole of the population. Lastly, there must be a threat to the very existence of the nation, whether as a threat to physical integrity of the population, threat to territorial integrity, or to the functioning of the organs of the state.

The principle of exceptional threat conveyed in the use of the terms *"public emergency threatening the life of the nation"* and *"public danger"* may be understood by reference to the merits and findings of regional bodies. In particular, the findings of the European Court and Commission in the *Lawless Case* and the *Greek Case* shed light upon the regional understanding of the factors which comprise the existence of a *"public emergency ..."*. As we have seen, in the merits of the *Lawless Case*[205], the European Court considered that :

*"the natural and customary meaning of the words 'other public emergency threatening the life of the nation'[206] is sufficiently clear; ...they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed"*,

203. While the two European treaties use the term *"public emergency which threatens the life of the nation"*, the American Convention uses the term *"public danger"* and *"or other emergency that threatens the independence"* or *"threatens the security of a State party"*.

204. In their discussion of the merits of the Landinelli case, the Human Rights Committee drew attention to two important principles concerning state of emergency: firstly, that measures taken during state of emergency must be of the shortest possible duration; and secondly, the important principle that, in the opinion of the Committee, the doctrine of National Security which underlies extended states of emergency, should be rejected.
Human Rights Committee Selected decisions under the optional protocol (second to sixteenth sessions), 1985 [CCPR/C/OP/1] p.65-66

205. Yearbook of the European Convention on Human Rights, 1961 No 4 Paragraph 28

206. *"Nation"* was defined by the majority opinion of the Commission in the *Cyprus Case* as *"the people and its institutions, even in a non-selfgoverning territory, or in other words, the organised society, including the authorities both under domestic and international law for the maintenance of law and order"*.
Yearbook of the European Convention on Human Rights, 2 (1958-59)

and the Court found that in the *Lawless Case*, the existence of a public emergency threatening the life of the nation was reasonably deduced by the Irish government.[207]

As for the opinion of the Commission in the *Greek Case* on the question of whether there was on the 21st April 1967, a public emergency in Greece threatening the life of the nation, the Commission stated that such a public emergency comprised a number of characteristics. These were :

*"1. it must be actual or imminent; 2. its effect must involve the whole nation; 3. the continuance of the organised life of the community must be threatened; 4. the crisis or danger must be exceptional, in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate."*[208]

The principle of the *"margin of appreciation"*, which will be examined more fully in the discussion of surveillance of states of emergency by regional bodies, was applied by the Commission in the *Greek Case*.[209]

The measures which a State Party may take in derogation of its obligations under the Covenant after a public emergency has been proclaimed are subject to the principle of proportionality, specified in paragraph 1 of the article. They must be *"to the extent strictly required by the exigencies of the situation"*, and they must not be *"inconsistent with [the state party's] other obligations under international law"*.

It is worthwhile to mention the comment of the Human Rights Committee with regard to derogation that measures taken under article 4 are of an exceptional and temporary nature, and should last only as long as the life of the nation is threatened.[210] The principle of proportionality is based on the concept of the strict limits required by any emergency situation. It finds its roots in the theory of self-defence, according to which a threat must be imminent, and the measures taken against it have to be proportionate to the threat.

Case law at the regional level gives a clearer view of the scope and application of this principle, though some discussions of the issue by the supervising bodies at the international level are discussed in the later section on surveillance.

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207. The factors which led to the state of emergency were : the existence of a secret army in Ireland which was carrying out unconstitutional activity by violent means; the fact that this army was also acting outside Irish territory, thus threatening Irish Relations with their neighbour; and the increase in terrorist activity in 1956 and 1957.

208. Factors adduced by the Colonels for the state of emergency were : the threat of a Communist takeover involving force; the state of public order; the constitutional crisis preceding the general election in May 1967. In spite of these factors, the Commission found that there was not, on 21st April 1967, a public emergency in Greece which threatened the life of the nation.
Denmark, Norway, Sweden, Netherlands v. Greece Yearbook of the European Convention on Human Rights, 1969 No 12 p71f

209. During the *travaux preparatoires*, there was general agreement on these qualifications, though with regard to the second element, the proposal was made, though rejected, that in order to avoid misinterpretation of the words *"international law"*, a reference to the *"principles of the Charter and the Universal Declaration of Human Rights"* should be included. Some felt that reference to the Charter would show that war was recognised only for reasons consonant with the Charter.

210. General Comment 5/13, Human Rights Committee General Comments 13th Session, 28th July 1981 [CCPR/C/21 of 19th August 1981] pp. 4-5.

The European Convention and the American Convention each contain the same phrase as the Covenant prescribing the principle of proportionality, providing that measures taken must not contradict other obligations under international law.

Again, for regional legal understanding of the phrase *"to the extent strictly required by the exigencies of the situation"*, the findings of the European Court and Commission in the *Lawless Case* and *Ireland v. United Kingdom* are the principal source. In the case of *Lawless v. Ireland*[211], the European Court found that the bringing into force and operation of part 2 of the Offences against the State (Amendment) Act 1940 was strictly required by the exigencies of the situation.[212] The Commission agreed with the contention of the Irish government that the measures taken under the Act were strictly required by the exigencies of the situation.[213] It seems that the Commission and Court considered the safeguards contained in the Act important factors.

In the case of *Ireland v. United Kingdom*[214], the Commission and Court examined allegations which included the charge that Article 5 had been violated by special powers brought into operation by the Northern Ireland government.[215] The Court found it was not established that derogations from Article 5 exceeded the extent required by the exigencies of the situation.

The principle of non-discrimination[216] also met with general approval

211. Yearbook of the European Convention on Human Rights, No. 4. 1961, pp. 474-8

212. This act provided, with certain safeguards, for detention without trial of individuals suspected of intending to take part in terrorist activities. The safeguards included the following : the application of the Act was subject to constant supervision by Parliament; the Act provided for the establishment of a *"Detention Commission"* comprised of an officer of the Defence Forces and two judges; any person detained under the Act could refer his case to the Commission whose decision was binding on the Irish government.

213. The Court judged that ordinary law had been unable to meet the necessity of the situation and that special courts which could have been set up under Offences against the State Act (1939) or military courts could not *"suffice to restore peace and order"* in Ireland in 1957. They also considered that the sealing of the border between the Republic of Ireland and Northern Ireland would have had extremely serious repercussions on the population as a whole beyond the extent required by the exigencies of the emergency. Therefore, as the Court considered that none of these means would have made it possible to restore peace and security, they found that administrative detention as provided by the Offences against the State Act (Amendment) 1940 appeared to be a measure required by the exigencies of the situation.
Yearbook of the European Convention on Human Rights, No. 4. 1961, Lawless Case (Merits)

214. Yearbook of the European Convention on Human Rights, No. 21. 1978.

215. These involved the arrest, detention and/or internment without trial of large numbers of people. These powers took the form of (a) an initial arrest for interrogation; (b) prolonged detention for further investigation; and (c) preventive detention for a period unlimited in law. The powers were based on regulations under the Civil Authorities (Special Powers) Act (N.I.) 1922.
D.J.Harris, Cases and Materials in International Law, 3rd ed, 1983, p. 483

216. Apart from the American Convention, no other regional instrument contains a clause comparable to that in the Covenant which safeguards the principle of non-discrimination during state of emergency. The provision in the American Convention stipulates explicitly that derogation shall not be permitted on the grounds of race, colour, sex, language, religion or social origin. These grounds are less extensive than those contained in article 1 which has in addition political or other opinion, national origin, economic status, birth or other social condition.
Though the principle of non-discrimination in time of public emergency is not made explicit in the European Convention, within the context of the Convention, the general provision of non-discrimination which appears in article 14 of the Convention may be understood to cover this omission.

during the *travaux preparatoires*, although the use of the word *"solely"* was discussed, in the phrase *"discrimination solely on the ground of race, colour, sex, language, religion or social origin."* It is clear that a state might take measures that appear discriminatory simply because the persons concerned belong to a certain race, religion, and so on, but that the actual reason for the derogation might be otherwise. For example, in the case of an action threatening public safety, such as a riot, it might well be the case that the participants belonged to a particular category of the society or other identifiable group.

It was considered important to emphasise in the article that the intention was to avoid discrimination solely on the grounds mentioned. It was agreed that reference to the various grounds for non-discrimination set forth in article 2, paragraph 2, of the Universal Declaration would not be appropriate, since the provision has a wide scope, and it was felt that legitimate restriction might in some cases be imposed on some of the categories it contains. It is hard to see why the wider scope of the provision in the Universal Declaration should have been considered inappropriate, since even in a public emergency it cannot surely be considered justified to discriminate against persons solely on such grounds as political or other opinion, national origin and so on. In my view, the use of the word *"solely"* in the provision means that the wider scope of the provision in the Declaration could have provided a stronger legal safeguard for the rights of individuals without unduly undermining the sovereign right of states to impose justifiable restrictions in emergency conditions.

In the event, guidelines as to the nature and extent of such derogation were incorporated in the first paragraph of the article, which specifies that any measures derogating from the Covenant should be :

*"to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."*.

Article 4 lists the provisions of the Covenant from which no derogation may be made, the rights which may be considered *"inalienable"*[217]. It was agreed in principle during the *travaux preparatoires* that certain obligations could not be derogated from even in times of public emergency, but the question of which provisions should be regarded as non-derogable was the subject of some debate.

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217. During the drafting of the two Covenants, the proposal was made that the preambles contain the statement that the rights they safeguard are *"inalienable and derive from the inherent dignity of the human person"*. The description of rights as *"inalienable"* was not agreed to while the second element of the description was generally accepted.
General Assembly Official Records, 10th session 20 September - 20 December 1955 Annexes, General problems relating to the draft Covenants, pp.8-9.

Some were happy with the wording of the draft, which was in fact adopted, although it was pointed out that the provision relating to manifestation of religion or belief, article 18/3 might be subject to the same degree of derogation as articles 19 or 20. Others thought there was a need, before the drafting of the Covenant was completed, to make a thorough study of the articles that allowed of no derogation. Several articles (5, 9, 12, 13, 14, 19, 20 & 21) were mentioned, as wholly or in part describing rights that should appropriately be listed in paragraph 2. While it is clear that such additions to the list of non-derogable rights would be a welcome safeguard of individual freedoms, and in the case of a right like freedom of opinion there seems no reason why the right should not be regarded as inalienable, it must be conceded that in the case of a right such as that of assembly it might be argued that the provision which the article itself contains for reasonable restrictions on grounds of national security, and public order and so on, might not be sufficient to safeguard the rights of the community or the life of the nation.

It was also pointed out that, while there was to be no derogation from certain provisions, derogations could be made from the rest of the Political Covenant, including measures of implementation, which might have far-reaching consequences.

The text finally adopted made reference to a number of articles from which no derogation is permitted : *"No derogation from articles 6, 7, 8 (paras 1-2), 11, 15, 16 and 18 may be made under this provision."*

In connection with article 8/3, the right to be free of slavery is not listed with the other non-derogable rights. Paragraph 3 provides that no one shall be required to perform forced labour. However, section (b), subsection (iii) provides that *"any service exacted in cases of emergency or calamity threatening the life or well-being of the community"* shall not be regarded as forced labour.

At the regional level, provisions specifying the scope of derogations may be found in three instruments, though the list varies from one instrument to another. In the American Convention suspension of guarantees may occur, as is the case under the European Convention and Charter.

The two Conventions establish a list of articles which States cannot derogate from under any circumstances, though, the American goes further in providing the judicial guarantees which are essential for the protection of such rights. However, in both instruments the principle of inalienability encompasses certain fundamental rights : right to life, prohibition of torture, prohibition of slavery, prohibition of retroactivity of penal measures. The American Convention, like the Covenant, also safeguards the right to recognition of legal personality and freedom of conscience and religion. It adds the right to participate in public life, in article 27.

Since the basic list[218] of non-derogable rights is common to several instruments, it may be argued that this amounts to a general principle of law accepted by the international community. Further, according to the Geneva Convention on the Law of Treaties, article 53, it seems that *"a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted"*. It is clear that the core list of inalienable rights derived from the instruments falls into this category. Thus, the principle of non-derogation from these inalienable rights must be considered binding on all states, even though they may not be signatories of treaties which provide it. In the case of countries which *have* signed and ratified such instruments, they are doubly bound by international law. Of particular importance to the protection of inalienable rights in the Arab region is the further assumption that in time of war or in the case of armed conflict not having an international character, the Geneva Conventions on humanitarian law all prohibit *"at any time and in any place whatsoever"* the infringement of the basic set of principles considered inalienable. It must be the case that this will apply also in matters of internal disorder, since it is inconceivable - at the theoretical level[219] - that the guarantees provided in time of war are not present in peacetime.

The task of surveillance of the guarantees provided by the Covenant in time of emergency is divided between two agents : the U.N. Secretary-General and the Committee established by article 28 of the Covenant. Their respective roles may in turn be examined on two levels : firstly, that of the explicit role granted by the treaty to the Secretary-General as depositary and to the Committee in their examination of reports submitted under article 40 of the Political Covenant, and secondly, the discretionary role which either agent may play.

As we saw in the examination of the principle of notification, article 4 of the Covenant assigns to the Secretary-General of the U.N. the role of depositary, in that it is through him that States must notify other States Parties that they are making use of their right to derogate from their obligations under the Covenant. At both the international and the regional level, as we shall see, the surveillance role of the depositary has been enhanced. In particular, the International Law Commission has examined the role of the depositary, especially the extent of his role in ascertaining whether the signatures, instruments or reservations conform to treaties, in order, if necessary, to draw the attention of States Parties to deficiencies.

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218. Right to life; prohibition of torture; prohibition of slavery; prohibition of imprisonment for civil debt; prohibition of retroactive penal measures; right to recognition of legal personality; freedom of conscience and religion.
219. See Francis Boyle "Upholding international law in the Middle East" Arab Studies Quarterly 4 no.4, 1982 pp.336-49.

In the *Study of the Implications for Human Rights of Recent Developments Concerning Situations known as States of Siege or Emergency*, the Special Rapporteur, approving the International Law Commission's findings, went on to comment, that, according to her understanding, the depositary has no discretionary power over the validity of reservations; however, if he doubts their regularity, he must inform the reserving State accordingly. In the result of a reply by the State Party concerned, the depositary is obliged to transmit along with the original reservation, the communication which has taken place on the subject of the reservation. The Special Rapporteur has suggested that this legal understanding should be examined for its application to the role of the Secretary-General in the procedure of notification under article 4 of the Covenant. The Special Rapporteur argues that to extend the discretionary role of the depositary[220] so that he might pass on communications with the State Party intended to ascertain these details if they were not contained in the original communication, would be a more effective element of international surveillance, which would not infringe the principle of state sovereignty. In support to the suggestion of the Special Rapporteur - to extend the supervisory role of the depositary under article 4 of the Covenant - this would represent an additional opportunity for situations which threaten human rights to come to the attention of international public opinion in the forum of the United Nations.

The supervisory role of the Committee on *"measures ... adopted which give effect to the rights recognised"* in the Covenant is set out in article 40. Naturally, this supervisory role extends to examining the way in which state of emergency may affect the enjoyment of the rights, including if applicable, the manner in which the exercise of derogation affects the rights. The practice of the Committee in this respect is clear from an examination of their discussions with States Parties of reports. The Committee has examined the question of national legislation regulating emergency, and pursued the question of the possible effects on human rights in those circumstances with the state representatives concerned. We shall see this clearly in the examination of the national legislation covering the issue in Chapter three, where the questions and comments, where appropriate, of the Human Rights Committee in respect of the Arab countries is examined in detail.

220. Drawing on the provision of the European Convention, article 15, she suggests that his role might be extended, according to the text which provides that the depositary should be kept *"fully informed"*, to in turn fully informing States Parties of derogation from obligations of the Covenant. The word *"fully"* does not appear in the Covenant, where the strict duty is merely *"to inform"* States Parties *"of the provisions from which it has derogated and the reasons by which it was actuated"*.

The comments of the Committee, on reports submitted by the government of Chile[221] indicate that the Committee considers that its supervisory role extends to commenting on the validity of derogation exercised under article 4 of the Covenant. In this respect, the Committee's practice seems to be following that of the regional organs, for example, the European Court and Commission, which though recognising the principle of the *"margin of appreciation"*, as we will see, reserves the competence and duty to comment upon the government's decision to derogate.[222] After considering the information supplied by the Chilean government, the Committee commented that this was insufficient, and some of its members went further in rejecting the arguments of the Chilean government of *"national security"* and *"latent subversion"*, on the grounds that the derogations were not justified on those grounds. However, it seems that the Committee has not gone beyond its statement in its General Comment to establish an abstract assessment of the principle of proportionality, but instead proceeds by reviewing each derogation (whether official or not) in its context.[223] This too will become apparent in the third chapter.

A further statement made by the Committee in the light of Chile's report reflects the Committee's concern to deal with the *actual situation* in the country rather than an abstract picture of the normal legal framework. The Committee noted that the Chilean report failed to meet the requirements of article 40, paragraph 2, *"since it merely provided an idealized and abstract picture of the legal framework which should ensure the protection of civil and political rights in Chile and ... made no reference to the practical enforcement of the legal norms"* and *"ignored the true situation in the country ..."*.[224] This observation will be seen to be particularly apt to the reports submitted by some Arab governments applying state of emergency legislation, and the Committee's discussions with their representatives illustrate this area of difficulty. In addition, it is important to point out, that the statements and practice of the Committee contribute valuable guidance on how its supervisory and judicial roles should be understood. With regard to statements which illustrate the Committee's understanding of the state of emergency, one of the most important sources is its General Comments on article 4.[225]

221. CCPR/C/1/Add.25; CCPR/C/1/Add.40.
222. Rosalyn Higgins "Derogations under human rights treaties" British Yearbook of International Law, 48 1976-77, pp.281-320.
223. For example, the Committee expressed concern about the United Kingdom's continued derogation from certain rights on the basis of article 4. The rights were those safeguarded by articles 9, 10, 17, 21 & 22. It requested justification for each of the derogations.
General Assembly Official Records, 34th session Supp no.40 (A/34/40) p.72.
224. General Assembly Official Records, 34th session Supp no.40 (A/34/40) p.18.
225. General Comment 5/13, Human Rights Committee General Comments 13th Session, 28th July 1981 [CCPR/C/21 of 19th August 1981] pp.4-5.

As we have already seen, the Committee has indicated that they consider that measures taken under Article 4 are of an exceptional and temporary nature, and should last only as long as the life of the nation is threatened. It has also commented that it considers that protection of human rights all the more important during the state of emergency, considering that it is equally important for States Parties, in times of public emergency, to inform other States Parties of the nature and extent of the derogations they have made,[226] and of the reasons therefor, and in addition, that reporting obligations under article 40 include that of indicating the nature and extent of each right derogated from, supplying relevant documentation.

Likewise, in its judicial capacity under the Optional Protocol, the practice of the Committee has shed light on its supervisory role in respect of the effect of state of emergency on human rights. Comments by the Committee in the *Landinelli Case*, have clarified certain issues raised by Article 4. In previous cases, the Committee had dismissed invocations by States Parties of the right to derogate, with a standard reply.[227] In the *Landinelli Case*, the State Party (Uruguay) attempted to justify its restriction on the political rights of certain individuals, by referring to its notice of derogation sent to States Parties, and stating that it had *"temporarily derogated from some of the provisions relating to political parties"*. The response of the Committee was to suggest, for the first time, that the right to derogate *"may not"* depend on compliance with the requirement of notification. It also explained in detail why it was not able to recognise Uruguay's asserted right of derogation.[228] The Committee concluded that : *"a State, by merely invoking the existence of exceptional circumstances, cannot evade the obligations which it has undertaken by ratifying the Covenant"*. In their discussion of the merits of the case, the Committee drew attention to two important principles concerning state of emergency: firstly, that measures taken during emergency must be of the shortest possible duration; and secondly, the important principle

226. The Committee also indicated that in some cases, it was not clear from reports of states not only whether a state of emergency had been officially declared but also whether rights from which the Covenant allows no derogation had not been derogated from. In addition, it was not clear if the required notification to other States Parties had taken place.
Ibid. p.5, para.2.
Again, we shall see some indication of this difficulty in the examination of the national level in Chapter 3.

227. *"The Covenant (Article 4) does not allow national measures derogating from any of its provisions except in strictly defined circumstances, and the Government has not made any submissions of fact or law to justify such derogation."*
Review of International Commission of Jurists 1980 No. 24 pp.46-7.

228. The response stated that Uruguay's notice of derogation *"confined itself to stating that the existence of the state of emergency situation was 'a matter of universal knowledge'; no attempt was made to indicate the nature and the scope of the derogations actually resorted to with regard to the rights guaranteed by the Covenant or; to show that such derogations were strictly necessary"*.
Human Rights Committee Selected decisions under the Optional Protocol (second to sixteenth sessions), 1985 [CCPR/C/OP/1] p.65-66.

that, in the opinion of the Committee, the doctrine of National Security which underlies extended states of emergency, should be rejected.[229] This point is relevant to the situation of some Arab countries, where the doctrine of national security is often misused to establish or prolong states of emergency.

As in the international instruments, surveillance at the regional level may be divided into two aspects : the role of the Secretaries-General of the regional bodies who act as depositary, but in some cases exercise wide discretionary powers in this respect (their respective roles may be explicitly granted by treaty, or discretionary to varying degrees); the role of the regional organs established by the instruments, whether in their judicial role or, as in the practice of the Inter-American Commission[230] in reviewing reports submitted by States Parties under the American Convention, in a role similar to that of the Human Rights Committee under the Covenant.

As we saw, according to the principle of notification, States Parties to the European Convention and Charter, and the American Convention undertake the obligation to inform the Secretary-General of their respective organisations of the measures taken under emergency law.[231] As we saw, the two European instruments require the State Party availing itself of the right to derogate to continue informing the Secretary General of the Council fully of the *"measures"* and *"the reasons"*, until the time when the provisions of the Convention are once more being *"fully executed"*, while the American instrument merely requires States to inform other Parties through the Secretary General of the Organization of the reasons, the suspended provisions and the proposed date for termination. The European obligation to continue to inform the Secretary-General does not appear in other regional instruments, or indeed in the Political Covenant. At the level of the regional instruments, the role of the depositary is extended, since he is empowered to request information from States Parties. As we saw, the European Convention provides that the Secretary-General of the Council of Europe should be kept fully informed of measures of derogation.

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229. The Committee drew a strong distinction between those who promote their political ideas by peaceful means and those who advocate violence. Some governments, particularly those which do not provide lawful means for the transfer of political power, regard any criticism or opposition to their authority as a threat to national security.
Niall MacDermot, Secretary-General of the International Commission of Jurists, in his introduction to States of Emergency : their impact on human rights. A study prepared by the International Commission of Jurists, p.i.

230. The supervisory role of the Inter-American Commission on the question of *"the manner in which ... domestic law ensures the effective application"* of any provisions of the American Convention is set out in article 43 of the Convention, according to which States Parties undertake to provide the Commission with such information as it may request of them.

231. Only the American instrument is explicit that this information will be communicated to States Parties, while the European instruments do not mention notification to Contracting Parties. However, as we saw, this deficiency was rectified in practice by a resolution of the Council of Ministers, which gave the Secretary-General this role.
Resolution (56) 16 of 26th September 1956 relating to the interpretation of article 15, para. 3 of the Convention.

In addition, according to article 57 of the Convention :

*"on receipt of a request from the Secretary-General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention".*

This role is exercised by the Secretary-General at his own discretion, as confirmed by proceedings before the Consultative Parliamentary Assembly of the Council of Europe. The findings of the European Commission and Court have shed light on their supervisory role in respect of the effect of state of emergency on human rights. Throughout all the previous sections, we have used the case law of these two organs to examine both the international and regional understanding of the substantive guarantees in instruments at both levels, and so to avoid repetition, in this section, the focus will be on the way that these two organs have interpreted their competence when dealing with cases of alleged violation of the Convention taking place during states of emergency. Again, the principal sources are the findings of the two organs in the *Greek case*, the *Lawless case* and *Ireland v United Kingdom*, but in addition, it is essential to examine the doctrine of the *"margin of appreciation"*[232] first used by the European Commission in their consideration of *Greece v United Kingdom.*[233] In this case for the first time, the Commission made it clear that the fact of derogation did not exempt the matter from consideration by the Commission. The Commission stated its competence to comment on the existence of a public emergency, and further stated its competence to review the proportionality of measures taken by a State Party in the light of article 15. The Commission introduced the idea of *"measures of discretion"*, saying that *"the government should be able to exercise certain measures of discretion in assessing the extent strictly required by the exigencies of the situation".*[234]

Thus introduced, the concept of the *"margin of appreciation"* continued to be applied by the European Commission, and was extended in its consideration of the *Lawless case*, to cover the assessment of the existence of a public emergency

*"... having regard to the high responsibility which a government has to its people to protect them against any threat to the life of the nation, it is evident that a certain discretion - a certain margin of appreciation - must be kept to the government in determining whether there exists a public emergency which threatens the life of the nation ... ".*[235]

232. See Clovis Morrison "Margin of appreciation in human rights law" in Human Rights Journal 6, 1973 and Rosalyn Higgins "Derogations under human rights treaties" British Yearbook of International Law, 48 1976-77, pp. 281-320.
233. Yearbook of the European Convention on Human Rights 2 (1958-9) p. 176.
234. Ibid.
235. Yearbook of the European Convention on Human Rights 12 (1969) pp. 107-108.

In the same case, the President of the Commission stated:

> *"the concept of the margin of appreciation is that a government's discharge of [its] responsibilities [for maintaining law and order during emergency] is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; once the Commission or the Court is satisfied that the government's appreciation is at least on the margin of the powers conferred by article 15, then the interests which the public itself has in effective Government and in the maintenance of order justifies and requires a decision in favour of the legality of the government's appreciation".*[236]

The ILO Committee on Freedom of Association has taken a series of decisions which add useful interpretation of the international standards governing the protection of human rights during states of emergency. The suspension of legal safeguards of basic rights which accompanies the proclamation of a state of emergency severely undermines protection of the rights in the ILO Conventions 87 and 98, for example, the proclamation of a state of emergency frequently leads to restriction of trade union activity. Neither Convention contains a provision permitting derogation from obligations assumed under the instruments. The Committee considers that the suspension of the enjoyment of the civil liberties which underlie the effective exercise of trade union rights based on state of emergency may only be contemplated in situations of *force majeure*, that is situations of extreme gravity.[237] This is also subject to the condition that measures affecting the guarantees in the Conventions should be limited in extent and time to what is strictly necessary to deal with the situation.[238] While the Committee concedes that, in these circumstances, certain civil liberties might be suspended, it considers that, in the field of trade union activity, guarantees of the security of the person should be neither abolished, suspended or limited.

The restriction on the freedom of action of trade unions and their members during emergency situations often includes a ban on the right to strike. While this may be necessary in the light of exceptional circumstances, the Committee's view is that such a restriction should only be imposed as a temporary measure.[239]

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236. Lawless v Ireland Verbatim report quoted in David Bonner Emergency powers in peace time, 1985, p.86

237. *"Under the wartime legislation of a country engaged in hostilities it may be necessary for trade unions, like other collectivities or individuals, to accept the placing of greater restrictions on their freedom of action than is normally the case under peacetime legislation."*
For example, 17th Report, Case No.73, para.72.

238. *"The Committee has taken the view that it would be desirable that wartime legislation should, as soon as practicable after the conclusion of hostilities, be replaced by legislation which allows a greater measure of freedom to trade unions."*
For example, 17th Report, Case No.73, para.72.

239. *"Since a general prohibition of strikes is an important restriction of one of the essential means by which the workers and their organizations can promote and defend their occupational interests, such a prohibition could be open to criticism unless it had been imposed exclusively as a transitory measure in a situation of acute national emergency."*
For example, 78th Report, Case No.364, para.84.

Unlike other supervisory bodies, apart from statements of a general nature[240], the Committee on Freedom of Association has not found itself competent to comment upon the grounds for imposing a state of emergency adduced by States Members, considering that it has no jurisdiction to comment on what it describes as political matters.[241]

The Committee has stressed that trade union activities suspected of being unlawful during emergency time may well be subject to the imposition of restrictions, though there should remain judicial control of any such measures.[242]

In contrast to the Committee, which does not have competence to examine the justification of the imposition of state of emergency, but restricts its consideration to the possible effects of emergency measures on the rights safeguarded in the Conventions, the Commission of Enquiry set up to examine complaints about Greece's observance of ILO Conventions 87 and 98 stressed the fact that international supervisory bodies weighing the plea of a state of emergency on grounds such as legitimate self-defence, have without exception made an independent judgement as to whether the circumstances justified the imposition of state of emergency. The ILO Commission examined complaints against the Greek government concerning violation of the Conventions during the years of the Colonels' rule. The Greek government submitted that the measures had been taken in the light of exceptional circumstances, which it was for the government alone to evaluate, however on the basis of information received, the Commission decided that none of these factors was such as to enable it to conclude that there had existed in Greece in 1967, a state of emergency or exceptional circumstances that could justify temporary non-compliance with the Conventions. Accordingly the Commission rejected the argument of *"justificatory fact"* adduced by the Greek government.[243]

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240. *"Although it is recognised that a stoppage in services or undertakings such as transport companies, railways, telecommunications or electricity might disturb the normal life of the community, it can hardly be admitted that the stoppage of such services is by definition such as to engender a state of acute national emergency. The Committee therefore, considered that the measures taken to mobilise workers at the time of disputes in services of this kind were such as to restrict the workers' right to strike as a means of defending their occupational and economic interests."*
For example, 93rd Report, Cases Nos. 470 & 481, para. 274, 275.

241. *"Measures of a purely political nature, such as a state of siege, are matters which are outside the Committee's terms of reference except in so far as they may have an impact on trade union rights."*
For example, 103rd Report, Case No. 514, para. 215.

242. *"Measures taken in a state of emergency may constitute serious interference by the authorities in trade union affairs ... except where such measures are necessary because the organizations concerned have diverged from their trade union objectives and have defied the law. In any case, such measures should be accompanied by adequate judicial guarantees which may be invoked with reasonable facility."*
For example, 120th Report, Cases Nos. 572, 581, 586, 596, 610 & 620, para. 43.

243. Official Bulletin of ILO, vol. 54, 1971 no. 2.

# CHAPTER TWO

# THE EMERGENCE OF THE CONSTITUTIONAL ORDER

# I N T R O D U C T I O N

Any realistic evaluation of the contemporary legal order in the Arab countries should take into account the Arabs' common historical background. This historical inheritance, both from the Ottoman empire's domination and the period of European colonialism, must be examined in order to identify its impact on the contemporary order. The legacies of foreign domination may be considered responsible for a wide range of serious problems in the Middle East and Africa.[1] One can say in addition that the geopolitical dimension[2] was and remains a crucial factor.[3]

This brief survey of the development of the Arab legal order in the nineteenth and twentieth centuries does not contain a detailed examination of the history of every country. The purpose is to highlight the main issues and common factors that are of significant impact in the creation of the contemporary order.

This chapter focuses firstly on the legacies of the Ottoman and colonial periods. Secondly, the question of minorities is examined since it plays a role in the stability of the political order, as national and international events have proved. Lastly, the focus is on the implications for the Arabs of the impact of nationalism in the achievement of independence and the development of the contemporary order.

Throughout the chapter, a number of themes, which continue to influence events in the region and shape the development of the contemporary order, are evident. The focus is on characteristic dimensions according to their effect, namely the kin-based and tribal nature of traditional society, and most important and pervasive, the religious factor.

The traditional context is essential for understanding the contemporary socio-political dynamic, as are the varied responses of modern Arab political thought. Similarly, the response to the Arabs' cultural heritage has ranged from secular modernism to religious conservatism. The two extremes, as well as the range of opinions which fall between them, have played and continue to play a vital role in the diversity of the contemporary legal order.

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1. For example, "Many of Africa's problems today are legacies of colonialism. The political boundaries, to a large extent, make little sense from the African social or political point of view. They were often drawn by the European powers for reasons of commerce or of European politics during the nineteenth century. In many areas, they cut across tribal lines, separating peoples and creating problems of national identity and national unity. In other areas, artificial unity, created for purposes of administration by the former colonial power, has caused problems."
J.F.A. Ajayi "A Survey of the cultural and political regions of Africa at the beginning of the nineteenth century", in J.C. Annex and G.N. Brown, Africa in the nineteenth and twentieth centuries, 1966, p.75.
2. The strategic dimension was vital through the ages, especially to maritime nations, as the Gulf of Aquaba and the Red Sea represented a bridge to the European colonialism, to their colonies in Africa, the Middle and Far East. Today, the strategic military interest to the Superpowers persists, as demonstrated by the Suez crisis and the Gulf war.
3. "... in history we must not neglect the importance of geography. We need to emphasise the extent to which our culture, our way of life, our social and political institutions are influenced by our geographical environment."
ibid.

Besides groupings within Arab society based on political or religious affiliation, it is a fact that the military continue today to be the strongest and most important organized grouping, playing a prominent or even dominant role at almost every stage.

Traditionally, the basic unit of social organization in Arab society is the kinship group. In the political sphere, strong kinship groupings have assumed some aspects of the role of the political party. Political life in some areas is dominated by kinship, and patronage is an element of Arab politics which cannot be ignored. Even though the individual may have restricted access to decision-making bodies, he may be able to influence administrative decisions by making use of *mahsubiyyah* (favouritism) in the public domain through the network of kinship connections which dominates Arab bureaucracy. A striking example of how kinship dominates power politics at the national level is the Sa'ud family which gives its name to the territory it has ruled since the formation of Saudi Arabia.[4] Kinship has also dominated national leadership in recent times in Morocco, Jordan, Libya, Lebanon and the Gulf states.

Within the kinship group, the rule is one of deference to the senior members. This is different from the wider social grouping at the clan or tribal level, where there has been a tradition of consultation. It has been rightly suggested[5] that the strength of kinship and tribal groupings in Arab politics has restricted political development through organizations, parties and trade unions. Even where highly committed political parties exist, they have been described as a facade behind which lie powerful tribal loyalties.[6]

In some areas, where the dominance of kinship groupings is the basis of authority, the idea of an objective rule of law may require special promotion.

The economic situation in some Arab countries until recent times has been described as quasi-feudal, with land and resources concentrated in the power of the élite, while the land was worked by a large landless peasant population.

Until the fall of the Ottoman empire, as we will see, such land was held under a concession from the state. Thereafter, it remained in the hands of leading families who dominated rural politics. Only with the social and economic reforms of post-war radical governments has the power of ruling families in rural areas been largely transferred to the central government and ruling party. Economic developments which, as we will see, have their roots in the colonial period, have altered the balance between rural and urban society. The decline of agricultural prospects, sometimes precipitated by the seizure of land for European settlers, as well as the emergence of industry and the discovery of oil, has led to the growth of urban populations.

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4. Royal Decree No.1716 of 18th September 1932 provided, in article 1, that : "The name of <<The Kingdom of Hijaz, Najd and its Dependencies>> shall be changed to that of <<The Kingdom of Saudi Arabia>>, and our title shall henceforth be <<The King of the Kingdom of Saudi Arabia>>.
Muhammad Khalil The Arab states and the Arab League : a documentary record Vol.1 : Constitutional developments, 1962, pp.242-3.
5. Michael C. Hudson Arab politics : the search for legitimacy, 1977, pp.84-5.
6. S.H. Amin Law and justice in contemporary Yemen, 1987, p.22.

Within the cities therefore, large groups lacking traditional political loyalties have grown up, which represent a potential challenge to political stability,[7] since such groups are subject to manipulation by the state and by sometimes extremist political and religious organizations.

As noted, religion continues to be a fundamental element in the national identity of the Arabs, and as such it is crucial in affecting the political and legal order. Throughout the Arabs' history, Islam has remained of great influence. Under this pretext the Ottomans ruled the Arab world for centuries, while the response of religious leaders ranged between revolt and submission, even to an unjust authority.[8] Resistance to European colonialism often took a religious characteristic, particularly in response to European policies of cultural assimilation. Nationalism too took an Islamic character in opposing foreign domination and remains a vital legitimising factor, for both ruler and opposition, as the following chapter indicates.

In most Arab countries, the military became and has remained the strongest organization, representing almost the only mechanism for obtaining political power. It has remained the vehicle of political advancement and, for the poorer and weaker sectors of the population, a source of education, training and employment. Western military technology and organization was crucial in disrupting traditional Arab society. As early as the Ottoman period, the leadership of several Arab countries realised that only Western military technology could protect them from European encroachment, and therefore purchased European military equipment, sent officers for training in France and England, and established military schools with European instruction. While the import of European military technology did not prevent the Europeans colonising the Middle East, it enhanced the political power of the military sector. The historical role of the military has been particularly important in the period of resistance to foreign domination, and in the post-independence period. At the national and regional level, the military have partnered civilians in opposing foreign aggression, since Salah al-Din al-Ayyubi and Abd al-Kader. Early nationalist revolts led by military officers, like 'Urabi in Egypt, were the fore-runners of national movements, which later continued this mixed civilian and military character, as for example, with the FLN in Algeria, and the Free Officers in Egypt, Libya, Sudan and Yemen.

In view of the geographical legacy of European colonialism, highlighted by Ajayi, the creation of minority groups in the region has been attributed to some extent to the policies of colonial rulers and the boundaries they left,[9] and it is important to point out that the minority issue has been and remains a factor contributing to the instability of the political order.

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7. Cairo, in particular, contains a large low-paid or unemployed population, who have challenged the stability of the government on several occasions, when reduction of government subsidies on basic foods led to riots. Other cities in the Arab world have witnessed a similar phenomenon in recent years, particularly in Sudan, Tunisia and Algeria.
8. In the absence of developed Islamic jurisprudence, through *Ijtihad*, some Muslim rulers, at one stage or another, used the *Shari'ah* to legitimise their authority and decisions. For example, the Qur'an (4:59) "Obey Allah, and the Apostle (Prophet) and those in authority among you".
9. J.F.A. Ajayi "A Survey of the cultural and political regions of Africa at the beginning of the nineteenth century", in J.C. Annex and G.N. Brown, Africa in the nineteenth and twentieth centuries, 1966.

Foreign powers often used minorities as a political tool or as partners in securing their interests. This had implications for the creation of the contemporary order, creating the potential for instability, either because the minority came to exercise power, or sought to achieve autonomy. Minorities in the region fall into a number of categories and exist at a number of levels, holding power in several states, revolting from the political order in others and subject to the process of assimilation in others. The approaches of governments in the region to the minority question have taken a number of forms, and it continues to impose itself on the region's development.

The first part of this chapter briefly surveys the implications of Ottoman rule in the region, insofar as it shaped the political organization and economic structure. This provides the background to an examination of European colonialism in the Arab world, which begins by identifying elements which led to European colonial expansion in the region, focusing on the different underlying philosophies and aims of the three European Powers who colonized North Africa and the Arab Middle East.

The approach of each Power and the policies it adopted in different territories and at several stages of its presence are examined with a view to drawing some conclusions about the impact of colonial rule on several aspects of society in the region. The main focus is on the effect of this period on the political and administrative structure, including its effect on political authority, national institutions, and the creation and development of the nationalist movements, again with a view to drawing some conclusions about the implications of colonial rule for the contemporary political order, which affects the development of the constitutional order today.

The next part of this chapter focuses on the question of the role of minorities in the contemporary Arab legal order, examining the issue of minorities from an international legal perspective, briefly tracing the evolution of international protection of minorities from early ideas of self-determination to contemporary approaches based on integration and non-discrimination. It briefly reviews the position of some minorities in the region, illustrating both minorities at different levels, and the range of governmental response to the minority question. Minorities in power, in secession and in assimilation in the region are examined, with the focus on the legal mechanisms adopted. Finally, the Kurds allow an examination of an Arab government's approach to a minority seeking autonomy. The Iraqi legislative response to Kurdish separatism is examined to illustrate how the legislature has sought to grant a degree of legislative and administrative authority to a minority within the national context.

Inextricably linked to the emergence of the contemporary Arab constitutional order is the development of Arab nationalism, and this forms the subject of the second main part of the chapter. Nationalism in the Arab context as we will see, has a particular meaning and nature, which may be defined in religious terms, or in terms of secular ideologies, such as socialism and pan-Arabism. Beginning with a theoretical discussion of the special nature of Arab nationalism, this section examines its historical context, from the secularization of Turkey and abolition of the Caliphate

with the consequent growth of nationalism as an expression of Islamic nationhood to the secular nationalism which grew in response to foreign rule, with the twin themes of socialism and Arab unity, expressed in Nasserism, Ba'thism and their variants. Besides secular nationalism, independence movements also took a religious dimension, as for example, in Morocco, Sudan and Libya.

Since nationalism and identification with the nationalist movements which achieved independence from foreign political domination continue to be important factors in legitimising political authority, whether secular or religious, radical or conservative countries, the next part of this section illustrates the continuing role of nationalism in a number of countries. The focus is on examples of contemporary radical nationalist regimes. This section is followed by an examination of the role of the military in relation to radical nationalist movements, which should enable us to draw some conclusions about the role of the military in the wider context of the contemporary legal order.

# SECTION ONE

# THE IMPACT OF THE COLONIAL PERIOD ON THE EMERGING CONSTITUTIONAL ORDER

Not surprisingly, features of the contemporary Arab order may be traced in the Arab past, as we see for example, when we compare certain events of the Ottoman period and aspects of the contemporary situation in the Middle East. Then as now, conflict persisted between religious and secular authority. Then as now, governments faced problems with minority groups and local loyalties which undermined the effectiveness of centralised government. Geographical, linguistic and religious elements played a major role in this dislocation. The Ottomans could not maintain or extend their authority over Kurdistan and Basra, due to the rough terrain and the distance from Istanbul. Elsewhere in the Ottoman empire, authority did not extend far into the *bilad al-siba*, with the *bilad al-makhzen* of the North African coast marking the extent of Ottoman legal control. Tribesmen in *bilad al-siba* were exempt from tax burden, because of the balance of power between the Ottomans and tribesmen, representing the division between religious and bureaucratic authority. The empire was only nominally in control of Syria and Palestine, Jordan and the Gulf states.[10] The mountainous regions of Lebanon and Syria, and the Atlas mountains in North Africa formed a natural barrier, isolating rural and tribal peoples. The deep conservatism and local loyalties of the rural and tribal population of these countries inhibited the spread of Ottoman control. Linguistic minorities too, like the Kurds and Berbers, played a part in this dislocation. Religious communities based on *Sufi* orders, like the Sanussi *Zawayya* in Libya and the *Marabout* in the Maghrib, also contributed. The division between the urban and rural communities was deep, and remains in Arab society today. Against this background, the inherent weaknesses of the Ottoman administration were magnified, as problems of communication contributed to lack of control over distant administration. Individual governors were weak or corrupt, though some contributed to development, for example, with the Qaramanli dynasty in Libya. In general, however, their concern was to maintain power to gather taxes for the *Sultan* and everywhere, changes of governor were frequent.

Since the Ottomans were Muslims, the political organization of the empire may be identified as a compromise between theocracy, limited by *Shari'ah* and consultation with the *Sheikh al-Islam*, and the monarchical power of the *Sultan.*[11] Ottoman administration[12] used the

10. In Syria, Lebanon and Jordan, tribes controlled the desert, exacting tribute from traders and travellers, affecting the security and stability of the region. The Bedouins maintained their loyalty to tribal chiefs and remained isolated from the civic administration.

11. See, for example, Norman Itzkowitz Ottoman empire and Islamic tradition, 1972; S.H. Amin Middle East legal systems, 1985 (several chapters contain sections on the Ottoman period).

12. The secular administration included the *Sultan* and his family, the grand vizier and officers of the government, members of the court and the standing army, Janissaries. All of the officers of the empire, both administrative and military, were slaves. According to Armajani, "*as slaves ... [they] were under the direct control of the sultan and not under the Shari'ah. In this way the sultan had complete control of the army and administration without interference from the Ulama.*" The *diwan* was the decision-making council, presided over by the *sultan*, the grand vizier, the two commanders from Europe and Anatolia, two judges, treasurers and the chancellor. Later, the leaders of the armed forces, both naval and military, joined the council. The army was the dominant institution in society and in time of war, the provincial governors joined the Janissaries with levied forces.
Yahya Armajani Middle East : past and present, 1970 pp. 153-4.

Irano-Turkish tradition, which gave lawmaking authority to the *Sultan*, with the *Ulama's* consent.[13]

In all the Ottoman provinces of the Arab world, the administration was headed by a direct appointee of the *Grand Porte*, the *Wali* or *Pasha*, who reported directly to the Internal Ministry. The provincial administration also contained a consultative council, made up of local notables, the *Pasha's Diwan*, which normally contained the *Mufti*, the chief judge, the *Daftur-dar* and the *Maktubji*. In effect, it reflected the structure of the organization in Turkey.[14]

The administration faced practical problems in the control of such a large empire, and so added other sources of law to the *Shari'ah*, including *Addat*, the customs of the local community, differing in the various parts of the empire, *Urf*, the non-religious law, often the will of the *sultan* or the judgements of the leaders of the community. *Qanun* was the official decree of the *sultan*, superseding other laws. The *Ulama* opposed all three, since they did not come from the *Shari'ah*, and in any case, these laws gave more powers to the *sultan* to contradict the *Shari'ah*. Two chief judges were charged with the administration of the *Waqf*, managing religious lands and funds. Their principal duty however, was to study cases and give their *Fetwa* on their relation to *Shari'ah*. Due to the extent of the empire, the Ottoman judicial system dealt with the separate status of non-Muslims under *Shari'ah* according to the *Millet* system.[15] Despite the claims of some historians[16] that the organization of the *Millet* system, under which non-Muslims enjoyed a considerable element of autonomy, was simply the method by which Islam solved its minority problem, nevertheless the relation between the Islamic community and linguistic, ethnic and religious minorities took a different character in different periods of history. The Ottoman land tenure system contained a division between three types of land, *Mulk*, *Habous* and *Arth*,[17] and land ownership was regulated by *Azel* and *Makhzen* estates. A proportion of *azel* was individually granted by Ottoman authority to its officials, while the rest was granted to

13. The *Ulama* (learned men) was made up of religious men, mosque officials, muezzins, readers of the *Qur'an*, judges (*Qadis*) and *Muftis*. The *Ulama* studied the *Shari'ah*, and the Qadis or Muftis might come into conflict with the secular administration if the latter acted in contradiction with *Shari'ah*. The chief of the *Ulama* was known as the *Sheikh al-Islam*, and he acted as adviser to the *sultan*.
14. I. Mirza [Constitutional law : a comparative study between the Libyan Constitution and Constitutions of other Arab countries], 1969, pp.142-9.
15. The *Millets*, or *"People of the Book"*, came under the jurisdiction of their own religion. The Ottoman administration considered all the non-Muslim subjects of the empire, from Armenians to Jews, the subject of the jurisdiction of their own religion and its laws. They lost this privilege only when they became objects of suspicion as a result of external interference.
16. P. Hitti A History of the Arabs, 10th ed. 1970 p.161
17. The *mulk* designated private property, though it was different from private property in the western system as conditions accompanied its exchange, for example, the *shuf'a* prohibited its acquisition by aliens, that is, people who were not members of the *Umma*. Family land was bound by customary regulations, such as indivisibility. Collectivity predominated over individuality, so that the tribesman did not need to hold land as an individual, and private property hardly existed. The *habous* included educational and religious buildings, workshops and land. *Arth* property was the collective assets of the tribesmen. Both *arth* and *habous* were inalienable, and the community used the land collectively for agriculture.
Rachid Tlemcani State and revolution in Algeria, 1986, pp.23-26.

tribesmen holding Ottoman office. Beylic or *makhzen* lands were the collective inalienable property of share-croppers. Land under state control was also restricted.

The weakness of the late Ottoman empire encouraged Western and Eastern ambitions for its Middle Eastern and North African territory, as economic and strategic interests led to the struggle of the Great Powers.[18] This struggle, which lasted two centuries, is relevant to the present narrative because the vital strategic areas at which these interests aimed were the Arab countries of the Middle East and North Africa, where the aim was to protect European trade routes to the East.[19]

Great Power rivalry played its part in the division of territory in the Arab region. The British and French at first contested control of Egypt, particularly control over *Kanat al-Suez*, and economic, besides strategic considerations, led them to establish dual control over Egypt in 1880.[20] Ultimately, Britain occupied Egypt to secure payments of Egypt's debts, and to protect its own and other European business interests, as well as to secure the *Kanat al-Suez* from local or rival European control.[21] In the Fertile Crescent, the *Sykes-Picot* agreement represented the compromise reached by the two Powers in dividing the region, which was later recognised in the League of Nations mandates, granted to Britain for Iraq and Palestine, and to France for Syria-Lebanon.

In North Africa too, Great Power rivalry led the French and Italians to compete for control of Tunisia,[22] and British interest at an early stage

18. While Russia had begun her attempts to break through to the Mediterranean, Napoleon's plan to establish a military base in Egypt had been only the first move in a continuing struggle between France and Britain to secure naval command in the Indian Ocean, by holding Egypt.

19. British interest in Egypt began in the 19th century, when the British East India Company made a treaty with the Mamluk leader of Egypt, securing Red Sea shipping. Napoleon's attempts to interrupt Britain's trade route to India by securing a base in Egypt were unsuccessful, as the Porte's forces, led by Muhammad Ali, repelled the French army in 1801. Britain's colonial involvement in the Gulf states was also aimed at protecting its southern and western sea routes to India. This led to the capture of Aden by the British East India Company during the nineteenth century. After the first world war, the British sought to consolidate their position in the Persian Gulf because of newly discovered oil in Iraq and Iran, American oil company exploration in Saudi Arabia and Mussolini's colonialism in the Horn of Africa.

See, on this period, J. Glubb A Short history of the Arab peoples and J.B. Kelly "The legal and historical basis of the British position in the Persian Gulf" Middle East Journal 1958, pp.119-140.

20. With the collapse of Egyptian cotton prices at the end of the American civil war, Isma'il borrowed from European bankers and by 1875, Egypt was heavily in debt. Isma'il raised taxes to fund his spending, selling his shares in the Suez Canal to Britain. Egypt's creditors persuaded the Porte to dismiss Isma'il, and foreclosed on their loans. French and English controllers were imposed on Egypt, to collect taxes and control expenditure, passing the Law of Liquidation in 1880.

Yahya Armajani Middle East : past and present, 1970 pp.216-7.

21. Riots in Alexandria, 'Urabi's uprising, and the killing of some Europeans provided the pretext for the intervention Britain, beginning with the bombardment of Alexandria in 1882 and the defeat of Urabi at Tel al-Kabir later that year.

22. European occupation of North Africa began with French troops landing in Algeria in 1830, which was welcomed by the Tunisian bey as a counter to the threat from the east. French interests in Tunisia did not immediately lead to colonization, but one factor which encouraged the French invasion was the danger of the spread of British and Italian influence in Tunisia, the latter, for example, through the purchase of the Tunis-Goulette railway. Although the British and Germans indicated to France that they should feel free to pursue their interests in Tunisia, the Italians too became more aggressive in seeking control through a growing Italian population, the acquisition of economic interests and the spread of Catholic missions and schools.

Wilfrid Knapp Tunisia, 1970, pp.97-9.

threatened to limit the control exercised by Italy in Libya. Prestige as well as economic factors encouraged Italy[23] to seek territory in North Africa, particularly after the rise of Mussolini, when the fascists sought *"five shores"* in an effort to revive the glory of empire. Libya represented both a convenient easy target and a route to other colonies in the Horn of Africa.

France too sought prestige in the acquisition of North African colonies, and like the Italians, the French sought territorial expansion, both to extend the African *"Francophone political community led by the French republic"*[24] and to provide land conveniently close at hand for French settlers. The international order, particularly after World War One, allowed these Powers to harmonise their ambitions through international agreements, such as the treaties signed at the Paris Peace Conference and the San Remo agreement, as well as the League of Nations Trusteeships,[25] which allowed the Powers to divide Arab territory in harmony with their own economic and strategic interests. The process had begun in the previous century, when the Treaty of Berlin divided Africa into colonial territories and spheres of influence. Secret diplomacy, in particular between the French and the British, sought to prepare the ground by which the expected Arab uprising against the Ottoman empire would benefit European interests.[26] One such agreement was the Anglo-French *Sykes-Picot* agreement, which secured the two Powers' interests, despite undertakings made at international conferences. Others include the *Husayn-MacMahon* correspondence and the *Balfour Declaration*, which indicate the policy of the Powers.

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23. The twin purposes of Italian colonialism were to maintain Great Power status, and find a fertile overseas territory for the growing rural population of Italy. Commercial interests also sought markets in North Africa, from Eritrea and Ethiopia to the Somali coast. Since the Congress of Berlin, when Italy had been given a promise of non-interference by the other colonial powers, she was merely waiting for a pretext to invade. Italian economic interest in Libya had begun with the activities of the *Banco di Roma*, in preparation for military incursions on the pretext of protecting their economic interests.
Lisa Anderson The State and social transformation in Tunisia and Libya 1830-1980, 1986 p.111.
See also, Claudio G. Segre "Italian development policy in Libya : colonialism as a national luxury" in G. Joffe and K.S. MacLachlan (eds) Social and Economic development of Libya, 1982.
24. J. Gus Liebenow African politics : crisis and challenges, 1986, p.28
25. The Paris Peace Conference did not settle the question of the Fertile Crescent. President Wilson's King Crane Commission recommended that mandates be established in Iraq and Syria, the former to be assigned to Britain and the latter to the United States. Faisal was to be the constitutional monarch of Syria, whose territory was not to be divided. It predicted war if France received the mandate over Syria, but the report was ignored, and the Anglo-French agreement of 1919 prevailed. French troops marched on Damascus, and despite Syrian resistance, captured the city in July 1920. The French mandate over Syria-Lebanon and the British mandates over Iraq and Palestine were ratified by the Council of the League in 1922. The Mandate for Syria-Lebanon provides : *"... the Principal Allied Powers have agreed that the territory of Syria and Lebanon, which formerly belonged to the Turkish empire shall ... be entrusted to a Mandatory charged with the duty of rendering administrative advice and assistance to the population ... the Principal Allied Powers have decided that the Mandate for the territory ... should be conferred on the Government of the French Republic, which has accepted it ..."*
Muhammad Khalil The Arab states and the Arab League ... , 1962, pp.93-98.
26. Mark Sykes expressed the concerns of the two Powers : *"It was clear ... that an Arab rising was sooner or later to take place, and that the French and ourselves sought to be on better terms if the rising was not to be a curse instead of a blessing ..."*.
Quoted in Edward W. Said Orientalism, 1978, p.221.

It is important at this stage to identify the philosophical background underlying the approach of each colonial power, which shaped their policies and hence affected the territory they occupied. While the focus is on the three main colonial powers[27], the implications of colonial rule naturally vary according to time and place.

The attitudes of the French towards their North African colonies were radical and had far-reaching implications. An objective of French policy was to incorporate overseas territories, occupied as a means of gaining land for settlers, into a greater political community, based on the French republic.[28] French language, values and institutions were to be the mechanism by which these provinces would be incorporated into a greater republic.[29] Some argue that the French policy was based on apparent racial equality, since everyone could gain equal social, economic and political status, if he accepted French values,[30] however the practices fall short of this ideal.

Like the French, the Italians were concerned to annex territory for Italian settlers, and to a lesser extent, to incorporate this overseas territory within the Italian kingdom.[31] Like the French again, they envisaged a form of *"citizenship"* for Libyans who spoke Italian or served in the Italian armed forces. Unlike the French, they did not envisage Libyan political participation within the Italian kingdom, nor even to a great extent, within Libya itself.

The concerns of the British, unlike both the French and Italians, were entirely strategic and economic, with the result that the British did not settle on Arab land. British relations with their colonies in the Gulf began with treaties of friendship and cooperation, intended to protect their sea routes to the East, though their control over strategic areas later became direct and had a military dimension, as their interests were threatened. British policy, in the main, focused on using existing local political leadership and traditional forms of organization to safeguard and protect their concerns. Further interference tended to come only

27. The focus is on French, British and Italian colonial policies, while Spanish colonisation of northern Morocco is not examined.

28. French occupation began with the capture of Algiers in 1830. By the second world war, there were around a million European settlers from France, Spain and Malta in Algeria, ruled as a part of metropolitan France, with direct representation in the National Assembly in Paris, though with only 13 seats, a disproportionately low number.
Ali Mazrui and Michael Tidy Nationalism and new states in Africa 1986, p.123.

29. The 3rd, 4th and 5th republics left open the constitutional option of incorporating African territories into a greater republic.
J. Gus Liebenow African politics : crises and challenges 1986, p.28.

30. French citizenship was granted to so-called évolués (evolved persons), those who had assimilated French values, French educated, served the empire, such as military or administrative duties.
Ibid. p.29.
The Law of 1865 which regulated French citizenship for the Algerian colony considered *"the Muslim native ... a Frenchman"*, but to gain citizenship, the Muslim had to renounce the *Shari'ah* and submit to French civil law. According to Hisham B. Sharabi, by 1934, less than 2,500 Algerians had done so.
Hisham B. Sharabi Nationalism and revolution in the Arab world, 1966, p.27.

31. The Royal Decree of 1939 declared the annexation of Libya as part of the Italian kingdom.
I. Mirza [Constitutional law ... ] 1969, pp.157-8.

when necessary to secure these interests. The British government has never accepted the principle of integration of overseas areas beyond the British Isles into the British state.

Colonial intervention in the Middle East and North Africa can be divided into three distinct stages.[32] The initial stage tended to consist of interference in the domestic economy to safeguard trade and sources of raw material. Though this was often carried out directly by the Power or through commercial concerns, it tended to be secured by treaty arrangement, which could be general, or favour a particular European Power. Treaties were concluded both with the central administration,[33] and with local leaders, often enhancing their prestige and strengthening their power at the expense of the central authority. In some countries, this stage also prepared the way for administrative intervention, with the "mortgaging" of the national economy by the central administration to pay, for example, for the development of the military or other national projects, with borrowing or investment involving Europeans, as with Ismail in Egypt and Ali Bey in Tunisia.

The next phase often involved some form of military intervention, to secure political dominance, with economic and legal concessions to the colonial Power. This stage, when national sovereignty was surrendered to an external power and control of the economy was likewise lost, often led both to the undermining of the existing central administration and enhancement of the position of traditional ruling élites, who gained status through their cooperation with the newly dominant power in the state. In the long term, however, the use of traditional ruling structures as what David Seddon has described as the *"substructure of imperialist exploitation"*[34] discredited the old order.[35] A third stage in colonial intervention was the creation of a colonial bureaucracy or the settlement of colonists.

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32. Alongside these three identifiable stages, there exist four recognisable mechanisms of colonial rule, which can be summarised as : direct control, as applied by Britain in Aden, France in Algeria and Italy in Libya; indirect control, through the Protectorate system, by Britain in Egypt and France in Tunisia and Morocco; the League of Nations Mandate which gave Britain the mandate in Transjordan, Iraq and Palestine, and France, Syria and Lebanon; lastly, the mechanism which is identified as the earliest phase of colonial intervention, the exclusive treaty relationship, which was maintained throughout the colonial period by Britain with the states of the Peninsula and the Gulf.

33. For example, prior to their military intervention, the French concluded a number of treaties with Algeria, through the Dey.
Mohammed Bedjaoui Law and the Algerian Revolution 1961, pp. 20-2.

34. David Seddon "Tribe and state : approaches to Maghrib history" in Maghreb Review v. 2, pt. 3, 1977

35. Two exceptions to this are the Hashemite monarchy in Jordan, and the Alawite monarchy of Morocco, where despite close involvement with colonial Powers, the present leader of Jordan was able to disassociate himself from the policy of the previous leader, and the king in Morocco today has profited from his father's late conversion to the nationalist cause. In 1912, the Alawite sultan was forced to submit to the French protectorate, though he did not lose his own position. The sultanate's legitimacy was challenged in the eyes of many by this acquiescence. In 1927 however, the legitimacy of the monarchy increased as Muhammad sided with the nationalists in resisting the French. The decision to deport him in 1953 increased his popularity in Moroccan eyes as well as the unrest which had prompted it. On his return, Muhammad had become a symbol of resistance and nationalist struggle.
Michael C. Hudson Arab politics : the search for legitimacy, 1977.

British policy in the Gulf, Egypt and North Africa demonstrates an aspect of the first phase identified above. Initially, British influence was secured through treaty arrangements[36] with local leaders, with the British favouring traditional and tribal leaders where this could secure British interests[37] in an efficient and economic way.[38]

Treaties also established the position of British advisers, who became the main executors of British policy in the region.[39] The British adviser took responsibility for security and, in theory, relations between princes and tribes, though in practice, British protection, advice and support led to dependence, as sheikhs and rulers began to rely on British assistance.

The second phase identified earlier, that of direct military intervention, was a characteristic of both French and Italian colonization. Since each shared the general aims of defeating the Ottoman administration, subduing the native population, and securing land for European settlers from the tribal system, military conquest was an early tool of colonial expansion in French and Italian North African territories. This was followed by the imposition of legislation which allowed the creation of land holding for European settlers.

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36. Provisions from the General Pacification Treaty between the Sheikh of Bahrain and Britain concluded in 1880 give an indication of the relationship between Britain and the local leadership : *"I, Isa ibn Ali al-Khalifah, chief of Bahrain, hereby bind myself and successors in the Government of Bahrain to the British Government to abstain from entering into negotiations or making treaties of any sort with any state or government other than the British without the consent of the said British Government, and to refuse permission to any other Government than the British to establish diplomatic or consular agencies or coaling depots in our territory, unless with the consent of the British Government ...".*

Other texts dealing with relations between Britain and Gulf states may be found in C.U. Aitchison A Collection of treaties, engagements and sanads relating to India and the neighbouring countries, 5th ed, 1933 Vol.xi.

See also : J.B. Kelly "The legal and historical basis of the British position in the Persian Gulf" Middle East Journal 121958, pp.119-140; Hussein al-Baharna The Arabian Gulf states : their legal and political status, 1978.

37. For example, Britain incorporated Aden into her empire during the 19th century under the administration of the Indian government. They sought the cooperation of coastal tribes, by offering protection to tribal leaders in return for an undertaking not to enter into agreements with or cede territory to other foreign powers, and to inform the British of any interference in tribal territory by other powers.

Tareq Y. Ismael and Jacqueline S. Ismael People's Democratic Republic of Yemen : politics, economics and society 1986, pp.11-14.

In 1820, treaties with the sheikhs, the Perpetual Maritime Truce, established peace in the sheikhdoms, and in 1853, Britain entered into agreements with Kuwait, Muscat and Oman, where she dealt directly with the ruling family of Abu Sa'id.

Her involvement in Egypt also began through agreement with local leaders, as in the 18th century, the British East India Company made a treaty with Egypt's Mamluk leader, securing Red Sea shipping. The British also pursued commercial interests in North Africa by treaty arrangement with the sultan, for example, securing her trade with Morocco in an agreement of 1856 which regulated trade with several European states, but granted Britain special advantages.

David Seddon "Tribe and state : approaches to Maghrib history" in Maghreb Review v.2, pt.3, 1977.

38. The British relied on the semi-feudal social structure, an economical policy, as they paid a minimal amount for the loyalty of the tribal leaders, and avoided the costs of administration by using the tribal structure.

39. The British pursued a similar policy in the Fertile Crescent. In Transjordan, where the British appointed Abdullah as *emir* in 1921, their influence was unchallenged. Legislative and executive powers were vested in the *emir*, who was assisted by an executive council. A legislative council was drawn from Bedouins and other groups, but administration was supervised by British advisers, who controlled the armed forces, budget and foreign affairs.

Yahya Armajani Middle East : past and present 1970, pp.311-2.

As we saw, Italian economic interest in Libya had begun with the activities of the *Banco di Roma*, in preparation for military incursion,[40] and the decision was taken to make military conquest of Tripoli and Cyrenaica in 1911. War was declared, and Italy invaded Libya, where Ottoman forces retreated after failing to repel the Italian attack. Turkey called on other European states to intervene, and signed the *Lausanne agreement*[41] in 1912. At this stage, the Italians occupied only the coastal area, and sovereignty continued to be contested between Italy and Turkey. Until the end of the First World War, the Italians had to compete with the Ottomans for the support of the Libyans, and neither was able to maintain a stable national administration.[42] The British became involved in Cyrenaica, initially opposing Ahmad al-Sharif and Nuri Bey, when they attacked the Egyptian border, but ending by supporting Amir Idris, later to become head of the Sanusiyyah order.[43]

Amir Idris accepted negotiation with the British and Italians, which ended with an agreement with the British, guaranteeing the Egyptian border, and an agreement with Italy, ending the state of war, with each side maintaining authority of the territory it controlled.[44] The withdrawal of the Ottoman challenge to Italy after the First World War left Libya once again open to Italian expansion. Italian policy followed the pre-war scheme, while agreeing to British patronage of the Sanussi. The Italians granted political privileges to the populations of both provinces of Libya, far beyond concessions made in Egypt and Tunisia in this period by the British and French,[45] who were very critical of

40. When the Italian government received reports from their consulate in Tripoli that unrest threatened Italian interests, it warned the Ottoman government in September 1911 to put an end to the riots which swept Tripoli and Cyrenaica.
Lisa Anderson The State and social transformation in Tunisia and Libya, 1830-1980 1986, p.111.
Useful background works include : Joffe and MacLachlán (footnote 23 above); Majid Khadduri, Modern Libya : a study in political development, 1963; John Wright, Libya : a modern history, 1981.

41. The agreement provided for a ceasefire and withdrawal of all Turkish civil and military personnel from Libya. Turkey abandoned its sovereignty and declared Libyan independence, by *firman*. The *Porte* maintained his religious authority over the Muslim inhabitants, and the Turkish authorities appointed Sayyid Ahmed al-Sharif as temporary governor. Some believe that the legitimacy of the Sanussi administration in Cyrenaica is based on this decree.
I. Mirza [Constitutional law ... ], 1969, pp.150-161.

42. Italy had no officials experienced in Arabic-speaking countries, and lacked an efficient administrative structure to govern the province. Tripolitania and Cyrenaica were separated, and each assigned a governor with civil and military functions. Having opted for direct administration, the Italians adopted a policy of relying on local leaders whom they paid, rather than military conquest, which was fiercely resisted. This policy failed, as the Italians proved unreliable patrons with uncoordinated policies and unfulfilled promises. In addition, they faced opposition supported by the Ottomans, who though they had formally withdrawn, supported Libyan resistance to the Italians.
Lisa Anderson The State and social transformation in Tunisia and Libya, 1830-1980 1986.

43. Jonathan Bearman Qadhafi's Libya 1986, pp.13-4.

44. Interior trade and the Sanussi zawayya, falling within Italian territory, were re-opened, with a guarantee that study of the Qur'an and implementation of *Shari'ah* would be maintained. Idris was allowed to maintain limited authority, not undermining Italian security.
I. Mirza [Constitutional law ... ] 1969, pp.150-161.

45. A republic was declared in Tripoli 1918. Italy negotiated with its leaders, and the result was the conciliation agreement signed in April 1919, which led the Italian king to ratify the Tripolitanian law, which granted the parliament legislative authority, with its members elected by the population of Tripoli. Executive authority was to be exercised by a ruling council of 10 members appointed by the parliament, with 2 members appointed by the Italians. It was headed by a governor-general, appointed by the Italian king, holding all civil and military authority. The constitution emphasised the implementation of *Shari'ah* with regard to personal status for Muslims and guaranteed religious observance. Freedoms of expression, assembly and education were provided, along with exemption / ...

the degree of local administration allowed by the Italians to the Libyans, which encouraged Tunisian and Egyptian calls for similar concessions.[46] The Italians took few steps to widen their administrative control in Tripoli, while the nationalist movement gained ground,[47] beginning in Cyrenaica, where the Italians had been persuaded by the British to work through the *Sanusiyyah*. In 1920, they reached a new accord with *Amir* Idris, known as the *al-Rajma* agreement,[48] which allowed them to exercise a measure of regional administration.

As we saw, in North Africa, Great Power rivalry led the French and Italians to compete for control of Tunisia.[49] French desire to control territory for settlement throughout North Africa meant that military conquest was followed by the need to deal with existing structures of land tenure, both traditional and those established under the Ottoman administration.

French military occupation of Algeria, for example, in the nineteenth century, had the three tasks of overthrowing the Ottoman organization, subduing Algerian resistance and establishing control of the land, which was the partial object of French colonial expansion. It destroyed the traditional structure of tribal socio-economic and judicial order, substituting French ownership and laws. Land acquisition was pursued through military means, sequestration, expropriation, settling troops, and property legislation which broke up the existing land tenure system. The colonial legislature aimed to secure land by expelling the native population and dismantling the tribal economy. It established a judicial

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... from military service for nationals. On 31st October 1919, Italy promulgated a law giving Cyrenaica a constitution, which guaranteed that the treatment of the population would be equal with that of the Italians, and established the right of the Italian king to appoint a representative controlling civil and military affairs in the province. It also provided for the establishment of a council of representatives, composed of delegates from the bedouins and the urban population.
I. Mirza [Constitutional law ... ], 1969.
See also L. Anderson "The Tripoli Republic, 1911-1922" in Joffe and MacLachlan, see footnote 23 above.

46. Lisa Anderson The State and social transformation in Tunisia and Libya, 1830-1980 1986, pp. 204-9.

47. Leaders of the national movement in Tripoli resolved in 1920, in the Gharyan conference, that a single Muslim leader with religious, civil and military authority should rule the country. They sent a representative to Sirt to negotiate with the Sanusiyyah. The Central Committee in Tripoli nominated Idris as the amir for all Libya in 1922. He appointed this organ to administer the affairs of Tripoli, until the election of the provisional national council, although this did not take place due to the arrival of the fascists.

48. This agreement shaped the Sanussi administration, by recognising Idris as the hereditary Sanussi amir of Cyrenaica, with Ajadebiyyah as the capital. The accord established a representative council. A constitution was promulgated containing the principles of the *Rajma* treaty and according to it, Idris controlled the southern province of Cyrenaica. Legislative power was to be exercised by a legislative council, representing cities, villages and oases in proportion to the population. As for military forces, the amir was to have power only to maintain order and security, which should not exceed 1000 soldiers, while in some areas, security and order was to be maintained with the Italians. The northern part of Cyrenaica, the coast and part of Jabal al-Akhdar, was to be under the control of an Italian governor who controlled civil and military affairs.

49. French occupation of Tunis came to be viewed in France as confirmation of France's Great Power status, and a border incident provided the pretext for the French to invade from Algeria. They met no resistance and signed an agreement known as the Treaty of *Bardot* with the *bey*, whereby France had the right to military occupation and control over foreign affairs and defence. After two years, another treaty was concluded at *al-Marsa*, establishing the French protectorate. In the years which followed, the French presence in Tunisia came to be seen as integral to the republic, through the creation of French institutions of government and the colonization of Tunisia by Frenchmen.
Wilfrid Knapp Tunisia 1970, pp. 101-3.

framework which replaced the tribal legal framework.[50]

French occupation of Tunisia had similarly to deal with the existing system of land ownership. One of the first tasks of the French in Tunisia as in Algeria, was to establish a legal framework which allowed them to acquire land, through a series of acts, beginning with that of 1885, based on the Australian *Torrens Act*. The problem of mainmort was removed by replacing yearly payments with a single lump-sum. The policy of colonization through land purchase was pursued by the French government, and despite increasing numbers of European immigrants, land ownership in Tunisia remained dominated by large estates.

Like the French, the British too took military action at a certain stage to secure economic interests, as British military intervention followed the dual control established by France and Britain to secure payment of Egypt's debts. 'Urabi's protest led the British to invade to put down his revolt in 1882, and although the British promised to withdraw from Egypt *"as soon as the state of the country and the organization of proper means for the maintenance of Khedival authority will permit it"*, British troops remained until 1956.[51]

The British mandate over Iraq took a military character in the early stages as the rebellion of 1920, caused by the announcement of the *San Remo* agreement, led the British to intervene. On gaining control of Iraq, the British High Commissioner announced the intention of establishing a national Iraqi government.[52]

Britain's attitude to their mandate over Palestine however was quite distinct from their policies elsewhere. Britain was given the mandate by the *San Remo* conference in 1920, and the *Balfour Declaration* promised the land of Palestine to the Zionists. During the British mandate, the British tried to carry out the mutually contradictory elements of the *Balfour Declaration*, which were to help establish a *"Jewish national home"*, while protecting the civil and religious rights of the Arabs.

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50. An 1844 Ordinance declared that all uncultivated lands in certain areas would be classified as vacant if no one could prove title of ownership. Another Ordinance of 1846 declared that title dating from after the French invasion was invalid. These ordinances allowed the expropriation of large areas of land by the French. In 1845, Algerian territory was divided into three zones : the civil, mixed and military. The first contained a majority of European settlers and French law was fully enforced in this zone. The second comprised territory where the settlers were in a minority, and here *Shari'ah* remained until it was gradually replaced by colonial regulations. Other rural territory was under direct military control. In 1863, a number of laws regulating land tenure were promulgated, which also put an end to charity by *zawiyyahs*. Legislation in 1863 and 1873 aimed at privatising land, and bringing private property under French control, destroying the distinction between *mulk* and *arth* land. The laws restructured tribal territory, breaking it up and assigning the divided lands to part of tribes so that the overall tribal structure was fragmented, coming under separate communal jurisdiction.
Rachid Tlemcani State and revolution in Algeria 1986, pp. 33-47.

51. Direct and indirect British rule continued in Egypt until 1952. Dual control was abandoned, the Ottoman *sultan* remained the nominal ruler and his representative was the Khedive, but actual power was exercised by the British representative.
See, for general background, Tom Little, Egypt, 1958; P.J. Vatikiotis The history of Egypt, 1980.

52. The Cairo conference of 1920 was intended to implement the *Sykes-Picot* agreement. The consensus was that Faisal should become king of Syria and Abdullah king of Iraq. However, the French expelled Faisal from Syria. In respone, Britain made Faisal king of Iraq, and Abdullah was given the emirate of Transjordan.

Since colonial policies tended to vary at different times and in different places in response to either national politics or regional developments, the following section briefly reviews shifts in the policy of the three colonial Powers to meet changes on the international and regional levels, as well as domestic developments.

We have seen how the British pursued their interests by favouring traditional leaders, as well as by military intervention. After the First World War, as opposition to their rule grew, they responded by creating and developing administrative structures and national institutions through which to exercise control.[53] After the Second World War, the growth of Arab nationalism which threatened British interests, led to another shift in policy, with an attempt at federation in Yemen,[54] and administrative reforms elsewhere.[55]

In Egypt, Britain's interests were initially pursued by a British administration, in which Egyptians participated through a *"legislative"* assembly, whose role was in fact no more than consultative.[56] Following unrest in 1920,[57] they responded in a way which was characteristic of British policy in the region, with the establishment of an investigative Commission. Lord Milner's Commission recommended the British give up

53. For example, after the war, Britain attempted to consolidate her position in South Yemen. After Aden came under the supervision of the Colonial Office in 1937, the territories in South Yemen were organised into two Protectorates. The Western Protectorate comprised 18 sultanates, shaykdoms and tribal confederacies administered by the British governor in Aden, the Eastern, 5 sultanates and 2 shaykhdoms, administered by a British political agent appointed by the governor.
For useful material on the historical background of contemporary Yemen, north and south, see : Tareq Y. Ismael and Jacqueline S. Ismael People's Democratic Republic of Yemen : politics, economics and society, 1986, Robin Bidwell The two Yemens, 1983; David McClintock The People's Democratic Republic of Yemen, 1982; J.E. Peterson Yemen, the search for a modern state, 1981; B.R. Pridham Contemporary Yemen : politics and historical background, 1984.
For legal background, see : S.H. Amin Law and justice in contemporary Yemen, 1987; Islam Ghanem Yemens : political history, social structure and legal system, 1981.
54. They began a series of discussions, from 1954, with shaykhs and sultans, to form a federation of Arab emirates of the south. These autonomous bodies would be tied to Britain by treaty, and protected by the British army. The federation was formed by 6 treaties in 1959, and 11 other states and Aden joined during the next few years, and in 1962 it was re-named the Federation of South Arabia.
55. In Aden, for example, Britain introduced a series of administrative reforms, including the establishment of a Legislative Council in 1947 to advise the British governor. Its members were chosen by the governor, half from the colonial administration, and it lacked any real power, and it was not until 1955 that a small elected element was added.
These reforms were intended to foster the growth of the pro-British Adeni elite and involve it in the governing process. The first test of British policy came in 1959, when full elections to the council were held, under highly restrictive conditions, as most Adenis were disenfranchised, by strict property and residence requirements, and many candidates were denied permission to stand at all. The Arab population boycotted the polls, and the Aden Association won most of the available seats. The failure of the elections in 1959 and 1964 to create a local administration soon led the British to attempt to consolidate their influence in the city by linking it to the traditionally pro-British tribes and principalities of the hinterland. In 1962, they oversaw constitutional talks concerning the incorporation of Aden into an enlarged South Arabia Federation. In 1963, this took place despite intense popular opposition from Adenis, and in 1964, federal leaders and British officials agreed that the federation would become independent by 1968.
J.Y. Brinton Aden and the Federation of South Arabia, 1964.
56. Britain's representative, Lord Cromer, ruled through a "legislative" assembly of 30 members, 16 elected and 14 appointed, which was actually consultative, as for each Egyptian minister there was a British adviser and for each governor, a British inspector.
57. After the First World War, the British refused to consider Egyptian calls for independence, but the Egyptians pressed their demands at the Paris Peace Conference, to which a delegation (Wafd) was led by Sa'd Zaghlul. Initially, the British had tried to prevent him from attending the conference, and the Prime Minister had resigned in protest. The Wafd party, led by Zaghlul, tried to prevent the appointment of a new Prime Minister. The British responded by exiling Zaghlul, resulting in / ...

the protectorate in favour of a treaty of alliance with an *"independent Egypt"*, which was to have a constitutional monarchy, while Britain would maintain Egypt's defence, guide her foreign policy and control *al-Kanat al-Suez*. In 1922, the British unilaterally ended the protectorate, through General Allenby, and declared Egyptian independence,[58] under King Fouad who, in 1923, promulgated a Constitution which provided for a bi-cameral legislature, and granted power to the King to dissolve the Parliament or rule by decree.[59] British influence is clear on the structure, which despite providing a formal legislature and judiciary, gave over-riding power to the executive, which could thereby continue to act with their guidance. This became clear in 1929, when the King dissolved the legislature and revoked the Constitution in response to a Wafd victory at the polls.[60]

As suggested above, regional as well as national events had their impact on colonial Powers' policies. For example, Britain's gradual moves toward independence in Egypt[61] and Iraq[62] came in response to

... riots, strikes, and violent unrest. Ultimately, the British had to concede and allow Zaghlul to lead the delegation, though it did not achieve anything.

58. For a discussion of this period of constitutionalism in Egypt, see Elie Kedourie Arabic political memoirs and other studies, 1974, pp. 21-23.
Allenby's Declaration of 28th February 1922 provided that : *"The British Protectorate over Egypt is terminated, and Egypt is declared to be free and independent sovereign state"* (article 1) and that : *"The following matters are absolutely reserved to the discretion of His Majesty's Government ... (a) The security of the communications of the British Empire in Egypt; (b) The defence of Egypt against all foreign aggression or interference, direct or indirect; (c) The protection of foreign interests in Egypt and the protection of minorities; (d) The Soudan ...* " (article 3).
Muhammad Khalil The Arab states and the Arab League ... , 1962, p. 459.

59. The Constitution, for example, granted the King legislative power (article 24), the power to sanction and promulgate legislation (articles 25 & 26). It granted him executive power (article 29) and veto power over legislation which could only be over-ruled by a two-thirds majority (article 36). It gave him the right to dissolve the Chamber of Deputies (article 38), made him Commander-in-Chief of the armed forces (article 46), and allowed him to appoint and dismiss ministers (article 49).
Royal Order No. 42 of 1923, Establishing a Constitutional Regime for Egypt Ibid. pp. 460-475.

60. He promulgated a new Constitution in 1930, giving him more power, and introduced a two-grade indirect voting system, which allowed him to rule without effective opposition. The Wafd led demonstrations and strikes as well as campaigns for sovereignty. It dominated Parliament, although the appointment of the Premiership, by the King, was normally to an anti-Wafdist, which meant conflict between the Parliament and the Cabinet, and the victor was normally the King or the British or both. Other political parties, such as the Liberal Constitutional Party, the Union Party and the People's Party, were more moderate than the Wafd and were prepared to cooperate with the British and the King.

61. The Wafdists still did not support the Constitution of 1930, leading to its suspension in 1935, on British advice. Despite their advice, he reinstated that of 1923, and elections were held in 1935, in which the Wafd won power again. In 1936 a treaty was signed, recognising Egyptian sovereignty, though this was limited by provisions that Britain remained responsible for her defence, that Egypt should make *"all the facilities and assistance ... including the use of ports, aerodromes and means of communication"* available in case of war. Britain was permitted to defend the Suez Canal.
The first article stated that the military occupation by the British forces was terminated, and the following 16 articles defined the nature of Egyptian independence. It appointed ambassadors between the countries, opened the way to Egyptian membership of the League of Nations, abolished the Capitulations, and opened unrestricted Egyptian emigration to the Sudan. The agreement was accepted by the Wafd party, and ratified by the Parliament in December 1936. The following year, the Capitulations were abolished and Egypt was admitted to the League of Nations.

62. A similar strategy was pursued in Iraq, where although between 1922 and 1930, several treaties were negotiated and discarded, as the Iraqi nationalists demanded more then the British were willing to concede, in 1930, Iraq was granted independence by a treaty which became the model for the Anglo-Egyptian treaty of 1936, as Iraq was declared independent, though the British retained strategic military bases, and Iraq agreed that its resources be at British disposal during war.
Again, a discussion of constitutionalism in Iraq in this period can be found in Elie Kedourie Arabic political memoirs and other studies, 1974, pp. 21-25. For general background see : Ernest Main, Iraq : from Mandate to independence, 1935.

domestic pressure combined with the need to maintain stability and a strategic presence in the region to counter the growing threat from European fascism.[63] Provisions of the treaty with Iraq of 1930 and the Anglo-Egyptian treaty of 1936 give an indication of the British concern to secure a military presence in strategic areas. Neither treaty had as its principal concern the real independence of the former protectorates, and this *"semi-independence"* had its impact on legal and political development, as we will see.

As suggested above, an element of colonial policy at a certain stage was the creation of national institutions through which influence could be exerted to safeguard colonial interests. When the institutions created in this way failed, the two responses tended to be limited reform, military action, or a combination of the two. British policy in the creation of the Hashemite kingdoms of Transjordan and Iraq represents an example of the first stage. The British concern to maintain control, and at a later stage, a strategic military presence, guided their actions towards Iraq, where their policy contained the two mechanisms, of reform, in the granting of *"semi-independence"* by the treaty of 1930[64], and of military action.[65] Another example of how the British pursued reform[66] of the institutions they created until military action[67] became inevitable may be seen in the period leading up to South Yemen's independence. British policy in Palestine was guided initially by the undertakings of the *Balfour Declaration.*[68] The reluctance of western

63. For example, with Italy's invasion of Ethiopia in 1935 and the threat of German influence in Iraq.
64. Despite granting Iraqi independence, the British presumably expected to continue to exercise influence through Faisal, whom they had made king in 1921. Iraqi nationalists opposed the treaty of 1930 which had maintained Britain's military presence, and the administration divided into factions, supporting and opposing alliance with Britain. The Iraqi parliament was dominated by the National Brotherhood Party from 1932 until 1936, when the government was overthrown by coup d'état, as the military entered Iraqi politics. Other coups followed until Nuri al-Sa'id was established as Prime Minister. He continued to cooperate with the British, and received loans from Britain, but did not declare war on Germany, because of Iraqi anti-British feeling and doubt over the eventual victor.
65. In 1940, Nuri al-Sa'id was forced to resign in favour of Rashid al-Gailani. Iraq participated in the 1939 conference on the Palestinian question, and al-Gailani tried to persuade the British to abandon the Balfour Declaration and declare the independence of Palestine in return for Iraq's support against Germany. Britain's refusal led the Iraqi government to approach the German ambassador in Ankara. Though Gailani resigned under British pressure, when he led a coup in 1941 with German support, the British landed troops in Basra, and with the support of the Arab Legion, forced Gailani and his supporters to flee to Germany.
Yahya Armajani Middle East : past and present, 1970, p.339f.
66. The scale of guerilla resistance in South Yemen led the British to modify their approach at the constitutional conference in London in 1965, when to try to reach agreement with the nationalist forces, representatives of groups such as the South Arabian League and the People's Socialist Party were encouraged to participate alongside federal and tribal leaders. The conference also discussed a different constitutional arrangement granting greater power to Aden. The conference failed however and the deteriorating security situation led the British High Commissioner to suspend the constitution, dismiss the nationalist Adeni Chief Minister and to re-establish direct British rule over the colony.
Tareq Y. Ismael & Jacqueline S. Ismael People's Democratic Republic of Yemen : politics, economics and society. The politics of socialist transformation, 1986
67. British colonial policy in Yemen entered a military phase when, in October 1963, the National Front for the Liberation of Occupied South Yemen launched its first armed attacks against the British. The uprising spread, and an assassination attempt against the British governor led the British administration to announce a state of emergency, imposing strict measures on political activists.
68. The British conceded the difficulty of reconciling the twin nationalist claims of the Arab and Jewish communities, as in 1936, Britain sent a fact-finding commission, - a familiar British response - which concluded that Britain could not *"both concede the Arab claim to self-government and secure the establishment of the Jewish National Home"*, and recommended partition.

states to admit Jewish refugees after the war also gave impetus to support for the new state.[69] National interest prevented the British from dealing even-handedly with the two communities,[70] and attempts at conciliation through conferences tended to exclude the Palestinians, in favour of interested Arab parties who might play a strategic role in the future.[71] As war approached, the British were prepared to reverse aspects of the mandate policy to win Arab support away from the Axis,[72] but in the face of organised hostility, which soon escalated to terrorist attacks on the British administration, their ultimate concern was to withdraw rapidly and hand over the Palestinian question to other parties,[73] the consequences of which must be regarded as one of the principal legacies for the region of the colonial period, which continues to aggravate regional tensions and inhibit regional stability and development.

A striking example of how a change of government in Europe altered colonial policy occurred with the coming to power of Mussolini in Italy. In Libya in 1922, the fascists repealed all the treaties which the Italians had made with the authorities in Tripoli and in Cyrenaica, which had given the Libyans a degree of political and administrative autonomy. They issued decrees in 1927, 1929 and 1934, demolishing the existing administration.

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69. *"In part, in supporting Israel, we were rejecting responsibility and not facing up to the realistic need for a more liberal American immigration policy at the end of World War Two ..."* Joseph McCarthy The Limits of power : America's role in the world, 1967, p.155f.

70. The mandate power allowed the establishment of the Palestinian Arab Executive Committee, as an unofficial spokesman of the Arab population, but the Palestinian community were comparatively little organized. Apart from the Supreme Muslim Council, which controlled the Muslim courts and *waqf*, the Arab Higher Committee coordinated sporadic and ineffective political activities. Both were headed by the Mufti who was strongly anti-Zionist and anti-British. By contrast, the Jewish community was organized in elected assemblies and enjoyed a degree of self-government. There were many Jewish political parties, representing a wide spectrum of political and religious views. The Zionists began industrial development in this period, but their most striking and disruptive programme was settlement and the acquisition of land, which had the clear aim of making the Palestinians a landless minority in their own country. The Zionists also encouraged East European Jewish migrants, who were excluded from settling in America or Western Europe, to settle in Palestine. The Jewish Agency commanded its own armed forces, many early settlements had armed guards, and ex-British army Jewish officers in Palestine formed the *Haganah*, which trained secretly and held arms illegally, though by 1936, it was tacitly recognised by the mandate authorities.

71. For example, in response to continuing civil war in Palestine, Britain attempted to organise a conference in February 1939 including non-Palestinian Arabs from Iraq, Egypt, Saudi Arabia and Transjordan and Jewish representatives from Palestine, the United States and Europe in London, which failed to produce any result.

72. As war in Europe approached, British concerns in Palestine turned to seeking Arab support and in 1939, a White Paper was issued in which policy was reversed in the Arabs' favour, proposing the formation of a bi-national state within ten years, making continued Jewish immigration conditional on Arab support, and restricting land sale. David McDowall The Palestinians, New ed., 1987, p.9.

73. After the war, the new British Labour government invited the Americans to participate in the solution of the Palestinian problem, and an Anglo-American Commission was established. The Commission made its report in 1946, recommending that Palestine be neither Jewish nor Arab, warning against partition and favouring a bi-national, bilingual state, safeguarding Arab and Jewish rights. It recommended the continuation of the mandate, pending a trusteeship arrangement under the UN. It also recommended the immigration of 100 000 Jewish refugees. Truman asked for this last to be carried out immediately, but Attlee refused, on the ground that the whole report must be considered. Again, a meeting of Arab and Jewish representatives in London did not achieve results. In 1947, the British submitted the Palestinian problem to the United Nations. The General Assembly appointed a Commission, which produced a minority report recommending a federated Palestine, while the majority report proposed partition. The Zionists supported the latter, and the / ...

Most important was the Royal Decree of 1939 which declared the annexation of Libya, as part of the Italian kingdom. All political organization collapsed and the national struggle began again, when the Italians took Tripoli and Cyrenaica. Italian policy in the *"Riconquista"* was violent military conquest.[74] This prepared the way for one of the aims of the Italian presence in Libya : the acquisition of land for the growing population of southern Italy and Tunisia. Unlike the French as we will see, the Italian policy of agricultural development was initially slow and uncoordinated, but as the Italians gained control, land was taken for settlement of colonists.[75] A decree of 1935 provided that Cyrenaica and Tripoli be controlled by an Italian general governor with civil and military authority, through the Ministry of African Affairs.[76] The provincial administration was almost entirely Italian, and Libyan nationals were largely excluded from government. Despite Italy's ambitions to create *"Libyan Muslim fascists"*[77] by breaking down tribal structures, it maintained and used the tribal or kinship organizational structure,[78] which served their administrative policies.

In the third phase of colonial rule, identified at the beginning of the section, that of the creation of a colonial administration, French policies in the Maghrib took into account local conditions and French interests,

... Arabs rejected both plans. The Political Committee of the UN considered partition, which was confirmed by the General Assembly. Pressure was brought to bear by the USA on countries who intended to vote aginst the plan before the final vote at the UN, and three of the five permanent members of the Security Council favoured the partition plan, while Britain and China abstained.

74. The military operations which the Italians undertook to pacify Libya were long, costly and effective. They took north Tripolitania by the end of 1924, and in January 1928, the Sanusiyyah submitted to the Italians. By that time, north Fazzan too, was under Italian control, and by 1930, the provinces of Tripoli and Cyrenaica were united as a single colony under an Italian governor. Graziani was sent to pacify Cyrenaica in 1930, where he rounded up nomadic tribesmen and put them in concentration camps to cut them off from Umar al-Mukhtar's rebels. By September a barbed wire fence along the Egyptian border cut off aid to the rebels. After Umar al-Mukhtar's capture and execution in September 1930, the Cyrenaican rebellion was over. The effects of the Italian action in Libya were severe, with agriculture devastated, and according to some estimates, the population halved by 1933.
Jonathan Bearman Qadhafi's Libya, 1986, p.15
Some members of the Italian administration spoke openly of the desirability of expelling the native population.
Lisa Anderson The State and social tranformation in Tunisia and Libya, 1820-1980, 1986

75. After initial attempts to work with the Ottoman land codes and local customary land rights, Italy, in a series of decrees, set aside the Ottoman law, to provide land for Italians in Tripolitania and Cyrenaica. Initial hesitation by Italians to emigrate led to credits being offered to those prepared to settle in Libya, and this increased the number of colonists. Later, Italians were settled directly by state-run organizations, in particular, on the Jabal al-Akhdar, to pacify the area.
See also P. Lombardi "Italian agrarian colonisation during the fascist period" and G.L. Fowler "The role of private estates and development companies in the Italiaan agricultural colonisation of Libya" both in Joffe and McLachlan, see footnote 23 above.

76. This was confirmed by the decree of 1937, when Italy took Ethiopia, beginning another stage of Italian colonization. Colonists began to arrive in their thousands to take up land plots, with accommodation built by Libyan forced labour.

77. A decree of 1934 provided special citizenship for Libyan Muslims who satisfied certain criteria, such as reading and writing Italian. They were able to serve in the Italian army, join the Libyan fascist party, and exercise administrative functions in areas with Libyan populations, or act as advisers in mixed districts.

78. In some areas, the population was administered by Libyan *"muhtars"*, appointed by the Italians, whose duty was to assist the authorities, while tribal populations were administered by sheikhs, responsible to the competent authorities, on the basis of tribal subdistricts.
Lisa Anderson The State and social tranformation in Tunisia and Libya, 1820-1980, 1986, p.181f.

adopting the most effective and economic strategy. In Algeria, the early period of conquest had led to military administration in the conquered areas, which was gradually replaced by civil authority.

As with the case of land reform, French policy aimed to put aside traditional structures, in favour of French judicial and administrative institutions.[79] They rejected both annexation and direct rule of Tunisia in favour of the creation of a protectorate, seen as an effective and inexpensive method of securing French interests.[80] The administration of the protectorate[81] in Tunisia was geared to the pursuit of French interests, and to this end, it used some existing structures, though traditional authority was progressively undermined, with bureaucratic structures coming partly to replace and redefine relationships formerly based on kinship and tribal affiliation. From the beginning of the protectorate, the élite had worked with the French, but they exercised little real power in the increasingly complex administrative system, and this undermined their traditional authority. Despite their exclusion from positions of responsibility,[82] educated Tunisians were increasingly employed in junior administrative posts under the protectorate, and their ability to manipulate the machinery of government earned them

79. After the creation of the Arab Bureaux, their agents carried out administration. The military moved into police work and the judiciary, and their position was enhanced by modification of the judicial system in 1854, when officers were able to submit offenders to military justice. Only in 1858 with the creation of the Ministry of Algeria and the Colonies did the officers become public prosecutors and investigators.

The French aimed to establish a tribunal in every commune, by which means the destruction of the traditional judicial and local administrative structure was to be accomplished. The land law of 1873 had deprived the qadis of jurisdiction over land tenure, and the tribal assembly could no longer control local affairs, which were now governed by French tribunals. A new Penal Code was issued in 1881, which permitted administrators and the civilian political authority to exercise powers normally restricted to the military in time of war. Other administrative bodies were established, including the *Conseils généraux* and the *Conseils municipaux*, at the local level, to which some Algerians were appointed by the governor-general. At the national level, most important were the *Conseil supérieur* and the *Délégations financières*, through which the settler administration established financial autonomy from metropolitan France by 1900. Parliamentary representation was achieved in 1930, in which the settler share was disproportionate : 53 settlers to 11 Algerian landowners. In 1930, a law was promulgated, creating two colléges, or parliaments, European and Algerian.

Rachid Tlemcani State and revolution in Algeria, 1986, p.41f.

80. Lisa Anderson The State and social tranformation in Tunisia and Libya, 1820-1980, 1986, p.141

81. The succession of Ali Bey gave the French Resident-General the opportunity to take control of the whole administrative structure, though the bey retained nominal sovereignty. The convention of al-Marsa provided that the bey should undertake *"such administrative, judicial, and financial reforms as the French government may deem useful"*. The Resident-General legislated through and enforced beylical decrees, the government structure was controlled by the Protectorate administration through directeurs, and there existed a Council of Ministers, made up of directors of government departments, Tunisian ministers and the French commanders of the armed forces along with the Resident-General. A consultative body was established in 1896, and by 1907, this included 16 Tunisian appointees of the Resident-General, as well as elected French officials. A Grand Council, established in 1922 and containing both French and Tunisian sections, exercised little power in itself or over the government.

Wilfrid Knapp Tunisia, 1970, pp.113-136.

82. *"The complexity of the French administration, its insistence on territorial conscriptions, and its monopoly of coercion and of genuine political influence diminished the roles of the tribal networks and pre-colonial élite and created the content for new political roles."*

The French established "technical" services, which became independent ministries staffed and controlled by Frenchmen. As the Tunisians gained technical education, the French introduced other conditions such as military service to exclude Tunisians, who were thus relegated to the ministries of local administration and Islamic law. Holding no other positions of responsibility, their role was reduced to that of intermediary between French and Arabic speakers.

Lisa Anderson The State and social tranformation in Tunisia and Libya, 1820-1980, 1986, p.150f.

a status formerly restricted to the élite.

French colonial policy in North Africa, and in particular in Algeria, was affected to a large degree by changes of government within France itself,[83] as well as by the attitudes of the large settler communities in Algeria, and to a lesser extent in Morocco and Tunisia.

Other regional events identified earlier, such as the rise of fascism, the granting of independence by the British, World War Two and eventually the growth of pan-Arabism, also affected French policies, which appear to have swung between reform and repression. Governments of the Fourth Republic were weak, formed as a result of political compromise and were therefore weak in their administration of colonial territories and vulnerable to pressure from the settlers. A distinction is clear between the French attitude to Tunisia and Morocco, and to Algeria. The former achieved independence relatively soon after the war, whereas until de Gaulle, the French seemed determined to hold Algeria at any price.

Changing circumstances in both France and Algeria, in particular after the start of civil war in 1955, were crucial in shaping French colonial policy in its later stages. As elsewhere, the French responded to Algerian nationalism with both limited political reform and violent repression. The French government's response to an organised armed uprising in May 1945[84] was to attempt mild political reform. In 1955, after the outbreak of civil war, the French authorities began a twin programme of keeping Algeria French and carrying out administrative and economic reform in the hope of satisfying both settlers and

83. In Tunisia, liberalisation of French colonial policy occurred early under the administration of Pierre Vienot, but even limited liberalisation was opposed by the Popular Front, arousing opposition from the French chamber, with the government breaking up in 1937. The more conservative assembly in power after the 1951 election brought fresh proposals making little concession to Tunisian nationalism. They were opposed by the French socialists, and the Resident-General used his powers to dismiss the moderate Tunisian leader and his colleagues. Strikes and demonstrations were met by increased repression, culminating in the murder of national leaders, such as Ferhat Rachid, leader of the *Union générale des travailleurs tunisiens*, by an extremist settler organization.

A further change in French policy came in 1954, to provide in Tunisia, extended participation of the native population while retaining a federative principle for the republic as a whole. In 1954, the new French leader, Pierre Mendès-France, announced self-government for Tunisia. Negotiations over Tunisia's internal sovereignty went on for a year, and were embodied in a series of conventions of June 1955, which protected French interests. Tunisia became independent in March 1956

For Maghrib history in general, see : Abdallah Laroui The history of the Maghrib : an interpretative essay, 1977.

84. In the June 1946 election to the Algerian seats in the French assembly, the newly formed *Union democratique du manifeste algerien* won 71 % of the vote. The new French Constitution of September 1947 increased Algerian representation to 18 in the Union Assembly and in the National Assembly, 30 in the Chamber of Deputies and 14 in the Senate. Half of the seats were reserved for Muslims in the National Assembly and Algeria itself was given a two-college assembly, an all-Muslim college, and a mixed Muslim-European college, the first was dominated by collaborationist Muslims and the second by colons, in both cases because the elections were "*arranged*" by the administration.

Ali Mazrui and Michael Tidy Nationalism and new states in Africa, 1984, p.123f.

nationalists.[85] The government of Pierre Mendès-France had moved Morocco and Tunisia toward independence in progressive stages in 1954-55, partly in order to avoid armed rebellion on either side of Algeria. The appointment in 1956 of Guy Mollet as Prime Minister who had advocated direct negotiation with the *Fronte de libération nationale*, raised nationalist hopes that a political solution was in sight, but Mollet gave way to pressure from the *colons*, and his weakness encouraged extremists in the French army, who helped overthrow the Fourth Republic in 1958. From 1957, French policy swung back to violent repression.[86] With de Gaulle, after the overthrow of the Fourth Republic, France entered the final stages of its North African colonial occupation. His policy was reformist,[87] and in 1959, he began moves towards a political solution based on majority rule. It seems that de Gaulle was more concerned with the strategic implications of the use of half a million troops in Algeria than to safeguard the interests of the *colons*. In 1959, he proposed a referendum on self-determination for Algeria, which provoked a revolt by the *colons* in 1960 which was defeated by army groups loyal to de Gaulle, and by Muslim non-cooperation with the *colons*. In June 1960, his government began direct negotiations with the provisional government in exile,[88] and after some difficulties, in 1962, he declared that Algeria would become independent.

85. Along with strict security measures, the new governor-general tried administrative reform, through decentralisation and allowing Muslims more participation in local affairs. He established a new body of officials known as the *Sections administratives specialisées*, who were appointed as district officers to administer directly the areas under their control. Their duties were to develop education, improve agricultural methods, supervise health and house-building programmes and act as judiciary.
Ibid. p.125

86. French policy from 1957 was a programme of forcible re-grouping of villages, in an attempt to cut contact with the guerillas. Atrocities were carried out by government troops, disguised as *Armée de liberation nationale* soldiers, a counterproductive measure which strengthened support for the FLN. French military retaliation against the FLN resulted in a brutal act in 1958, when French planes bombed an apparent FLN *colon* near the Tunisian border, Sakhite Sidi Youssef, killing 68 Tunisian villagers. This outrage led to international condemnation, including diplomatic pressure from the United States.

87. Muslims were given voting rights as French citizens on the constitutional referendum for the Fifth Republic. In 1958, he launched the Constantina plan, which provided for expansion of education, health care and industrialisation, and the rapid introduction of Muslims into public service.
Ibid. p.129

88. A contemporary description of the government in exile may be found in Mohammed Bedjaoui Law and the Algerian Revolution, 1961

An important factor with far-reaching implications in the contemporary political and legal order was the use of minorities by the colonial powers for maintaining their authority and influence in the region.[89] Colonial policy toward minorities aimed at the division of colonised society on religious, ethnic and linguistic grounds,[90] in order to undermine the development of organised forces within society. Minorities also became the instrument of colonial policy in several countries. The philosophical background of each colonising power also affected their attitude toward minorities. Despite the non-discriminatory character of the French doctrine of incorporating colonial territory within the Republic, the French tended to favour minorities who could be expected to further their interests.[91]

Though contemporary Arab states differ in economic development and political outlook, they share in varying degrees the legacies of foreign rule, which have had far-reaching implications for the development of the present political structure and constitutional order from the Atlantic Ocean to the Gulf. This brief conclusion reviews the main implications of that period, focusing on the legacies of European colonial rule on the emerging order. The political legacy of domination of the Arabs was deep and lasting : for two centuries the Ottomans dominated the region, to be followed by European control.[92]

Foreign rule disrupted traditional society, creating divisions in territories and communities which still have effect today. The depth of cultural transformation of the European colonies of the Middle East and North Africa is open to question. However, there is a greater degree of apparent cultural impact in the former French North African colonies, while Britain's cultural influence appears superficial.

89. The Palestinian question and the Israeli occupation, in which all colonial powers share responsibility, remains the most striking legacy of colonial rule in the region. An examination of this complex and well-documented issue is beyond the scope of this research, save to note its impact on the development of the contemporary order in the region and its stability.

90. French policy aimed at the division of North African society between Arab and Berber communities, for example, by reviving Berber customary law in place of Islamic legislation for the Berbers, and by sponsoring their educational development. Their concern was not to protect the minority culture or language, with education conducted in French at the expense of both Arabic and Berber.
Rachid Tlemcani State and revolution in Algeria, 1986, p.198f.
In Morocco, the Berber Dahir of 1930 had aimed at encouraging Berber separatism as a counter-weight to urban Muslim Arabs' anti-colonialism.
Michael C. Hudson Arab politics : the search for legitimacy, 1977.

91. The French military in Syria-Lebanon adopted the French policy of supporting minorities who would in turn favour France. The military commander divided the province into 5 : Greater Lebanon, Latakia (an Alawi district), Aleppo, Syria (districts of Homs, Damascus and Hama) and Jabal al-Druze (a Druze district). Though this division proved impractical, it is clear that it was made partly with the minority Alawi community favoured by France in Latakia, and the Druze minority in Jabal-al-Druze in mind. Lebanon was easier for France to administer than Syria, chiefly because of the Maronite Christians who supported them. Division of people according to religion was a basic policy, but the military high commissioners aided the propagation of Roman-Catholicism and favoured Catholics.

92. Of the 16 Arab territories that attained independence between 1926 and 1968, all were under Ottoman administration since at least the beginning of the 18th century. During the 19th and 20th centuries, they came under the direct administration of European powers, whether under French or British protectorates, or, after the First World War, French or British Trusteeship (under the League of Nations mandates). After the Second World War, Libya passed from the direct control of Italy to the trusteeship of the UN, under which she achieved independence.
For the impact on the region in general, see Fred Halliday Arabia without sultans : a political survey of instability in the Arab world, 1975.

Most important and lasting of the legacies of colonial rule in the region is the psychological legacy, since the exploitation of Arab land, resources and the Arab population, and the creation of false institutions has had far-reaching implications for the progress of the Arab nation, inhibiting its development, creating obstacles to unity and instability, elements which persist in the contemporary order.

The economic, political and administrative policies[93] of the foreign powers who controlled the Arab countries reflected the cultural characteristics[94] and national interests of the powers themselves[95] rather than the needs of these communities. The presence of the powers was always closely connected and practically linked to national interests or, in France's case, to those of the larger community. Economic development, for example, was influenced to a great extent by colonial policies, and paramount in every case was the interest of the colonizing as opposed to local needs or concerns. France and Italy in particular transformed the system of land tenure in their North African colonies in the interests of the settler communities.[96] Rapid urbanization of the nomadic and semi-nomadic population as well as limited industrialization were also consequences of European economic policies in their Arab colonies.[97]

93. As we saw, during the Ottoman period, the Arabs were subject to political and administrative systems which reflected the political movements and the changing administrative organization in Turkey, with the Islamic element representing the only common ground between the leadership and institutions such as the *Ulama*. The balance of power was subject to shifts according to the relative strength of these institutions. Islamic *Shari'ah* governed the attitude of both the Ottomans and the Arab population to minorities, which were religious in character, and according to *Shari'ah*, regulated by the laws and organs of their own beliefs. The period of governing until 1908, when the constitution was promulgated, was far from ideal, with dynasties and corruption characteristic. The Ottoman administration took into account social conditions in their political and administrative divisions, especially the tribal conditions of these provinces.

94. Agricultural production in North African colonies, for example, focused on grape-growing for wine production, in spite of the Muslim population.

95. Documents issued by the British government with respect to the Egyptian Protectorate indicate the attitude that British interests remained paramount. For example, a Foreign Office Circular to British Diplomatic Missions in March 1922 stressed "*...the rights and interests of the British Empire are vitally involved, and will not admit them to be questioned or discussed...*"
Muhammad Khalil The Arab states and the Arab League ... , 1962 p.460.

96. For example, the Italians took land for the settlement of colonists to provide 68 000 hectares of land in Tripolitania by 1925. Between 1923 and 1932, 120,790 hectares in Cyrenaica were taken.
Lisa Anderson The State and social tranformation in Tunisia and Libya, 1820-1980, 1986, p.215.
See also the articles by P. Lombardi and G.L. Fuller cited above, footnote 75. Protectorate economic policies in Tunisia, in furthering the commercialization of agriculture and the development of a real estate market provided a suitable context for colonization, in which Europeans came to control the most fertile land.

97. As France introduced plantations and mechanised farming on a large scale in Algeria, for example, settlers forced many Algerians from their land into the urban centres, where they were politicised by unemployment and poverty. Both the immigrant middle class and favoured local minorities enjoyed privileges not shared by the native middle-classes, again leading to their politicization.

The administrative policies too, of the foreign powers reflected the political concerns, the cultural policies and the economic interests[98] of those powers, either manipulating or seeking to undermine features of traditional society, such as tribal authority structures. The Ottoman administration[99] encountered by the European powers had made use of both religious and tribal structures and affiliations. While in some countries, the European colonizers constructed their own administrative systems, elsewhere they adopted and reformed aspects of the Ottoman administrative structure to fit their own purposes,[100] sometimes appointing European administrators to supervise existing legal and administrative apparatus.

Where Europeans created an administrative structure, its work was conducted entirely or largely by the personnel of the foreign Power,[101] though in some countries there was limited participation in the junior levels. This was normally conditional on participation within the assimilationist policies of the power, which clearly limited the numbers able or willing to participate within this context. The effect in the

98. Cromer's reforms in Egypt increased cotton output after the building of the first Aswan Dam in 1903, but its main result was to enrich the political power of a small class of land-owners. In 1913 almost half of Egypt's cultivated land was owned by 13, 000 landlords while the rest was shared by a million and a half *fallahin*.

99. Aspects of the provincial religious administration are still to be found in modern Arab republics and monarchies, such as the *Ulama* and *mufti*, while the administrative section of *diwan* and *wali*, though remaining in some states only until independence, remain to the present within some monarchies. Consultative councils remained too within some modern monarchies, with some developing to be the "*Council of Notables*", appointed by the King.

For example, the monarchical Constitution of Libya of 1951, as amended, establishes the *Umma* council, containing the Councils of Notables and of Representatives, (article 93) of which the former contains 42 members appointed by the King (article 94). It also establishes local administration containing local and *baladiyyah* councils (article 176).

In the provinces, de-centralised institutions, such as *Wilayat* headed by *Wali*, *Muhafaza* headed by *Muhafize*, *Baladiyyah* headed by *Din*, *Mutasarrifiyyah* headed by *Mutassarif* remained until the sixties in Libya, and to the present in other monarchies.

100. In most cases, the colonizing powers sought the most economical and effective system of administration regardless of the effect on the development of the colonised community, as we saw, for example, in British policies in the Gulf.

French direct rule was not always imposed, where an alternative and reliable power structure already existed, as for example, in the case of Morocco, where in the Treaty of Fez of 1912, the French recognised the Alawi Sharifian dynasty. The existing administrative structure was retained with the addition of an administrative substructure staffed by French personnel. Legislation and decrees were promulgated in the name of the sultan leaving him nominally the source of authority in the country. In Tunisia, in the early stages, the beylical administration was preserved, though a parallel French administration quickly acquired all effective powers, and the bey became a figure-head, while central power was in the hands of the French Resident-general.

101. Examples from the three Powers illustrate this approach.

In Libya, the provincial administration was almost entirely Italian, with the Libyans largely excluded from government, though, as we saw, some Libyans, granted special citizenship, were allowed to exercise administrative functions in areas with Libyan populations, or act as advisers in mixed districts.

The British tended to use their own personnel in senior posts in the administration, in order to secure British interests. Cromer and Kitchener in particular, believed that the Egyptians could not be trusted with the administration of Egypt. However, the body of administration was carried out by Egyptians, with the result that the British left Egypt with a thriving bureaucracy and governmental machinery.

The French protectorates in North Africa were also largely staffed by French personnel, and administration by metropolitan institutions tended to move the focus away from local needs to those of the larger community.

For useful discussion of the impact of colonial education and administrative policies, with particular reference to the legal profession, see Donald M. Reid Lawyers and politics in the Arab world, 1880-1960, 1981.

French colonies of North Africa was to create a French-speaking and French-educated intellectual élite, but few administrators, while in former British colonies, the tendency to create national apparatus created administrative bureaucracies and a trained body of Arab civil servants.

Another factor restricting Arab participation in colonial administration was the increasing requirement of technical or political qualifications to exercise power even at junior levels. The growing importance of technical qualifications also contributed to undermining traditional authority based on kinship,[102] though elsewhere, to varying extents, the Powers had shared the policy of maintaining and using the tribal or kinship organizational structures, to extend their authority to the hinterland.[103] Where applied, this policy had the result of deepening the division between rural and urban communities, and of creating a two-tier administrative structure, containing both traditional and modern elements.

As before, the fact that the interests of the power itself, rather than the needs of the colonised community predominated led to negative results reflected in both the quantity and quality of the administrative apparatus, in terms of institutions and personnel, at independence. In contrast to the spirit of the aims set out, for example, in the League of Nations mandates in accordance with Article 22 (4) of the League of Nations Charter, of creating institutions which could serve the nation's interests at independence or of developing the population so as to provide qualified and experienced administrators to take over the European apparatus, colonial policies tended to serve only the short-term interests of the European Powers and to restrict local participation to comparatively junior levels.

*Similar conclusions may be drawn about the policies of administrative* reform adopted at various times by colonising powers.[104]

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102. The pre-colonial Tunisian state administration was not dismantled, but administrative reforms, particularly concerned with educational qualifications for posts in the bureaucracy undermined political support based on kinship, while at the same time the extension of territorial administrative units and registration of title to land undermined the coherence of kin-based political identity.

103. Tribal and kinship organization became the tool of Italian administrative policy in Libya, with lasting consequences for political organization. As peasant communities were destroyed along with the Libyan administration, kinship identities were revived as a political structure.

104. Administrative reform in the French North African colonies occurred at more than one stage. In Tunisia, where aspects of the pre-colonial administration were maintained by the French, reform minimised the role of Tunisians. At a different stage, in Algeria, the French carried out administrative reform in response to the outbreak of civil war in 1955. As we saw, the French governor-general implemented administrative reform, which although allowing Muslims more participation in local affairs, established the *Sections administratives specialisées*, a corps of French military officials.

Colonial policies also affected political life in the Arab countries to a great extent, interrupting the development of political thought and activity, and affecting the creation and development of political organizations. With colonial occupation regarded as a cultural assault on Islam,[105] political and religious movements were diverted to the national struggle for independence as a direct reaction to foreign domination, and in particular, the "missionary" nature of some colonial policies. The nature of some parties was a response to the presence of foreign powers, with their programmes based primarily on the achievement of independence, and to a greater or lesser extent, on calls for Arab unity.[106]

Nationalist opposition to colonial rule developed at varying stages in different countries.[107] In some countries, colonial policies delayed the creation of modern political parties,[108] and inhibited the growth of conventional forms of political participation.[109] A policy which undermined the development of political parties was the tendency of some powers to deal principally with traditional élites, thereby excluding and alienating other sectors of society, who were thus unable to participate effectively in developing political life. To a certain extent, this led some elements of the population to accept the *de facto* circumstances of colonial rule, whether exercised directly or through the leadership which assumed power in the post-independence era in countries such as Iraq, Egypt, Jordan and Morocco.

Within some colonies, the Arabs' political role existed within the larger nation, a phenomenon which began under Ottoman rule.[110] Political institutions developed later in French colonies, with parties and other

105. French colonial occupation in Morocco was regarded as a Christian assault on Islam, and the early nationalist movement, particularly in Istiqlal, was influenced by the ideas of Muhammad Abduh and the Salafiyyah movement.

106. For a discussion of Arab political parties see : Elie Kedourie Arabic political memoirs and other studies, 1974, pp. 28-58.

107. For example, in the French territories, Tunisian reactions reflected both changes in protectorate policies and growing disenchantment with French government. Early protests came from the beylic élite, concerning the failure of the protectorate to develop the Tunisian population. The middle class of Tunis attacked the failure of the French to employ Tunisians in high level posts, and the refusal of the French to recognise a Tunisian constitution. Finally, protest organised by Tunisian provinces emphasised the protectorate's systematic bias against Tunisians and called for a return to Tunisian control.

108. Elsewhere, conventional parties grew up both to voice nationalist opposition to colonial rule and to act as intermediary between the population and the foreign administration. For example, the Neo-Destourians used a clientele network throughout Tunisia, providing services such as legal aid, employment and insurance, and acting as intermediaries with the French administration in return for political support. Its organization around clientele networks permitted nationwide participation, and patronage allowed the party to bring together varied groups which ideological politics would have divided.
Lisa Anderson The state and social transformation in Tunisia and Libya, 1986, p. 141f.

109. For example, the consequence of the British presence in the Arabian peninsula was to strengthen the rule of particular families and tribes. Little political development took place and at independence there was no experience of political participation apart from the traditional tribal structure.

110. For example, the whole Libyan population was represented by six members -representing six provinces - in the Turkish parliament.
Muhammed al-Madani Libyan Administrative Law, 1965, p. 62.

associations[111] initially organized with respect to national concerns, rather than those of the colony itself.

Political favour was shown to certain groups within the colonies, as the Powers saw most convenient for their ends. Thus, certain groups within Arab society came to exercise political influence or power.[112] Another outcome of the colonial policy of favouring certain groups was that of incoherence in the political front opposing the colonial power. Traditional leaders, modernised élites and broadly-based nationalist movements found themselves in opposition to one another as well as to the colonial power.[113]

Parties like the Wafd in Egypt and the Neo-Destour in Tunisia operated within the political framework created by the colonial powers, though the failure of this framework to translate Arab aspirations led nationalist forces in several countries to seek power in alliance with the military. Belief in the "democratic process" as a vehicle of change was irretrievably undermined, with the failure of existing organs or those created by colonial rulers to provide a mechanism through which political parties could bring about change responding to national needs. This failure was due both to the inherent weakness of the organs themselves and interference in such aspects as limitations on the scope of participation, and the *"arranging"* of elections.

The colonial powers, or leaders acting on their advice, responded to nationalist calls with reform[114] of constitutions and institutions, with the result that the new constitutional order became more authoritarian.[115] Other responses included the imprisonment, exile or assassination of nationalist leaders, which dramatically weakened political leadership. The failure of the political mechanism to bring about change meant that the military option was seen in several countries as the only mechanism by which nationalist goals might be achieved.

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111. In 1946, the *Union générale tunisienne du travail* was formed, independent from the CGT, since the French union, which had come under communist domination after the war, wanted to preserve the dominance of French workers. It pursued an independent course, joining the anti-communist International Confederation of Free Trade Unions, and thereby gaining access to an international forum for its case for independence.
Wilfrid Knapp Tunisia, 1970 pp.132-3.

112. A consequence of the British presence in the Arabian peninsula was to strengthen the rule of particular families and tribes. We have seen another example, which has implications for the contemporary structure, in French support to minorities who thereby became the protectors of their interests. The French favoured those groups who potentially might support France, including religious minorities like the Christians or Alawis, and the Berbers in the North African colonies.

113. The struggle for independence in British colonies was often triangular, since the British, the traditional or British-backed leader and the modernised élite or nationalist movement tended to oppose one another, as in the cases of Iraq, Aden and Egypt.

114. In British colonies in particular, concessions tended to come in response to organised demand and when the higher cost of resisting reform outweighed any advantage which might be kept by maintaining the *status quo*. British policy in South Yemen had been slow to respond to growing calls for independence. By relying on traditional leaders and leaving nationalist groups out of negotiations until the last stage, Britain found herself unable to negotiate a constitutional route to independence, leaving the country to civil war.

115. Constitutions promulgated in Egypt, as we saw, enhanced the power of the monarch to give him over-riding executive authority.

Another conclusion which could be drawn from these policies is the undermining of constitutionalism[116] and institutions. The constitutional route to independence in most Arab countries was undermined in the eyes of the population, by the role of the colonial power in the framing of the constitutional order,[117] which in some cases confirmed the legal status of a ruling minority,[118] or failed to reform the feudal economic structure. It was also undermined by continuing colonial influence after *"semi-independence"*, for example, through the treaties which maintained a foreign military presence, such as the treaty between Britain and Iraq of 1930, the Anglo-Egyptian treaty of 1936 or British treaties with Gulf states.

In several countries, the lack of a peaceful route to independence,[119] as well as the absence of a mechanism for peaceful political change after independence may also be traced to the failure to build a coherent constitutional order. Despite an appearance of modern state-building, Arab participation in the foreign-created institutions of colonial rule was superficial and restricted to participation by select groups in the government of their subject nations, while real political power was strictly controlled by foreign personnel, even when they utilised traditional power structures to extend their control. Particularly after the First World War, with the emergence of the principle of self-determination, the European powers became concerned to an extent to legitimise their position in Arab territory by providing limited opportunities for the participation in government of local élites, and eventually a measure of self-government, but with the national interests of the Powers remaining paramount, the political structures they created and the opportunities for participation they allowed, were no more than superficial.

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116. Elie Kedourie has made a study of the failure of constitutionalism in the Middle East. See, for example, his Arabic political memoirs, 1974, pp.1-27, and recently, "Crisis and revolution in modern Islam" in Times Literary Supplement May 19-25 1989, pp.549-553

117. King Faisal I governed under the Constitution of 1924, which had been given by the British, after a series of constitutional proposals proposed by a British Commission and the Iraqis, had been rejected. The authorship of the new Constitution is disputed, as some regard it as the "grant" of the British, while others describe it as the work of the constitutional assembly.
I. Mirza [Political science and principles of constitutional law], 1960, p.89-110.

118. The British policy of installing members of the Hashemi family as their representatives in the mandate territories was not fully successful in maintaining control after independence, as the British were forced to intervene militarily to secure Iraq from the German threat. In the post-war period, the policy maintained western influence in Jordan through Abdullah's grandson, but successive army coups d'état in Iraq removed British influence. Their continuing influence in Egyptian political life, principally exercised through the ruling dynasty of Muhammad Ali, was ended by the Free Officers coup of 1952.

119. The Yemeni case provides a striking example. The British were unable even to establish a caretaker government, and left the country to civil war between the two main nationalist movements.

The policies of both direct and indirect rulers of the Arab population were aimed not at nurturing the Arabs' political development with a view to building strong institutions capable of translating Arab desires for equality, justice and political participation, but rather to provide the mechanism by which the colonial nation could maintain power. Some argue that *"western"* institutions were transplanted into Arab countries where they failed to take root because of differences in historical experience and values,[120] but this analysis is based on orientalist assumptions, and must be rejected, since there are no grounds for suggesting that the population of Arab countries did not share common aspirations to political equality, justice and the opportunity to contribute to their political development. While it is clearly the case that Arabs' modern historical experience, under foreign domination, was distinct from the experience of European nation-states, leaving behind legacies of division, political incoherence, a crisis of representation and weak institutions in political life, this does not mean that the Arabs rejected political development, simply that they had yet to experience it in reality. Institutions and laws were unable to satisfy the aspirations of the population, not because they embodied values alien to Arab society, but because they were not successful in translating such ideals as equality, justice and participation into reality.

120. John L. Esposito Islam and politics, 1985, p.129.
The weakness of *"political institutions (parliaments, political parties, free elections)"* is not due to *"differing"* values and concepts, but rather, as this thesis will continue to argue, in their failure to operate in practice because of the weakness of the political and legal structures which should sustain and regulate them. *"Parliaments"* in which a single governmental viewpoint is dominant and maintained by constitutional and other legal provisions, are not parliaments in any real sense; *"political parties"* which are not free to represent the spectrum of political thought and aspirations of the population cannot be described as true political parties; and *"elections"* where the law is unable to safeguard the right of free and equal participation in a secure and legally protected political process cannot be described as *"free elections"*. The failure of political institutions in Arab countries is not due to their *"western"* or *"alien"* origin, but to their lack of real content, which would ensure their failure in any country.

# SECTION TWO

# THE IMPACT OF NATIONALISM AND THE NATIONALIST MOVEMENTS ON THE EMERGING CONSTITUTIONAL ORDER

The Arabs embraced the cause of *Qawmiyya* (nationalism) because of a cultural, linguistic unity and, to a certain extent, unity of historical experience, but because of problems in definition, it is important to examine the term *"nationalism"*, both in content and scope, through its various manifestations. As we saw, Arab contact with the West took several characters : military, commercial and colonial, leading in most cases to a collective, nationalist response. In identifying the role of nationalism in the creation of the contemporary political and legal order, it is important to identify the precise nature of Arab nationalism in particular periods of history.

Arab nationalism today does not share the same content,[121] or context - even in general usage - as, for example, the classic European notion of nationalism,[122] where the European communities formed homogeneous, administratively and politically centralised nation-states.[123] Although the term may be applied according to its general usage in an Arab context during a certain period, a distinction must be made in a later stage.[124] For Arabs, under Ottoman and European control, the first object of nationalism was independence and liberation from foreign domination, not necessarily the creation of independent nation-states, as in Europe.

At a later stage, the nationalist struggle within each state focused on national independence, leading to the creation of independent states, each in accordance with different ideologies. A further dimension, that of *"pan-Arabism"* was added to the term with the result that it became misleading. Though Arab nationalists strove for a greater unity at the regional level, the factor of political unity did not exist, and the maximum achievement at this level was the Arab League whose Pact stressed Arab unity and created a regional political organization aimed at fostering cooperation between the member states.[125]

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121. The same has been said of African nationalism.
K.W.J. Post Nationalist movements in West Africa, p.326.
For background, see also : Hazem Z. Nuseibeh The ideas of Arab nationalism, 1956; Walter Z. Laqeur Communism and nationalism in the Middle East, 1956. Translations of important texts may be found in Sylvia Haim Arab nationalism, 1962.

122. From the European point of view, nationalism combines negative and positive elements, where the former represents a rejection of the outside world, a rejection of universalism. The positive element, at least in the European context, has been the expansionism which has led both to foreign conquest and border quarrels on the European continent for four centuries. European nations fought, not to establish their identity and sovereignty against a foreign occupier, but to control the sources of wealth in Europe and throughout the world. Some see nationalism in Europe and its subsequent overseas expansion in colonialism as the inevitable consequences of the development of capitalism.
S. Amin The Arab nation : nationalism and class struggle, London, 1978.
Nowadays, in the European context, both elements have been rejected as outmoded : interdependence and the interests and aims of the broader European community have largely triumphed. Nationalist movements continue to thrive in European states, particularly where communities feel that their political and cultural identity is threatened by the trend towards political union.

123. S. Amin The Arab nation : nationalism and class struggle 1976, p.10.

124. The aftermath of the First World War brought some hope to the Arab nation, when historical events led to political progress, including full or semi-nationhood. In contrast, the Second World War, combined with the danger of political Zionism, heightened the urgent need for Arab unity. The creation of Israel and other events led to the establishment of the League of Arab States, giving nationalism the chance to put itself to the historical test.

125. Article 2 defines its purposes as the strengthening of the relation between the member states, the cooperation between them, and the safeguarding of their political independence, sovereignty, territorial integrity and a general concern with the affairs and interests of the Arab countries.
American Journal of International Law 39, 1945

Early *"nationalist"* movements then, campaigned not in the name of an already existing unity, but rather to translate into reality their aspiration to the right to be free politically. This distinction has led writers to suggest that *"Arabism"* is a more accurate term in this context. From the Arab point of view, the aim of the early nationalist movement was principally to regain national sovereignty, with a view to regaining control over the political and economic life of the area, and shaping the destiny of the Arab nation. This is one of the important differences between Arab and European nationalism. Arab nationalism was no expansionist movement. The principal struggle was focused against external occupation : it was primarily a struggle for national liberation.[126] Though historical events played a major role in the rapid development of nationalist movements in the Arab world, a religious consciousness fed Arab nationalism throughout history and continues to influence it today.[127]

In the twentieth century, with the collapse of Ottoman rule, some Arab Muslims achieved the status of nationhood. The ensuing ideological controversy among Muslim intellectuals was only the beginning of a continuing debate between nationalism and universalism. The consequences of the First World War, when the European Powers divided the spoils of the Turkish empire, highlighted the basic contradiction between the goals of Arab nationalism and Islam with its universal message of non-discrimination.[128]

In this era, we see the effect of the two main currents : religious and secular, and within them, traditional and modern, conservative and radical, in Arab political thought, their positive and negative effect, and their essential role in the creation of contemporary Arab states. The current aspirations of Arab intellectuals to democracy in a rationalist order depend on the success of the balance between these forces.[129]

Nationalism, as other aspirations of Arab society, found and continues to find its reflection within the two main tendencies of that society. The first represents the religious dimension, and the second the secular. It should be noted that each dimension took its own place in each modern Arab state. At this stage, it is worthwhile to summarise briefly the two main tendencies of nationalism, Islamic conservatism and liberal modernism. The first is based on Islamic orthodoxy, and draws its identity from the original sources of Islamic law and

126. Anouar Abdel-Malek characterises this struggle as a *"nationalitarian"* as opposed to a conventionally *"nationalist"* movement. He further characterises the *"nationalitarian"* period as the predominance of a positively oriented movement, creating progressive values and institutions, while the conventional nationalism of the colonial powers aimed at *"ethnic and racial domination"*.
Anouar Abdel-Malek (ed.) Contemporary Arab political thought 1983 p.9.
127. For example, in the nineteenth century, Islamic political thought identified nationalism as patriotism and a mark of faith.
Hamid Enayat Modern Islamic political thought 1982, p.111f.
128. Islamic law confirms the prohibition of discrimination : *"A coloured person has no preference over a white man, nor a white person over a coloured one, nor an Arab over a non-Arab, nor a non-Arab over an Arab, except through righteousness"*.
129. Anouar Abdel-Malek (ed.) Contemporary Arab political thought 1983 p.7.

ethics.[130] Arab and non-Arab fundamentalists, like Banna', Sayyid Qutb, Ghazzali and Mawdudi, rejected all varieties of nationalism, linguistic, ethnic and liberal, on grounds of universalism arguing that the only homeland which could be recognised by the term *"Dar-al Islam"* is the global application of the *"domain of Islam"*, with the Islamic homeland the only legitimate ground for nationalism.[131]

The second tendency, that of liberal modernism, took a quite different approach. Philosophical rationalism and political liberalism, with its Eastern character, shaped its political thought, as far as the creation of the social, political and economic order was concerned. The transformation, in this context, took into account the cultural heritage, and varied in outcome from conservative liberalism to Marxism.

The context of the rise of Arab nationalism can be traced from the decay of the Ottoman empire, and the spread and consolidation of European rule in the region. Early nationalist activity had been directed against Ottoman rule,[132] but the focus of Arab nationalism proper was resistance to European colonialism. Three factors combined to give force to the nationalist movement after the First World War : firstly, the division of Ottoman territory between the Powers after the war and the creation of separate nation-states, no longer held together by a centralised regime on a religious pretext. The second factor was the growing Arab movement for liberation from European domination. As Turkish influence receded, European cultural and political dominance gave impetus to resistance to a rule which was both foreign and non-Muslim. A third factor, also related to Islam, was the influence of religious movements, such as the *Salafiyyah* movements.[133]

We have already seen how the territory of the former Ottoman empire was divided between the European powers, beginning in the nineteenth century. The process continued, as we saw, with the distribution of Arab territory in the Middle East as European mandates, as part of the post-war settlements, and the consolidation of European rule in North Africa. European colonial rule in these territories provided a focus for nationalist resistance movements, which may be divided between the two characteristics mentioned earlier : one a religious tendency, which drew on the *Salafiyyah* movements and modern Islamic political thought,

130. It should be stressed that this basis remains a purely theoretical one which neither Left or Right have substantially practised at any level, as we shall see in the examination of Islamization.
131. Hamid Enayat Modern Islamic political thought 1983 p.115.
132. Lisa Anderson "Nineteenth century reform in Ottoman Libya" International Journal of Middle East Studies, 16, 1984.
133. The *Salafiyyah* movement as a force manifested itself in Saudi Arabia in the last decade when its open rebellion and discontent reached its height in the events which took place in the Great Mosque of Makkah.
Hermann Frederick Eilts, foreword in John L. Esposito Islam and politics 1985.
*Salafiyyah* cults included the *Wahhabi* in Arabia, *Shawkani* in Yemen, Sanussi in Cyrenaica (Libya), *Mahdi* in Sudan.

and the other, Arab nationalism,[134] which manifested a range of orientation, from secularism to nationalism of a Muslim rather than Islamic character.[135] The focus is on these two main tendencies of nationalism, tracing the movements from their early manifestations as a reaction to foreign rule and the decay of the Ottoman Caliphate, through their role in the achievement of independence and, in broad terms, how the secular radical tendency is manifested politically today.

Arab nationalism originated in the late nineteenth century within the territory of the Ottoman empire. The earliest nationalist movements were primarily secular and found expression in the writing of Syrian and Lebanese intellectuals, who drew on European nationalism, constitutionalism and liberalism. Later, Muslim writers identified the cause of Arab nationalism closely with Islam. Such ideas posed a challenge to the Ottoman administration of Arab territory, and they crystallised into political ideas under Abd al-Hamid, finding expression in organizations, particularly in Syria and Lebanon.

Within the Ottoman empire, a number of *Salafiyya* cults had grown into an important political force. It based its doctrine on the political philosophy of Ibn Taymiyah,[136] and initially, represented a conservative reaction to the contemporary political and legal order, in religious terms, contrasting the corruption of Ottoman rule with Islam.

With the advent of European colonial rule, Muslim thinkers, such as al-Afghani, Muhammad Abduh and Rashid Redha articulated the Muslim response both to domestic problems of development and European imperialism. Al-Afghani stressed the weakness and disunity of the Islamic world in the face of European expansion, connecting it to the corruption of the political order, and advocating radical reform of political institutions. He was joined by Abduh, who actively supported revolution in Egypt, and advocated secular principles of nation-building.[137] He urged the reform of the Caliphate within the framework of the Ottoman empire, as a defence against European imperialism.

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134. In the light of the dominant role of the "*ruling party*" in several radical Arab republics, an understanding of their ideological foundations begins with a review of their role in the nationalist struggle.

135. John Esposito Islam and politics 1985, p.94.

136. Ibn Taymiyah was one of the Muslim theologians who responded to the disintegration of the Muslim empire into disparate and competing dynasties by calling for a return to the original teaching and early practice of Islam. He defined the sources of Islamic teaching strictly, as the *Qur'an* and *Sunnah*, and the practices of the early Muslims, dismissing later developments as *Bedah* (innovation). He argued that the Qur'an specified clearly that the basis of government in Islamic state is *Shura*("*consultation*"), and his view went against the contemporary trend which divided religion from secular authority, by opening the consultative council to religious and national representatives : the *ulema* and leaders of public opinion. He thereby opened the dynamic of the state to other elements of the Muslim community. He re-iterated the responsibility of the state to implement and safeguard *Shari'ah*, adding that it is the duty of the people to ensure that the government remains true to the doctrine.

137. For example, he argued that government should be civil rather than religious, that sectarianism should be rejected as a political force dividing society, and that education be the basis of a civil society. Though he identified these bases as characteristic of European nations, he stressed that they did not contradict Islamic doctrine.
Hamid Enayat Modern Islamic political thought, 1983.
For background, see also C.C. Adams Islam and modernism in Egypt, 1933; Tom Little, Egypt, 1958; P.J. Vatikiotis, The history of Egypt, 1980.

The question of the Ottoman Caliphate was the subject of debate and division between Muslim and nationalist thinkers of the early twentieth century. The secular thinker, Ali Abd al-Raziq, called for its abolition, on the grounds that Islam had never prescribed any form of government in the literal sense, and that the Caliphate had no foundation in the primary sources.[138] While his thesis was opposed by orthodox scholars, his attack on the notion of Caliphate encouraged many Muslim thinkers to adopt in its place the concept of a *"democratic"* Islamic state. Earlier writers, like 'Abd al-Rahman al-Kawakibi and Najib Azuri, had called for the Caliphate to be restored to the Arabs. Later, Reda,[139] a follower of Abduh, called for the restoration of the universal Caliphate as the mechanism of Islamic legal reform,[140] though after Ataturk's abolition of the caliphate and the establishment of separate Muslim states, he supported broad Arab nationalism, with an Islamic character, in contrast with some Egyptian nationalists who favoured secular nationalism, as he saw it as the mechanism for bringing about wider Muslim unity. Calls for the restoration of the Caliphate to the Arabs were not translated into reality, despite Sharif Husayn's[141] self-proclamation as Caliph of the Muslims in 1924, when the Caliphate was abolished. Turkey's transformation to a secular state[142] and termination of institutions of an Islamic character led to hostility among Muslim Arabs.

138. He argued that the Muslims therefore, are free to choose any form of government. He advocated the separation of religion and government : he argued that although the Prophet had combined religious and political leadership of the community, this true combination ended at the Prophet's death. The early political community had established some form of government, and the first administration of the Khalifa was political and not religious in its nature.

139. Hamid Enayat Modern Islamic political thought, 1983 p.70f.

140. Reda supported Ibn Sa'ud's revival of the Wahhabi movement in the Arabian peninsula. Like Hassan al-Banna, he stressed the sufficiency of Islam, and restricted the source of its teaching to the primary.

141. Sharif Husayn of Makkah, though recognised by the Hijaz, Iraq and east Transjordan, was discredited for Muslims in India and Egypt, as he was seen as the agent of the British. Husayn had been involved in negotiations with the British, who hoped to use him to lead Arab opposition to the Ottomans. The *"Husayn-McMahon correspondence"* concerned Husayn's promise to recruit soldiers to fight the Ottomans, in return for which, the British had promised to support Arab independence, and Husayn's ambitions to lead an Arab nation.

142. In 1928, a constitutional amendment deleted the phrase *"the religion of the Turkish state is Islam"*, and the Constitution declared Turkey a secular state.
John L. Esposito Islam and politics 1984, pp.94-100.

## NATIONALISM AND THE EMERGING CONSTITUTIONAL ORDER

After the First World War, Arab nationalism took on a new dimension. Writers like Satih' al-Husri[143] began to articulate ideas of pan-Arabism which gradually spread beyond Greater Syria and Iraq, and gained ground among the Arabs, focusing in their desire for liberation from foreign rule. The varied experience of foreign rule explains the differing forms of nationalism which emerged during the European colonial period.[144] In Iraq, for example, less urbanized than Syria and with a heterogeneous population, the idea of pan-Arabism developed later than, for example, Syria and Palestine, where the post-war European division of territory fostered ideas of a re-united Syria, and greater Arab nation.[145] At a later stage, such ideas were developed by the founders of the *Ba'th* party in Damascus, one of the manifestations of Arab nationalism which affects the contemporary legal order.

The *Ba'th*, created in 1953, combines pan-Arabism and socialism, advocating nationalization of industry,[146] distribution of land[147] and extensive social reform.[148] A secular Arab nationalist movement, the *Ba'th* party speaks of *"one Arab nation with an eternal mission"*, and sets itself the task of forming a united Arab homeland, free from

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143. *"Whoever has links with an Arab country and speaks Arabic, whatever the official name of the state of which he is a citizen, whatever his religion or doctrine, or descent or family history ... is an Arab. Arabism is not restricted to the inhabitants of the Arabian peninsula, nor is it specific to Muslims. On the contrary, it extends to all those who have links with an Arab country and who speak Arabic, be they Egyptian, Kuwaiti, Moroccan, Muslim, Christian, Sunni, Jafarite, Druze, Catholic, Orthodox or Protestant. They are all children of Arabism, provided they have links with an Arab country and speak Arabic. The existing Arab states were not constituted as so many distinct entities by the will of their inhabitants or because of any natural necessities : rather, the repartition was the outcome of treaties and agreements concluded between the states which dominated the Arab countries and shared them out among themselves.*

*The same applies to the present frontiers between Arab countries : they were not drawn up according to the interests of these countries and their inhabitants; rather they were the outcome of endless haggling and manoeuvring between imperialist powers determined to look after their own interests."*

Satih' al-Husri Arabism before everything, 4th ed., 1961.

144. In Syria, France overthrew an Arab government in 1920, and introduced direct rule. In Iraq, Britain responded to the uprising of 1920 by introducing a form of indirect rule by Arab ministers and local governors, backed by British advisers. Those in power under the monarchy thought of themselves as nationalists in the sense that they had opposed Ottoman rule, and were part of the government of an Arab country, but it soon became clear that Turkish rule had merely been exchanged for European control.

145. Post-war nationalists in Syria tended to fall within two main groupings : *Hizb al-Sha'b* and *al-Kutla al-Wataniyya*, which opposed the French mandate. Both had the programme of *"Syria for the Syrians"* and sought an independent united Syria. In Iraq, political parties were less developed before the second world war. The ruling structure was the creation of the British, and the only opposition grouping was *Jam'iyyat al-Ahali*.

146. For example, article 29 of the *Ba'th* Constitution provides that : *"Public utility institutions, major natural resources, and big production and transport facilities are the property of the nation to be operated by the state directly, and all foreign companies and concessions shall be cancelled."*.

Quotations from the *Ba'th* Constitution are from Muhammad Khalil's The Arab states and the Arab League : a documentary record. Vol.1 Constitutional developments, 1962.

For historical background to the *Ba'th*, see John Devlin The Ba'ath : a history from its origins to 1966, 1984.

147. For example, article 30 of the Constitution states : *"Under the supervision of the State and in agreement with its general economic programme, land ownership shall be limited according to the ability of the owners to cultivate it fully without exploiting the effort of others."*

148. Article 42, for example, of the Constitution calls for abolition of class differences and distinctions, saying that class differences are due to a corrupt social system. It therefore sets as its goal the removal of such distinctions for *"the persecuted working classes of the community"*, until all citizens are given the opportunity to live under an equitable social system, without distinction between citizens *"except insofar as mental efficiency and manual skill are concerned"*.

imperialism.[149] *Ba'th* ideology links socialism and Arab unity in that it *"... [does] not believe that it is possible to separate Arab unity from socialism,"* though *"Arab unity is a higher value than socialism, and is more advanced, but the demand for Arab unity will remain an abstract and theological notion ... consequently, our identification of unity and socialism gives the ideal of unity its substance".*[150] Nevertheless, the *Ba'th* does not regard itself as merely a socialist party : *"it is an Arab party, a party of the Arab renaissance, which implies upheaval ...".*

It stresses the role of the people and the necessity for social and economic liberation. According to its theory, unity will become a practical question and demand, when the people are prepared for struggle for a free and honourable life. It lays emphasis on opposition to imperialism and Zionism as the enemies of Arab unity, and attacks what it characterises as obstructing progress to unity, such as dogmatism, backward customs and tribalism[151], rejecting fanatical nationalism and internationalism. The Constitution of the Party focuses on the worth of the individual, though it judges this by *"the work they do toward the development and prosperity of the Arab nation ...".* It specifies his freedom to exercise the political rights of freedom of speech, assembly, belief and art, as *"sacred things, which no authority can diminish".*[152]

Cairo was another centre for the development of secular nationalism in the Arab world. From an early stage, under Ottoman and colonial rule, nationalist calls for a constitution, representation and limits to the power of the *Khedive* were common under Tawfiq and Isma'il, and early nationalist movements manifested the elements which were to become characteristic : military leadership and political parties with nationalist programmes.[153] Egyptian nationalism was affected by western, liberal, secular nationalism, and although early nationalist leaders were followers of the Islamic modernism of Afghani and Abduh, a more secular-oriented nationalism developed with the thought of Ahmad al-Sayyid Lutfi, Taha Husayn and Abd al-Raziq.

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149. The *"Third Principle"* of the *Ba'th*'s Constitution describes imperialism as *"a crime to be fought by the Arabs with all the means at their disposal"*, and it goes on to describe the Party as a revolutionary party which believes that its main objectives, *"the revival of Arab nationalism and the building up of socialism, can only be achieved through revolution and struggle ...".* It therefore decides : *"to fight foreign imperialism for the complete liberation of the Arab homeland"* and *"to strive for the unity of all the Arabs in one independent state".* (Article 6)

150. Michel 'Aflaq The Battle of the single destiny, 1959.

151. The Constitution of the Party describes *"bedouinism"* as a primitive social state, which weakens national production and paralyses a large part of the nation and retards its growth and progress. It aims to settle *"Bedouins"* by giving them lands, abolishing tribal systems, and applying the laws of the State to them.

152. *"The Second Principle : Personality of the Arab Nation"*

153. Colonel 'Urabi headed the uprising of 1882 which provided the pretext for the Powers to intervene in Egypt. Mustafa Kamal's *Hizb al-Watani*, through its anti-British position, was able to mobilise mass opposition, and a later stage of nationalist development saw the combination of a number of groups into a broad front seeking independence, headed by the *Wafd* party, which was broadly based and able to mobilise popular support.

The tendency in Egypt which favoured a secular state was not organised in militant organizations like Islamic groups, believing in separation of religion and state, while stressing the importance of Islamic culture in the life of Egypt. An influential spokesman of the secular movement between the wars was Taha Husayn, whose thought took a liberal, national and rationalist course, rejecting both excessive traditionalism and excessive western liberalism as well as western domination of the Arab world. This tendency was also reflected in Arab nationalism in the wider context.

Egypt's secular path continued after the coup which brought Nasser to power in the fifties. The Free Officers Movement, a grouping which contained communists and members of the Muslim Brotherhood as well as radical nationalists, opposed the political and economic corruption of the pro-British monarchy,[154] but, in the early fifties, had no radical programme other than land reform. By 1956, the programme of the revolution was set out in the Constitution.[155] It set forth broadly socialist aims, and aimed at the establishment of *"social justice"* and a *"sound democratic system"*. The attitude of this Constitution to Arab nationalism is conservative, with Egypt described as *"a sovereign, independent Arab state ... part of the Arab nation"*.[156] Gamal Abdel Nasser[157] emerges through his dedication to Arab unity, socialism and the task of what he describes as regaining *"decision-making power"*, an aim shared by other nationalists[158] and the link he establishes between independence, socialism and Arab unity.

Nasser laid emphasis on the need to develop the depth of the Arab people's revolutionary understanding : the clearer their vision of their aims and insight, the more they would be able to evaluate possibilities and discover their *"true revolutionary path to freedom"*.[159] Thus, he thought, any triumph against imperialism was only the beginning of the revolutionary struggle from a better position.

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154. The first statement by Muhammad Neguib announcing the *coup d'état* of July 1952 described Egypt as having *"undergone a most critical period of bribery, corruption and government instability. These factors had a great influence on the Army. People who received bribes, and those with ulterior motives contributed toward our defeat in the Palestine war. After the war, corrupt elements increased, and traitors plotted against the Army, whose affairs were entrusted to ignorant, treacherous or corrupt people. This was in order that Egypt would be without a (strong) army to protect her."*.
Muhammad Khalil The Arab states and the Arab League ... , 1962, pp. 492-3.

155. *"To put an end to imperialism and its agents, to abolish feudalism, to put an end to monopolies, and the domination of the government by capital, to establish a powerful national army, to assure social justice, to establish a sound democratic life"*.
Constitution of the Republic of Egypt, January 16th 1956. Ibid.

156. Part 1, article 1 of the Constitution. The preamble also mentions the Arab nation : *"conscious of our function as an organic part of the great Arab entity; conscious of our responsibilities and of our obligations in the common Arab struggle for the dignity and glory of the Arab nation"*. Ibid.

157. As well as his leading role as President of the Revolutionary Guidance Council of the Republic of Egypt and then of the first United Arab Republic in 1958, Nasser's vision and philosophy of Arab nationalism may be seen in his main works : Socialism *(Al-ishtirakiyyah)*, Our Social Revolution *(Thawratuna al-igtimaiyyah)*; National Action Charter *(Mithaq al-amal al-watani)* ; The Great Change *(Al-tahawwul al-azim)* and above all the Philosophy of the Revolution *(Falsafat al-thawra)*.

158. Sometimes termed *"the national 'will'"*.

159. Quotations which follow are from a speech by Nasser in 1962, in which he drew up a "balance-sheet" of the first ten years of the revolution.
Gamal Abd-al-Nasser *Mithaq al-amal al-watani*, 1962.

He blamed the failure of previous nationalist movements on the lack of economic reform, which had undermined political change, and also criticised such movements for not adopting theories inspired by the national experience, instead importing ready-made theories. Democracy and social freedom, according to Nasser, could not be reduced to conformity with theories without roots in the national experience.

According to Nasser, political democracy and political freedom alone are meaningless without *"economic democracy and social freedom"*, since the political framework of any country reflects its economic situation and represents the interests of the dominant group. Thus, according to Nasser, Egypt before the revolution of 1952 represented the political product of the coalition between feudalism and exploitative capitalism,[160] and this was reflected in its political life.

Nasserism saw socialism as the route to social freedom : social freedom could only be achieved *"if each citizen [were] given the opportunity of acquiring a fair share of the national wealth."* This was not only a question of redistribution of wealth, but also required the *"broadening out of the foundations of the national fortune"*, to satisfy the rights of the masses.[161]

Nasserism calls for scientific socialism as the form most suited to implementing a successful plan for progress, rejecting capitalism, whether local or international, as unsuitable for the under-developed country, in the light of international capitalist monopolies. Since Nasser criticised national capitalism as being motivated by a desire for profit, he proposed uniting the national economy, using modern science to serve investment, and drawing up a general plan of production. Along with increased production, equitable distribution had to be tackled by the setting up of programmes in every sector to ensure the workers' benefit. The task of broadening the foundation of national wealth could not be left to private capital, nor could distribution of profit be a matter of free choice or good faith : the spirit of the revolution thus led to *"the need for the people to own all the means of production and to orient the surplus produced according to a plan drawn up in advance"*. Nasserism saw this socialist solution as the only path to economic and social progress, the path to democracy in all political and social aspects. However, the fact of the people controlling the means of production did not imply the nationalization of those means, nor the

160. He saw capitalism as the partner of imperialism, with the economic momentum of capitalist countries deriving from investment in the colonies. Thus, the wealth of India formed the basis of economic activity which led to the development of British agriculture and industry. Likewise, the cotton-fields of Egypt sustained the British economy at the expense of the Egyptian peasants.

161. Nasser's socialist programme found its place in the Constitution and institutions of Egypt. The Constitution of 1956, for example, in the section headed *"The fundamental basis of the Egyptian social order"*, specifies that *"the national economy is organised according to plans which conform to the principles of social justice, and aim at the development of national productivity and the raising of the standard of living"* (article 7), that *"capital must be employed in the service of the national economy. The different ways in which it is employed may in no case be incompatible with the general welfare of the people"* (article 9), and that *"the law with a view to the realisation of social objectives and the prosperity of the people, assures the compatibility between the / ...*

abolition of private property.[162] The twin means were to be the creation of a competent public sector to direct progress, with responsibility for the development plan, and the existence of a private sector which rejected exploitation and contributed within the context of the development plan. Both sectors were to be controlled by the people.

Alongside programmes of economic planning, Nasser sought to organise the population in a *"national union"*, whose aim was to achieve the goals of the revolution.[163] Nasser's revolutionary plan intended to draw upon all the experience of the Arab nation, its history, wisdom and revolutionary spirit. He believed that unity could not and should not be imposed,[164] being rather a long process with several stages. He described national governments reflecting *"the will of the people and their struggle for national independence"* as steps toward unity in that they could not oppose it. He described the unity of even two Arab nations as a progressive step toward wider unity. Though Nasser envisaged the creation of a federation of progressive and nationalitarian movements at some stage, he did not see the Arab League[165] as the means to Arab unity, criticising it as an inherently limited association of governments. Though he acknowledged its role in coordinating Arab activity, it should not become *"a means of blocking the present and undermining the future"*.

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*... general economic activity and private economic activity".*
The Constitution also seeks to combat feudalism : *"the law determines the maximum holding of agricultural land in such a way as not to permit the establishment of feudalism"* (article 12), *"the law organises the relations between landlords and their tenants"* (article 14), and encourages cooperatives : *"the State encourages co-operation and aids co-operative enterprises in all their forms ... "* (article 16).

162. The Constitution of 1956 states that *"private property is inviolable. The law organises its social function. Property may not be expropriated except for purposes of public utility and in consideration of just compensation in accordance with the law"*, (article 11).

163. *"The citizens constitute a national union with a view to realising the aims of the revolution and to coordinate the efforts to build up a nation, healthy politically, socially and economically. The national union will nominate candidates for membership of the National Assembly. The way in which this union is to be formed will be the object of a decision of the President of the Republic."* (article 192)

164. Though in this context, the UAR supported any nationalitarian movement, its support would be confined to matters of fundamental principle, allowing local elements to work out specific tactics in the light of local circumstances : the forces of Arab unity should cooperate with all nationalitarian forces in the region, but it should not impose a formula.

165. As we saw, the Pact of the Arab League sets out its objectives as follows : *"strengthening the close relations and numerous ties which link the Arab states ... to support and stabilise these ties upon a basis of respect for the independence and sovereignty of these states, and to direct their efforts toward the common good of all the Arab countries, the improvement of their status, the security of their future, the realisation of their aspirations and hopes"*.
The Pact of the League of Arab States in American Journal of International Law, vol. 38, 1945
The founding members of the League were the presidents of Syria and Lebanon, and the monarchs of Transjordan, Iraq, Saudi Arabia, Egypt and Yemen. Naturally, radical nationalists rejected the organization as the means to Arab unity, since it was founded by conservative leaders, some of whom were closely associated with the colonising powers. In addition, the articles of the Pact emphasise the independence and sovereignty of member states, and it clearly aims at cooperation, rather than closer federation. Later, its membership was extended, and from the 1950s, nationalist movements were admitted with observer status.
Omar A. Bakhashab The Legal structure of the Arab League LLM thesis, Glasgow University, 1979.

1958 saw several attempts to bring about Arab unity, through both federation[166] and union. The latter mechanism was adopted by the Egyptian National Assembly and the Syrian Council of Deputies when the two republics of Egypt and Syria joined in the United Arab Republic, *"as a first step toward the realisation of complete Arab unity"*.[167] The republic was to have a presidential democratic system of government, in which executive authority was to be vested in the Head of State and legislative authority in one legislative assembly. The Union was to be open to all other Arab states, to join in union or federation.

The necessity of constitutional development, to encompass the political development, was taken into account. The Egyptian leader, in his speech to the combined Egyptian and Syrian assemblies, laid emphasis on the evolution of the 1956 Egyptian Constitution to accommodate the political change.[168] The provisional Constitution of the United Arab Republic, promulgated by Nasser as head of state, contained a number of elements common to the revolutionary Egyptian Constitution of 1956. For example, it emphasised once again that *"social solidarity"* was to be the basis of society, and that the national economy should be organised by plans, in pursuit of social justice and raising the standard of living.[169] According to article 68, legislation within each of the two regions[170] was to remain valid unless repealed or amended by procedures provided in the Constitution, when promulgated.

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166. In response to the creation of the United Arab Republic, the Hashemite kingdoms of Iraq and Jordan joined in the Arab Federation in February 1958, though each state retained integral state entity, sovereignty and existing government (article 1 of the Arab Federation Agreement between Iraq and Jordan, February 14th 1958). The preamble of the agreement recalls the proclamation of "*a new dawn of the Arab nation ... and unification of its peoples ...*" by Sharif Husayn, father of Abdullah and Faisal. It recalls the "*revolution*" for the unity "*based on the glorious past of the Arab world, faith in itself and its old and eternal mission*". The elements of federation included : foreign policy and diplomatic representation; unity of the armies; elimination of customs; unification of education curricula. Like the United Arab Republic, the Arab Federation was open to other Arab states, but proved unsuccessful and short-lived, as Qasim withdrew from the federation later the same year (July 23rd 1958), saying that it "*was not a real union that aimed at [realising] the interests of the people in the two countries. It was rather meant to consolidate the corrupt monarchical system as well as to disrupt the unity of the emancipated Arab [people] and to realise the interests of a clique of rulers who did not come to office through [the choice of] the people and who did not work for the realisation of their aspirations*".

167. Proclamation of the United Arab Republic February 1st 1958
Muhammad Khalil The Arab states and the Arab League ... , 1962
This attempt to bring about Arab unity was the first in a series in which Nasser played a leading role. His final attempt, the Federation of Arab Republics, in which he joined with the revolutionary Libyan leader and Nimeiri of Sudan, in 1971, began with the signature of the Tripoli Charter in December 1969, was followed by the promulgation of the Federation of Arab Republics on 2nd September 1971, when the original members were joined by Syria, though Sudan dropped out. This experiment in Arab cooperation is examined in Peter K. Bechtold's "New attempts at Arab cooperation : the Federation of Arab Republics, 1971-?" Middle East Journal 27, 1973 pp.152-172.

168. Address by President Gamal Abd al-Nasser to the Egyptian and Syrian National Assemblies sitting in joint session, February 5th 1958.
Ibid.

169. Articles 3 & 4 of the Provisional Constitution of the United Arab Republic
cf. articles 4 & 7 of the Egyptian Constitution of 1956, above.

170. "*The United Arab Republic consists of two regions : Egypt and Syria. In each there shall be an executive council ...*" article 58 of the provisional Constitution.

Like Egypt again, the Constitution of the United Arab Republic also provided for the existence of a *"national union" "to work for the realisation of national aims and the intensification of the efforts for raising a sound National structure, from the political, social and economic viewpoints".*[171]

If Egypt represents a centre of secular nationalism, Saudi Arabia, long the paradigm of the modern "Islamic" state, was enabled by its oil wealth to become a force in the Muslim world beyond its borders, challenging secular nationalism and pan-Arabism. Modern Saudi Arabia[172] reflects the success of the religio-political alliance of the Islamic revivalist Wahhabi movement with a local ruler, Ibn Sa'ud. The Wahhabi leader provided the movement's religious legitimacy, which sought to mirror the early Islamic community, in rejecting the idolatrous polytheism of the tribes whose commercial interests focused on the Holy Cities, in favour of a strict monotheism. Islam and control of the Holy Cities have formed the ideological basis of Saudi domestic,[173] regional and foreign policy. The guardianship of Makka and Madinah, and control of the *Hajj* have secured the prestige and power of Saudi Arabia in the Muslim world. The threat from Arab nationalism, and in particular from Nasser, led Saudi Arabia to seek to expand its role in the Islamic world, with the overthrow of monarchies in Iraq and Egypt, the emergence of radical socialist governments in Syria and Algeria, and the defeat of the royalist leaders of Yemen all contributing to Saudi Arabia's quest for a leadership role in the wider Muslim community.

The rise of the pan-Arab movement and Nasser's increasing prestige as a third world leader in the sixties led him to condemn conservative regimes, such as that of Saudi Arabia, accusing them of collaboration with western powers and distorting Islam to retain their position. He too sought to utilise the legitimising factor of Islam by presenting his ideology of pan-Arab socialism as an Islamic movement, embodying the revolutionary spirit of Islam, emphasising equality and social justice.

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171. Article 72 of the provisional Constitution, cf. article 192 of the Egyptian Constitution, above.

172. The emergence of modern Saudi rule began in 1902, with the capture of Riyadh by Abd al-Aziz. By 1912, he controlled all of Najd and by 1926, Abd al-Aziz had captured the Hijaz from the rival Hashemites. He declared himself King of the Hijaz and Najd in 1927, and five years later, the state was renamed the Kingdom of Saudi Arabia.

By 1932 Abd al-Aziz controlled the peninsula, and he used Islam to legitimise his claims : Wahhabism legitimised his seizure of the Holy Cities from fellow-Muslims and his battles with other Muslim leaders; his appeals to Islamic unity drew on Islamic symbolism, recalling the religious solidarity of the Islamic community under the Prophet.

Islamic symbolism had been used to focus the Sa'ud movement and Islam continues to be used as the ideological basis of Saudi rule. The Qur'an and *Shari'ah* form the fundamental structures of state : constitution, law and judiciary, as we will see in the next chapter.

173. Saudi Arabia's heavy reliance on Islam in legitimising the rule of the royal family has invited criticism of the government by opposition in the name of Islam, as occurred, for example, in 1979 when the Grand Mosque in Makka was seized by militants. The siege lasted until the Saudi government obtained a *fetwa* calling on the government to retake the mosque. This incident was followed by riots among the Shia population of the Eastern Province. The significant Shi'a minority of the Province has long felt discriminated against by Sunni rulers, and they drew impetus from the Iranian revolution. Both the seizure of the Mosque and the Shia riots raise questions about political unrest within Saudi Arabia.

Nasser's aspirations to Arab leadership led him to utilise both Arab and Islamic aspects of Egyptian identity. He also appealed to Islam[174] to mobilise popular support and counter the threat from the Muslim Brotherhood. The use of Islam to legitimise Arab socialism also increased the prestige of Nasser's foreign policy for Muslim Arabs, and Islam became politicised in the developing struggle between radical nationalism represented by Egypt and the conservative nationalism of Saudi Arabia. Faisal responded to Nasser's challenge by taking up the cause of pan-Islam.[175] According to Esposito,[176] Faisal sought to create an Islamic alternative to Nasser's Arab socialism, with the result that ideological battle[177] was joined, with each side appealing to Islam. Faisal used pan-Islam to try to counter Nasser's pan-Arabism, and the two leaders competed by obtaining *fatawi* legitimising and discrediting Arab socialism. When Faisal said that pan-Islam included Arabism, Nasser announced that Arab socialism was based on Islam, attacking the Saudis as usurping the people's power and wealth.

Arab nationalism, as distinct from Islamic modernism, stressed the unity of the Arab nation, its national identity and common culture, history and language. Although Arab minorities had supported nationalism during the period of Ottoman rule, when nationalism became allied to Islam as the common ideology of the Arab Middle East, it became a popular movement.

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174. Though he had refused to include a statement that Islam was the state religion in the Egyptian Charter of 1956, the Constitution of the same year contained such a statement in a prominent position (part 1, article 3). He also nationalised al-Azhar, giving key positions to his officials and imposing reform of the curriculum. The University thus lost most of its academic and political independence, and the government's control of al-Azhar and mosque officials allowed Nasser to rally support for policies of nationalisation of public utilities and land reform. The rector of al-Azhar, for example, declared that Islam and socialism were reconcilable. He also justified government policies such as expropriation of land.

175. Saudi Arabia's pan-Islamic leadership manifested itself in a number of ways : during the 1962 *Hajj*, Faisal persuaded the *Ulema* to condemn socialism, and organised the Muslim World League, which propagated Saudi views of Islam, emphasising Islamic community over any form of nationalism. In 1965, Faisal and the Iranian Shah joined to call for a summit conference of Muslim heads of state in Mecca. This was denounced by Nasser, who saw it as a threat to pan-Arabism, as falsification and exploitation of Islam. In 1970, the first Islamic conference of ministers was held in Jeddah, and it established the Organization of the Islamic Conference. This body, the first official inter-governmental pan-Islamic institution, was only the first of a series of trans-national Islamic bodies, created by Saudi Arabia to enhance her position of leadership of the Islamic world. Saudi Arabia has also used its financial wealth to support Islamic movements throughout the Muslim world, such as the Muslim Brotherhood in Egypt and Syria, and the *Jamiyat Islami* in Pakistan. Another facet of Faisal's pan-Islam focused on calls for the liberation of al-Quds (Jerusalem). The defeat of Arab forces and the loss of al-Quds in 1967 was the opportunity for Saudi Arabia to counter Nasser's bid for regional pan-Arab leadership, and enhance her own prestige at the expense of radical Arab nationalism and socialism, as Faisal provided aid to the defeated Arab countries, forced Nasser to remove his troops from Yemen, and took up the Palestinian cause.

This issue became an important element of foreign policy, to which Saudi Arabia rallied world Muslim support. Faisal was thus able to combine pan-Islamism with Arabism and establish the position of Saudi Arabia as world leader of Arab and Islamic concerns. On Faisal's death in 1975, Khalid asserted his Arab, Islamic leadership, repeating Saudi Arabia's committment to Islam and Arab solidarity.

William Ochesnwald "Saudi Arabia and the Islamic revival" International Journal of Middle East studies, 13 1981, pp.271-86.

See also, John Duke Anthony Saudi Arabia's influence in the Arab world, 1982.

176. John L. Esposito Islam and politics, 1985.

177. Radical and conservative nationalism came into direct conflict over North Yemen, where radical forces joined with Nasserism to support the revolutionary government, and influence the nationalists of South Yemen.

Arab history, identity and language had remained closely linked to Islam, through the language of the Qur'an and the history of Islamic conquest. Arab nationalism had inevitably to address its relationship to Islam. Despite the secular modernising orientation of modern radical governments,[178] the socio-political character of the Arabs remains broadly conservative, with religion continuing to play a crucial role. This is reflected in governments' politicization of religion and the rise of groups such as the Muslim Brotherhood.[179]

Nationalism grew up in North Africa at a later stage than in Egypt, for a number of reasons.[180] As we saw, French colonial policy placed its north African protectorates within the French republic, thus inhibiting the growth of nationalism. French policy in the Maghrib aimed at political and cultural assimilation through a programme of naturalization. Arab identity along with Islamic heritage thus became key issues in the nationalist movements of the Maghrib. Religious and secular leaders mobilised mass support on a number of religious issues.[181]

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178. As new Muslim states tended to minimise the role of religion in state-building, major Muslim groups, like the Brotherhood and *Jamaat-i-Islami*, called for an Islamic alternative, and their influence grew in the Arab and Muslim world. Within Egypt, for example, the Brotherhood became involved in politics, opposing British influence and calling for the establishment of an Islamic state. In 1948, Farouk reacted to a spell of violence by banning the organization and its leaders. After the assassination of the Prime Minister, the Brotherhood was driven underground and into exile. With the lifting of martial law in 1952, the Brotherhood emerged briefly, but their early support for Nasser disappeared when he failed to establish an Islamic state, and conflict between the Brotherhood and the government reached a peak in 1954, with an assassination attempt against Nasser. This was used as a pretext to crush the Brotherhood with mass arrests, and the execution of members, including Sayyid Qutb, the second main ideologue of the Brotherhood, who was more militant than al-Banna, and has influenced such radical contemporary Islamic groups as *Takfir wa Hijra* and *al-Jihad* in Egypt.

179. *Al-Ikhwan al-Muslimun* declared their beliefs to be based on three principles : Islam is a complete, self-evolving system; Islam derives from two sources - the Qur'an and Sunna; Islam is suitable for all times and all places. Al-Banna outlined the programme of the Brotherhood in two "*fundamental goals*" as follows : "*That the Islamic fatherland be freed from all foreign domination ...*" and "*That a free Islamic state may arise in this free fatherland, acting according to the precepts of Islam, applying its social regulations, proclaiming its sound principles, and its sage mission to all mankind.*"
M. Asad Government and politics in Islam, p. 63.
In *Nahwa al-Nur*, al-Banna called for the judicial system to be brought into conformity with Shari'ah. In the area of government institutions, and criticism of government actions, Islamic principles must be paramount. He also called for an end to political pluralism and the multi-party system, instead proposing a single common front. Other reforms proposed by al-Banna were social and economic, again advocating the enforcement of Islamic principles and the rejection of Western influence. *Al-Ikhwan al-Muslimun* called for the re-establishment of Islamic principles, above all in public morality, though also pervading government institutions and the judicial system.
Hamid Enayat Modern Islamic political thought, 1983 p. 85.

180. The degree of the religious impetus to nationalism also meant that north African nationalism arose later than in the Fertile Crescent : internally, the North African cults were relatively conservative; the external threat to Islam was posed by European invasion. Thus the reaction in North Africa was initially less pronounced than in a state like Egypt.

181. For example, in Morocco, where the French tried to play on traditional divisions between Arab and Berber, providing the focus for political resistance. The Berbers, who had resisted attempts at Arabization, became the focus of French policy, as the Berber Decree of 1930 declared that Berber tribal areas would be under French and tribal law rather than *Shari'ah*. It was an issue which united Berbers and Arabs in resistance as mosques and preachers denounced the policy as a threat to Islam, and to the unity and identity of the community.
In Tunisia, French attempts at assimilation by the offer of naturalized citizenship were rejected on Islamic grounds as apostacy, since this citizenship implied a transfer from Islamic to French jurisdiction. The Tunisian *mufti* issued a ruling in 1932 which prohibited the burial of such naturalized citizens in Muslim burial-grounds.

The reactions of the religious leadership to European administration varied, as *Ulema* and *Sufi* brotherhoods though resisting the ideological challenge, compromised politically to varying degrees with the Europeans.[182] The acquiescence of religious leaders meant that early resistance movements against foreign rule in North Africa tended to be led by modern educated reformers. The defence of Islam was a rallying issue for such reformers in view of French assimilationist policies.[183] The *Salafiyyah* movements also affected the nationalism of Arab North Africa.

As nationalists of several political views sought to mobilise popular support, Islam provided the focus which transcended social divisions, throughout the Maghrib.[184] In the independence movements of the Maghrib, Islam complemented nationalism, and as a basic component of national identity and an ideological focus for mass mobilization, it continues to play its role in the contemporary political and legal order, and the nationalist movements of today.

Secular nationalist movements have had to accommodate the question of Islam, within a range of socialist ideologies. From the revolutionary regime of the People's Democratic Republic of Yemen to the radical nationalist leadership of Algeria, ideologues have responded to critics with the claim that Islam is compatible with revolutionary development through socialist programmes.

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182. For example, the *Sanussi'ah* in Cyrenaica came to agreements with the Italians which safeguarded rights of schools, and in Algeria, a religious leader assisted the French by obtaining a ruling from al-Azhar dealing with the position of Muslims in a Christian-ruled country.
John L. Esposito Islam and politics, 1985, p. 74.

183. Islamic reform in each French colony shared common characteristics : resistance to French policies, a rejection of the supposed detrimental effects of *Sufi* cults. Educational reform which sought to provide an Islamic counterpart to the French and Italian educational systems also became a mechanism of resistance to colonialism. The leadership of such reform tended to be modern, educated Muslims, rather than the traditional religious establishment, who had lost prestige through collaboration in the French colonies. Another aspect was a call to reform of Muslim personal life, with emphasis being placed on the dynamic character of Islam.

184. Islam played its role in the development of the main Moroccan political party, *Istiqlal*, led by the *Salafiyyah* leader, Allal al-Fasi, which remained a small grouping of religious reformers based in Fez and Rabat until it adopted the organization of the *Sufi* orders, with the result that it became a mass political movement.
The Algerian nationalist movement also drew on the influence of *Salafiyyah* ideology, and used Islam as a rallying factor. A number of Islamic reform groups were influenced by Abduh and Redah, among the most important of which was led by Abdul Hamid ben Bathis. The reformers joined with the *ulema* to found the *Algerian Association of Ulema*, whose motto was *"Islam is my religion, Arabic is my language and Algeria is my fatherland"*. The organization combined Islamic reformism and nationalism, creating a network of schools and centres, through which it spread Algerian Muslim nationalism. Modern reformers gained legitimacy by joining with the traditional religious leaders to promote Algerian nationalism which combined an Islamic with an Arab character. The Algerian revolution adopted the Islamic theme of earlier nationalist movements, with the slogan *"Algerie musulman"*. The war was characterised as a *Jihad*, its fighters as *Mujahidin*.
See F. Colonna "Cultural resistance and religious legitimacy in colonial Algeria" Economy and society, 2 (3) 1976, pp. 233-52.
In Tunisia, nationalism gained motivation from Abd al-Aziz al-Thalibi, who organised the Destour party. Again, he was influenced by the ideas of Abduh and the *Salafiyyah*, though while advocating Islamic reform, he focused on national independence, with the Destour promoting a national identity based on Tunisia's Arab and Islamic heritage. Nationalist leaders asserted their role as the defenders of Islam against French cultural domination, and adopted Islamic symbols for mass mobilisation and political activism. French attempts to outlaw the wearing of the veil were also rejected by a range of Muslim opinion as a threat to Islamic culture, and a threat to a symbol of national identity.

The approaches of Algeria and Yemen to Islam differ, with Algeria stressing the Islamic element of the national struggle, and reiterating the importance of Islam in the National Charter and Constitution, while the Yemeni nationalists, though acknowledging Islam, give it less prominence. The nationalist movement in PDRY has had to clarify its position with respect to Islam, which poses a challenge to the ruling ideology. Since it is often characterised as *"atheist"* by conservative leaders in the region, it has adopted a conciliatory attitude toward Islam[185] by, like Nasser, asserting egalitarianism and social justice, and avoiding actions which might antagonise the population.

In the fifties, the ideological divide became clear between conservative monarchies[186] and republican nationalists, the latter represented by Nasserism with its reformist pan-Arab socialism.[187] During the sixties, as Nasserism waned and Ba'thism gained support from activists, radical regimes came to power in Syria, Iraq, Algeria, Sudan and Libya. A third pan-Arab movement, the Arab Nationalist Movement, had backed Nasser's calls for Palestinian liberation.

In the late sixties, all three movements shifted leftward, with the failure of the United Arab Republic, the defeat of 1967 and the failure to liberate Palestine leading to the radicalization of Arab nationalism, for example, giving radical groups the impetus to reform the ANM, and create the left-wing Popular Front for the Liberation of Palestine.[188]

Emphasis on socialism and opposition to colonialism were the focus of such movements which blamed Western-style government for sustaining feudal society and the continuing influence of western capitalism and imperialism in the region. The failure of liberal nationalism was denounced by the new regimes, which promised social revolution to redress the socio-economic imbalance of their countries.[189] Contemporary radical nationalist movements, such as the Iraqi *Ba'th*, the National Liberation Front in the PDRY, the *Front de libération nationale* in Algeria,[190] and lately the 1969 revolutions of Libya and Sudan,

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185. Islam is recognised by the 1970 Constitution as the state religion (article 46), and guaranteed protection insofar as it is compatible with other constitutional principles, though particular emphasis is laid in combating *"corrupt concepts"* spread by colonialism and tribalism, (article 31).
See also Al-Tayyib Zain al-Abidin "The Yemeni Constitution and its religious orientation" Arabian Studies 3, 1976, pp.115-35.

186. For example, the Libyan Kingdom, which achieved independence in 1950, the Hashemite Kingdoms of Jordan and Iraq, the Kingdom of Morocco, and the Kingdom of Saudi Arabia, as well as the emirates of the Gulf and Peninsula.

187. This ideological division was focused by Egyptian and Saudi involvement in North Yemen's civil war, when Nasser's support for the revolutionary regime in North Yemen provided a support base for South Yemeni nationalists, who later became radicalized as a nationalist movement in the region. With the failure of the United Arab Republic, and Nasser's move to national social reform, Yemeni nationalist forces divided between those who advocated traditional political development and popular movements which called for revolution.

188. David McDowall The Palestinians New ed., 1987 p.30.

189. For example, the themes of a speech of Ahmad Ben Bella, President of Algeria, provide the national doctrine for utilisation of natural resources : *"To be efficacious and coherent, the actions of the producer-countries will have to be geared to win back all the revenues due to them as owners of these natural resources, which are a gift of nature and not a creation of the capitalists."*
In Anouar Abdel-Malek (ed.) Contemporary Arab political thought, 1970, pp.168-171.

190. The FLN was set up by the union of *fallahin*, workers and intellectuals in the independence struggle and was identified with the core of the population.

advocate socialism and Arab unity, though they differ in degree and approach to achieving these goals. Another common factor is the stress which each lays on the recovery of the society from the legacies of the past, the consolidation of national sovereignty and national development.[191]

These movements share the characteristic of giving a prominent role to the leadership of the revolutionary forces,[192] and most establish a ruling party and stress the role of the *al-jamahir al-sha'biyya* (popular masses) in building socialist structures, though again, they vary in degree.

Since the present leadership came to power in 1968, the Iraqi *Ba'th*[193] has focused primarily on *"consolidation of economic and political independence, liberation of the national will, the creation of a unified and socialist society, the building up of a central and strong national authority, and the liberation of the oil wealth and other natural resources from the control of foreign monopolies"*.[194]

It has tried to achieve its aim of *"consolidating its revolutionary march and effecting radical transformations within a nationalist, socialist and democratic framework"* by state structure legislation, such as the Law of the Leading Party (Law no.142) of 1974, which binds all government organs to adhere to the ideological principles set out in the *Political Report of the 8th Regional Congress of the Arab Ba'th Socialist Party*.

In Algeria too, the national liberation struggle shaped the contemporary state, its structure and ideology. Socialism partners national liberation as key issues in the National Charter, where other key issues are Arabization, Islam, anti-imperialism and third world concerns.[195]

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191. For example, the Algerian National Charter emphasises the necessity of a strong state : *"The recovery of national sovereignty, the construction of socialism, the battle against underdevelopment, the building of a modern and prosperous economy, and vigilance against external dangers all require a solid and ever-strengthened State ..."*
Quoted in Rachid Tlemcani State and revolution in Algeria 1986, p.159

192. While neither the Egyptian nor the Algerian revolution made any direct reference in ideological documents to the character of revolutionary leadership, the *Ba'th* stressed two points : the importance of *"collective leadership"* as against the leadership of a single person, and the distinction between party leadership and government.
Hisham B. Sharabi Nationalism and revolution in the Arab world, 1966, pp.84-55.

193. After the split from Syria, the Iraqi *Ba'th* party was concerned to establish itself as the *"true"* party, and so invited 'Aflaq to become secretary-general of the *"sole legitimate Ba'th party"*, but it is important to distinguish between the Iraqi *Ba'th* as an organization and *Ba'th* ideology as originally articulated.
Marion Farouk-Sluglett and Peter Sluglett "Iraqi Ba'thism, nationalism, socialism and national socialism" in Saddam's Iraq : revolution or reaction CARDRI, 1986, p.102-5.

194. CCPR/C/1/Add.45 of 8th June 1979, pp.2-3.

195. Algeria is particularly associated with pan-African issues, within the context of both the Organization of African Unity and the Arab League.
Ali Mazrui and Michael Tidy Nationalism and new states in Africa, 1984, p.348f.

Like the Yemeni Constitution, the Constitution of the Arab *Ba'th* Socialist Party seeks to combat all religious, sectarian, tribal, racial and regional fanaticism. It also seeks to abolish *"bedouinism"*.[196] This is a threat to the traditional social order of Arab society, and represents a direct threat to conservative regimes, where power continues to be based on family and tribal structures.

The principle of Arab unity remains a vital element in radical Arab nationalism. Unlike Libya, where it is seen as an urgent necessity, the movements in PDRY and Iraq see socialism as the mechanism by which a greater unity could be achieved, while each concentrates on national unity and state-building as a first step.

In keeping with original *Ba'th* ideology,[197] the Iraqi *Ba'th* party lays stress on the goal of Arab unity. Its ideological framework, as enunciated in the 8th Regional Congress of 1974, focuses on the Arab nation *(Umma Arabiya)*, the Arab homeland *(al-Watan al-'Arabi)* and the Arab masses *(al-Jamahir)*.[198] Thus, it states, *"the political strategy of the party aims, in a scientific and practical way, at developing Arab trends and tendencies toward the higher national aspirations of the Arab nation in its present stage of historical development"*.

The nationalist characteristic of the Yemeni revolution is set out in the first article of the Constitution, where the unity of the Yemeni population is stressed.[199] Article 13 goes on to set the guiding principles of Yemeni foreign policy.[200] As in Iraq, an ideological document, the *Report of the 5th Congress of the National Front Political Organization*, outlines the movement's nationalist programme. According to the Report, the Front supports the movement for Arab national liberation, which contributes to the struggle against imperialism and the exploitative capitalist classes. The nationalist movement is seen as a force for democracy, and the Front recognises that different parts of the Arab world have special characteristics, and so agrees that a certain diversity of nationalist approach should be tolerated.

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196. Article 43 provides : *"Bedouinism is a primitive social state which weakens national production and makes of a big group of the nation a paralysed organ which retards its growth and progress. The Party shall strive for the settlement of the Bedouins by giving them lands, abolishing tribal systems and applying the laws of the State to them."*
Muhammad Khalil The Arab states and the Arab League ... , 1962, p.669.

197. The Constitution of the *Ba'th* party begins : *"One Arab nation with an immortal mission, the Arab renaissance (Ba'th) Socialist Party a popular national revolutionary movement striving for Arab unity, freedom and socialism."* Its first principle states : *"The Arabs are one nation, having a natural right to live in one state and to be free to direct its affairs ..."*.
Ibid. pp.663-4

198. The changing priorities given to goals of Arab unity, including the liberation of Palestine, according to political necessity, are reviewed in A. Baram "Qawmiyya and Wataniyya in Ba'thi Iraq : the search for a new balance" Middle Eastern Studies Vol.19 no.2 1983.

199. This states : *"Believing in the unity of the Yemen, and the unity of the destiny of the Yemeni people in the territory ..."*, and specifies its goal as a *"united democratic Yemen"* leading to *"democratic Arab unity"*.

200. *"... it shall strengthen its relation with progressive Arab states, Arab peoples, socialist, progressive and peace-loving states."*

It asserts that the PDRY will not deviate from what it describes as its patriotic and national duties, and that it will support the Palestinian cause and the revolutionary movements in the Arabian Gulf and Peninsula.[201]

Although neither Nasserism nor Ba'thism,[202] with their forms of Arab nationalism, could have become effective in the sense of gaining political power without the direct or indirect role of the military, ironically, the same vehicle was the force which set back Arab unity, with the dissolution of the first united Arab state in contemporary history.[203] It could be said that the military *coup* of 1952 in Egypt[204] set the pattern of post-war military intervention on the grounds of what has been called *"renewal of national purpose"*, adding a new element in the distribution of political power.[205] Military rule has tended to follow the civilian rule of the post-independence nationalists, for example, in Egypt, Iraq, Libya, North Yemen and Sudan.[206] The Algerian case is unique in that the military took part in the nationalist struggle and in the first government after independence along with civilians, as well as in the *coup* of Boumedienne, which took power from the civilian government of Ben Bella.

The introduction to this chapter mentioned several factors which contributed to the important role of the military in Arab political life. In addition, the political vacuum left by the end of colonial rule gave the impetus for the army to take power. The presence of alien rulers had led the nationalist movements to focus their political energy on liberation. When this focus disappeared, the political forces in the society were unable to create a united political front. Military intervention for *"renewal of national purpose"* took place particularly in countries where post-independence regimes were perceived both as too closely allied to the former colonial power, and as out of step with

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201. The PDRY has backed attempted rebellions in the Gulf, for example, in Oman in the mid-70s.
Time, December 3rd 1984
However, the decline of Nasserism after 1967 along with the need for security has led Yemen to seek accommodation with its hostile neighbours - *"Saudi Arabia has been perceived as South Yemen's most deadly enemy and Iraq one of its few friends ..."*
Michael Hudson Arab politics : the search for legitimacy 1977, p.351

202. Fouad Ajami describes the impact on Ba'thism of its military route to power in The Arab predicament : Arab political thought and practice since 1967, 1981 pp.40-50

203. For example, Syria withdrew from the United Arab Republic in 1961, when the 1958 Constitution was suspended by Decree no.1 of 30th September, which restored the Constitution of 1950, promising a new Constitution within six months. Qasim's withdrawal from the Arab Federation in 1958 follows the same pattern, though the union of Iraq and Jordan represented only a superficial unity (see footnote 166 above).

204. Although Colonel Husni al-Za'im's successful *coup* in Syria in 1949 was the first in the post-war period, its political impact was limited in comparison with Free Officer's *coup* in Egypt in 1952.
As well as providing the model for military intervention, Nasser's *coup* influenced the radical programmes of *coups* in Libya, Sudan and North Yemen in 1969. Both Nimeiri and Qadhafi led a Free Officers Movement, which initially adopted Nasserist ideas.
Ali Mazrui and Michael Tidy Nationalism and new states in Africa 1984, p.230-2.
See also, P.J. Vatikiotis The Egyptian army in politics : pattern for new nations, 1961.

205. John W. Harbeson (ed) The Military in African politics 1987, p.12.

206. In Syria, in 1949, Colonel Husni al-Za'im seized power. In 1958 General Aboud took power in Sudan, as a result of rivalry between armed forces and politicians, aggravated by sectarian considerations. In the same year, Major-General Abd al-Karim Qasim took power from the monarchy in Iraq. In the mid-70s, Colonel Ali Abdullah Saleh took power in South Yemen by military *coup d'état*.

current political trends toward Arab unity and socialism, for example, in Egypt, Iraq and Libya. In such countries, the army saw itself as the *"vanguard"* of the population, which intervened on behalf of the people to remove backward regimes.[207]

A second stage of transition of power within the military by *coup d'état* can be seen in the assumption of power by the *Ba'th* in Syria and Iraq,[208] while transitions in Egypt and Algeria[209] illustrate later phases of military rule, where peaceful succession takes place within the military structure. This second stage when power changes hands within the ruling military structure represents a shift away from the pretext of national purpose for military intervention in political life. Such transfers of power within the military may be based on rivalry or reform, where the reason given may be corruption or the failure of the earlier *coup* to achieve its goals,[210] or that the leadership has distanced itself from the regular military. For example, the intervention of the military in 1965 in Algeria was justified on the pretext that the civilian government had exceeded its constitutional power,[211] though the real reason may have been Ben Bella's moves to minimise the role of the army.[212]

Naturally, the military's arrival in power tends to lead to the removal of existing institutions,[213] and the suspension of political parties.

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207. In Libya, the Free Officers' Movement said that it came to power in response to the desire of the Libyan population to remove the former corrupt regime. Its first communiqué stated : "*...your armed forces have undertaken the overthrow of the corrupt regime, ... By a single stroke it has lightened the long dark in which the Turkish domination was followed first by Italian rule, then by this reactionary and decadent regime, which was no more than a hotbed of extortion, faction, treachery and treason. From this day forward Libya is a free self-governing republic ...*".
In Iraq, the head of the armed force's First Statement Proclaiming the Revolution and Abolishing the Monarchy : "*Depending on God, and the support of the faithful sons of the people and the [assistance] of the national armed forces we have accomplished the liberation of the beloved fatherland from the domination of the corrupt clique that was installed by imperialism to rule the people and to tamper with their fortunes in the interests [of imperialism] and for personal interests ...*"
The Arab states and the Arab League .. Muhammad Khalil, 1962 pp.27-8.

208. The *Ba'th* came to power for a second time in Iraq in 1968, and in Syria in 1963. In 1971, Asad took over by *coup d'état*.

209. Benjedid's regime differs from that of Boumedienne in being more open to civilian politics. He has consolidated his position by working with civilians, though he sets the terms of such cooperation. He has worked within the framework of the party while those who brought him to power remain on the sidelines to play a critical role at the next succession. While working with civilian politicians, the Algerian military have not diminished their identity as military officers.
I. William Zartman "The Military in the politics of succession : Algeria" in John W. Harbeson (ed) The Military in African politics 1987 pp.21-45.

210. One pretext for Boumedienne's *coup* in 1965 was that he was acting in accordance with the principles of the Revolution : socialism and democracy. Elsewhere, second-stage movements against the original leadership have also been described as "*correction*" movements, such as Asad's action to remove al-Atassi, and in different circumstances al-Sadat's "*correction*" in 1971 of Nasserism. In Syria, the preamble of the Constitution describes the "*rehabilitation movement of 16th November 1970*".
Nimeiri's *coup* in 1969 criticised earlier governments, including that of General Aboud as having no programme other than the maintenance of power.

211. Under article 52, which allowed him "*in case of imminent peril ... to take exceptional measures*".
A. Carty The Third world state (the Algerian military *coup* of June 1965) Political human rights, the separation of powers and legal positivism.

212. For example, Ben Bella intended to form a popular militia and run down the regular army.
Ali Mazrui and Michael Tidy Nationalism and new states in Africa 1984, p.233f.

213. For example, the *coup* of 1958 in Iraq led to the deposition of the Hashemi king, with the First Statement proclaiming the Revolution and Abolishing the Monarchy in July 1958. In Libya, the 1969 movement led to the deposition of the Sanussi monarch. The Egyptian case is unusual in that, after the abdication of Farouk in July 1952, his son, Fouad was proclaimed king. The monarchy was not replaced by the republican system until the Constitutional Proclamation of July 18, 1953.

In general, a first stage is then to create temporary institutions. In the transitional period, power tends to be exercised by an organ like the *"revolutionary"* or *"republican command council"*[214], in which sovereign power is centralised, and which may issue constitutional declarations.[215] Judicial institutions, such as *"revolutionary court"* and the *"revolutionary prosecutor"* may be created. The leadership also tends to assume legislative authority during this period, and legislates by decree or communiqué. During this stage too, *coup* leaders may create or enhance the power of an existing intelligence apparatus as a counter-balance to the power of the military as, for example, in Sudan.[216]

At a later stage, characterised as the beginning of normalisation, a temporary order tends to be created, with, for example, the drafting of a provisional constitution. Once in power, one tendency of the military is to seek a direct popular base, by connecting itself to the masses, for example, through the creation of a political organ which represents the ideology of the movement such as the Sudan Socialist Union, or the Arab Socialist Union in Libya and Egypt, of which the military ruler is the head. Existing parties may be used as the mechanism to achieve a similar goal, for example, the *Ba'th* in Syria and Iraq,[217] and the FLN in Algeria. Other processes of *"civilianizing"* their presence in power appear to aim at *"military democracy"*. Popular support is sought through broadened political participation : some rely on political parties to achieve institutional strengthening and wide political participation;[218] others stress mass participation through General People's Congresses[219] and revolutionary committees at the expense of other political forces within the society;[220] others adopt the strategy of treating parties as one element in a three-part structure, involving the military and civil service. While most military regimes retain ultimate supremacy, some also make civil service and party members partners in ruling coalitions.[221]

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214. Collective leadership of this type has been short-lived in most military regimes. As Hisham B. Sharabi asserts, *"as soon as ... the Revolutionary Council becomes supreme, dissension arises and the struggle for absolute leadership begins. Every military coup d'état in the Arab world has had the same result: collective leadership breaks down and is replaced by a dictatorship"*.
Hisham B. Sharabi Nationalism and revolution in the Arab world, 1966, p.64-65.
215. Like the Constitutional Proclamation which established the government during the transitional period in Egypt in 1953, or the Constitutional Declaration of 11th December 1969 in Libya.
216. Nelson Kasfir "One full revolution : the politics of Sudanese military government, 1969-1985" in John W. Harbeson (ed) The Military in African politics 1987 pp.141-62
217. The *Ba'th* in Iraq have reversed the process by making members of the Regional Command of the *Ba'th* party members of the Revolutionary Command Council.
218. For example, both the Egyptian and the Iraqi National Assemblies in the 1980s contain a restricted range of political parties. The parties which participate in the Iraqi Assembly in the National and Progressive Front (in which the *Ba'th* plays a guiding role) are listed in Report of the Human Rights Committee GAOR 35th session Supp. no. 40 (A/35/40), pp.32-3
219. In Libya, the relationship between the military or their representatives and the people has been manifested through the General People's Congresses.
Jonathan Bearman Qadhafi's Libya 1986, p.153.
220. Military regimes tend to exclude former *"professional politicians"* and members of government from the political process as *"reactionary"* elements which will obstruct radical programmes.
221. Despite the banning of political parties soon after Nimeiri's *coup* in Sudan in 1969, he made a short-lived ruling coalition with communists, who were added to the Revolutionary Command Council and allowed to pursue political activity.

For example, Zartman has identified a ruling coalition in Algeria containing military and civilians, while the party has been reduced to a secondary role, as a *"mechanism of recruitment and discipline"*.[222]

Decentralisation of power to local councils is also a feature of some military programmes aimed at encouraging popular participation, though key posts tend to be reserved for those loyal to the central authority. Later changes within the military, as a result of *coup d'état*, tend to lead to less far-reaching changes in the political or legal order, though even here constitutional institutions and instruments may be subject to revision or amendment.[223]

Military governments are frequently responsible for prolonged states of emergency[224] to effect political transition, or on the grounds of state of war or threat of war, danger to public order or to national security. Most dangerous is the doctrine of national security, which has contributed to the frequent military *coups*, and the imposition and extension of states of emergency in the Arab world. As elsewhere, the use of this doctrine threatens democracy and freedom of political life,[225] as the duty of the military to defend the nation is extended to combating ideological or cultural manifestations of the *"enemy"*.[226]

While *"second-stage"* military regimes may not abolish the Constitution itself, martial law or other exceptional legislation tends to be the mechanism which abrogates constitutional provisions. In some cases, like Syria, martial law has become more permanent than the Constitutions, which have changed, while martial law became the norm rather than the exception.[227] Emergency legislation normally focuses power in the hands of a strong executive,[228] a tendency which can be seen in all military regimes. The use of emergency legislation allows this concentration of power to be maintained beyond the transitional period which follows any *coup d'état*.

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222. I. William Zartman "The Military in the politics of succession : Algeria" in John W. Harbeson (ed) The Military in African politics 1987 pp.21-45.

223. In Syria, the *coup* of 1962 dismissed the constituent assembly instituted by the leaders of the 1961 *coup* with the task of drafting a new Constitution. The leaders of the 1962 *coup* then amended the 1950 Constitution, which had been restored by the leaders of the 1961 *coup*.

224. As we will see, the threat from Israel has provided the pretext for long-term extension of states of emergency in Jordan and Syria, while in Egypt, the pretext has been internal threats to security.

225. This doctrine also explains the reluctance to permit a return to genuine elections, civilian government and political pluralism. The UN Special Rapporteur on States of Emergency describes the position of governments who have adopted regimes of transition to so-called new forms of democracy. Though in some situations, a lapse of time or "transition" may be necessary to prepare for a return to elected government, what characterises these new forms of democracy is the purpose of confining the political process within narrow ideological parameters, thus limiting participation to a select part of the population. This is incompatible with the very essence of democracy.
States of emergency : their impact on human rights. A study prepared by the International Commission of Jurists, 1983.
The impact of emergency legislation on the legal order will be examined in detail in the next chapter.

226. Normally the *"enemy of the revolution"*, *"enemy of the people"*, and so on.

227. The leaders of 1962 *coup* in Syria declared martial law in December 1962, by Decree no.51, abrogating the emergency Decree no.162 of 1958. This Decree has remained in force up to the present despite the promulgation of a number of Constitutions, in 1964, 1969 and 1973.

228. For example, Decree no.51 of 1962 in Syria, article 3, para.(a) and its amendments, concentrates power in the hands of a Martial Law Governor.

Military rule has shaped the emergence of the contemporary political order in some Arab countries. While the role of the military may not be paramount or even clear in government, in most states it is nevertheless important, because of the force or pressure the military can bring to bear by virtue of its power.[229]

Legitimacy has been sought, not only by force of arms, but also politically, and as we have seen, this has fundamentally affected the political order and other spheres. The constitutional order, in particular, has been affected by military intervention, which has also precipitated the progress from monarchy to republic in several countries.[230] The nationalist programmes implemented by the leaders of military movements have also deeply affected the new constitutional order, because of the stress they lay on the radical nationalist doctrines of socialism and Arab unity.

One pretext for military intervention or maintenance of power has remained, in general terms, resistance to imperialism : with a shift from the need to remove corrupt regimes with links to colonial powers to the need to combat the threat from Israel and neo-colonialism. It has been pointed out that in order to bolster popular support for military leadership dramatic incidents have been initiated.[231] The nationalisation of *Kanat-al-Suez* in Egypt in 1956, and the removal of British and American military bases in Libya[232] in 1970 come into this category.

The military have tended to retain power, in part because of the long-term goals they set, and in part for reasons associated with the doctrine of national security, which leads to the restriction of political life, as we will see, and the postponement of a return to civilian government. A related aspect of military rule which we have seen is the use of state of emergency legislation. This too, may be connected to the nationalist programmes which involve the threat of a seventh confrontation with Israel.

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229. The threat of military intervention has shaped the policies of the monarchical system in Morocco, leading for example, to the suspension and replacement of constitutions in the sixties and seventies. The King's decision to occupy the Spanish Sahara in 1975 was also primarily a means to divert the military who posed a threat to the monarchy, as had become apparent in a number of attempts on the King's life.
Other considerations underlying Hassan's decision to occupy Spanish Sahara are reviewed by Jerome B. Weiner "The Green March in historical perspective" Middle East Journal 33, 1979, pp. 20-33

230. For an examination of the trend of military *coups d'état* in the region in the period 1949-1979, see Eliezer Be'eri "The Waning of the military coup in Arab politics" Middle Eastern Studies Vol. 18 no. 1 1982.

231. Hisham B. Sharabi Nationalism and revolution in the Arab world, 1966, p. 64

232. The intention of deriving political advantage from this action is clear since the leases on the air-bases were due in any case to expire in 1970. The treaty of 1954 between the United States and Libya stipulated in article 30 that it would remain valid until 24th December 1970, and will continue to be so until one of the governments informs the other of its intention to terminate. Libya chose to finalise the treaty by negotiation before the date due.
Muhsin al-Shishakli [Public international law], 1971, pp. 144-5.

# CHAPTER THREE

# THE CONSTITUTIONAL ORDER AND THE RULE OF LAW

# SECTION ONE

# THE IDEOLOGICAL IMPACT ON THE LEGAL ORDER

## THE IDEOLOGICAL IMPACT ON THE LEGAL ORDER

In the period since independence, we can see the effect of the two main currents identified in the previous chapter, conservative and radical, in Arab political thought, and their essential role in the creation of the contemporary legal order. This section examines the scope of the ideological dimension translated in political documents, which also found its way to Constitutions and other legislation. Since the framework of the legal order in general and the protection of rights and freedoms in particular are subject, *inter alia*, to their compatibility with the ideological principles and the foundations of the political system and its prevailing plans and programmes, thus it is essential to examine their scope and the degree of their effect. *"Ideology"*, in the Arab context, is understood to mean *"a set of political and social ideas which guide the policies of a government or a party, and which tends to constitute a dominant doctrine in as much as it becomes the ideological expression of a ruling power"*.[1]

The content of such *"ideologies"* in the Arab world, whether secular, religious or in combination, should likewise be understood to be more the *"ideological expression"* of the ruling group than representing the values and ideas normally associated with the terms mentioned. Terms such as *"al-thawriyyah"* (revolutionism), *"ishtirakiya"* (socialism),[2] *"dimuqratiya"* (democracy)[3] and even "Islam" will be found to have differing meanings from country to country and over a period of time. From this perspective, the concept of ideology in the Arab context presumes a body of ideas centred on political power or authority, which Ali Merad has called a *"doctrinal expression of power"*.

This discussion is confined to a brief evaluation of the essential role which these currents have played from the outset in drawing up political doctrines and programmes, to shed light on the spirit of the new constitutions and institutions they have created. Firstly, the focus will be on the secular ideology[4] expressed in ideological documents and Constitutions, and secondly, the Islamic dimension, which affects to a greater or lesser degree the legal order of most states.

Most radical nationalist regimes have tried to build a socialist political framework through state structure legislation and institutions, though their approach, and the degree of its effect has varied. The two radical nationalist ideologies we examined in the previous chapter have found their way to power in the contemporary constitutional order :

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1. Ali Merad "The Ideologisation of Islam in the contemporary Muslim world" in Alexander S. Cudsi and Ali E. Hillal Dessouki, Islam and power, 1981.
2. *Al-Thawra*, the Iraqi *Ba'th* newspaper, quotes the following statement of Saddam Husain: *"Socialism does not mean the equal distribution of wealth between the deprived poor and the exploiting rich; this would be too inflexible. Socialism is a means (Wasila) to raise and improve productivity."*
3. In 1980, *al-Thawra* contained a discussion of democracy in which it was said not to be *"the relationship between the leading party and the citizens,"* but *"the extension of the bond between the vanguard party, the state and the masses"*.
Quoted in Marion Farouk-Slugglett and Peter Sluglett "Iraqi Ba'thism: nationalism, socialism and national socialism" in Saddam's Iraq : Revolution or Reaction ?, CARDRI, 1986, pp.89-107.
4. The elements of "revolutionary ideology" in the Arab world are reviewed in Hisham B. Sharabi Nationalism and revolution in the Arab world, 1966, p.82-92.

*Ba'th* ideology has been proclaimed by the Iraqi Interim Constitution of 1970 and the Syrian Constitution of 1973,[5] while the present leadership in Egypt and Libya proclaim their debt to Nasserism and 1952 revolution.

The *Ba'th* believes that socialism[6] is the mechanism by which the goals of nationalism may be achieved, through *dimuqratiya sha'biya* (popular democracy) in which the *Ba'th* is the central element. In Iraq, the Political Report of the 8th Congress of the Arab *Ba'th* Socialist Party describes socialism as *"a vital prerequisite for the liberation, unity and resistance of the Arab nation"*, and the Arab masses as the participants and objects of socialism.[7] The preamble to the Syrian Constitution of 1973 describes the establishment of a socialist system as *"a necessity stemming from the needs of Arab society"*.

In Algeria and the People's Democratic Republic of Yemen, the national liberation struggle shaped the contemporary state, its structure and ideology. In Algeria, socialism partners national liberation as key issues in the National Charter, which also stresses the Algerian people's *"choice of socialism"*, and sets out how this is to be pursued through state socialism.[8] Since its creation, a clear committment to socialism has shaped the PDRY's ideological framework,[9] leading to intervention in several spheres with the aim of altering the traditional structure of society, with a strong committment to Marxist-Leninist socialism which claims to take into account local conditions.[10]

In Libya, political programmes have varied since the abolition of the monarchy in 1969. At an early stage, it identified itself with the common themes of Arab nationalism *"Hurriya, Ishtirakiya, Wahda"* (Liberty, Socialism, Unity), emphasising the special nature of *"socialism"* as a local phenomenon, distinct from alien ideology.

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5. Article 8 of the Syrian Constitution states *"The vanguard party in the society and the state is the Ba'th Arab Socialist Party. It directs a national progressive front which strives to unify the potential of the popular masses and to press them into the service of the goals of the Arab nation"*.
6. Article 4 of the *Ba'th* Constitution states : *"The Arab Socialist (Ba'th) Party is a socialist party, which believes that socialism is necessary for Arab nationalism, being the ideal system which ... enables the nation to increase its production ... "*.
Muhammad Khalil The Arab states and the Arab League : a documentary record. Vol.1 : Constitutional developments, 1962.
7. The Iraqi *Ba'th* has aimed to achieve its goals of *"consolidating its revolutionary march and effecting radical transformations within a nationalist, socialist and democratic framework"*.
8. As we saw, the Algerian National Charter emphasises the necessity of a strong state : *"... the construction of socialism, the battle against underdevelopment, the building of a modern and prosperous economy, ... require a solid and ever-strengthened State ... "*.
Quoted in Rachid Tlemcani State and revolution in Algeria, 1986, p.159.
9. The PDRY has been described as *"the only Arab state with an institutionalized socialist structure"*.
Tareq Y. Ismael and Jacqueline S. Ismael PDR Yemen : politics, economics and society, 1986, p.161.
10. Articles 7 and 9 of the Constitution provide : *"The historical role of the working class moves upwards and [it] become[s] ultimately the leading class in society. Soldiers, women and students are regarded as part of this alliance by virtue of their membership of the productive forces of the people ... The National Front Organization leads, on the basis of scientific socialism, the political activity amongst the masses and within mass organization so as to develop society in such a way that national democratic Revolution, which is non-capitalist in approach, is achieved."* *"All power serves the welfare of the working people. The working people in the People's Democratic Republic of Yemen exercises its political authority through the people's councils which are elected in a free and democratic manner"*.

The ideological dimension found its way to the Constitutions of many Arab countries, which identify their nation's ideological framework as *"nationalist"*, *"socialist"*, *"people's"* and *"democratic"* and it is within this context that the establishment and operation of organs of government, and indeed the exercise of all political rights in such countries must be viewed, as we will see in the following chapter.

The revolution of 1952 continues to have an impact inside and outside[11] Egypt. We have seen how Nasserism was translated in the Constitutions of 1956 and 1958, and it continues to influence the Egyptian Constitution of 1971, whose first article sets the ideological tone, in defining *"The Arab Republic of Egypt whose socialist, democratic system is based on alliance of the working forces of the people..."*. The first article of the Algerian Constitution of 1963 likewise identifies the nature of the republic with the qualifying words *"democratic and people's"*,[12] though in the 1976 Constitution, this was replaced by the declaration that : *"Algeria is a socialist state"*. The 1963 Constitution went on to set out the objectives of the revolution, for example, in article 10, as *"building up the country, in accordance with the principles of socialism and the effective exercise of power by the people"*, and the 1976 Constitution confirms the Algerians' choice of socialism, in article 10.

Along with socialism, *"revolutionary democracy"* is the mechanism adopted by the radical states for achieving the goals of nationalism, though its description and nature vary from country to country, for example in Algeria, it is *"socialist democracy"*, while in Libya, the phrase is *"direct popular democracy"*. According to Iraq's government[13], the Arab *Ba'th* Socialist party *"was able to define the general framework for its theory of democracy as direct popular democracy ..."* The Syrian legislator also chose *"popular democracy"* as the system of governing, as the preamble to the Constitution indicates. Democracy in Algeria, as elsewhere, is influenced to a great extent by the ideological framework of the *Fronte de Libération Nationale*, and within the limits of the FLN as manifested in the National Charter.[14]

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11. In Libya, article 6 of the Constitutional Declaration states : "*... the Libyan revolution aims to achieve socialism by implementing social justice ...*".
The preamble of the Nasserist Constitution of 1956 lists the objective of assuring social justice, as we saw in the previous chapter.

12. Variations of the formula *"democratic and people's"* are found in the titles of other Arab republics, for example, the People's Democratic Republic of Yemen, the Socialist People's Libyan Arab Jamahiriya and the People's Democratic Algerian Republic.
Official titles are taken from the Arab League draft Convention for Human Rights.

13. For example, in its statement to the Human Rights Committee.
CCPR/C/1/Add.45 of 8th June 1979, p.103.

14. Chapter 2 of the National Charter describes the *"Concept of the State"* : *"The concept of the Algerian state as an ancestral entity rebuilt by the National Liberation Front has witnessed various stages leading it from the concept of social democracy as it was enunciated by the Proclamation of November 1, 1954, to the reality of the popular democracy imposed by the masses striving for the building of the socialist society"*. It goes on *"the Algerian republic is popular in essence, Islamic in faith, socialist in orientation, democratic in institutions, and modern in inclination"*.

Although, as we will see in a later chapter, constitutional and other provisions in these countries appear to legalise the existence of more than one party, it is clear that in many countries, a single *"ruling"* party plays a pre-eminent role, under varying pretexts. This role is institutionalized by the Constitution in the People's Democratic Republic of Yemen (PDRY), Algeria and Syria, and by the Law of the Ruling Party in Iraq. It seems that this common theme is inspired by socialist models,[15] which lay stress on the role of the ruling party in the life of the nation.

Since it came to power in 1968, the Iraqi *Ba'th* has focused primarily on " ... *the building up of a central and strong national authority* ...",[16] by state structure legislation, such as the Law of the Leading Party (Law no.142) of 1974, which binds all government organs to adhere to the ideological principles set out in the Political Report of the 8th Regional Congress of the Arab *Ba'th* Socialist Party. In Syria, article 8 of the 1973 Constitution describes the *Ba'th* Arab Socialist Party as *"the vanguard party in the society and the state"* which directs the national progressive front. According to article 7 of the PDRY Constitution : *"the National Front Organization leads, on the basis of scientific socialism, the political activity amongst the masses and within mass organization so as to develop society in such a way that national democratic Revolution ... is achieved."* After the integration of all *"vanguard"* parties within its ranks, the National Front was renamed the Yemeni Socialist Party, which has been described as the *"vanguard"* party by its secretary-general, one of Yemen's leading ideologues.[17]

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15. For example, in the Soviet Constitution of 1936, which is the clearest model for the institutionalization of a single party. Article 126 states that : *"The Communist Party of the USSR is the avant-garde of the workers in their struggle to build a communist society and represents the guiding nucleus of all workers' organizations, whether social or state"*. Its position is re-confirmed in the Constitution of 1977, in article 6, states : *"The leading and guiding force of Soviet society and the nucleus of its political system and of all State organizations and public organizations, is the Communist Party of the Soviet Union. The CPSU exists for the people and serves the people"*.
A model from within the Arab region may be found in the Provisional Constitutions of the United Arab Republic, which specify the role of the Arab Socialist Union as representing the vital forces of the nation, for example, in article 192, above.
The role of the ASU is upheld by article 5 of the Constitution of 1971, which provides that it is *"the political organization which ... represents the alliance of the people's working forces; namely peasants, workers, soldiers, the intelligentsia and national capital"*. It is described as the tool of this alliance in entrenching the values of democracy and socialism.
16. CCPR/C/1/Add.45 of 8th June 1979, pp.2-3.
17. *"The Yemeni Party is the vanguard of the Yemeni working class aligned with the peasants and other working segments of the population and revolutionary intellectuals. It is the living expression of this class-consciousness - a consciousness of its real interests, future and historic role. The aim of the Party is to transform the society in a revolutionary manner to consolidate the achievements of the national democratic revolution and the transition to socialism. [This transition] is guided by ... the theory of scientific socialism, which takes into account local conditions of growth and the development of the national democratic revolution in our country."*
Interview with Abd al-Fattah Ismail in *Al-Hadaf* (party newspaper) 29th October, 1978, p.6.
See also Helen Lackner "The rise of the National Front as a political organization" in B.R. Pridham (ed) Contemporary Yemen : politics and historical background, 1984.

The Algerian Constitution of 1976 illustrates the pre-eminent position of the FLN in relation to other constitutional organs. It is described as *"the single party of the country"*, which *"constitutes the guide of the socialist revolution and the leading force of society. It is the organ of leadership, planning, and animation of the socialist Revolution"*. It *"sees to the permanent mobilization of the people through* ***the ideological education*** *of the masses, their organization and their formation into cadres for the construction of the socialist society"*. Article 98 of the Constitution goes on to specify that *"the country's leadership is the embodiment of the unified political leadership of the Party and the State. Within the framework of this unity the party's leadership guides the general policy of the country"*.[18]

In countries like Algeria and PDRY, the *"ruling"* party, by virtue of playing a significant part in the struggle for independence, claims the role of interpreting the aspirations of the people and guiding the nation toward realising its goals. Mohammed Bedjaoui, a leading member of the FLN, has characterised it as a *"nation-party"*, which he distinguishes from both a *"union of parties"* and a *"single party"*, emphasising its *"exclusively national character"* and its identification with the nation.[19]

The union of parties has become a common phenomenon in the Arab world, particularly after the creation of the United Arab Republic, when even the Syrian *Ba'th* agreed to dissolve itself in order to participate in the *"National Socialist Union"* established by the Constitution. It has become conventional, particularly in the period following revolutionary change, for political parties to lose their formal identity in joining with others in a *"national front"* or union party.[20] In Syria, the *"national progressive front"* formed by this process is nevertheless directed by the *Ba'th* Arab Socialist Party, according to article 8 of the present Constitution, as we have seen.

Bedjaoui rejects the identification of the FLN as a *"union of parties"* of this type, arguing that the failure of other parties led Algerians to join the FLN *"as individuals after the preliminary or actual dissolution of their respective parties"*.[21] He notes that political parties themselves could not become part of the FLN, and in this, the similarity to the National Socialist Union in the United Arab Republic and Libya, for example, is clear.

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18. Chapter 1 The Political Function of the Constitution of 1976.
19. Mohammed Bedjaoui Law and the Algerian revolution, 1963, pp. 82-3.
20. As we have seen in the first chapter and as we shall continue to argue in the next chapter, any such organization, voluntary or involuntary, runs the risk of undermining the right of freedom of association. While a voluntary union of political parties, for example, in time of crisis, need not necessarily endanger freedom of association, should such an arrangement be institutionalized, or maintained beyond the existence of the grounds which led to it, this would represent a threat to this freedom.
21. Article 7 of the Statutes of the FLN indicates its intention towards its political future and that of other organizations, in stating : *"The character of a militant member of the FLN is incompatible with membership of any other political organization."*

Bedjaoui makes clear that the goals of the FLN are not restricted to the liberation of Algeria, but also encompass - in the preamble of its Statutes -, the *"building of a democratic and social Republic"* The Statutes of the FLN make explicit the aim which the organization shares with other ruling parties in the region, that of guiding and organizing the people in achieving the goals of nationalism.[22] Bedjaoui, writing in 1961, qualifies the characterisation of the FLN as a single party on theoretical and organizational grounds.[23] He quotes Maurice Duverger's description of *"the single party"* which aims to create a new élite of political leaders to rule the nation. Duverger's description characterises the party as a mechanism of recruitment, selection and organization, which maintains direct communication between the government and the population. He stresses its dual character, as an organ of government and a mechanism for reflecting the people's reactions. This conception of the single party or group is common to other radical Arab republics and indeed many third world nations, where the party acts as both the agent of government policy, and the guide and interpreter of the wishes of the population, and mediator in communication with the government.

Another tendency which often accompanies political change is the creation of a single and permanent ruling authority, (such as head of state, revolutionary or republican council, party leadership). The unconstitutional character of this development may be seen in countries where, in the name of revolution, a group or party obtains power and exercises it in the name of the people, as the source of that power. At this stage, political parties are dissolved and the establishment of a limited or unlimited transitional period is declared.[24] During this period, a body such as the Revolutionary Command Council is considered to be the supreme authority in the country which enjoys sovereign powers.[25]

22. Article 4 of the Statutes of the FLN provides : *"the FLN will pursue its historical mission as guide and organizer of the Algerian nation after independence has been established, in order to build a real democracy, economic prosperity and social justice."*

23. Bedjaoui denies that the FLN is either a purely ideological party, a class party on Marxist lines or a conservative party of the fascist type, claiming that it is *"a revolutionary, equalitarian and democratic party"*.
Mohammed Bedjaoui Law and the Algerian revolution, 1963, p. 87.

24. For example, in Egypt, where the Proclamation of January 16, 1953 states that: *"The Army Revolution has derived its strength from its complete faith in the right of all citizens to a strong and honourable life, to full and absolute justice, and to a full and comprehensive liberty within the framework of a sound constitution that expresses the wishes of the people and that regulates the relationship between those in power and those who are governed ..."*.
In North Yemen, in 1974, the Constitution was suspended and a constitutional Declaration made as follows : *"In the name of the people, the Chairman of the Command Council, ... desiring to consolidate the bases of authority during the transitional period ... announce in the name of the people that during the transitional period the country will be governed in accordance with the following rules ..."*. Thirteen articles follow.

25. *".. as the [political] parties in their antiquated manner and their reactionary mentality [can] represent only the gravest danger to the existence of the country and its future, I, therefore, declare the dissolution of all political parties as from today and the confiscation of all their funds for the good of the people, [to prevent] their being expended in order to sow the seeds of discord and disharmony. And in order that the country may enjoy stability and productivity, I declare the establishment of a three-year transitional period. [This] will enable us to set up a sound democratic and constitutional government. .. I shall not permit any tampering with, or harm to, the interests of the homeland, and .. most severely strike at any one who may stand in the way of those objectives .."*.
Muhammad Khalil The Arab states and the Arab League ... , 1962, pp. 495-6.
The 1970 Constitution of the Yemen Arab Republic centres executive power in the Republican Council.

Moreover, this organ entrusts itself with the task of taking measures in particular for protecting the Revolution and its objectives.[26]

As a consequence of the weakening of the rule of law by the introduction of ideology, so the enjoyment of human rights could be gravely affected by the influence of ideology, since it tends to be subject, *inter alia*, to its compatibility with the ideological principles and foundations of the political system, its prevailing plans and programmes. Such ideological boundaries could lead to the application of measures which contradict the spirit of constitutional provisions upholding human rights. Constitutions and political documents establish the framework and scope of the exercise of rights and freedoms, stressing in addition the duties and obligations which accompany them. For example, article 55 of the Algerian Constitution provides for freedom of expression and assembly, but goes on to stipulate that they are exercised subject to article 73, which provides for the *lapsing* of freedoms of those who use them *"to infringe upon the essential interests of the national collectivity, ... and the socialist Revolution"*. The Chapter of the Constitution headed *"The Duties of the Citizen"* stipulates, in article 75, that every citizen must protect *"the interests of the national collectivity [and] respect the achievements of the socialist Revolution"*.

Several radical states emphasise the socialist democracy which establishes the conditions in which individuals exercise freedoms and rights. For example, within the context of *"... socialist democracy, the Algerian State guarantees real freedom of the individual... Socialist democracy ... prepares the objective conditions that enable citizens to exercise their fundamental freedoms and their rights within the framework of the law ..."*.[27]

Likewise, the two states[28] governed by Ba'thist ideology proclaim *"popular democracy"* as the formula which ensures the population the enjoyment of fundamental freedoms. The Yemeni Constitution, in several articles, guarantees rights to citizens, but stresses the obligations of the citizen to the community, within the context of the revolution.[29]

Though we saw in the first chapter that restrictions on specified and strictly determined grounds are acceptable and even necessary for the

26. For example, article 37 of the Libyan Constitutional Declaration of December 1969 provides that the RCC is the supreme organ of state, competent to promulgate laws.
Similarly, the Egyptian Constitutional Proclamation of 1953, establishing transitional government, in Article 8 states that: *"The Commander of the Revolution shall, in the Revolution Command Council, be entrusted with supreme sovereign powers, particularly in respect of measures which it considers to be necessary for protecting the Revolution, the system on which it is based for the achievement of its objectives, as well as the right to appoint and dismiss Ministers."*. Ibid, p. 296.

27. From the Algerian National Charter.

28. For example, the preamble to the Syrian Constitution states that : *"Freedom is a sacred right and popular democracy is the ideal formula which ensures for the citizens the exercise of their freedom, which makes them dignified human beings capable of giving and building ..."*.
For the impact of the *Ba'th* ideology in Syria, see Robert W. Olson, The Ba'th and Syria, 1982.

29. Individuals are rewarded in accordance with their contribution to economic and social development (article 14), work is not just a right but an obligation (article 35), citizens contribute to the public revenue according to their ability (article 54). *"Every citizen shall protect and support public ownership as the essential material basis for the national democratic revolution"* (article 52).

enjoyment of rights and freedoms, by reviewing certain constitutional provisions in radical Arab countries, it may be observed that ideological concerns restrict or limit the exercise of certain rights within the context of *"the socialist system"* or the *"progressive line of the revolution"*. Such restrictions tend to be imposed within the framework of the revolution or, in more vague terms, the themes of Arab nationalism.

The Iraqi Constitution of 1970 illustrates a basic limitation imposed by the ideological framework, as article 26 provides that political rights are guaranteed in accordance with the objectives of the Constitution, and the limits of the law as the *"... State shall endeavour to provide the means required for practising these freedoms, which are compatible with the nationalist and progressive line of the revolution"*. A similar approach elsewhere may be found in other legislation which sets the criteria of participation in the state apparatus, including the judiciary.[30]

Similarly, the right of individuals to freedom of opinion and expression is restricted in the Syrian Constitution, in the following terms : *"Every citizen has the right freely and openly to express his views ... He also has the right to participate in supervision and constructive criticism in a manner that will safeguard the soundness of the domestic and nationalist structure and will strengthen the socialist system."*[31] Likewise, in the Libyan Constitutional Declaration, freedoms are ensured *"within the limits of the interests of the people and the principles of the Revolution"*, and as we have seen, the rights of freedom of expression and assembly are restricted by the ideological context in Algeria.

Despite the secular ideology of the Arab republics, the population of all Arab countries is predominantly Muslim, and so the Islamic dimension remains to varying degrees a vital factor, to which all the authorities have responded, within modern and traditional states alike. One can say that reference to Islam is one of the most important constants of ideological legitimacy in the contemporary Arab legal order.

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30. For example, the Labour Code no.151 (1970), article 196, sets forth trade union objectives as follows : *"organising the struggle of the working class in the light of a free, conscious and progressive programme for the protection of the sacredness of labour and the noble value of the human being, the re-affirmation of the historic role of the working class in building, administering and building society and the State, and in realising the goals of the Arab masses in unity, freedom and socialism"*. CCPR/C/1/Add.45 of 8th June 1979, pp.88-89.
Similarly, Act no.35 of 1977 provides that judges are selected in line with *"socialist aspirations"*. CCPR/C/SR.747 of 22nd July 1987, p.7.
The oath of the chairman and members of the Supreme Constitutional Court in North Yemen swears to guard *"the objectives of the revolution"*, according to article 156 of the Constitution of 1970.
In Algeria, article 166 of the Constitution stipulates that *"Justice contributes to the defence of the accomplishments of the socialist Revolution and to the protection of its interests"*, and article 173 provides that *"the judge is to contribute to the defence and protection of the socialist Revolution"*.

31. This is provided by article 38 of the present Syrian Constitution where, similarly, freedom of association is secured towards realising goals such as *"the building of the Arab socialist society and the protection of its regime"*, according to articles 48 and 49.

Ideological documents[32] and Constitutions[33] rarely omit a reference to Islam or affirmation of Muslim identity, which ranges from a source of legislation[34] to the basis of the political dynamic, but everywhere constitutes an important source of ideological legitimacy.

Revolutionary leaderships' use of Islam emphasises the social values of liberation, community and distribution, in order to provide legitimacy for their political and socio-economic programmes,[35] while traditional leaders, such as those of Saudi Arabia, the Gulf states and Morocco, rely on the values of piety and obedience, and strict observance of the state version of Islamic law, which tend to reinforce their traditional authority.

The kingdom of Saudi Arabia represents the most traditional Islamic country in the region, where preservation of Islamic traditions has had the fullest impact on the political and legal order. More than any other Arab country, Saudi Arabia has displayed a commitment to the preservation in its society of *Shari'ah*, since the creation of Kingdom of Hijaz, whose Constitution of 1926 underlines this commitment.[36] We have seen in the previous chapter how the Saud family in collaboration with the *Wahabbi* religious sect drew on Islam to legitimise the creation of the state of Saudi Arabia, and how reliance on this formula of ideological legitimacy continues to manifest itself.

In what Omar Bendourou[37] has described as the *"theocratic monarchy"* of Morocco, the legitimacy of the ruling structure is based on Islamic religious tradition, despite article 2 of the Constitution of 1972,[38] according to which sovereignty is vested in the nation. In a royal address of October 1978, the monarch rejected separation of powers, asserting that his role as *"Amir al Mouminine"* allowed him to control constitutional institutions. In political life, the Moroccan legislator

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32. The Algerian Charter proclaims that *"the Algerian people is an Arab and Muslim people"*, and that *"Islam is the State religion and a fundamental component of the national personality ..."*.
33. The Algerian Constitution reaffirms Algeria's choice of *"Islam, which is the State religion"*, (article 2). Article 6 of the Moroccan Constitution of 1972 states: *"Islam is the religion of the State ..."*. The Iraqi Constitution, in article 4, stipulates that Islam is the state religion. Article 1 of the Tunisian Constitution proclaims Islam to be the religion of the Tunisian state.
The 1970 Constitution of the Yemen Arab Republic prefaces its preamble with Qur'anic verses, and states, in its first sentence, that the Yemenis are an Arab and Muslim people, before going on to stress the importance of Islam, in articles 1, 2 and 3, which describe Yemen as an *"Arab Islamic state"*, where Islam is the religion of the state, and Islamic *Shari'ah* is the source of all laws.
34. A discussion of some practical aspects of the use of *Shari'ah* as a principal source of legislation may be found in George N. Sfeir's "Source of law and the issue of legitimacy and rights" Middle East Journal 42 no.3 1988, pp.436-446.
35. The Algerian National Charter, in Chapter 2, states that *"... socialism has a powerful bond with the lengthy evolution of the national liberation struggle, in complete conformity with the doctrine of Islam, which advocates social justice"*.
36. For example, parts I, II, III, Article 2 states : *"The Arabian Kingdom of the Hijaz is ... Moslem country in all its internal and foreign affairs "*. The Constitution also, in Article 5, states that: *" The entire administration of the Kingdom ... His Majesty is bound by the Shari'a laws"*. Article 6 states that: *"Sentences in the Kingdom of the Hijaz shall be given according to the Koran and the Sunnat of the Prophet"*. Article 10 provides : *"Shari'a Affairs include everything in connection with the Shari'a court, the two Holy Sanctuaries, wakfs, mosques and all religious establishments"*.
37. Omar Bendourou "The Exercise of political freedoms in Morocco" in Review of the International Commission of Jurists, no.40, June 1988.
38. *"Sovereignty is vested in the nation, which shall exercise it either directly, by way of referendum, or indirectly through constitutional institutions"*

affirmed the principles of modern democracy through *Shari'ah*, and therefore, the system of *Shura*, involving direct consultation with the representatives of the Muslim community, and *Bai'a*, which is the act through which the head of the community was recognised by the representatives of the people, as the spiritual and temporal head of the legislative and executive powers, as we will see.[39]

Libya and Sudan appear to represent a similar phenomenon, since their policies of Islamization seemed to give Islam the supreme position in the state structure, though their real impact and duration was limited. From 1977, the Libyan authority declared that the 1951 Constitution and the 1969 constitutional declaration were abolished in favour of the Qur'an, and that the Libyan legal system was based on *Shari'ah*.[40] However, the Libyan authority did not reinstate *Shari'ah* in traditional form, but introduced some Islamic elements to be interpreted by the courts as part of Libyan law.[41] A small number of Islamic laws, closely related to the positive legal order,[42] were promulgated with enough publicity to create the impression that Libya was reverting to *Shari'ah*.[43] The selective use of the elements of Islamic law has meant the failure of any real attempt to Islamicize Libyan law.

Modern states, like Egypt, Iraq and Syria, have emphasised radical, secular modernization, though in recent times, some have implemented Islamization policies.[44] In the radical republics, Nasser in Egypt[45] and the *Ba'th* in Syria[46]

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39. CCPR/C/SR.332 13th November 1981 p.2.
40. CCPR/C/1/Add.20 of 24th January 1978.
41. The schools of *Fiqh* were dismissed as being without legal force, and the *Sunnah* of the Prophet were rejected as a source of law. In 1978, the authority stated that the only Islamic law was that contained in the Qur'an : *"The Qur'an is the Shari'ah of the society"*.
Quoted at the beginning of Raymond N. Habiby "Muammar Qadhafi's new Islamic scientific socialist society" in Religion and Politics in the Middle East (ed) Michael Curtis, 1981, pp.247-259.
However, the leadership has also insisted that the Qur'an provides guidance only on matters of personal ethics and does not cover the problems dealt with in the Green Book, so that there is no possibility of conflict between the two. When the *Ulama* presented verses contradicting the philosophy of the Green Book, their views were rejected on the grounds that they were linked to the conditions of the seventh century Arab world, and so were irrelevant for contemporary Muslims.
42. The laws enacted were drawn up by experts from the civil and Islamic law fields, with a commission established to review existing laws and eliminate laws violating Islamic law, replacing them by laws embodying the basic principles of *Shari'ah*.
Muhammad Sami Nabrawi [Highway robbery and theft], 1975.
43. "Human rights practices in the Arab states : the modern impact of Shari'a values", Georgia Journal of International & Comparative Law, Vol. 12:55, 1982, p.56.
44. Ibrahim Ibrahim "Islamic revival in Egypt and Greater Syria" in Cyriac K. Pullapilly (ed) Islam in the Contemporary World, 1980, p.163.
45. Nasser was unable to bring about reform in Egyptian family and personal status codes. Any such reform would have substantially reduced the influence of *Shari'ah* rules, and might have been regarded as a threat to the Muslim basis of the Egyptian state.
R. Humphreys "Islam and political values in Saudi Arabia, Egypt, and Syria" in Michael Curtis (ed) Religion and Politics in the Middle East, 1981, pp.287-306.
Such reform came only in 1979, when very limited amendments to the law of personal status in Egypt were confirmed by the National Assembly.
Aziza Hussein "Recently approved amendments to Egypt's law on personal status" in Michael Curtis (ed) Religion and Politics in the Middle East, 1981, pp125-128.
46. In Syria, the secular Ba'thist government has avoided recognising Islam as the state religion, though it has not attempted to reform the *Shari'ah*-based personal status code of 1953. The Constitution of 1973 merely identifies *Shari'ah* as a principal source of legislation and provides that the head of state should be a Muslim. Some claimed that the riots which followed publication / ...

faced opposition when they sought to reduce the role of Islam. As we saw, Nasser attempted to minimise the effect of opposition organised on Islamic grounds, and under Sadat in the seventies, the continuing influence of modernisation could be seen in the debates on the drafting of the 1971 Constitution.[47]

This brief review clearly indicates the impact of the ideological context on the constitutional framework, both in terms of legislation and of organs. As far as the legal order is concerned, the stamp of ideology finds its place in the early statements of the new political order, as well as constitutional declarations and Constitutions.

As we saw in the Constitutions, so almost all other legislation is inspired by this ideology. Organs too, from the Supreme Court to the ordinary judiciary find themselves called upon to interpret phrases such as *"socialist aspirations"*, which cannot be understood within the classical jurisprudence of terms such as public order, since the gap between the political legislator and the judiciary is expressed in different languages as a result of the interference of these ideologies. As we will see, for example, in the judgement of the Libyan Supreme Court with regard to the Election Law, the judiciary understood the *"democratic life of the nation"* within the classical jurisprudence, quite differently from the political legislator, who has a revolutionary definition of democracy.

Since all these governments retain the role of legislator as well as executive, they bring laws to protect the new political order, for example, the *Law for the Protection of the Revolution* in Libya, and frame other legislation within the ideological context, for example, the *Law for the Reformation of the Legal System* in Iraq.[48]

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... of the draft constitution of 1973 were directed against its *"irreligiousness"*, but they brought about no significant change in the secular Constitution adopted by the Syrian government in that year.

47. All agreed that Islam should be named as the state religion and that *Shari'ah* should be in some way a basis of legislation. The practical role of the *Shari'ah* was debated, with some saying that legislation should be drafted simply in its spirit, while others argued that it should be strictly adhered to as the only source of legislation.

The comment of one of the drafting committee of the new constitution was that by the *Shari'ah* : *".. we should understand not the whole corpus of medieval jurisprudence but only the Qur'an and the authentic teaching of the Prophet ... this approach was fully in accord with the best and most ancient practice, for if one examined the conduct of the first generation of Muslims, it was plain that they were guided not by blind adherence to fixed rules but by their sense of how best to serve the public welfare."*

In the event, the Egyptian Constitution stipulated, in article 2, that the principles of *Shari'ah* constitute a primary source of law.

48. This Law sets forth the foundations for and objectives of reform in the spheres of economic, commercial, civil, administrative, political and penal legislation. It also specifies the means for the reform and its stages.

S.H. Amin Middle East legal systems, 1987, pp.193f.

## SECTION TWO

# CONSTITUTIONAL DEVELOPMENTS AND THE RULE OF LAW

# IN THE CONTEMPORARY LEGAL ORDER

## CONSTITUTIONAL DEVELOPMENTS

The constitutional background naturally reflects the transition from colonial control or influence through semi-independence to full independence. Thus a condition of constitutional difficulty will be seen in the following examination, since the emergent states within each tendency are well characterized either by a static order which represents the traditional political thought without adjustment, or by an unstable order, with frequent suspension or breakdown of constitutional processes, the continual replacement of new constitutions and finally by the institutionalization of state of emergency in more than one Arab country.

Therefore, it is essential, as a background to assessing the efficacy of the emerging legal order in protecting the rule of law and individual liberties to examine the different legislators' approach. Its efficacy will depend essentially upon the degree to which these States' institutions are able to use the powers conferred upon them by legislation, to bring about stable and effective reform, and so it is also important briefly to review the role of the judiciary in assimilating radical principles and institutions to the emerging states, their response to the validity and efficacy of these Constitutions especially in the transitional periods and times of political change. This analysis of constitutional developments should enable us to have an overall view of the new political structures and the main boundaries of the emerging legal order in the Arab region. This view must remain rather approximate in this section, as the evaluation of these principles and institutions will depend on other stages of analysis in several other parts of this Chapter and the next.

The emergence of the constitutional order in the Arab world in the mid-twentieth century illustrates classic examples of the establishment of Constitutions : at the creation of a new state, for example, Saudi Arabia; at the achievement of independence, for example, Morocco and Tunisia; and by revolution, for example, Egypt. The mechanism of creation of the new constitutional order is determined by the nature of the constituent power which originates the Constitution. The monarchical method creates a constitution which represents the *"contract"* between ruler and ruled, while democratic methods are through constitutional referendum,[49] based, for example, on French practice, or the work of a constituent assembly,[50] a method based on the American Convention.

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49. The Constitution of the United Arab Republic was adopted by this method. It was originally to be created by a governmental committee, but its draft was rejected by the Egyptian leaders on the grounds that *"it does not respond to revolutionary calls and objectives, in eliminating imperialism, feudalism and monopolies"*. A second committee to draft *"a new constitutional project within the scope of the objectives of the revolution"* was agreed by the Revolutionary Command Council and the Cabinet. It was adopted by referendum in June 1956.
50. This method was adopted by Jordan in framing the Constitutions of 1946 and 1952, by Syria in 1950 and by Kuwait in 1962 as well as by Tunisia in 1959, as we will see.

The mechanism of constitutional referendum allows the people to participate directly in confirming the prevalent legal idea of their society, while the constituent assembly allows the people's representatives to take part in the creation of the Constitution itself. For the referendum to represent the legal idea, the Constitution should be presented to the people, and the referendum conducted according to certain conditions.[51] Examples of each type may be found in the recent constitutional history of the Arab world.

Theoretically, it seems that most Arab Constitutions have adopted the method either of constituent assembly or people's referendum, and in some cases both,[52] as we will see. Apart from the Egyptian Constitution of 1923, the Iraqi of 1925 and the Lebanese of 1926, which were created by treaties or with external interference,[53] as we saw in the previous chapter, the Sa'udi Kingdom, remains the only Arab country which cannot be characterised by any such formula.

While the theocratic monarchy[54] of Saudi Arabia lacks a formal Constitution, it is often asserted that the Qur'an and *Sunnah* along with the consensus of the four Caliphs act in its place.[55] Constitutional principles drawn from these sources were expressed in positive form in 1926 in the Basic Law of the Hijaz, sometimes called the Constitution of Hijaz. It establishes a consultative monarchy and centralises all power in the King, whose activity is regulated by *Shari'ah*,[56] as interpreted by the *Ulama*, who provide interpretative *fatwa* on external and internal affairs of state.[57] The King's actions are also regulated by consultation with the *Majlis al-Shura*.

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51. Firstly, that it should take place in a society of some political maturity, where several views of the Constitution may be discussed, (though, as we will see, this qualification should not be stringently applied so as to delay the establishment of the constitutional order); secondly, that it should take place in conditions of complete freedom; and thirdly, that the subject of the referendum should be a Constitution or specific legal idea.

52. The *Ba'th* Arab Socialist Party seized power by *coup d'état* in 1963. The provisional Constitution adopted in April 1964 was suspended in February 1966 by the regional command of the Ba'th party. The new provisional Constitution of May 1969 was amended in 1971 after a military coup in which the present regime came to power. The present Constitution was brought into force by a Presidential decree of 14th March 1973, a national referendum having taken place three days before the Constitution had been drafted by a People's Council, whose members had been selected by the President.
States of emergency : their impact on human rights A study prepared by the International Commission of Jurists, 1983 p.280.

53. For example, in Iraq, King Faisal I governed under the Constitution of 1924, which is connected to the British colonial period, when a series of constitutional proposals, based on the New Zealand and Australian constitutions (proposed by a British Commission), and the Turkish and Japanese constitutions (proposed by the Iraqis) had been rejected. Some regard it as the "*grant*" of the British, rather than expressing the will of the Iraqi people, while others describe it as the work of the constitutional assembly.
Ismail Mirza (Political science and principles of constitutional law), 1960, p.89-110

54. Islam has continued to provide the ideological basis for the ruling family and provides its legitimacy.
John L. Esposito Islam and Politics, 1985, pp.100-111.

55. Aharon Layish "'Ulama and politics in Saudi Arabia" in Metin Heper and Raphael Israeli, Islam and politics in the modern Middle East, 1984.

56. In part II, article 5, of the Basic Law, "*The entire administration of the Kingdom of the Hijaz shall be in the hands of His Majesty King Abd-el-Aziz the 1st, Ibn Abd-el-Rahman Al-Faisal Al-Saud. His Majesty is bound by the Shari'a laws.*"

57. For an examination of the role of the Ulama in legal and political life in Saudi Arabia, see Aharon Layish "'Ulama and politics in Saudi Arabia" in Metin Heper and Raphael Israeli, Islam and politics in the modern Middle East, 1984.

This body comprises several parliamentary elements, though its members are appointed by the King.

Aspects of constitutional reform occurred in the 1950s, when the Council of Ministers, formerly an advisory organ, was granted legislative and executive powers by Royal Decree,[58] and in the 1960s, when a draft organic law was prepared, based on Islamic principles. Internal and external pressure also led to a proposal for the creation of a more democratic version of the *Majlis al-Shura*,[59] which was rejected. When Faisal came to power in 1962, he announced a ten-point programme of government,[60] partially in response to the creation of the republican regime in North Yemen, though his proposals for constitutional reform were not adopted. Again, in December 1979, the preparation of a basic law creating a consultative council was announced, along with the drafting of a Constitution, which did not take place, although a constitutional committee was set up in 1980 to prepare a fundamental law.[61]

In the absence of a formal Constitution, sovereignty in Saudi Arabia is vested in the *Shari'ah*, and succession to the throne of the Kingdom is according to custom, with the consent of the *Ulama* and senior princes,[62] and allegiance to the King sworn in the act of *bay'a*, as in the Moroccan monarchy. In the absence of any conventional constitutional life no national assembly or parliament in the classical sense has ever been created as in other traditional monarchies or Emirates.[63]

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58. *"The Council of Ministers shall draw up the policy of the State, internal and external, financial and economic, educational and defence, and in all public affairs; and shall supervise its execution; and shall have legislative authority, and executive authority and administrative authority. ... and international treaties and agreements shall not be regarded as effective, except after its approval."* Article 18 of Royal Decree no. 380, embodying the new Statute of the Council of Ministers of May 1958.
See : C. Harrington "The Saudi Arabian Council of Ministers" Middle East Journal, 12, 1958, pp. 1-19; H. St John B. Philby "Saudi Arabia, the new statute of the Council of Ministers" Middle East Journal, 12, 1958, pp. 318-323.

59. A *Majlis al-Watani* (National Council) was proposed, which would be subject to dissolution by the King, and of whose members, only one third would be royal appointees.

60. These included enactment of a basic law setting up a consultative council with legislative power, regulating its relations with the authorities, and ensuring rights within the framework of *Shari'ah*.

61. Aharon Layish "'Ulama and politics in Saudi Arabia" Metin Heper and Raphael Israeli, Islam and politics in the modern Middle East, 1984.

62. As in 1964, King Saud ibn al-Aziz was removed from office after 12 years, when the council of senior princes, Ulama and officials demanded the resignation of the King, on grounds of the Islamic legal principle of *"public interest"*. He was succeeded by his brother Faisal, who ruled until 1975.

63. In 1971, the federation of six shaykhdoms of the Gulf formed the United Arab Emirates, whose President is the Amir of Abu Dhabi, and Vice-President the amir of Dubai. They comprise Abu Dhabi, Dubai, Sharja, Ajman, Umm al-Qaywayn, Fujayra, Ras al-Khayma. Its highest Executive body is the Supreme Council, which consists of the rulers of each emirate, who exercise one vote each, according to article 46 of the Provisional Federal Constitution of the United Arab Emirates. Below it is the Council of Ministers, established by article 55, consisting of a Prime Minister, his deputy and a number of ministers, the total *not exceeding fourteen members, which administers each emirate.*
Article 68 of the provisional Federal Constitution establishes a federal National Council, consisting of forty delegates nominated by the ruler of each emirate. Abu Dhabi and Dubai have 8 seats each, Sharja and Ras al-Khayma 6 each and the remaining emirates, 4 each. Its power is limited to considering legislation prepared by the Council. For example, it is presently considering a draft federal Criminal Code. *Shari'ah* is the main source of legislation in the United Arab Emirates, according to the provisional Constitution, article 7, and article 2 stipulates that the United Arab Emirates is an Islamic state.
See E. Nakleh "Political participation and constitutional experiments in the Arabian Gulf : Bahrain and Qatar" in T. Niblock (ed) Social and economic development in the Arab Gulf, 1980, pp. 161-76.

Since there are no parliamentary assemblies, political parties, or trade unions, traditional channels of tribal authority remain the prime mechanism[64] through which citizens may exercise their political aspirations, as Saudi plans for a consultative assembly in the last three decades have not come to pass. One can say that the Saudi monarchs have maintained close and stable relations with the *Ulama* and other elements of the religious establishment, and they have been careful to consult with and establish a basic agreement with them not only on religious matters but also internal and external political issues that require or benefit from religious sanction, in contrast with several other Arab orders.

In contrast with the Saudi system, which lacks a formal constitutional framework, the Maghrib countries of Tunisia, Morocco and Libya took a constitutional path at independence in establishing what has become their contemporary legal framework, apart from the latter which was changed by the revolution of 1969. Before examining the constitutional development of the Maghrib, it is worthwile to point out again the international dimension and its role in the creation of the constitutional order, which can be seen, for example, in the treaties between Britain and Iraq in 1922,[65] and with Egypt in 1936, and the French with Lebanon in 1926.[66] In the early fifties, the Tunisians brought to the attention of the United Nations Security Council a dispute between France and themselves concerning negotiations on Tunisian independence. After some difficulties,[67] the French were pressurised into holding negotiations with Tunisian nationalist representatives, which culminated in the *Franco-Tunisian Protocol* of March 20th 1956,[68] in which France recognised the independence of Tunisia.

Morocco was the first of the former French colonies to become independent in 1956, and Muhammad V[69] announced that a Constitution[70]

64. Centres of power in the Kingdom include : the Royal Court; heads of major tribes; businessmen; the professional élite of technocrats and the military. Layish comments that it is not clear whether the *Ulama* holds more effective power than the tribal leaders.
Aharon Layish "'Ulama and politics in Saudi Arabia" Metin Heper and Raphael Israeli, Islam and politics in the modern Middle East, 1984.
65. In the first of these, in article 3, King Faisal declared that his government intended to promulgate a Constitution, which remained until the revolution of 1958. Its background was briefly examined in Chapter 2.
66. Like the British in Iraq, the French provided the draft of the Lebanese Constitution of 1926.
67. The Tunisian Prime Minister's attempt of January 1952 to bring about the intervention of the Security Council was unsuccessful, as was the action in April 1952 of eleven members of the United Nations to bring the question before the Security Council. A further attempt by thirteen member states was successful however, and on 13th December 1952, a resolution called upon France and Tunisia to negotiate to bring their dispute to an end.
68. The text may be found in American Journal of International Law 51, 1957, pp.683-684.
69. For an examination of the constitutional role of the Moroccan king prior to independence see : I. William Zartman "The King in Moroccan constitutional law" Muslim World, 52, pts. 2 & 3, 1962. For general historical background see, Douglas Ashford, Political change in Morocco, 1962.
70. Muhammad V established a commission of jurists, theologians and political representatives to draft a Constitution to replace the Royal Charter, though this body was dissolved in 1961 without accomplishing its task. On the accession of Hasan II, a constitutional committee, composed principally of foreign jurists, was established to draft the Constitution eventually presented in November 1962, less than one month before the referendum of 7th December.
"The New Constitution of Morocco" in Bulletin of the International Commission of Jurists, 16, 1963, pp.28-37.

would be drawn up in 1962 to replace the Royal Charter of 1958.[71] The campaign which preceded the constitutional referendum of December 1962 raises the question of the King's decision to put a Constitution before the Moroccan population, in a referendum which, like similar French referenda, limited the scope of response to simple acceptance or rejection of the Constitution as presented. The opposition considered it was *"imposed"* on the population, since it had not been drafted by a constituent assembly. The King argued that no basis existed in law for the creation of such an assembly and, as an absolute monarch, he could not confer his power on such an organ, pointing out that the Moroccan Constitution was subject to referendum.[72] The King's argument, that he could not confer his power on a constituent assembly, is not borne out by events in Tunisia, where the beylical monarchy gave way to a republican regime, and the Constitution was drafted by just such a constituent assembly as the Moroccan king refused. Although the Constitution was subject to referendum, its draft was made available less than a month before the referendum, with the result that the campaigns which preceded it were largely unable to focus on its content. The Constitution of 1962 describes Morocco as *"a constitutional, democratic and social monarchy"*. It has been pointed out that articles 2 and 3 are drawn from articles 3 and 4 of the French Constitution of 1958, in that they provide that sovereignty shall be exercised by the nation *"either directly through referendum or indirectly through constitutional institutions"* and that political parties contribute to the representation of citizens in the government. French influence is noticeable elsewhere, and its tendency is to enhance the power of the Executive, in respect of the Cabinet, Prime Minister,[73] and Parliament[74], as well as by giving

71. The Charter of 1958 set forth constitutional principles, such as separation of powers, responsibility of ministers, the election of a National Assembly, and guarantees of individual liberties, such as freedoms of speech, assembly and association, enacted in the *"Code of Public Rights"* of November 1958. Dahirs dating from this period still regulate these freedoms in Morocco.
Omar Bendourou, "The Exercise of political rights in Morocco", Review of the International Commission of Jurists, no. 40 1988.

72. Willard A. Beling "Some implications of the new constitutional monarchy in Morocco" in Middle East Journal vol. 18, pt. 2, 1964, pp. 163-79.
This article also contains an examination of the campaigns which preceded the referendum.

73. Article 24 states that the King *"will appoint the Prime Minister and the Cabinet ... He may accept their resignations either on his own initiative, or as a result of an individual or group resignation."* This provision is closer to the French Constitution of 1830 than that of 1958, in allowing the Head of State to dismiss a Minister on his own authority. Also similar to this Constitution is article 65 of the Moroccan one where it is stated that *"the government is responsible to the King and to the House of Representatives."* Articles 80 and 81, which deal with the vote of confidence in the government, are also based on article 49 of the French Constitution.

74. The predominant role of the King as the Executive may be seen clearly in the latter's relationship to the Parliament from the following articles. For example, according to article 27, the King may dissolve the House of Representatives, and articles 77-79, dealing with the circumstances in which Parliament may be dissolved, are similar to those of article 12 of the French Constitution.
The power of the Parliament to legislate is strictly confined, according to article 48, while the Executive is empowered to make law by Dahir. Between parliamentary sessions the government may, according to article 58, legislate by Decrees, later submitted to Parliament for ratification. Article 47 gives the government, *"for a limited period and for a specific objective"*, the power to legislate by decree. This corresponds to article 44 of the 1972 Constitution. The King may return a law proposed and passed by the Parliament for revision, according to article 70, and any law may be submitted to public referendum by the King, article 72. If a bill rejected by Parliament is accepted by public referendum, the Parliament is dissolved, article 75.

scope to emergency powers.[75] An important, and in the Arab world, unique provision is found in article 3 : *"There shall be no single party government in Morocco"*. The Constitution makes the King the Head of State, Chief Executive, Commander-in Chief of the Armed Forces, and above all, *Amir al-Mouminine* (Commander of the Faithful). Constitutionally, the period following independence was unstable, as the King tried to respond to political change by adjusting the constitutional framework,[76] until the promulgation of the present Constitution in 1972, which embodies many of the features of the 1962 Constitution.

The process of return to constitutional life in Tunisia[77] did not begin until 1956, when a Constituent Assembly was elected to draft a new Constitution,[78] although it was not until June 1959 that the Assembly approved the first Constitution of independent Tunisia. In July 1957, the Republic was proclaimed by a resolution of the Constituent Assembly.[79] It is worth pointing out that the National Constituent Council,[80] created by the Beylical decree of 29 December 1955, provided that the election of its members should be by free, direct and secret ballot for Tunisians resident in Tunisia at the date of the final electoral lists, though the decree confined the right to vote to males.[81]

Like the Moroccan legislator, the Tunisian favoured a strong executive authority in the context of a presidential republican regime.[82]

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75. Article 35 of the Constitution regulating the state of emergency though drawn from art.16 of the French Constitution, goes further in empowering the King to declare a state of emergency when "... *such events take place may jeopardize the functioning of constitutional institutions*" : the French article, in contrast, specifies that their functioning should have been interrupted in fact. The Moroccan art. requires "*consultation with the leaders of both Chambers*", while the French requires consultation with the Constitutional Council. Like the French article, the Moroccan specifies the aim of the King's must be to "*ensure a return to the normal exercise of constitutional institutitions*". The French text stipulates that its aim must be "*to ensure to the constitutional governmental authorities, in the shortest possible time, the means of fulfilling the functions assigned to them*".

76. In June 1965, the King responded to increasing discontent and instability, as political parties called for democratic elections and the formation of a government by the party with a parliamentary majority, by declaring a State of Emergency, suspending the Constitution and assuming all legislative and executive powers for five years. In August 1970, a new Constitution was promulgated by elections to a new single chamber parliament. The two major parties in Morocco, *Istiqlal* and the *Union National des Forces Populaires* (UNFP) boycotted both the constitutional referendum and the elections, as they had done in 1962. Efforts for reconciliation were unsuccessful, leading to the promulgation of a third Constitution in less than twelve years, in 1972.

77. Tunisia had long been a beylical monarchy, under the Constitution of 1861, which was suspended in 1864. In 1934, the bey met with the Destourian (Constitutional) party, who demanded a return to the constitutional system.

78. Ismail Mirza [Constitutional law: a comparative study of the Libyan Constitution and those of other Arab countries], 1969 pp.130-131.

79. "*Nous, Députés de la Nation Tunisienne, membres de l'Assemblée Nationale Constituante ... prenons, au nom du peuple, la décision suivante ... nous déclarons la régime monarchique totalement aboli; nous proclamons que la Tunisie est un Etat Républicain ...*".
Resolution of the Tunisian National Constituent Assembly Proclaiming the Republic July 25th 1957.
Muhammad Khalil The Arab states and the Arab League ... , 1962, p.448.

80. The National Constituent Council formed several Committees which drafted the Constitution, before it was accepted unanimously.

81. Official Gazette, 104 of 30th December 1955, p.2493f.

82. During the drafting of the Constitution, the Chief Rapporteur of the Constituent Assembly emphasised its intention of establishing a genuine regime to abolish anarchy and overcome difficulty, while safeguarding the freedoms and rights of citizens. In the light of this intention, he stressed, the assembly had chosen a strong executive "*in order that responsibilities shall not be dispersed and authority scattered. A strong executive authority is the primary guarantee of individual and group liberties, the best security of their rights ...*".
George N. Sfeir "The Tunisian Constitution" in Middle East Journal, 13 pt.4, 1959.

The Constitution confirms the establishment of the republic in the Preamble[83] which also describes the system of government as *"une démocratie fondée sur la souveraineté du peuple et caractérisée par un régime politique stable basé sur la séparation de pouvoirs"*.

Although the Constitution provides for the establishment of a single legislative organ, the National Assembly, which *"exerce le pouvoir législatif"*, as in the Moroccan Constitution, the President may legislate by decree *"pendant un délai limité et en vue d'un objectif déterminé"* at the end of which the decrees must be submitted to the Assembly for approval,[84] and in emergency situations, *"en cas de péril imminent menaçant les institutions de la République ... et entravant le fonctionnement normal des pouvoirs publics"*, when the President may take extraordinary measures on his own initiative, on which he must later report to the Assembly, (article 32). Unlike the Moroccan Constitution, the President in Tunisia may act without consulting the Head of the Legislature, but like the French Constitution, which clearly influenced the scope of the article, an interruption of the normal functioning of organs of government may lead to the adoption of exceptional presidential powers.

The Constitution balances the strength of the Executive authority with provisions which secure individual rights (Part One, articles 5-17), and safeguards democracy through establishing the mechanism of government, for example, by providing that both President and National Assembly are chosen by free, direct and secret ballot (articles 40 and 19), and by subjecting important functions of the Executive such as general government policy, the budget, declaration of war, peace-making and treaty-making to the supervision of the National Assembly (articles 33-36, 49). Part Three, which deals with the Executive Authority, defines the scope of executive action and Part Four safeguards the independence of the judiciary. The Tunisian Constitution does not empower the Supreme Court to review the constitutionality of legislation or create a constitutional organ,[85] but instead provides for the legislative supremacy of parliament, although it provides for a Council of State, one of whose functions is : *"une juridiction administrative connaissant des litigés entre les particuliers d'une part et l'Etat ou les collectivités publiques d'autre et des recours pour excès de pouvoir"* (article 57).

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83. The Preamble also describes *"le régime républicain"* as *"la meilleure garantie pour le respect des droits de l'Homme et pour le maintien de l'égalité, au regard des droits et des devoirs, de tous les citoyens ..."*

84. Similarly, when the Assembly is in recess, the President may enact decrees which are likewise submitted to the Assembly for approval (article 31).

85. Unlike the Moroccan Constitution of 1962, which envisaged the creation of a constitutional body within the Supreme Court, to rule upon the constitutionality of certain laws and other measures along with supervising the legality of electoral procedure.
"The New Constitution of Morocco" in Bulletin of International Commission of Jurists, 16, 1963, p.32.

This brief review of the constitutional route to independence followed by two former French colonies of North Africa indicates both the influence of French legal culture and the concerns of developing nations to reconcile the needs of development with the need for legal reform. Although this led to different forms of government, the Tunisian and Moroccan Constitutions both lay great emphasis on the necessity of a strong executive, with several provisions enhancing executive power drawn from the Gaullist Constitution of 1958. This phenomenon is common to other African countries, particularly Francophone states, where the concern for development led to the enhancing of executive power : *"their principal concern was ... the establishment of a strong executive as the pivotal constitutional instrument, and such regulation of its relation with the legislative body as to endow it with a dynamic power of change".*[86]

Features of the Constitution of the Fifth French Republic which found their way into the two Constitutions we have examined comprise several which enhance executive power to varying degrees : the possibility of appeal to the people and to the Constitutional Council against decisions of the legislature in the Moroccan Constitution; the exceptional powers available to the Head of State in case of emergency in both Constitutions; certain restrictions on the law-making scope of the legislative body and exercise of control over government, again, in both Constitutions. Each Constitution also stresses legal principles and gives characteristic weight to individual liberties.[87]

A third North African state which followed a constitutional route to independence also illustrates the international dimension in decolonisation and its role in the creation of the constitutional order. The creation of Libya, *"comprising Cyrenaica, Tripolitania and the Fezzan, ... an independent and sovereign state"* was presided over by the United Nations. The creation of the first Constitution of the new state was set in motion by a UN resolution,[88] which provided that : "a *Constitution for Libya, including the form of the government, shall be determined by the representatives of the inhabitants of Cyrenaica, Tripolitania and the Fezzan meeting and consulting together in a National Assembly*", with the assistance of a UN Commissioner[89] and Council.[90]

86. Ernest Hamburger "Constitutional thought and aims in former French Africa" in Social Research, 28, 1961.
87. The Constitutions, drafted in the late 1950s and early 1960s, could hardly fail to incorporate the spirit of the Universal Declaration of Human Rights, adopted in 1948.
88. UN General Assembly Resolution 289 (IV A) of 21st November 1949.
89. Article 4 of the Resolution provides that : "*for the purpose of assisting the people of Libya in the formation of the Constitution and the establishment of an independent Government, there shall be a United Nations Commissioner in Libya appointed by the General Assembly and a Council to aid and advise him*".
90. The Council consisted of ten members, namely : "*(a) one representative nominated by the Government of each of the following countries : Egypt, France, Italy, Pakistan, the United Kingdom of Great Britain and Northern Ireland and the United States of America; (b) one representative of the people of each of the three regions of Libya and one representative of the minorities in Libya ...*".

The Federal Constitution of Libya of 1951 described the United Kingdom of Libya as federal and its system of government as representative, (article 2). It represents the only lasting central confederation in the contemporary Arab legal order, (with the exception of the United Arab Emirates[91]) with the State becoming *"The Kingdom of Libya"*[92] in 1963.[93]

The Federal Constitution also described Libya as an hereditary monarchy, its form as federal and its system of government as representative, (article 2). Chapter Two enumerates the rights of the people in thirty five articles and Chapter Three sets out the powers of the government. Article 36 lists the matters in respect of which the federal government exercises legislative and executive powers, including matters relating to war and peace, treaties and martial law. Chapter Four provides, in article 40, that sovereignty is vested in the nation, in article 41, that legislative power be exercised by the King in conjunction with the Parliament, in article 42, that executive power be exercised by the king, and in article 43, that judicial power be exercised by the Supreme Court.

Chapter Five of the Constitution sets out the powers of the King, the supreme head of the State, entrusted by the people with the sovereignty[94] of the United Kingdom, who exercises his power through his ministers, with whom lies all responsibility.[95] As with the other Constitutions we have examined, article 64 allows the King to take special powers to legislate by decree when Parliament is not in session.

Again, such measures must be submitted to Parliament at its first meeting. According to article 69, the King, like the other Heads of State we have seen, declares war, concludes peace and enters into treaties. He is also empowered to proclaim martial law and a state of emergency, though the Libyan Constitution provides a safeguard not present in the Moroccan or Tunisian texts, that the proclamation must be presented to Parliament to decide whether it should continue, (article 70).

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91. See footnote 62 above.
92. The Libyan Kingdom Constitution. After amendment by Law No. 1 of 1963, Article 2 states : "... *its name is "The Libyan Kingdom"*.
93. The experiment of central federation has important implications for its participants, since states lose their international character in the new federal state.
As we saw, 1958 saw several attempts at Arab federation. The two republics of Egypt and Syria joined in the United Arab Republic, which was to have a presidential democratic system of government, in which executive authority was to be vested in the Head of State and legislative authority in one legislative assembly. The Union was to be open to all other Arab states, to join in union or federation. Despite the fact that Syria and Egypt were later joined by Iraq and Yemen in the United Arab Republic, the federation ended within a few years.
In the same year, the Hashemite kingdoms of Iraq and Jordan joined in the Arab Federation, though each state retained integral state entity, sovereignty and existing government. Like the United Arab Republic, the Arab Federation was open to other Arab states, but proved unsuccessful and short-lived, as Qasim withdrew from the federation later the same year.
94. The 1963 amendment to the Federal Constitution provided, in article 40, that sovereignty was to God, entrusted to the nation, as the source of all powers.
95. According to articles 58-60 of the Federal Constitution.
For a comprehensive examination of the Federal Constitution and its 1963 amendment, see Ismail Mirza [Constitutional law: a comparative study of the Libyan Constitution and those of other Arab countries], 1969. For the period after independence see also, Saladin Hassan Sury "The political development of Libya 1952-1969 : institutions, policies and ideology" in J.A. Allan (ed) Libya since independence, 1981.

As in Morocco, the King has the right to appoint and dismiss the Prime Minister and his cabinet from office, or accept their resignations, (article 72). The seventh Chapter of the Constitution regulates the parliament and the eighth, the judiciary, where the independence of judges is upheld in article 142. This Chapter also provides for judicial review of constitutionality.[96]

The Libyan Constitution of 1951, like the 1962 Constitution of Morocco and the 1959 Constitution of Tunisia, is characterised by the concentration of wide powers in the hands of the King as Head of State, however, it contains in addition, a number of provisions safeguarding against the abuse of executive power not found in the other Constitutions.

It is true that, at independence, the Arab legal order contained many legacies from the past as we have seen, and several deficiencies requiring urgent and uncompromising reform which nationalist regimes came in some countries to bring about. It is equally true, and perhaps more important, that in resolving these problems, reform went hand in hand with the need for legality. Continuing political change has naturally affected the stability of legal systems, in particular at the constitutional level, where the reconciliation of these two necessities faced by almost all new states today will determine true development, present and future. Charles Howard McIlwain has perfectly expressed the legislators' dilemma :

*"We cannot get the needed redress of injustice and abuses without reform, and we can never make these reforms lasting and effective unless we reduce them to the orderly processes of law."*[97]

Even revolutionary reformers in the Arab world have been concerned to maintain a form of legality, seen in their Declarations and revolutionary Constitutions, though their concern tended more toward political legality, as we saw in their ideological emphases.

Constitutional reform was one of the first problems to present itself to the new orders with, above all, that of adjusting their new principles and institutions to a specific set of circumstances and local conditions. By virtue of the decline in critical jurisprudence in most Arab countries, constitutional jurists were hesitant in their dilemma of accommodating the revolutionary demand for urgent reform and the observance of the principle of legality with its broad connotation.

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96. Article 152 provides that the King may refer *"important constitutional and legislative questions"* to the Court for an opinion, in which it must take into account the provisions of the Constitution. Article 153 provides that : *"an appeal may be lodged with the Supreme Court ... against any judgement by a provincial court in civil or criminal proceedings if such judgement included a decision in a dispute concerning the Constitution or the interpretation thereof."*
These articles were cancelled in the 1963 amendment of the 1951 Constitution, as we will see in the following section.

97. Charles Howard McIlwain, Constitutionalism : ancient and modern, 1947, p.145 quoted in George N. Sfeir "The Tunisian Constitution" Middle East Journal, 13.4 1959, p.447.

Thus, opinions among constitutional jurists reflect this difficulty, for example, in their assessment of the effect of the political change, whether it comes through revolution or *coup d'état*, or change within the revolutionary context itself.

Some consider that the revolution or *coup d'état* revokes the Constitution automatically, without the need for explicit legislation. Abdul Hamid Metwalli argues that abolition of the Constitution happens automatically, provided the *coup d'état* is directed against the previous political system. If the coup is directed against the corruption of the previous administration however, the result is not the same. Abolition of the Constitution requires an act of the legislature, or some positive statement by the authority that the Constitution is repealed. He argues that if the revolution is not against the political system, but only the corruption of the regime and its administration, the revolution does not cancel the Constitution immediately, giving as an example, the movement of 1952 in Belgium which deposed Leopold III, but did not lead to the abolition of the Belgian Constitution.[98] The Iraqi legislature took a similar stance after the revolution of 14 July 1958, which did not immediately cancel the monarchical Constitution of 1925.

In my view political change does not automatically cancel the Constitution, as it does not interrupt the legal idea, but represents only a change. Thus, the revolution of 1952 did not abolish the Egyptian Constitution of 1923. The fate of the Constitution rested on the will of the new power, and only on 10th December 1952, did the leader of the armed forces declare, in the name of the Egyptian people, the abolition of the Constitution of 1923. Thus, during the period from July until the Constitutional Declaration of December, the 1923 Constitution remained in force, when not in contradiction with legislation brought by the new leadership.[99]

Another example which demonstrates this approach, is the Libyan Constitutional Declaration of 1969, which in article 34, states that legislation in force will remain valid except when it conflicts with the rules set in the Constitutional Declaration, or with new laws promulgated by the new legislature. This Declaration, unlike the initial Declaration of the Free Officers in Egypt,[100] established *"a free self-governing republic ... the Libyan Arab Republic"*.

In Egypt in February 1953, the Constitutional Proclamation established a government for a three year transitional period and confirmed that the Revolutionary Command Council maintained sovereign power and authority in the state.[101]

98. Abdul Hamid Metwalli [Constitutional law], 1956, p.83f.
99. Muhammad Kamal Layla [Constitutional law], 1967 pp.499-501.
100. The Egyptian monarchy was not abolished until July 1953, though Farouk was forced to abdicate in favour of his son soon after the coup in July 1952.
101. Article 8 provides that : *"The Commander of the Revolution shall, in the Revolution Command Council, be entrusted with supreme sovereign powers ... as well as the right to appoint and dismiss Ministers"*.

A new permanent Constitution was promulgated in 1956. This formula is common to Iraqi political change in 1963[102] and 1964[103], where again, the Revolutionary Command Council acted on its own authority in promulgating temporary Constitutions, but contrasts with Libya, where the Revolutionary Command Council, although possessing sovereign power and being the legislature, made the Constitutional Declaration in the name of the people, (article 18) and that authority would be exercised by the Command Council on their behalf.

It is clear that the legal system is likely to be deeply affected by revolutionary change and so, in this section, the focus is on the position of legislation in the revolutionary transitional period in Libya. Even though the Libyan Constitutional Declaration does not contain an explicit text protecting human rights for example, one can say that rights are granted, the authorities are bound by law to protect them and may be held accountable for their violation. The legislature's intention in this respect may be drawn from four sources. Firstly, as we saw, the Declaration itself, in Article 34, stipulates that all laws and legislation prior to the Declaration will remain in force, except the revoked Constitution of 7 October 1951 and its amendments, (Article 33), and other legislation which conflicts with the rules set out in the Declaration, as well as other legislation which contradicts future Revolutionary Declarations. Secondly, the legislature authorized the judiciary, during the revolutionary transitional period, to take into account in its judgements the protection of human rights until promulgation of the permanent Constitution.[104] The majority of jurists agree on the full competence and responsibility of the Libyan judiciary to protect human rights, and consider the constitutionality of laws which could undermine them in the transitional period, especially when, as Shukri argues, the legislator allowed by implication legislation and organs to operate in this period.[105]

Thirdly, the Libyan Supreme Court in 1970 adopted the same interpretation, sharing the view that the First Revolutionary Statement announced by the RCC on 1st September 1969, revoked only the monarchy and its political institutions of 7 October 1951, and not the Constitution and its legal institutions.[106]

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102. Article 19 of the temporary Iraqi Constitution of April 1963, states that this law is considered as constitutional law.
103. Constitutional Declaration of 22nd April 1964.
104. This authorisation is stated explicitly in Article 27 of the Constitutional Declaration which states that: "*the judiciary ... protect individual's rights, dignity and freedoms.*"
105. Muhammad Shukri [Lectures in constitutional law] 1972-73 (Libya University Faculty of Law) p.149f.
106. Likewise, the Second Announcement refers only to the invalidity of all the political institutions under the monarchical system, such as the Council of Ministers and the Parliament. It goes on to confirm the Revolutionary Command Council as the only supreme authority in the Libyan Arab Republic.

The Court confirmed that the matter of abolishing the *political* institutions is entirely different from abolishing a law, on the ground that legislation in force was not repealed according to the Constitutional Declaration. Another conclusion which may be drawn from this case is that the Supreme Court itself, in examining the constitutionality of a law, was exercising its judicial control of constitutionality of legislation under prior legislation, the Supreme Court Law of 1954.[107] This confirms that both organs and legislation continued to function under the new constitutional order.

Finally, since the Constitutional Declaration, in line with others,[108] can be seen only as a temporary guideline[109] in the transitional period for the establishment of the new order and organization of state institutions, hence, the question arises of the duration of this necessary transitional stage. Again, the Libyan Declaration,[110] stands silent in this matter, though an indication may be seen of the intention of promulgating a Constitution, from Article 27, which stipulates that : *"This Declaration will remain in force until the permanent Constitution be promulgated"*. By implication, one can say that only when a new Constitution is promulgated will the transitional period be at an end.

In Libya, in April 1973, the Head of the RCC called for the Abrogation of Laws[111], though this gesture did not go beyond a political declaration, and did not take any constitutional or other legal formula. In contrast, the legislature (the RCC) issued several acts and amendments to existing

107. The Court considered that the Election law remained in force, as democratic life could not be imagined without elections and legislation which would regulate them.
The Libyan Supreme Court judgement in case [No.1/12 J] of 11 January 1970, The Supreme Court magazine, the sixth year, the first ,second and third issue, April, 1970,pp. 42-43.
108. The Libyan Supreme Court judgement in case [No.1/12 J, of 11 January 1970], was based on its jurisdiction as a constitutional supreme court under Articles,14,15 and 16 of Supreme Federation Court Law, which was promulgated by a royal Decree on the 10th of November 1953, and its Amendment by the royal Decree of 3rd November 1954. The Supreme Court magazine, the sixth year, the first, second and third issue, April, 1970, pp. 42-43.
109. Like, for example, the Egyptian Constitutional Declaration issued by the RCC on 10th February 1953, which states in its preamble that its intention is to stabilise the rules of governing during the transitional period, and to organise the rights and duties of all citizens,
Muhammad Layla [Constitutional law], pp.502-503.
and the Iraqi Constitutional Declaration of 27th July 1958.
Muhammad Shukri Lectures in constitutional law 1972-73 (Libya University Faculty of Law), p.147f.
110. In creating a *"Progressive, Unifying, Democratic and national system"*, the legislature distinguished between the temporary and the permanent order in achieving the national and progressive revolution whose final goal is *"freedom, socialism, unity"*.
111. On 15 April 1973, the Head of the Revolutionary Council declared Five Points for the Continuation of the Revolution: the first was *"To Abrogate All Laws "*. According to the representative of the Revolution *"All laws at present should be cancelled while revolutionary work will continue to lay down new measures. The new measures will be based on laws which are compatible with what is actually taking place. This does not mean any threat to the life and security of the people. That will never happen because we are Moslems and apply the Islamic law. If you apply the law of God, it is impossible to wrong any person or threaten his security."* Other points were: To Purge the Country of the Sick Persons; Freedom of the People; Revolution Against Bureaucracy; and The Cultural Revolution.
C. Bezzina The Green Book : practice and commentary, 1979, pp.62-65.

laws, such as the amendments to the Penal Code by Law No.80 of 1975,[112] and the promulgation of additional laws in 1979 for economic offences,[113] and in 1975 for trade unions (act no.107/75). Legislation, in the form of acts, was promulgated in the years which followed, both on internal matters[114] and at the international level.[115]

Another major change in the Libyan order was the announcement of 2nd March 1977, of the Establishment of the People's Authority,[116] from which again, one could draw several assumptions with regard to the validity of the Constitutional Declaration of 11th December 1969. As we see, though in this action of 1977, the Libyan political order took a new turn, theoretically, the principle of constitutionality was not ignored, but remained an important factor in legitimizing political decisions. Other aspects of the Declaration stress the continuing validity of the role of law, for example, even though popular direct authority is the basis of the political system, the fact remains that the people exercise this authority by law, which defines the function of people's organisations.[117]

112. These amendments, according to Amnesty International, introduced harsher punishments for offences against the external and internal security of the state as well as illegal political activities, and significantly increased the number of offences punishable by death.
Amnesty International, Violations of Human Rights in the Libyan Arab Jamahiriya, 20 November 1984, p.11.
113. These laws, for example, The Law of Economic Crimes such as damaging oil installations, public institutions and depots of basic commodities, which provided for the death penalty.
Ibid. p.11
114. For example, the Labour Act no.58 of 1970, and Law no.106 of 1973 (as amended by Act no.53 of 1975), concerning health care. Social security was provided for the Libyan population by Act no.11 of 1980. Other acts were promulgated concerning the personal and family status of women, such as Act no.10 of 1984, and Act no.15 of 1984.
115. For example, Act no.37 of 1976, by which Libya ratified its accession to some of the ILO Conventions.
116. *"The Libyan Arab People ..., in keeping with the first Declaration of the revolution ... guided by the principles set forth in ... the Constitutional Declaration issued on 2 Shawwal 1389 A.H. (corresponding to 11th December 1969) ... believing in the objectives of the glorious revolution ... to establish a system of direct democracy ... which embodies the rule of the people over the land of the glorious revolution of 1st September and establishes the authority of the people, which is the only authority ...".*
117. C. Bezzina The Green Book : practice and commentary, 1979, p.66f.
An brief examination of the structure of the Libyan congresses may be found in Jonathan Bearman Qadhafi's Libya, 1986, pp.145-56. An examination of the Arab Socialist Uion in Libya may be found in Henry Habib Politics and government of revolutionary Libya, 1975.

We have seen how colonial policy aimed at the division of colonised society on religious, ethnic and linguistic grounds. This policy has enhanced the significance of minority groups in the contemporary legal and political order, with lasting implications.

The aim of international legal protection of minorities[118] has undoubtedly shifted in approach from the protection of groups to the protection of individual rights, with the earlier focus on the rights of such groups to self-determination giving way in the new international legal order, after the achievement of independence by many former colonial territories, to a concentration on the principle of non-discrimination and encouragement of integration.[119]

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118. The United Nations Subcommission on the Prevention of Discrimination and Protection of Minorities formulated a definition of minority focusing on *"only those non-dominant groups in a population, which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics, markedly different from those of the rest of the population"*. Further, such minorities must be *"loyal to the State"*.

This formulation may be criticised on a number of grounds. Firstly, it is clear that minority status may be imposed on a group so that the will to preserve identity may then be the result and not the cause of minority status. Secondly, a non-dominant group may actually be a majority within the population. Colonial boundaries, as we saw, and the exploitation of religious and ethnic divisions, made tribes, for example, involuntary minorities throughout North Africa. Thirdly, the requirement of loyalty to the State is clearly inappropriate where a minority is the dominant group, like the ruling minority Alawi group in Syria, the Gathaftha tribe in Libya and the al-Saud family in Saudi Arabia.

A more useful definition might provide that a minority is a group in a country which possesses, and has a common will (however conditioned) to preserve certain habits and patterns of life and behaviour which may be ethnic, cultural, linguistic or religious or a combination of them, and which characterise it as a group. This definition is based on the understanding of the Permanent Court of International Justice in the Greco-Bulgarian Communities Case (1930). Such a minority may be politically dominant or non-dominant.

Another definition prepared by the Special Rapporteur for the Subcommission (in the Capotorti Report, 1977) defines minority as : *"a group numerically inferior to the rest of the population of a state in a non-dominant position, whose members - being nationals of the state - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population, and show if only implicitly, a sense of solidarity directed towards preserving their culture, traditional religion or language"*.

James Fawcett The International protection of minorities, Minority Rights Group Report, 1979

119. The protection of minorities has long been the subject of international legal instruments, through treaties such as the Treaty of Berlin (1878). The Wilson-Miller Draft of the Covenant of the League of Nations sought to give expression to the protection of minorities, for example, *"The League of Nations shall require all new States to bind themselves, as a condition precedent to their recognition as independent or autonomous States, to accord to all racial or national minorities within their jurisdiction exactly the same treatment and security, both in law and in fact, that is accorded to the racial or national majority of their people."*

The Minorities treaties, concluded after World War One, contained common provisions, setting the standards for the protection of minorities, such as an *"equal right to establish, manage and control, at their own expense, charitable, religious or social institutions, schools or other educational establishments"* and to have an *"equitable share in public grants"* for such purposes. The minority language was to be used freely and instruction in schools was to be conducted in the minority language in towns or districts where a considerable portion of nationals of the country whose mother tongue is not the official language reside. The Treaties placed the protection of minorities under League of Nations guarantee, and a number of countries, including Iraq, made declarations undertaking to protect their minorities on being admitted as members of the League of Nations.

The next stage was the move to protection of minorities through the principle of non-discrimination and hence the process of integration, which was reflected in the opinion of the Permanent Court of International Justice, for example, in the Minority Schools in Albania case, which described the principle underlying the minorities treaties as securing *"for certain elements incorporated in a state, the population of which differs from them in race, language or religion, the possibility of living peacably alongside that population and cooperating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority and satisfying the ensuing special needs."* The Court also pointed out that additional measures may be required to secure *"equality in fact"* : *"Equality in law precludes discrimination of any kind : whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations."*

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This is reflected in the human rights provisions of the United Nations Charter which emphasises the principle of non-discrimination, as does article 2 of the Universal Declaration of Human Rights. The International Convention on the Elimination of All Forms of Racial Discrimination goes further in setting the scope of protection of rights, by prohibiting racial discrimination,[120] against *"persons, groups of persons, or institutions"*, and it allows distinctions made between citizens and non-citizens.[121] In contrast, the Political Covenant, in article 27, provides explicitly for the protection of the interests of minorities,[122] although as with the other rights safeguarded by the Covenant, the rights are guaranteed to individuals rather than groups. This provision seeks to achieve the *"equality in fact"* mentioned in the opinion cited above.

Thus, it can be said that international legal protection[123] has moved from the protection of minorities through separation, expressed in the principle of self-determination, to integration, expressed through the principle of non-discrimination, with emphasis on the achievement of equality in fact, which may require special measures. Confirmation that the principle of non-discrimination has gained considerable ground in the international approach to the minority question is found in the establishment of the Subcommission on the Prevention of Discrimination and Protection of Minorities, which has focused on discrimination in respect of specific rights, examining submissions from non-governmental organizations.

It is undeniable that the minority issue has been and remains a factor contributing to the instability of the political order in the Middle East,[124] where cohesive minorities present a challenge to governments

120. Which it describes as *"any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, engagement or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life"*.
121. This provision is accompanied by the requirement that provisions dealing with nationality, citizenship and naturalization should not discriminate against any particular nationality.
122. A study of the implementation of article 27 of the Political Covenant was initiated by the Subcommission on the Prevention of Discrimination and Protection of Minorities, and Special Rapporteur Francesco Capotorti submitted his report in 1977. Its conclusions, which included a recommendation for bilateral treaties between concerned parties, were adopted by the Subcommission. It further proposed that the Human Rights Commission draft a Declaration of Minority Rights, within the context of article 27. Though a Yugoslav draft declaration was used as a starting point, work on the declaration has not progressed far to date. The draft rejects the numeric criterion adopted in Capotorti's definition of minority and prescribes full equality with the rest of the population, and gives strong support to the principle of non-interference in internal affairs, through *"strict respect for sovereignty, territorial integrity and political independence"*.
123. The International Labour Organisation has adopted a Convention on Indigenous and Tribal Populations (107/1957). It does not provide for their right to self-determination, since it describes their social and economic conditions as being at a less advanced stage than other parts of the national community, and their *"status as regulated wholly or partly by their own customs or traditions or by special laws"*. The aim of the Convention appears to be the *"progressive integration into the life of their respective countries"*, according to article 1, although it provides that national integration must exclude *"artificial assimilation"*, according to article 2.
124. R.D. McLaurin (ed) The political role of minority groups in the Middle East, 1979.

where the political order or government in power are fragile. Alienation has meant that group loyalties are often stronger than loyalty to the state, and so state policies must attract the support of minorities or minimise the effect of their opposition. In addition, minority groups are often associated with illegal changes of government, for example, following *coups d'état*,[125] while minority groups in power may modify the political and legal order itself.[126]

Minorities in the region[127] fall into a number of categories - linguistic, religious and racial - and exist at a number of levels. They hold power in several states, are in revolt from the political order in some states and are subject to the process of assimilation in others. Clearly minorities may exist within the borders of nation-states, or, like the Kurds, Berbers and Armenians, form transnational minority groups. Besides these classical minority groupings, other groups in the region may be viewed as having minority status, such as political opposition and some professional groups.

The approaches and policies of governments in the region to the minority question take a number of forms, sometimes conditioned by the nature of the real or perceived threat to the government itself, the political order or the integrity of the national territory. From governments which face the threat of secession by a minority to governments which face challenges from groups seeking a greater share of power in the state, policies vary according to the perceived threat. Where the minority question is acknowledged to exist, legal policies adopted by governments vary. Positive measures include the granting of limited autonomy within the national territory, or integration through a process of assimilation. More widespread are policies based on the belief that minority groups pose a threat to the government or political order. Measures taken include the restriction of political rights for members of the minority, in particular, of its leadership, and restrictions on expressions of minority identity.

Extreme measures include violation of the civil rights of minority populations, mass deportations[128] and even policies which amount to genocide.[129]

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125. The minority Kurdish and Iraqi Communist groups participated in coups in Iraq during the early sixties.
126. This is clear in the case of Syria, where for more than twenty years, the Alawi minority has controlled political power, and most aspects of domestic and foreign policy.
127. The creation of minority groups in the region has been attributed to some extent to the policies of colonial rulers and the boundaries they left. For example, the present position of the Hashemi family in Jordan was largely as a result of British colonial policies in the Fertile Crescent, and colonial boundaries made the Berber population a transnational minority throughout North Africa, in Libya, Algeria and Morocco. Development too has created a large minority class of migrant workers within many Gulf states and elsewhere. These migrant groups comprise several categories, including other Arab nationals and non-Arabs.
128. Migrant workers in particular are subject to mass deportations, often because of disputes between host governments and those of the countries of which migrant workers are nationals.
129. Mass killings of political opponents have occurred in a number of countries, including Iraq, where the Kurdish minority is a target, according to Amnesty International.
See, for example, Amnesty International Newsletter vol. xix, number 3 March 1989.

In some countries, the issue of minorities is not officially acknowledged by the government, who nevertheless adopt policies ranging from assimilation to suppression, sometimes in association with other governments.[130]

A distinct category of minority in the region is that of the minority in power,[131] whose policies tend to focus on the retention of power, through the granting of positions in government, the armed forces and so on, and may affect the political order itself.[132] The minority may base its power on political, military or economic superiority, or on religious or cultural identity. Some minority groups find themselves in power in traditional societies which, as we will see, have not adapted in response to change. For example, the political and legal order of Saudi Arabia has not changed to accommodate contemporary political ideas.

While sectarian differences underlie aspects of the political and legal order in Syria, in Saudi Arabia, the ruling family of Sa'ud is sustained by a narrow interpretation of Islamic doctrine, which has led to political stagnation.[133]

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130. For example, radical and conservative governments alike joined to oppose the candidature of the Arab Lawyers Union for consultative status within ECOSOC in 1987.
A. Youssoufi "Human rights in Arab countries" Review of International Commission of Jurists, 39/87.

131. Technically, the situation in Qatar and United Arab Emirates is that a minority government of nationals rules a population which contains a majority of aliens. Religious minorities in power have included the Maronites in Lebanon and the Alawis in Syria.

132. Since the fifties in Syria, power has been held by the Alawi sect, a minority religious group, whose rise to political power through the army and the Ba'th party during the fifties and sixties illustrates a phenomenon which can be seen elsewhere in the Arab world.
Their rise to power began after the Druze revolt against the Shishakli government, when many Alawi joined the military and political parties. Military service offered an opportunity to the Alawi, who had gained key positions in the officer corps and the ranks, during the French mandate, since unlike the Sunni majority who did not cooperate with the French authorities, the Alawi were encouraged by the French policy of recruitment of minority groups, part of their wider policy of fragmenting opposition.
The many *coups d'état* in the fifties had depleted the officer corps of Sunnis, through purges and transfers, leaving the Alawi in key positions in the sixties. Both major political parties, the Ba'th party and the Syrian Social National Party, who also recruited Alawis to their membership, saw the army as a way of securing power. The Alawi were attracted to secular parties, because of their religious minority status, though they did not support Nasser's appeal to pan-Arabism. After the dissolution of the United Arab Republic, the position of the Syrian Socialist National Party was considerably weakened, leaving the Ba'th party as the most effective political channel for the Alawi.
A detailed description of their rise to power may be found in Nikolaos van Dam, The struggle for power in Syria, 1979. See also, Patrick Seale The struggle for Syria, 1965; Robert W. Olson The Ba'th and Syria, 1982.
Since in power, it is clear that the Alawis have consolidated their control of the Syrian administration and armed forces by Alawi appointments to key posts, and by purges of opposition.
The aim of securing the position of the Alawi is also clear from legislative measures and administrative actions, particularly those directed against Sunni Muslim opposition. For example, membership of the Muslim Brotherhood is a capital crime in Syria, according to Decree No. 49 of July 1980 (which is retroactive), and Amnesty International have reported mass killings in the early 1980s.
Amnesty International Yearbook 1982.
Conflict of a sectarian nature surfaced at the promulgation of the new Constitution in 1973, when the failure to name Islam as state religion led to urban riots. The Constitution reflects a policy by the administration of diminishing the role of Islam in favour of secular socialism, and minimising the role of the Sunni Ulama.
Peter Gubser "Minorities in power : the Alawites of Syria" R.D. McLaurin (ed) The political role of minority groups in the Middle East, 1979.

133. For example, political participation has not developed beyond tribal consultation, political parties and trade unions are prohibited, and there is no effective opposition to the ruling family.

Besides religious minorities in power, other countries in the region are led by minority groups of an ethnic nature. In Libya, for example, considerable power is exercised by the minority Qadhadfah tribe who have carried out Gadaffi's policies, whether these have adopted the tone of Arab nationalism or the *"Third Universal Way"*. Another category of minority which undermines the stability of the political and legal order in the Middle East is that of the minority in revolt. The Kurds, the Saharawi[134] and the South Sudanese[135] are among the most striking examples of minorities who are seeking separation from the existing political order.

One of the largest minority groups in North Africa is the transnational Berber population, who live throughout Libya, Tunisia, Algeria and Morocco.

134. In 1975, Morocco occupied the former territory of Spanish Sahara, claiming it as part of Greater Morocco, although the United Nations and the International Court of Justice rejected the Moroccan claim, saying that it did not find *"any tie of territorial sovereignty"* between Western Sahara and Morocco. Since 1976, the Polisario Front has conducted an armed campaign to reclaim the Saharawi Arab Democratic Republic, while its population has been largely confined to refugee camps inside Morocco and Algeria. The Republic was declared in 1976 and is now recognised by more than 70 countries, including Algeria, which has in the past provided strong support.

In 1988, the UN called for a cease-fire, which should be followed by a referendum, in which the population of the occupied territory would choose independence or integration with Morocco. Details of the referendum were disputed between the Polisario and the Moroccans. For example, the Moroccans insist that the Spanish census be used as the basis of electoral lists.

The minority question in the West Sahara must be regarded as the creation of the Moroccan government. The decision to occupy Spanish Sahara followed a number of attempted army coups against the monarchy, and must be seen as a measure intended to divert the army from the political struggle, which reached its heights in the seventies. While thirteen years of war have undoubtedly placed strains on the Moroccan national economy, (the construction of a 1000 mile desert wall is estimated to have cost £ 500 million, and the cost of its defence is said to be £ 1 million a day) its claim to the territory, untenable in international law, is maintained for reasons of national policy.

The latest position of the Moroccan government on the referendum illustrates classic elements of the minority issue, identified earlier. While the referendum offers the choice between separation and integration, the Moroccans have now suggested that integration might be achieved by the granting of limited autonomy within the Moroccan state or a future Maghreb federation.

The issue of the Western Sahara is interesting for the light it sheds on the effects of the minority issue in the regional context. The changing attitudes of neighbouring states reflect the political use which can be made of the minority question by hostile or friendly governments. Algeria, for example, from the earliest stage a supporter of the Polisario Front and one of the first to recognise the Saharawi Arab Democratic Republic, provided military and political support throughout the war with Morocco. Since 1987, however, diplomatic contacts between the Algerian and Moroccan governments have suggested a shift in Algeria's position, and it may be that recent peace talks between Morocco and the Polisario leaders reflect this change.

Although Libya has supported the Front, politically and militarily, against Morocco in the past, some contacts between the two governments have suggested that Libyan interest is in making political use of the conflict. For example, the treaty of federation between Libya and Morocco of August 1984 was followed by a security agreement, according to which nationals of each state could be forcibly repatriated, perhaps to face political charges. The agreement, which led non-governmental organizations to voice concern, also banned all political activities *"against the other side"*.
Amnesty International Yearbook, 1985.

Such a treaty clearly undermines any support that the Libyan leader might give to the Front. It also illustrates the temporary nature of the support any Arab government may give to another state's political opponents, another form of minority group, as we have seen. Exiled members of Libyan opposition have been returned by Morocco to Libya, where they were executed. In 1983, for example, 'Uma al-Mahayshi, was executed in Libya after being deported from exile in Morocco.
Amnesty International Yearbook, 1988.

135. Sudan under Nimeiri sought secularization as a means of diffusing conflict between north and south, a strategy abandoned by the declaration of the Islamic state before his fall from power.

Where the government of a country acknowledges that the minority question exists, Berbers are the subject of official policies of assimilation. In other countries, however, governments deny that the Berbers constitute a distinct ethnic group, on the grounds that their populations are homogeneous.[136] Policies of these governments too are based on assimilation.[137] There is little transnational political unity among the Berbers,[138] though within each of the countries they inhabit, Berbers have taken part in activities against the national governments.[139]

The influence of the Berbers in political life in North Africa, like that of any other group out of power is limited. Added to restrictions on political life in general, the Berber social structure means elections are dominated by the system of patronage and obligation, which can be seen elsewhere in the region, and which limits the independence and effectiveness of any candidate.

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136. The Moroccan government, for example, has said that Morocco's national unity has withstood many attempts to destroy it, *"attempts sometimes based on alleged differences of language or at least of dialect, and sometimes on imagined ethnic or at least geographical differences ... "*.
CCPR/C/10/Add.2 of 19th February 1981, p.8.
The Algerian government has said that its population is homogeneous, and that it has never conducted censuses based on ethnic origin, as this would be *"contrary to the principles of Islam"*. The National Charter describes national policy as *"strengthening the national personality and .. the collective identity of the people"*.
CERD/C/158/Add.2 of 3rd April 1987, p.4.
The National Charter states that the Algerian population is *"not a collection of disparate people or a collection of disparate ethnic groups. The nation is the people itself seen as a historical entity, acting consciously in daily life and within a clearly defined territorial context with a view to carrying out, with all the citizens which comprise it, the communal task of a joint destiny and sharing the same trials and the same aspirations"*.
137. Throughout North Africa, Berbers are being assimilated into the Arab population. Their territorial dislocation began with forced relocation by the French, and the process has continued throughout North Africa as many Berbers, displaced from their traditional homes, sought employment in the new urban industries and abroad. Assimilation policies implemented by central governments continue the colonial policies of diminishing the role of traditional leaders by substituting government appointees, and weakening tribal ties, for example, by nationalising tribal lands. Another policy common to North African governments is Arabization, which stresses the Arabic language and Arabic culture. In Algeria, state policies indicate in addition, an attempt to weaken Berber culture, for example, by restricting Berber language broadcasts in 1971 and discontinuing the Berber Dialect Chair at the University of Algeria in 1973-4. The National Charter continues to stress the Arab and Islamic character of the Algerian nation, although sporadic Berber unrest indicates the dissatisfaction of this community. The interpretation of Berber unrest manifested, for example, in April 1980 after the banning of a conference on "Ancient Berber poetry" at the university of Tizi Ouzou, is controversial. The western media interpreted the unrest as expressing ethnic conflict between Arab and Berber, reflecting the traditional Orientalist view, "the Kabyle myth", while the Algerian media blamed the unrest on external agitators, representing the forces of neo-colonialism. A more credible interpretation of the unrest, which was popular in character, is that it represents a response to the decreased margin of intellectual and cultural freedoms allowed by state socio-cultural programmes, such as Arabization.
Rachid Tlemcani State and revolution in Algeria, 1986, pp.198-203.
Another policy is the promise of special development aid to Berber regions. While the Moroccans failed to fulfil these promises, the Algerians have included Berber areas, particularly the Kabyles, in their development plans, including schools, housing, roads and agricultural loans. Similarly, the Libyan government has included Tuaregs in development plans. Algerian assimilation has also led to Berbers being assigned a proportionate share in public service.
William E. Hazen "Minorities in assimilation : the Berbers of North Africa" in R.D. McLaurin (ed) The political role of minority groups in the Middle East, 1979.
138. Berbers in Tunisia and Morocco supported the Algerian struggle against the French, though this was not an independent policy, as the Moroccan and Tunisian governments also supported the rebellion.
139. In Morocco, prominent Berbers were involved in an attempted coup, and many members of the Polisario Front are Berbers. In Algeria, Berbers were involved in resistance against Ben Bella in 1963 and 1964.

The Kurds represent an ethnic and linguistic minority in five countries,[140] and Kurdish nationalism has grown during the twentieth century, since their case for independence was recognised by the Allied Powers after the First World War, during the Paris Peace Conference in 1919, from which came the Treaty of Sèvres (1920).[141] The Treaty, which did not come into force as a result of political change in Turkey, represents the nearest the Kurds have come to an independent state.

This section is not a detailed study of the long and complicated struggles of the various Kurdish communities for autonomy or independence, but concentrates on the Iraqi Kurdish community, and the approach of the Iraqi legal order to the question, which was initially based on a policy of integration,[142] and the granting of limited autonomy, despite the failure of successive Kurdish leaders to make a coherent response to its legislative proposals. Ironically, the present Ba'th government in Iraq, while it has recognised Kurdish rights to a greater extent than other countries in the region, has found itself increasingly at conflict with the Kurds.

Despite several changes of government in Iraq during this period, the Kurds were unable, in part because of continuing rivalry between nationalist leaders which prevented the establishment of a united front, to make any real steps toward autonomy. In 1970, the *Ba'th* government announced an agreement with the Kurdish Democratic Party, which provided for the first time, a large measure of autonomy for the Kurds. It provided for the amendment of the Iraqi legal order, to give explicit

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140. Significant communities of Kurds live in Turkey, Syria, the Soviet Union, Iran and Iraq.

141. The treaty stated that a Commission composed of Allied appointees would "*prepare for local autonomy in those regions where the Kurdish element is preponderant, lying east of the Euphrates, to the south of the still-to-be established Armenian frontier, and to the north of the frontier between Turkey, Syria and Mesopotamia*" (article 62).

Article 64 states : "*... if, after one year has elapsed since the implementation of the present treaty, the Kurdish population of the area designated in article 62 calls on the Council of the League of Nations and demonstrates that a majority of the population in these areas wishes to become independent of Turkey, and if the Council then estimates that the population in question is capable of such independence and recommends that it be granted, then Turkey agrees, as of now, to comply with this recommendation and to renounce all rights and titles to the area ... If and when, the said renunciation is made, no objection shall be raised by the main Allied powers should the Kurds living in that part of Kurdistan at present included in the vilayat of Mosul seek to become citizens of the newly independent Kurdish state.*"

David MacDowall The Kurds, New ed., 1985, p.11.

142. Before the *Ba'th* party came to power in Iraq for a second time in 1968, the Kurds had achieved a measure of recognition within the Iraqi Constitution of 1961, which stated that : "*The Kurds and Arabs are partners within this nation. The Constitution guarantees their rights within the framework of the Iraqi republic*".

Despite this recognition and the achievement of ministerial office by a number of Kurds, war broke out late in 1961 between the Kurds and the Iraqi central government, and conflict continued sporadically until 1970. In June 1966, the civilian Prime Minister Bazzaz put forward a twelve-point plan. "*A permanent Constitution will guarantee the equal rights and duties of Kurds and Arabs, (Point 1). This will be realised by a provisional law, which is to be promulgated 'on a decentralized basis'. Each province, district and sub-district will have its own elected council, exercising wide powers in education, health and other local affairs, (Point 2). The Kurds will be represented in the national Council in a percentage proportionate to the whole population. Then they will have equal opportunity of taking public employment. Provision is made for Kurdish to be an official language, for scholarships being awarded to Kurds, and for a free Kurdish press. Compensation will be paid to the war victims and their families, and funds will be spent on reconstructing the Kurdish areas.*"

Bulletin of International Commission of Jurists, 31, 1967 p.39.

recognition of Kurdish nationality in the Constitution,[143] the participation of Kurds in government,[144] the recognition and promotion of Kurdish language and culture, economic development and agrarian reform within the Kurdish region, and most important from our point of view, the establishment of an autonomous Kurdish region.[145]

The next opportunity for the Kurds to pursue their nationalist ambitions seemed to come with the outbreak of war between Iraq and Iran in 1980. Without examining the role of the Kurds in the nine-year struggle in detail, it must be said that the Kurdish minority became the instrument of interested powers, as they attempted to take advantage of the preoccupation of their governments to pursue a policy which now moved from demands for autonomy to demands for virtual separation.[146]

Legislative measures undertaken by the Iraqi government illustrate a policy of integration, granting some degree of autonomy as an alternative to Kurdish independence. We have already seen some of the provisions of the 1970 autonomy agreement, partially implemented in 1974 and the years which followed. One of the terms was the amendment of the Constitution to acknowledge the position of the Kurdish minority.[147]

Autonomy is granted to the Kurdish region in article 8 of the Constitution,[148] and it is regulated by other legislation such as Revolutionary Command Council Decision 288 of 11th March 1970, which

143. The Constitution was to be amended to read : *"The Iraqi people consist of two main nationalities : the Arab and Kurdish nationalities"*.
144. It proposed a Kurdish vice-president and key ministerial positions for Kurds.
145. The agreement, which was to be implemented within four years, was signed by Barzani, but splits within the Kurdish movement again prevented any progress. Although the government began unilateral implementation of parts of the agreement during the early 1970s, the Kurdish leadership again found itself in conflict with the Baghdad government.
Points of dispute included the question of the Kurdish candidate for the Vice-Presidency, the question of the extent of the Kurdish area, and the demands of the Kurds for decentralisation, through economic resources and territorial independence. Conflict focused on the status of Kirkuk, desired by each side for its rich oil resources. Barzani accused the government of trying to change the demographic balance in the region by settling Arabs there, while the government offered to use the 1965 or 1957 census. Barzani and the KDP insisted, after nationalisation, on a proportion of the oil revenue from Kirkuk. This was clearly unacceptable to the Iraqis. The KDP also suspected that the Iraqis would continue to intervene in Kurdish local affairs, while the Iraqis accused the KDP of wishing to form a state within a state.
146. By 1983, when the Iraqi government was weakened by the continuing conflict, the Popular Union of Kurdistan had the opportunity to press once again for regional autonomy. The Iraqi government agreed to some Kurdish demands and agreed to discuss others in return for an end to hostilities in northern Iraq. The demands included : an extension of the autonomous region to include Kirkuk and other areas; an end to Arabization, the return of displaced Kurds to the Kurdish area and the removal of the *"no-man's land"*; clear autonomous powers save in respect of foreign affairs, economy and defence; members of the executive to be elected by the legislature; reconstruction of cultural life with Kurdish as official language; establishment of a Kurdish University at Sulaymaniya; constitution of pesh mergas as the force guaranteeing autonomy; security of the region to be regional rather than national responsibility; 30 % of oil revenue to be allocated to the development of Kurdistan.
147. Article 5 of the current Constitution provides : *"(a) Iraq is part of the Arab nation; (b) the Iraqi people consists of two main ethnic groups : Arabs and Kurds. This Constitution recognises the ethnic rights of the Kurdish people, as well as the legitimate rights of all minorities, within the framework of Iraqi unity"*.
148. These are : *"(a) One of the vice-presidents of the Republic must be a Kurd; (b) In administrative units where the majority of the population is Kurdish, civil servants must be Kurds or proficient in the Kurdish language; (c) There must be no discrimination between Kurds and others in regard to access to public office, including key positions in the State such as ministers and army commands, subject to the requirements of competence."*

contains general guidelines for autonomy.[149]

Act no.33 of 11th March 1974, subsequently amended by RCC Decision 28 of 20th September 1978, sets further principles on which Kurdish autonomy is based.[150] The region of Kurdistan enjoys autonomy, being regarded as a separate administrative unit,[151] with distinct personality though remaining *"within the framework of the legal, political and economic unity of the Republic of Iraq"*.

With the exception of powers invested in the institutions of the Kurdish autonomous region, all authority is exercised by the central institutions of Iraq, and departments of the central authority within the region are subject to the jurisdiction of the ministries to which they belong, though autonomous institutions may report on such departments to the ministries concerned. The principal autonomous institutions are the Legislative Council[152] and the Executive Council.[153]

149. The region remains an *"inseparable part of the territory of Iraq"* and its population *"an integral part of the Iraqi people"*. The Act places the responsibility for safeguarding the rights and freedoms of the population of the autonomous region with the autonomous administration, in article 3. Arabs and minority groups are represented in autonomous institutions in numbers proportionate to their numbers in the region. It also regulates the position of the Kurdish language, regarded, along with Arabic, as an official language of the region and a language of education.

150. *"The region in which the majority of the population are Kurds shall enjoy autonomy in accordance with the provisions of the law"*.

An English translation of Act no.33 of 11th March 1974 is contained in CCPR/C/37/Add.3 of 18th July 1986, p.54f.

151. The composition of the Legislative Council is regulated by Act no.56 of 15th March 1980. Its members are chosen by secret ballot in free and direct public elections, and each member of the Council represents the entire population of the autonomous region. A member of the Legislative Council may not also be a member of the National Assembly. Any citizen who meets the legal requirements may become a candidate for membership of the Council.

It may adopt legislative measures, such as, those needed to develop the region within the general policy of the State; to develop the culture and traditions of the people of the region; concerning semi-official departments, institutions, and agencies of a local nature. It may also approve planning proposals prepared by the Executive Council dealing with socio-economic affairs, development projects, education, health and employment, in accordance with the central planning of the State. It may hold discussions with the Executive Council on matters within its own responsibility. It meets at Arbil, elects its officers by secret ballot and its term of office is 3 years. It holds 2 annual sessions, whose duration may be prolonged for a month by the President of the Republic or by a majority of members of the Council, where it considers legislative measures, which may be proposed by the Executive Council or 10 members of the Legislative Council.

152. The Executive Council is accountable to members of the Legislative Council on matters within its scope, and the latter may propose a vote of no-confidence in the Executive Council or any of its members. The Council, which contains a president, vice president and members from each autonomous department, exercises a number of functions, which include : enforcement of laws, regulations and court orders; the administration of justice and preservation of security; the promulgation of decisions adopted by the Legislative Council. It also prepares draft plans for development in the autonomous region and supervises local public facilities and institutions. It is also responsible for the appointment of civil servants, where this does not require a presidential decree, administers the region's budget and prepares an annual report on the region, which is submitted to the President of the Republic and the Legislative Council.

153. The president of the Executive Council of the autonomous region attends meetings of the Council of Ministers, and the secretaries-general of branches of autonomous administration may become members of the councils of ministries to which their branches are related. Supervision of the legal validity of decisions taken by autonomous institutions is exercised by a body established at the Iraqi Court of Cassation, consisting of the President of the Court and 4 members chosen by the Court from its members. Decisions taken by legislative institutions of the autonomous region are transmitted to the Minister of Justice, who may lodge an appeal against their validity with this special body. Such measures are suspended until the delivery of a judgement on its validity, which must be delivered within 30 days of the lodging of the appeal. Decisions found to be legally invalid are regarded as null and void. This procedure is distinct from that which operates in Iraq as a whole where there is no special organ concerned with the constitutionality of laws, and the only mechanism seems to be through the National Assembly.

After this brief review of the emerging constitutional order in the Arab countries, the next section examines the legislatures' approach to the rule of law, and the principle of legality. An indication of the supremacy of principles of law, such as separation of powers and equality before the law as expressed in Arab Constitutions, may be drawn from articles which emphasis adherence to the rule of law as the basis of legality[154] and stress the supremacy of law.[155] Even states which lack a substantial body of positive law, such as Saudi Arabia and Oman, stress that *Shari'ah* has supremacy over all authorities. Most Arab Constitutions identify the rule of the law as the framework within which the freedoms and rights of individuals are secured and regulated.[156]

The principles of separation of powers[157] and the independence of the judiciary[158] are upheld by constitutional texts throughout the legal order. Provisions safeguarding the independence of the judiciary take several forms : some stress that no interference in the judicial process is tolerated, while others emphasise the independence of judges, provide that their activity is regulated by law[159] and that they are subject only

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154. In Egypt, the 1971 Constitution emphasises the adherence of its order to the rule of law, which it describes as the sole basis for legitimate authority, in the preamble : : *"the achievement of freedom for the human personality of every Egyptian, in full awareness of the fact that the humanity and dignity of every individual is the guiding principle which has directed the course of man's tremendous progress towards his highest ideals. The dignity of the individual is a natural reflection of the dignity of the nation since the individual is the corner-stone in the structure of the nation which derives its status, strength and prestige from the value, work and dignity of its individual members. The rule of law, apart from being a necessary guarantee of individual freedom, is also at the same time, the sole basis for the legitimacy of authority"*.
Public bodies and institutions are committed to the principle of the sovereignty of law as the basis of rule in the state, as emphasised in article 64 of the Constitution.
155. For example, the Constitution of 1973 stresses the rule of law in Syria in article 25 (ii), which states: *"the supremacy of the law is a fundamental principle in society and the state"*, while the Libyan Constitutional Declaration of 11 December 1969, like the revoked Constitution of 1951, declares its adherence to the rule of Law.
156. The legal framework within which Algerian citizens enjoy and exercise rights may be seen in the Constitution and National Charter. Chapter IV of the Constitution is devoted entirely to fundamental freedoms and human rights, which should not be affected by any proposed revision of the Constitution. This is stated in article 195, which describes human rights as having a supra-constitutional character. The National Charter emphasises, among other objectives, that : "... *the Algerian State guarantees real freedom of the individual ... prepares the objective conditions that enable citizens to exercise their fundamental freedoms and their rights within the framework of the law ...*".
Article 27 of the Syrian Constitution states that : *"citizens exercise their rights and enjoy their freedoms in accordance with the law"*.
157. As we saw, in Tunisia, the Constitution, in its preamble, emphasises the important principle of the separation of powers, as does the Syrian Constitution, which proclaims the principle of the separation of the legislative, executive and judicial powers.
158. For example, article 165 of the 1971 Egyptian Constitution states that the judiciary is independent. The principle is also established in article 63 of the Iraqi Constitution and has been confirmed by a number of legislative acts, including Act no.160, 1979 concerning the structure of the legal system. The 1970 Constitution of the Yemen Arab Republic provides that the judiciary is independent and controlled by no authority save the law, (articles 144-5).
Article 131 of the Syrian Constitution guarantees the independence of the judicial authority, and the Moroccan Constitution establishes the judiciary's independence from other powers in article 76. The independence of the judiciary is guaranteed in the Jordanian Constitution, in article 97.
159. For example, the Egyptian Constitution, in article 70, stresses that the judiciary is the only authority competent to issue orders affecting individual freedom. Act no.35 of 1984 was promulgated to amend provisions of the Judicial Authority Act no.46 of 1972, establishing and regulating a Higher Council of the judiciary and guaranteeing judicial immunity to members of the Department of Public Prosecutors.
CERD/C/149/Add.22 of 30th January 1987, pp.16-7.

to law in the exercise of their duties.[160]

All these constitutional provisions aim to provide a secure judicial framework in which the rights and freedoms of citizens may be protected. The Algerian legislator, for example, stressed the role of the judiciary in safeguarding the rights of citizens, in both the Charter, which states *"... the judges are called upon to play an important role in view of the fact that they are invested with the power to interpret the laws and apply them under the auspices of the Supreme Court ..."* and article 164 of the Constitution, which provides that : *"The courts shall guarantee for all the legitimate protection of their fundamental freedoms and rights."* We saw a similar intention in the declaration of the revolutionary legislature in Libya in 1969.

Protection for individual liberties tends to be guaranteed in the constitutional order on a basis of equality. The principle of equality before the law is widely found in Arab Constitutions, of monarchies[161] and republics[162] alike. The general statement of the principle often contains a reference to the principle of non-discrimination. The principle is modified, however, by ideological considerations, in a number of

160. For example, article 166 of the Egyptian Constitution provides : *"Judges are independent in the administration of justice. They are subject to no other authority save that of the law. No authority whatever has the right to interfere in pending cases or in the affairs of justice"*. Likewise, the Algerian Constitution, in article 172, provides that : *"Judges shall be subject only to the law."* Chapter V of the Tunisian Constitution provides, in article 65, that : *"Judges shall be independent. They shall be subject to no higher authority in their judgement, but that of the law"*. The Higher Council of the Judiciary regulates the appointment and conduct of judges and an organic law, Act no.67-29 of 14th July 1967, governs the status of judges.

Article 28 of the Libyan Constitutional Declaration states : *"Judges shall be independent. In the exercise of their functions, they shall be free from any authority except that of the law and their conscience."* Article 133 of the Syrian Constitution stipulates that judges are independent and subject only to the law. Judges are appointed by a Supreme Judicial Council presided over by the President, and containing the Minister of Justice and the President of the Court of Cassation, and the Presidents or members of other courts, and they may not be suspended, dismissed or transferred without the Council's approval, according to Chapter 3 of the Constitution.

Article 98 of the Jordanian Constitution provide that judges must be appointed and dismissed by royal decree, in accordance with the law. According to article 101, courts are open to all and protected from interference. In North Yemen, the 1970 Constitution provides for the establishment of a technical *Shari'ah* body to assume responsibility for defining *Shari'ah* rules in relation to commerce.

161. Article 5 of the Moroccan Constitution provides : *"All Moroccans are equal before the law"*, and the Jordanian Constitution, in article 6, provides that all Jordanians are equal before the law, and that there shall be no discrimination between them with regard to their rights and obligations, on grounds of race, language or religion.

162. The Libyan legal system contains legislation at different levels to safeguard individuals equally within Libyan territory. The Egyptian Constitution provides for equality before the law for all citizens, in article 40, which affirms equality *"without discrimination on grounds of sex, origin, language, religion or belief"*. Likewise, the Algerian Constitution provides for equality before the law for all citizens, in article 40, which specifies that *"The law shall be the same for all, whether protecting, restricting or repressing"* and in article 165, that *"Justice shall be equal for and accessible to all and is reflected by the respect for law and the search for equity."*

The principle of equality before the law is also to be found in the Tunisian Constitution, in article 6, which states : *"All citizens shall be equal in rights and duties and equal before the law"*, the principle is safeguarded by the Iraqi Constitution, which states : *"All citizens are equal before the law without discrimination on the grounds of sex, race, language or religious origin."*

states.[163] A further category of ideological restriction is apparent in texts in countries where the ruling authority's interpretations of *Shari'ah* form the basis of the legal and political structure.[164]

Principles upholding the legality of penalties are to be found in the legal systems of most Arab countries, in constitutional texts and legislation at the level of Codes. Both monarchies and republics stress that penalties are personal,[165] and set the principle that there is no crime or penalty except as prescribed by law, *nulla poena sine lege.*[166] Most also stress the principle of non-retroactivity of criminal law.[167]

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163. For example, although the Syrian legal system stresses the principle of equality before the law, by reviewing the constitutional text, it seems that this equality is accompanied by duties and must be seen in the light of article 45, which stipulates that such guarantees exist within certain ideological boundaries, since they are intended to enable citizens to contribute to the creation and maintenance of the new order. The Syrian legislator guaranteed this right by an explicit text as article 25, para.3 states: *"The citizens are equal before the law in their rights and duties"*

Article 45 stipulates that: *"The state shall guarantee women every opportunity that will enable them to contribute effectively and fully to political, social, cultural and economic life. It shall act with a view to removing obstacles which hinder their development and their participation in building the Arab socialist society"*.

164. For example, in Qatar, human rights are guaranteed to Qatari citizens on a footing of equality *"within the limits of Islamic customs and traditions"*.

CERD/C/156/Add.2 7th March 1988, p.8.

In the Constitution of the Yemen Arab Republic, while article 19 states that all Yemenis are equal [in terms of] public rights and obligations, article 34 provides that women's mandatory rights and obligations are as stipulated in the *Shari'ah* and in accordance with the law.

165. For example, article 21, paragraph b of the Iraqi Constitution, which states that : *"there shall be no offence or penalty except as defined by law ..."*, and article 13 of the Tunisian Constitution provides : *"penalties are personal ..."*.

166. For example, article 31 of the Constitutional Declaration in Libya stipulates that : *"1. there shall be no crime or punishment except on the basis of a law"*, and article 21 of the Constitution of the Yemen Arab Republic provides that there is no crime or punishment except as defined.

Likewise, the Jordanian Constitution provides, in article 8, that no one shall be detained or imprisoned except in accordance with the provisions of the law.

167. For example, the Egyptian Constitution, article 45, specifies that : *"No person may be held guilty, except by virtue of a law duly promulgated prior to the alleged offence"* and the Algerian Constitution, in article 45, states : *"No person may be held guilty, except under a law promulgated prior to the offence in question."* In Tunisia, article 13 of the Constitution provides : *"Penalties ... may be imposed only under a law enacted prior to the commission of the offence"*, while in Morocco, article 4 of the Constitution provides for the non-retroactivity of law, and this principle is also to be found in the Jordanian Criminal Procedure Act, which stipulates that no penalty may be imposed if it is not prescribed by law at the time when the crime was committed, and any law modifying the conditions of incrimination in favour of the accused applies retrospectively to acts committed before its entry into force. This applies to a new law abolishing a penalty or imposing a lighter one, when the application will be of the favourable law, even to crimes committed before its entry into force. In cases where, after sentence has been pronounced, a new law is promulgated to such effect that the act for which sentence was pronounced ceases to be a punishable offence, execution of the sentence is halted, and the conviction set aside. However, a law which imposes heavier penalties is not applied retrospectively to crimes committed before its entry into force.

A similar provision is to be found in the Tunisian Penal Code, though the text here specifies that the heavier penalty must have been imposed before the final judgement, article 1 of the Code also provides for the application of the lighter penalty should the punishment be made more severe after the commission of the offence, but before final judgement is made.

Article 2 of the Libyan Penal Code provides that crimes shall be punished according to the law in force at the time they were committed, and in cases where a law more favourable to the defendant is enacted, that law shall apply.

Legal principles intended to ensure fair trial are again to be found at the constitutional level and in Codes. For example, the principle of presumption of innocence is found in the legislation of republics and monarchies alike.[168] Further principles which may be found in republics and monarchies alike are the right to defence,[169] and the provision that trials should ordinarily be held in public. Legislation in both republics and monarchies, besides stipulating this principle, also sets out the cases in which trial may be held *in camera*, in general cases likely to affect public order or public morality.[170]

Throughout the Arab legal order, the right of appeal to a higher court is provided for at several levels of the judicial systems. In general, conciliation and cantonal courts are appealed to the first instance court,[171] which in turn may be appealed to the appeal court.[172]

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168. For example, the Algerian Constitution provides, in article 46, that *"Under the law everyone shall be presumed innocent until found guilty by an ordinary court, with all the guarantees required by law."* Other examples may be found in article 12 of the Tunisian Constitution, which states that : *"Everyone charged with a penal offence shall be presumed innocent until proved guilty ..."* and article 20, paragraph a of the Iraqi Constitution, which provides that : *"An accused person is presumed innocent until proved guilty through a legal trial."* The Syrian Constitution also provides that defendants are innocent until proven guilty by a court.
Likewise, in the Libyan Constitutional Declaration, article 31 provides that *"... the defendant is innocent until he is proved guilty ..."*, and according to the Yemen Arab Republic Constitution of 1970, article 24, *"the accused is innocent until he is proved guilty"*.
The Egyptian Constitution provides, in article 67, that the accused is given the benefit of any doubt and presumed innocent until proven guilty.
Again, in Morocco, the principle of the presumption of innocence is also provided by article 14 of the Code of Criminal Procedure, while in Jordan, the Criminal Law no.16 of 1960 states that every accused person shall be presumed innocent until proved guilty according to the law.
169. For example, the Egyptian Constitution, article 67 provides that the Court will depute an attorney to act in defence of anyone accused of a crime, and according to article 12 of the Tunisian Constitution, *"Everyone charged with a penal offence shall be presumed innocent until proved guilty at a trial at which he has had all the guarantees necessary for his defence"*.
The Syrian Constitution guarantees the right to access to defence counsel, according to article 27, and in Libya, article 106 of the Code of Penal Procedure establishes the right of the defendant to be accompanied by counsel. Likewise, the Constitution of the Yemen Arab Republic upholds this principle in article 24, and article 20, paragraph b of the Iraqi Constitution provides that : *"The right to defence is sacred during all the stages of enquiry and trial in accordance with the provisions of the law"*.
Article 311 of the Moroccan Code of Criminal Procedure provides that every person tried by a criminal court shall be assisted by counsel, while according to the Jordanian Criminal Procedure Law no.9 of 1961, an accused person will have defending counsel.
170. In Tunisia, the Code of Penal Procedure and the Code of Civil and Commercial Procedure have established the principle that hearings should take place in public, though this rule is subject to specified exceptions. Similarly, the Iraqi Constitution provides in article 5, that the courts conduct cases in public, and that hearings *in camera* are the exception. Article 20, paragraph c. states that : *"Sittings of courts shall be open, unless the court decides to convene in camera."* Hearings in Moroccan courts are public, except in cases affecting public order or morality, where hearings may be held *in camera*, according to the Code of Criminal Procedure.
171. For example, in Tunisia, offences judged in the cantonal court can be reconsidered by the court of first instance, according to article 124 (2) of the Code of Penal Procedure.
For a wider examination of the judicial systems of Middle Eastern countries, see : S.H. Amin Middle East legal systems, 1985; Herbert Liebesny, "Judicial systems in the Near and Middle East" Middle East Journal, 37, 1983, pp.202-217. For individual countries, see, for example, S. Solaim, "Saudi Arabia's judicial system" Middle East Journal 25, 1971, pp.403-407; Riad Khany, "The legal system of Syria" Comparative Law Yearbook, 1 1977, pp.137-151; M. Swidler, "Egypt : the court system" Middle East Executive Reports, 4 no.1 1981 pp.28-30.
172. In Tunisia, the Court of Appeal judges, in second instance, offences judged in the court of first instance, according to article 126 of the Code of Penal Procedure, while in Morocco, judgements rendered by courts of first instance in the case of minor punishable offences may be appealed against in the Criminal Appeals Division of the Court of Appeal, and the judgement rendered there may be the subject of an application to the Supreme Court for annulment.

Appeals to the Supreme Court, or Court of Cassation are normally based on the grounds of violation of law, erroneous application or interpretation of law.[173] Persons who have interest, that is, either the accused, the prosecutor or the plaintiff are permitted to appeal, according to the Codes of Civil or Penal Procedure, which normally regulate the conditions and procedures of appeal.[174]

From its position at the head of the judicial hierarchy, the Supreme Court is able to play an important role in interpreting constitutional provisions and creating legal principles to guide lower courts.[175]

173. For example, in Iraq, article 249 of the Criminal Procedure Law permits anyone convicted of a criminal offence to challenge, before the Court of Cassation, judgements, decisions and measures taken by a Criminal Court or a Court of Session if such a judgement, decision, or measures were based on a violation of the law, or on an erroneous application or interpretation thereof or of an essential error in procedure, examination of evidence, or the imposition of penalty has taken place in such a way as to have prejudiced the decision. If however, the procedural error does not harm the defence, it is neglected.
CCPR/C/1/Add.45 of 8th June 1979, pp.68-9.
In Tunisia, judicial decisions may be reviewed in order to correct an error of fact made to the detriment of a crime or offence (article 277). The cases in which such a review can be made are prescribed in articles 277 and following of the Code of Penal Procedure. An appeal for cassation may be made to the Administrative Tribunal against a decision of a cantonal tribunal having the final say and against decisions of the Criminal Court. The grounds for such an appeal may be incompetence, abuse of authority, miscarriage of justice or false application of the law.
CCPR/C/28/Add.5/Rev.1 of 2nd May 1986, p.33.

174. For example, in Iraq, article 265 of the Code of Criminal Procedure permits anyone convicted of a violation to challenge, before a court of session, judgements, decisions and measures taken by a criminal court or an examining judge within thirty days. Under article 275 of the same Code, it is possible to appeal to a higher criminal court against a decision of the criminal court within thirty days of the day it is taken.
CCPR/C/1/Add.45 of 8th June 1979, pp.68-9; CCPR/C/37/Add.3 of 18th July 1986, p.34.
Likewise, in Jordan, articles 256 to 260 of the Code of Court Procedure guarantees for every convicted person the right to appeal to a higher tribunal.
In Morocco, article 134 of the Code of Civil Procedure of 28th September 1974 provides that : "*The right of appeal exists in all cases which are not expressly excluded by the law.*"
"*Appeals against judgements by a court of first instance must be lodged within thirty days ...*"
CCPR/C/10/Add.2 of 19th February 1981, pp.9-10.
In Libya, article 365 of the Code of Penal Procedure provides that the defendant shall have the right of appeal, and article 381 provides that the defendant shall have the right of recourse to a Court of Cassation. CCPR/C/1/Add.20 of 24th January 1978, pp.7-8.
In some countries, specified exceptions exist to the right of appeal. For example in Tunisia, petty offences are considered not to merit the right of appeal, so that the cantonal judge has the final say. In addition, article 128 of the Code of Penal Procedure provides that the Criminal Court shall always have final say, because of the composition of the court and the procedures followed, which are considered adequate guarantee. The court is composed of 5 judges and its judgements follow a preliminary examination undertaken by a specialist judge, and reviewed by the Committal Chamber, which contains a President and 2 Counsellors. Even for these exceptions however, an appeal for cassation may be made against a decision of a cantonal tribunal and against decisions by the Criminal Court on the grounds of incompetence, abuse of authority, miscarriage of justice or false application of the law.
CCPR/C/28/Add.5/Rev.1 of 2nd May 1986, p.33.

175. The Supreme Court in Jordan illustrates the practical importance of this role in the appeal process, by extending its jurisdiction to safeguard the rule of law during the state of emergency.
Since the provisions of martial law in Jordan were applied over a long period, the Jordanian Supreme Court, in its decision no.44/1967, abandoned the principle that appeals against exceptional legislation did not fall within its jurisdiction, and instead ruled that "... *decisions taken in accordance with exceptional legislation are invalid unless they are intended to ensure the defence of the kingdom*".
CCPR/C/1/Add.56 of 25th January 1982, pp.5-6.

Finally, the question of international treaties within the emerging legal order should be reviewed, in order to identify the position of instruments of relation to the rule of law and individual liberties, as an important component of the legal order in safeguarding human rights. Taking in account the fundamental principle that specification of the competent authority to ratify international treaties is left to the Constitution, the relationship of international treaties to the constitutional order varies throughout the emerging legal order.

In most countries, the ruling authority is the power authorised to conclude international treaties on behalf of the populations. Though the identity varies between countries, from King to President to Emir, the Executive acts on behalf of the nation in concluding treaties and participating in international agreements.

In the republican systems, the tendency is for the sovereign acts of legislation and setting state policy to be exercised by Revolutionary Command Council or President, whose role is specified at the constitutional level.[176] In the monarchies, the King or Emir exercises this function on behalf of the population.[177]

Procedures vary among the Arab countries as to how international treaties and agreements are ratified, and gain the force of law. In some countries, the legislature has the power to ratify international treaties,[178] elsewhere this is carried out by the Revolutionary Command Council[179] or Executive while elsewhere, a legislative act promulgated by the legislature[180] or in some countries, the Executive is required.[181] In

176. For example, in Libya, the Revolutionary Command Council carries out sovereign acts on behalf of the people, according to article 18 of the Constitutional Declaration. According to article 23, the RCC is the organ authorised to conclude and ratify treaties except in the case where it authorizes the Council of Ministers to conclude and ratify treaties.
Article 104 of the Syrian Constitution of 1973 authorises the President to conclude and to abrogate treaties and international agreements, in accordance with the Constitution.
The Algerian Constitution, in article 159, provides that the President may conclude international treaties. Likewise, according to article 58 of the Iraqi Constitution of 1970, paragraph j, among other powers, the President has the authority to conclude international agreements and treaties.

177. Article 31 of the Moroccan Constitution provides : "*.. the King shall sign ... treaties.*"

178. In Tunisia, ratification is carried out by the legislature, where the Constitution states that treaties ratified by the Chamber of Deputies become part of domestic legislation.
Similarly, in Syria it is implicit in the Constitution that international instruments, once ratified and promulgated, become part of the Syrian legal system, since the People's Council exercises the power to approve international treaties, according to article 71, para. 5, which provides : "*The People's Council shall exercise the following powers : ... 5. To approve international treaties and agreements which concern state security ... and all treaties which relate to the right of sovereignty ... as well as those treaties and agreements which run counter to the provisions of laws in force or whose execution calls for the promulgation of new legislation*".

179. In Iraq, and Libya international agreements are ratified by the Revolutionary Command Council, as prescribed in the Constitution, (article 43, paragraph d), or by the National Assembly, while in Libya the ratification could be either by Decisions as in the case of the Cooperation Treaties with Algeria or by law such as Law no. 22 of 1970, ratifying the Protocol to the same treaty.
Official Gazette no. 15, Eighth Year, of 1 April 1970.

180. The Kuwaiti legal system adopts the principle that an internal legislative act must be promulgated through the channels specified in the Constitution for an international convention to which Kuwait has acceded to acquire the force of law.

181. In Egypt, it seems that international treaties are ratified by Presidential decree, according to article 151 of the Constitution. For example, the International Convention on the Elimination of All Forms of Racial Discrimination was approved by Presidential Decree no. 369 of 1967.
Likewise, according to the Algerian Constitution, article 159, treaties are signed and ratified by the Algerian government, in the person of the President of the Republic.

some monarchies, the task of ratification is shared by the King and the legislature.[182] Even though the importance of assigning the power of ratification to the Head of State or the Legislature is conceded, nevertheless, within the Arab context, one must disagree with the opinion which favours the Head of State or other such organs as ratifying power. A more positive mechanism would be to allow the Legislature to examine the content of important treaties.

In general, within the Arab legal order, treaties acquire the force of law on ratification.[183] Although in some countries, the provisions of treaties are granted equal status with municipal legislation, in others, their status is higher than other laws, including, in some countries, the Constitution.[184]

Finally in this section, emphasis must be laid on Arab Constitutions' recognition of the Political Covenant. We have seen already how the position of international treaties within national law varies, with some countries giving them precedence over domestic law, with the exception of the Constitution.

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182. For example in Morocco, article 31 of the Constitution provides that : "... *the King shall ... ratify treaties. However, treaties involving state finances may not be ratified without prior approval of the Chamber of Representatives*".

183. The Egyptian Constitution stipulates that conventions to which Egypt accedes have the effect of law after they have been signed, ratified and published in accordance with the prescribed procedures.

The Algerian Constitution, in article 159, considers international treaties, once ratified, part of national legislation - "*International treaties duly ratified by the President of the Republic, in the conditions provided for by the Constitution, shall have the force of law.*"

When ratified, international instruments become part of the Iraqi domestic legal system and acquire the force of national law as binding provisions on all organs, which may be invoked before tribunals and administrative bodies. The Iraqi government, in its initial report to the Human Rights Committee in 1977, shares the same assumption as the representative points out that : "... *the ratification of such international charters and agreements makes them part of the local legislation.*" CCPR/C/1/Add.45 of 8th June 1979, p.11; CCPR/C/1/Add.45 of 8th June 1979, pp.5-6.

In Syria, with regard to international treaties, it is implicit in the Constitution that such instruments, once ratified and promulgated, become part of the Syrian legal system.

According to article 24 of the amended Provisional Constitution of the state of Qatar, all treaties, of any subject, acquire the force of law on ratification, the exchange or deposit of instruments of ratification or accession, and the publication of the instruments in the Official Gazette. There is no need for their provisions to be promulgated in the form of domestic law, or approved by the domestic authority. Both secular and *Shari'ah* courts must apply them within certain restrictions.

184. Article 32 of the Tunisian Constitution states that duly ratified treaties take precedence over internal laws. This means that once ratified by the Chamber of Deputies, such instruments become part of domestic legislation and carry greater legal weight than other laws.

International treaties become an integral part of Moroccan internal public order, since the Moroccan legislator, in the Dahir of 6th September 1958, provided that "... *The provisions of duly ratified and published international treaties or agreements shall take precedence over those of internal legislation*". The position of treaties signed by Morocco is outlined in article 31 of the Constitution which states: "*Treaties which might affect the provisions of the Constitution shall be approved in accordance with the procedures laid down for amendment of the Constitution*". Treaties which do not affect the provisions of the Constitution can be incorporated immediately into Moroccan law.

Article 70 of the Kuwaiti Constitution outlines the manner in which international treaties to which Kuwait is party, acquire the force of law, providing that international conventions to which Kuwait has acceded thereby prevail over existing legal provisions which conflict with them.

As we saw, according to article 24 of the amended Provisional Constitution of the state of Qatar, all treaties, of any subject, acquire the force of law on ratification.

In Jordan, it seems that international agreements which Jordan ratifies or accedes to have the force of law, and have precedence over all national legislation, with the exception of the Constitution. Judgement no.32-82 of 6th February 1982 UN GAOR 37th Session Supp.no.40 (A/37/40) p.43, para.196.

Several of the Arab countries have signed the Covenant, and of these most have ratified it,[185] though three[186] have made reservations which do not affect their obligations concerning the substance of political rights. The status of the Covenant in Arab states' domestic law, reflects the general problem of the position of international agreements *vis-à-vis* national legislation. As we saw, some legal systems give precedence to international treaties, while others place such treaties on an equal footing with all or some domestic laws. In most Arab countries which signed and ratified the Covenant, it thereby became part of domestic legislation, on an equal footing with other national laws. This should have given the judiciary competence to apply these international provisions, particularly those which uphold basic rights.

185.

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| 1 | International Covenant on Economic, Social and Cultural Rights. |
| 2 | International Covenant on Civil and Political Rights. |
| 3 | Optional Protocol to the International Covenant on Civil and Political Rights. |
| 4 | International Convention on the Elimination of All Forms of Racial Discrimination. |
| 5 | The International Convention on the Suppression and Punishment of the Crime of Apartheid |
| 6 | Convention on the Elimination of All Forms of Discrimination against Women |
| 7 | Convention on the Prevention and Punishment of the Crime of Genocide. |
| 8 | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. |
| 9 | Convention relating to the Status of Refugees. |
| 10 | Protocol relating to the Status of Refugees. |
| 11 | Convention on the Political Rights of Women. |
| 12 | African Charter for Human and People's Rights. |

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Algeria | s | s | | x | x | | x | s | x | x | | x |
| Bahrain | | | | | | | | | | | | |
| Dem. Yemen | x | x | | x | s | x | x | | | | x | |
| Egypt | x | x | | x | x | x | x | x | x | x | x | x |
| Iraq | x | x | | x | x | x | x | | | | | |
| Jordan | x | x | | x | s | s | x | | | | | |
| Kuwait | | | | x | x | | | | | | | |
| Lebanon | x | x | | x | | | x | | | | x | |
| Libya Jam. | x | x | | x | x | | | | | | | x |
| Morocco | x | x | | x | | | x | s | x | x | x | |
| Oman | | | | | s | | | | | | | |
| Qatar | | | | x | x | | | | | | | |
| Saudi Arabia | | | | | | x | | | | | | |
| Sudan | x | x | | x | x | | | s | x | x | | x |
| Syria | x | x | | x | x | | x | | | | | |
| Tunisia | x | x | | x | x | x | x | xc | x | x | x | x |
| U.A.E. | | | | x | x | | | | | | | |
| Yemen | | | | | x | | | | x | x | | |

x = ratification, accession, approval, notification or succession, acceptance or definitive signature.
s = signature, not yet followed by ratification.
c = declaration recognising the competence of the Committee against Torture under articles 21 and 22 of the Convention.
Taken from Human rights : status of international instruments as at 1 March 1989, Geneva, 1989, and Document no. AHG/155 (XXIV) Annex 1 supplied by the Organization of African Unity.

186. Iraq, Libya and Syria have made reservations in respect of their obligations under the Covenant. Each country indicates, in similar terms, that signature of the Covenant does not signify recognition of the state of Israel. Iraq makes the further reservation that signature and ratification of the Covenant does not constitute signature of the Optional Protocol to the Covenant, while Syria adds a reservation to the effect that it considers article 26, para. 1 of the Economic and Social Covenant and article 48, para. 1 of the Civil and Political Covenant incompatible with the purposes of the two Covenants.

SECTION THREE

# THE CONTROL OF CONSTITUTIONALITY :

# LEGISLATION AND CASE LAW

As noted earlier, factors of particular importance in the efficacy of the constitutional order in upholding the rule of law during the transitional period of reform are the extent and nature of constitutional review within the legal order itself. Since control of constitutionality is an important aspect of the principle of legality, the criterion for judging the nature of government acts, this role is ever more important.

In the Arab legal order it is most striking, since radical and conservative countries, the former affected by revolutionary change and ideological concepts of reform, and the latter by their reaction to radical change, have been led to intervene more and more in political, social and economic activities under the pretext of reform, either by executive acts or by the promulgation of legislation, giving rise to the danger of conflict between the legal idea enshrined in the Constitution and these laws.

The organ charged with the protection of the rights of the population, the judiciary, may exercise to a greater or lesser degree, retrospective control of constitutionality of laws,[187] though, as we shall see, in some Arab countries, the courts are not empowered to carry out this vital function, as the constitutional legislator either chose review through the legislative power in the French tradition,[188] or stood silent altogether.

This section examines the issue of review of constitutionality of legislation within the Arab legal order. It excludes Saudi Arabia and Oman, since they do not possess written Constitutions, as we have seen. The Constitutions of the remaining countries fall into the two categories of rigid or flexible.

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187. The entitlement of the courts to examine the constitutionality of laws passed by the American legislature has long been recognised. This legal institution developed through practice, in the absence of constitutional provision, and in the American context, has led to political and constitutional controversy, for example, the well-known issue of Roosevelt's "New Deal" in the 1930s.
It was adopted from 1803, when Chief Justice Marshall said that this power was consequent on the judge's duty to decide what the law was in the case of dispute. In case of conflict between a constitutional provision and other law, the court's duty was to decide the question by applying the the higher or constitutional provision.
B. Schwartz, American constitutional law, 1955, pp.10-11.

188. Constitutional review by the legislative, and to some extent, the modern concept of constitutions, arose from the French Revolution, which greatly influenced political structures in Europe and beyond. The doctrine of the sovereignty of the people did not empower courts to limit the Legislative Assembly, regarded as expressing the will of the people. The rigid revolutionary Constitutions of France could not be amended by normal majority votes in the Parliament, since the *pouvoir constituant* was seen as distinct from legislative power in belonging to the people themselves, with the result that the power of Parliament was limited to interpretation of the Constitution. This interpretation was regarded as authoritative in that Parliament was regarded as the organ expressing the will of the people. In this context, the principle of separation of powers was regarded as prohibiting the courts from examining constitutionality of laws. Some French Constitutions of this period explicitly prohibited the courts from interfering in the legislative power or preventing the application of law.
States following the French example naturally encountered difficulties with the relationship between the Constitution and statutory laws. Switzerland was the first to address the issue by establishing a procedure in which appeals could be made to the Federal Council, thence to the Federal Parliament, and ultimately to the Federal Court. A constitutional amendment of 1874 allowed the individual to pursue his case to the Federal Court. Elsewhere, special constitutional courts were established. In Austria, such a court was established as early as 1867 to resolve disputes resulting from government actions, and since the Second World War, constitutional law courts have become more widespread.

A. Tabataba has characterised the Constitutions of Iraq and Qatar[189] as flexible on the grounds that they may be amended by ordinary legislation, and those of Kuwait, Bahrain and the United Arab Emirates as rigid, on the grounds that more stringent procedures are required for constitutional amendments than for ordinary legislation.[190]

189. The Amended Provisional Qatari Constitution of 1972 provides, in article 67, that *"The Emir may modify this fundamental system by amendment, repeal or addition if he sees that the supreme national interest requires that change"*. Furthermore, articles regarding the promulgation of ordinary laws or its amendments indicate that the Council of Ministers is the organ competent to propose laws or regulations, which are referred to the Shur'a Council for discussion and opinion before referral to the Prince for ratification and promulgation. (art. 23/F2, 34/F2 and 51/F1)

So, Tabataba argues, since the procedure required to amend or promulgate ordinary laws is more difficult than for amendments to the Constitution, where it is sufficient that the Emir orders it, without any requirement for referral to the Shura council, and there is no restriction on the Amir's authority to propose an amendment other than that the amendment is required by the *"supreme national interest"*, the Constitution of Qatar must be described as flexible, and control of constitutionality cannot be said to exist at all.

A. Tabataba ["The jurisdictional control over constitutionality of laws in the Arabian Gulf"] Maj. Dirasat al-Khalij wa-al-Jazirah al-'Arabiyyah, v.6 1980 part 24 pp.11-40.

190. Article 174 of the Kuwaiti Constitution provides that *"the Amir and one third of the National Council have the right to modify the Constitution by amendment, repeal of one or more of its provisions or by addition of new provisions. If the Amir and the majority of members of the Parliament agree on the modification, the Council discusses the project ... There must be an agreement of two thirds of the Council. This modification will not be executed except after its ratification and promulgation by the Prince"*. If the Prince refuses a proposed amendment, it may not be referred again within one year of the rejection. Any proposition to amend the Constitution will not be accepted within five years of its promulgation.

Tabataba comments that such a complicated procedure is not required in the cases of the promulgation or amendment of ordinary laws, since according to article 109, any members of the National Council can propose ordinary laws, whose acceptance requires no more than the agreement of the members present.

In Bahrain, article 104/f of the Constitution stipulates the condition that any amendment to any provision of the Constitution, must be agreed by the majority of the Council, and ratified by the Prince. Like the Kuwaiti Constitution, article 104/b provides that if any constitutional amendment is rejected it cannot be referred again within a year.

It is not clear who is competent to propose an amendment to the Constitution, which means that the Amir or any member of the Council may propose an amendment and therefore, the Constitution is equal to ordinary law. Nevertheless, Tabataba describes this Constitution too as rigid, though it seems to display the characteristic he identified in the flexible type of Constitution.

The Provisional Federal Constitution of the UAE appears to be rigid, since proposal for amendment is the right of the Supreme Council in the state, while the proposal to amend ordinary laws is in the competence of the Federal Council of Ministers according to article 50/f2. In addition, article 144 requires the presence of supreme interests of the Federation for an amendment to the Constitution, and the Supreme Council is competent to evaluate the presence of such an interest, while the Constitution does not require any objective conditions for amending ordinary laws. Finally, the Constitution does not require a special majority for the Federal Council to agree on bills or their amendments, while the Federal Council's consent to constitutional amendments requires a special majority of two thirds of its members, according to article 144, 2/b, which means there is a restriction on the amendment of the Constitution than for amending ordinary laws.

Tabataba examines a number of articles which cast doubts on the rigidity of the Constitution, because of apparent discrepancies in the nature of majorities required for, for example, holding Federal Council meetings in places other than the capital and constitutional amendment.

He also emphasises that for constitutional amendments as well as in promulgation or amendment of ordinary laws, the Supreme Council could overcome the opposition of the Federal Council by re-introducing a proposed amendment, and if the latter opposes it, the Supreme Council has the right to insist on the amendment and promulgate it.

Ibid.

Legislative control of constitutionality also varies in nature, since in Tunisia, for example, no specific organ exists to review constitutionality, though review may be carried out by the legislative body[191] or administrative organs. Several Arab countries have a *conseil d'état*,[192] though in practice the duties of this organ tend to be restricted to preparing legislation and acting in an advisory capacity.

In Iraq, there is no special organ concerned with the constitutionality of laws,[193] though a mechanism appears to exist through the National Assembly, where a Judicial Committee considers draft bills or other legislation referred to it directly by any ministry or indirectly, where legislation and bills drawn up by the Council of State are transmitted to the President of the Republic, who in turn transmits them to the National Assembly to examine their constitutionality. If the National Assembly rejects a bill, the Revolutionary Command Council may call a meeting of the two houses, in which the bill must then be passed by a two-thirds majority.[194]

According to article 66 (b) of the Iraqi Provisional Constitution, it cannot be amended save by a two-thirds majority of the Revolutionary Command Council.[195] The RCC also play a dominant role in the promulgation of ordinary legislation,[196] Tabataba argues that since RCC

191. Tunisia operates a system of political control of constitutionality of laws, according to articles 72-74 of the Constitution. The President or one third of the Chamber of Deputies may suggest revisions of the Constitution, and a proposed amendment may be debated by the Chamber of Deputies, after an absolute majority has agreed to consider it. The Chamber of Deputies should pass the amendment by a two-thirds majority, after two readings, though even then, an interval of at least three months must elapse between readings.

192. In Syria, the *Majlis al-Dawla* (State Council) makes administrative and judicial review of the decisions of government agencies which are binding on the government. According to the Constitution, article 138, the State Council acts as an administrative tribunal.

The Tunisian Constitution of 1959 also establishes a Council of State to deal with conflicts arising between individuals and the State or Public Authorities, and in all matters concerning abuse of powers.

In Egypt, according to article 172 of the 1971 Constitution, the State Council is an independent judicial body, which specialises in settling administrative disputes and disciplinary cases.

In Kuwait, article 171 of the Constitution provides for the establishment of a Council of State to assume the functions of an administrative jurisdiction, rendering legal advice, and drafting bills and regulations.

193. According to a representative of the Iraqi government, although no special body exists, the method used is a "*pragmatic*" one. If any ministry considers a given law to be in contradiction with the Constitution, it could request the National Assembly to repeal or amend it.
CCPR/C/SR.744 of 22nd July 1987, p.12.

194. CCPR/C/SR.744 of 22nd July 1987, p.9.

195. Two-thirds of the People's Assembly must combine to suggest amendments to the Constitution.
CCPR/C/37/Add.3 of 18th July 1986, p.3.

An example occurred when the Iraqi National Assembly voted to reject a draft bill on 29th December 1985, on the ground that the proposed bill was incompatible with existing legislation. The bill prescribed financial penalties for women who married a foreigner without having obtained prior permission. According to its provisions, the women concerned would have had to reimburse the state the costs of schooling for their children. The National Assembly had held that "... *the bill was contrary to human rights and in particular to the rights contained in the Covenant*".
CCPR/C/SR.744 of 22nd February 1987, p.9.

196. For example, article 52 provides that the National Council will review legislation proposed by the RCC within fifteen days ... If agreed to, it is referred to the President for promulgation.
If refused or amended, it is returned to the RCC. If the latter accept the amendment, it is referred to the President for promulgation. If the RCC insist on its opinion on a second reading, it is returned to the National Council to be reviewed by a joint session of the two Councils, and the decision of a two-thirds majority is final.
Likewise, article 53 stipulates that "*the National Council will review legislation* / ...

regulations have the force of law, and it is not possible to identify the nature of the legal rules promulgated by this Council except by examining their nature and subject, control of constitutionality of laws cannot be said to exist.[197]

The role of the Syrian Court, established by articles 145-8 of the 1973 Constitution and Act no.19 of 2nd July 1973, should be seen in a different light from other such courts in the Arab legal order, since even though article 145 explicitly gives the Supreme Court the task of reviewing constitutionality of laws, the same article specifies that it must be requested to review legislation passed by the People's Assembly or the President by the latter or a quarter of the People's Assembly.[198] Since the importance of this organ does not lie only within the control of *proposed* laws or legislation, but also in examining the constitutionality of laws and regulations *in force*, with some Syrian legislation in force dating from as early as the 1940s,[199] it must be said that the Syrian legislator gave a severely limited role to this authority, by restricting its scope to laws proposed by the President or Peoples' Assembly, and allowing it to act only at the request of the Legislature or the Executive.

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... *proposed by the President of the Republic within fifteen days, If rejected, it is returned to the President with reasons for the rejection. If accepted, it is promulgated. If the National Council make amendments, they are referred to the RCC. If accepted, the legislation is promulgated. If rejected by the RCC, it is returned to the National Council again, within one week. If the National Council agree with RCC, then the project is referred to the President for promulgation, but if the National Council, in its second reading, insists on its opinion, a joint session of the two Councils, will examined the proposed legislation, and the decision of a two-thirds majority is final, and transferred to the President of the Republic for promulgation*".

Again, according to article 54, the National Council reviews proposed legislation referred to it by quarter of its members, excluding military and public security affairs. If the Council accepts the legislation, it is referred to the RCC within fifteen days of the day of its arrival in the Council's Office. If the RCC agrees to it, it is referred to the President of the Republic for promulgation or amendment. If the RCC rejects or amends it, it is returned to the National Council. If the latter insists on its opinion in its second reading, a joint session headed by the President of the RCC or his deputy considers the legislation. The decision of a two-thirds majority is considered final and the legislation is referred to the President for promulgation.

197. A. Tabataba ["The jurisdictional control over constitutionality of laws in the Arabian Gulf"] Maj. Dirasat al-Khalij wa-al-Jazirah al-'Arabiyyah, v.6 1980 part 24 pp.11-40.

198. Article 145 provides : "*The High Constitutional Court decrees and rules on the constitutionality of the laws in accordance with the following : (1) if the President of the Republic or one quarter of the members of the People's Assembly challenge the constitutionality of a law before its promulgation, the latter will be suspended until the High Court rules on it within 15 days starting from the date when it was apprised of the challenge. If the law has an urgent character, the High Constitutional Court must rule on it within 7 days; (2) if one quarter of the members of the People's Assembly challenge the constitutionality of a legislative decree within 15 days starting from the date of the opening of the session of the People's Assembly, the High Constitutional Court must rule on it within 15 days counting from the date when it was apprised of the challenge; (3) if the High Constitutional Court determines that the law or the legislative decree infringes on the Constitution, then the provisions of the said law or the said legislative decree which are contrary to the provisions of the Constitution will be considered to have been automatically abrogated with retroactive effect*".
Article 147 goes on to provide that : "*The High Constitutional Court, at the request of the President of the Republic gives its opinions on the constitutionality of government bills, legislative decrees and executive decrees*".

199. Report from Amnesty International to the Government of the Syrian Arab republic, 1983, p.5.

Limitation on the scope of the Supreme Court in this respect is long-standing, as the 1950 Constitution gave the Syrian Supreme Court competence to review :

(a) the constitutionality of laws referred to it, according to article 63 of the Constitution, that is, laws which a quarter of the People's Council or the President object to on grounds of unconstitutionality;
(b) the constitutionality of bills or decrees referred to it by the President.[200]

It is important to highlight some views as to whether this constituted political or judicial control of constitutionality of laws. According to Munir al-Ajlani,[201] the Syrian Constitution chose judicial control, though it narrowed this control, by specifying the Supreme Court, and by the provision that the objection could only be raised by a quarter of the People's Council or the President. Mustapha Barudi[202] is also of the opinion that the constitutional article meant to avoid repealing many laws for an article or paragraph contradicting the Constitution, so that the Supreme Court cannot examine the constitutionality of law unless requested by the President or quarter of the People's Assembly, and otherwise it has no right to interfere in the laws promulgated by the Legislature. If the court decides on unconstitutionality, it does not act alone, but its decision is shared by the Government and the People's Council.

The jurisdiction of the Supreme Court under the 1950 Constitution was confined to review of constitutionality of laws before they were promulgated, with the further limitation that they should be transferred by quarter of the People's Council or the President of the Republic, which means that the control of Supreme Court is prospective only and dominated by the executive and legislative powers. Even when a law was referred, it did not end by repeal of a projected law, but only its return to the Council to review it. For this reason, and because of the dominant role of the Executive and Legislature, in law as well as in fact, this must be considered as political control.[203]

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200. Legislation promulgated before the Constitution remains in force, according to article 153, which states : *"Legislation in effect and issued before the proclamation of the Constitution will remain in effect until amended so as to be compatible with its provisions"*.
Article 63 of the Constitution states that if a quarter of the People's Council object to a law on the grounds of unconstitutionality before it is promulgated, the President of the Republic will send it to the Court. This prevents promulgation until the court makes a decision within ten days. If the law is urgent, the court must decide within three days. If the Court does not take a decision during this period, the President may promulgate the law. If the law is compatible with constitutional provisions, the President may promulgate it, and if the law violates the constitution, the law will be returned to the People's Council to correct the constitutional conflict.
201. Munir al-Ajlani [Constitutional rights] 1955, p. 65.
202. Mustapha Barudi [Constitutional rights] part 1, 2nd ed. 1957, p. 293.
203. Mirza compares this function with the function of the constitutional committee in the French constitution of 1946 and the constitutional council of 1958. If the Syrian constitution adopted what article 63 before its final adoption (article 73 of the project of the Syrian Constitution), which states that " ... *a proposal of law which the Supreme Court decides is unconstitutional is considered repealed*". In that case we could have said that the Syrian Constitution accepted constitutional control by prospective repeal, which is a definite constitutional control of the constitutional law.
I. Mirza [Constitutional law ...], 1969.

One must disagree with Ajlani's point of view entirely and with Barudi's conclusions and justifications. One cannot say that the Syrian Constitution accepted judicial review by any means, since it is not enough to be influenced by the title and ignore other considerations. The method adopted in the Constitutions of 1953 and 1971 must be considered legislative and executive control of a political nature rather than judicial.[204]

The same could be said of the mechanism for interpretation of constitutional provisions in Jordan, since, according to article 122 of the Constitution, the High Tribunal established by article 57 of the Constitution interprets constitutional texts, *at the request of the Council of Ministers or by a decision taken by an absolute majority of any House of the National Assembly.*

In the revoked Libyan Constitution of 1951, the legislator clearly chose judicial review of constitutionality of laws,[205] referring it to the ordinary judiciary, namely the Supreme Court,[206] but in 1963, it was deprived of this important constitutional authorisation. The legislature, by Law no.1 of 1963, amending the Constitution, weakened this important function, by repealing articles 153 and 154 of the Constitution. When the jurisdiction of the Supreme Court was thus limited, control of constitutionality passed to the ordinary legislature. This principle remained in force at least until 1969, when it was not in fact repealed or strengthened by the new legislator.

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204. A further worrying restriction on the scope of the High Constitutional Court of Syria is the provision of article 146 of the 1971 Constitution, which provides that laws which receive the people's approval in popular referenda may not be the subject of constitutional review by the Court. The phenomenon of a direct appeal to the people by the Head of State, by-passing the legislative authority, has already been noted in the Moroccan Constitutions of 1962 and 1972. Any provisions which limit the scope of the organ charged with upholding the constitutionality of law must be regarded as a potential threat to the rights upheld by the Constitution.

205. In the Libyan Constitution of 1951, in articles 153 and 154, the legislator by explicit text authorised the Supreme Court to control the constitutionality of laws. Article 153 provides that ... judgements will be petitioned in accordance with the federation law before the Supreme Court. The judgement will be promulgated from criminal and civil provincial courts, if the judgement derives from a dispute relating to the Constitution or its interpretation.

In November 1953, a law regulating the jurisdiction of the Supreme Court was passed. Article 14 of this law again authorised the Supreme Court to give judgement in the cases where constitutional matters were involved. In the same law, article 15, paragraph 2, provides that "... *if the case before any section of the court ... contains a fundamental legal matter in relation to the Constitution or its interpretation, that section must postpone final judgement and transfer it to the constitutional section of the Supreme Court to decide, or else, the judgement of that section may be appealed against before the constitutional section within 60 days of announcement*", and paragraph 3, "*Judgements from the provincial courts, whether civil or criminal, may be petitioned before the Supreme Court, if these judgements are related to the Constitution or its interpretation*". Article 16 states that "... *any person who has a direct personal interest has the right to petition the Supreme Court against any legislation, procedure or act in contradiction with the Constitution*".

I. Mirza [Constitutional law ...] 1969, p.549.

206. The Constitution considers that when it sits in this capacity, as a result of the judgement of the Supreme Court that a law is unconstitutional, this law is repealed *erga omnes*. The Iraqi Supreme Court exercised a similar authority under the Constitution of 1925.

Egypt stands at the beginning in developing the judicial role, in its increasingly important task of protecting the rule of law and individual and collective rights.[207]

A brief review of Egyptian judicial decisions on constitutionality of legislation promulgated under the Constitution of 1923 illustrates how the judicial power interpreted certain principles with regard to its competence in exercising this function. It also illustrates how the judiciary has interpreted constitutional provisions, setting legal principles. Since the beginning of constitutional life in Egypt in 1923, no judicial organ was authorised explicitly to control the constitutionality of laws, though the view that the judiciary had this implicit right arose early[208] and continued until this task was made an explicit duty in the Constitution of 1971.[209] Far more important in the development of the legal order is the establishment of an independent judicial body in 1979, by Law No.48 of 1979, to control and review the constitutionality of legislation, namely the Supreme Constitutional Court.

At the beginning of 1941, the Egyptian *Ahleia* First Instance Court judged clearly for the first time the right of the judiciary to examine the constitutionality of laws. The Court found that the duty of the judge is to find the legal text in disputes under his jurisdiction, and judge within the limits of the ordinary law as well as the fundamental law of the state. If the ordinary law comes into conflict with the Constitution, the judge is obliged to implement the constitutional text, ruling out the ordinary law. In so doing, the judge cannot be considered to usurp legislative authority to promulgate law,[210] since he does not repeal the lower law or abstain from judgement, but only exercises his legal right in characterising the law which should be implemented in a dispute.

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207. Mostafah K. Kerah, in ["The Courts in their hundredth year"] in Al-Gara Newspaper, (1st December 1983) pointed out the role of the Egyptian judiciary, reviewing key cases since 1910, such as the Abrahim al Wadani Case, Badari, the workers wards, and the case against the writer Abas El-Akaad, which have not been available for study since the revolution of 1952.

208. As early as 1924, the Supreme Court reviewed the constitutionality of part of the Penal Code as an appeal court, when a judgement from Alexandria Criminal Court in a case involving individual liberties was considered by the Court of Cassation. Petition was made against the judgement of the lower court on the grounds that the article 151 of the Penal Code restricted the right protected by article 14 of the Constitution, and that the judgement was in conflict with article 164 of the Constitution. The Court of Cassation returned the case, supporting the judgement of the Criminal Court on the following grounds : "... *with regard to ... article 151, it does not violate constitutional provisions, as freedom of opinion guaranteed by the Constitution should be understood within the law.*"
Attorney-General v. Mahmud Husni al-Urabi, Anton Maron et al.
Mahmud Helmi, [The Constitutional system in the United Arab Republic], 1965.

209. Articles 174 & 175 : "*The Supreme Constitutional Court will be an independent and separate judicial body in the Arab Republic of Egypt ...*".
"*The Supreme Constitutional Court alone will assume judicial control of the constitutionality of laws and bills. It will interpret the legislative provisions ...*".

210. The defendant claimed that the competence of the judiciary to examine the constitutionality of laws would undermine the principle of separation of powers, by giving the judiciary a dominant position over the legislator. In the Court's judgement, if the legislature violated the provisions of the Constitution, it could not force the judiciary to be partner in this violation, since the latter is independent within its jurisdiction and the judge is required to find the legal text in disputes, and judge within the limits of the ordinary as well as the fundamental law of the state.

Development of judicial review of constitutionality may be seen in the first judgement of the Egyptian Supreme Court, through the Administrative division, on 10 February 1948, when the Court upheld the principle that in the case of conflict between the Constitution and other legislation, the constitutional text prevails, confirming the competence of the judiciary in this respect.[211]

Another case demonstrates the Egyptian Court's reasoning, when the Constitution is silent with regard to control of the constitutionality of laws, as in the case of the Egyptian Constitution of 1936. Once again, the return to constitutional principles is the only course for the judiciary in respect of a law which conflicts with the Constitution.[212]

211. The government defendant argued that courts have no jurisdiction to examine the substance of the constitutionality of laws, but may only identify that the formal foundation of a law exists. They should abstain from examining the matter of a law's compatibility with the principles laid down in the Constitution, according to the principle of separation of powers, which depends on the independence of each authority in its function from the others, and the obligation of non-interference or delay.

The Court reasoned that there existed no text restricting its authority in reviewing the constitutionality of laws. It reasoned that in this action the Court applies the principle of separation of powers, in putting affairs in correct constitutional context. It argued that the Egyptian Constitution set this principle implicitly, when it specified for each authority that it should operate according to the Constitution (article 23), and that judicial authority should be exercised by courts in their different degrees and competence (article 30). The Egyptian Constitution set the principle of separation along with the principle that all authorities should adhere to the principles set in the Constitution (article 23), and since the Constitution confirms the principle of cooperation between them on the grounds of respect for these principles, thus they operate in parallel to organise constitutional life, since if any authority violates any of these principles, it will be considered as exceeding its competence. If an authority were to misuse the concept of the principle of the separation of powers to violate the Constitution, this would mean anarchy and lack of control, whereas the obligation of each authority to uphold the principles of the Constitution is the best guarantee in applying the principle of separation to support the Constitution.

The judgement also examined the role of the courts with regard to conflict between an ordinary law and the Constitution, whether by text or by spirit, determining what the courts should apply in that case, and how the court interprets its jurisdiction. Since the Constitution provides, in article 30, that the judicial authority exercised by the court is appointed to implement law in the disputes before it, this means that courts have the right to determine in situations of conflict between laws, which law should apply. In the case of contradiction between normal law and the Constitution in any dispute before any court, there is no doubt that courts apply the Constitution as the supreme law, and neglect the normal law. In so doing, the judiciary is not over-riding the legislative authority, since the courts do not legislate or repeal laws, and indeed do not suspend application of law. If the ordinary law is neglected, that is due to the supremacy of the Constitution, which has to be taken in account by the judge and legislator on equal terms. The Constitution itself repeats that legal idea in article 167 when it makes the application of laws prior to the Constitution depend on their compatibility with its provisions. It is clear that this article was intended for courts facing conflict between applying those laws and the Constitution. Thus, the Court considered the right of the judiciary well known, and confirmed the supremacy and sovereignty of the Constitution in the case of conflict with ordinary law.

212. In 1952, the administrative court issued judgement on the issue of conflict of laws, providing the following reasoning : if the Constitution is silent with regard to judicial control of the constitutionality of laws, the return to constitutional principles is the only recourse for the judiciary when the court is asked to implement a law in conflict with the Constitution. The principle that the judiciary must apply the law in any case is considered to be an original principle of the Constitution, and in this case, the law is an abstract general rule despite its source, whether constitutional or brought by the legislature through the Parliament or regulating decision. Conflicts between laws demand the implementation of the higher decree law and the dismissal of the lower law. Thus, in the case of conflict between Council of Ministers' decision and Minister's decision, the former is applied and of conflict between decree and law, the latter will be applied. On the same footing, if a law conflicts with the Constitution, the Constitution must be applied.
I. Mirza, [Constitutional law ...] 1969, pp. 442-448.

An examination of Arab Constitutions indicates that the majority of Arab legislators adopted judicial control of constitutionality of laws. The organ which exercises judicial control may be established by constitutional text or other legislation as a distinct organ,[213] or else the function is exercised by a division of the Supreme Court.[214]

Law stipulates details of the formation of organs concerned with constitutionality of legislation. For example, article 2 of Law no.14 in Kuwait provides that five advisors, who must be Kuwaiti citizens, are selected by secret ballot by the Judicial Council, and a decree is promulgated for their appointment, while in the United Arab Emirates, article 3 of the Supreme Federal Court Law stipulates its composition of a President and four judges. Article 4/F1 specifies that he should be a national of the United Arab Emirates, though article 5 of the same law makes an exception of Arab nationals, who may be appointed as judges in the Supreme Court in certain cases.

In Tabataba's[215] opinion, although judges are more capable than others in examining legal issues, it would be more effective if political considerations were taken into account in the composition of constitutional Courts. He goes on to point out that the *travaux preparatoires* of article 173 of the Kuwaiti Constitution stipulate that

" ... *the possibility will be left to the regulations of that constitutional court of including the Parliament and Government in its formation* ... ".

According to Tabataba, this mixed composition of the court would help to make the legislative and executive powers more susceptible to judgements of unconstitutionality. Authman Khalil Authman[216] shares Tabataba's view that the participation of political elements does not mean that they will dominate its views. Rather, this political representation means that the circumstamces surrounding the promulgation of a law and the implications resulting from a declaration of its unconstitutionality, which may not be seen by judges whose task is only to examine the law itself, would be taken into account.

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213. The Constitutional Court in Kuwait was established by Act no.14 of 1973.
CERD/C/149/Add.16 14th November 1986, p.4.
The establishment of the Egyptian Supreme Constitutional Court was embodied in Act no.48 of 1979.
In the Yemen Arab Republic, the 1970 Constitution provides for a Supreme Constitutional Court "*formed from a number of Shari'ah scholars ... elected by the Majlis al-Shura and nominated by the President of the Republican Council*", (article 155).

214. The Algerian Supreme Court is authorised to review the constitutionality of laws, and exercises the power to interpret them without any interference by the organs of the party or the state. Its decisions and judgments must be respected absolutely.
CERD/C/158/Add.2 of 3rd April 1987, p.24.
Section X of the Moroccan Constitution of 1972 concerns the establishment of a Constitutional Chamber within the Supreme Court, whose organisation and functioning will be governed by an organic law, exercising the power conferred upon it by the Constitution or organic law.
The Provisional Federal Constitution of the United Arab Emirates authorises the Higher Federal Court to review constitutionality, in article 99.
According to Article 103 of the Bahraini Constitution "*the law will appoint the judicial organ which will have the jurisdiction in examining disputes regarding constitutionality of laws and regulations ...*".

215. A. Tabataba ["The jurisdictional control over constitutionality of laws in the Arabian Gulf"] Maj. Dirasat al-Khalij wa-al-Jazirah al-'Arabiyyah, v.6 1980 part 24 pp.11-40.

216. Authman Khalil Authman [Constitutionality of laws], Lectures to post-graduate students in Faculty of Laws of the Shar'ah University, 1973, pp.160-1, 166.

Nevertheless, the Kuwaiti legislator preferred to keep the Court's composition to judges, on the grounds that the subject of the Court's review was law, and no one without qualification in law should deal with them, in order that legal matters should not be affected by politics and the views of non-judges.

As we saw, the UAE Constitution specifies the number of 5 judges, in article 96, while the Kuwaiti Constitution does not specify the numbers in article 173, leaving that to the law. It would have been better had the constitutional legislator followed the UAE Constitution in specifying the number of judges. In states where the ordinary law can increase or decrease the numbers of members of the courts, their independence is in danger, since the political organs may change the court's composition, making it more compatible with its views, by appointing new members adopting the government's views.[217]

The scope of jurisdiction of Constitutional Courts or Chambers within the Supreme Court vary throughout the legal order. Besides considering constitutionality of laws and regulations,[218] they may also interpret

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217. The composition of the Constitutional Chamber of the Moroccan Supreme Court is also subject to the threat of political interference, since three of its members are appointed by the King and three by the President of the Chamber of Representatives "... *at the beginning of each legislature, after consultation among the groups represented*", according to article 95 of the Constitution.
A similar risk exists in the Yemen Arab Republic, where the 1970 Constitution provides for a Supreme Constitutional Court "*formed from a number of Shari'ah scholars ... elected by the Majlis al-Shura* and nominated by the President of the Republican Council", (article 155).

218. According to article 175 of the 1971 Constitution of Egypt, the Supreme Constitutional Court is authorised to interpret legislation. For example, in case no.5 of judicial year no.1, the Court ruled that article 2 of Legislative Decree no.150 of 1964 was unconstitutional. In case no.7 of judicial year no.2 (1983), the Court found that, according to the Constitution, no legislation may stipulate that an administrative act should not be subject to judicial control. The principle involved was a denial of the right of a certain group to engage in litigation which, "... *notwithstanding its applicability ... entails a negation of their equality with other citizens to whom this right is not denied*".
CERD/C/149/Add.22 of 30th January 1987, pp.3-4.
The Algerian Supreme Court is authorised to review the constitutionality of laws, and exercises the power to interpret them. The Code of Civil Procedure, article 274, specifies the cases in which the Supreme Court is the judicial authority responsible for hearing appeals for interpretation or assessment of the legality of legislation.
CERD/C/158/Add.2 of 3rd April 1987, p.24.
According to article 155 of the Constitution of North Yemen, the duties of the Supreme Constitutional Court will be to give final decisions on *inter alia* "*the constitutionality of ordinances and resolutions which have the force of law*".
Article 33 of the Law composing the Federal Supreme Court in UAE specifies that it "*examines the constitutionality of federal laws, if an objection from one or more emirate alleges that they violate the Constitution*". It also examines the constitutionality of law, legislation and regulations if referred to it by any federal or emirate court during the examination of a case. In addition, it examines the constitutionality of legislation promulgated by one of the Emirates if an objection is raised by the federal authorities on the grounds of unconstitutionality.
Article 103 of the Bahraini Constitution states "*the law will appoint the judicial organ which will have the jurisdiction in examining disputes regarding constitutionality of laws and regulations ...*".
For Kuwait, article 1 of the Kuwaiti Constitutional Court Law states that "*a Constitutional Court will be established with jurisdiction ... to examine disputes regarding laws and regulations ...*". The jurisdiction of the Constitutional court in Kuwait covers not only constitutionality of laws and regulations, but extends to laws and decrees promulgated by the executive according to article 71 of the Constitution, when Parliament is in session or when it is dissolved, if the necessity of taking measures cannot be postponed. Article 6 of the law of the Constitutional Court establishes the Court's competence to examine the legality of regulations, in conflict with articles 169 and 171 of the Constitution, which give this jurisdiction to a Chamber, special court or state council. This jurisdiction includes repeal of legislation and compensation for administrative decisions violating the law, which, it may be argued, will also belong to the Constitutional Court too until one of these organs is established to control the legality of regulations and administrative decisions in general.

constitutional provisions,[219] interpret treaties[220] and in some cases, consider administrative acts.[221] A number are also called upon to examine electoral disputes.[222]

With regard to the question of who has the right to request or challenge the constitutionality of laws or regulations, again Arab legislation varies. An examination of constitutional texts indicates that the right may be exercised by the public authorities, by courts and by individuals. Public authorities have the right to claim before the competent court the repeal of a law on the grounds of unconstitutionality.[223] Individuals may raise the issue of unconstitutionality of law, as may courts.[224]

For example, the Supreme Constitutional Court Law of Egypt instructs that if any of the litigants rebut during litigation before any court or organ of judicial competence on grounds of unconstitutionality of text, in law or regulation, and the Court or organ observes the seriousness

219. For example, the Constitutional Court in Kuwait considers constitutional texts, while the 1970 Constitution of North Yemen provides that the Supreme Constitutional Court may consider the constitutionality of constitutional amendments, according to article 155.

220. For example, the UAE Supreme Federal Court may interpret international treaties and agreements.

221. According to article 155 of the 1970 Constitution of North Yemen, the Supreme Constitutional Court may try *"the Chairman and members of the Republican Council and the prime Minister and Ministers"*.

The Federal Supreme Court of UAE may try ministers and senior officials, for acts in the course of their official functions. In addition, according to Tabataba, the judgement of the Supreme Court indicates its jurisdiction to examine the legality of administrative decisions, when it discussed the definition of administrative decision and decided that the Court will not interfere except when there is an administrative decision within the legal meaning. This jurisdiction may also be understood from the text of article 102/f/1 of the Constitution.

Case no.2/2 Judicial Supreme Administrative Session 9 1975, judgement in Justice magazine issue 8, 2nd year, 1975 pp.67-8.

A. Tabataba ["The jurisdictional control over constitutionality of laws in the Arabian Gulf"] Maj. Dirasat al-Khalij wa-al-Jazirah al-'Arabiyyah, v.6 1980 part 24 pp.11-40.

Section X of the Moroccan Constitution authorises the Supreme Court to supervise any abuse of authority through its Constitutional Chamber. The Supreme Court is also the body with jurisdiction over administrative decisions which may violate laws and regulations in force.

222. For example, the Constitutional Court in Kuwait examines electoral disputes, while in North Yemen, according to the 1970 Constitution, the duties of the Supreme Constitutional Court will include *"investigation in election disputes concerning members of Majlis al-Shura"*.

223. According to article 173 of the Kuwaiti Constitution, the Government and the interested parties shall have the right to challenge the constitutionality of laws and regulations.

According to article 4, para.2 of the Constitutional Court Law, the Kuwaiti parliament has the right to object on grounds of constitutionality. Since the law does not specify the majority required to make this decision, a simple majority of those present will be sufficient.

The Council of Ministers has the right to present a bill to amend or repeal a law considered to violate the Constitution. If the legislator gave the Council of Ministers this right, the intention was to give a final opportunity for objection to a law supported by Parliament. In addition, if the Executive authority proposes a law amending a law to which the Parliament agreed, the legislator gave the Council of Ministers the right to object on the constitutionality as a final method.

The Provisional Federal Constitution of the United Arab Emirates authorises the Higher Federal Court to review constitutionality, in article 99, if asked to do so by one or more Emirates or the Federal Authority. As we have seen, article 145 of the Syrian Constitution permits the High Constitutional Court to examine the constitutionality of laws if the President of the Republic or one quarter of the members of the People's Assembly challenge its constitutionality before promulgation. It also gives its opinion on the constitutionality of government bills, legislative decrees and executive decrees at the request of the President of the Republic.

224. For example, the Court Laws in Kuwait (article 4/B), UAE (article 58) and Egypt (article 29) indicate that courts may raise the issue of unconstitutionality of law. For example, in Egypt, as we will see in detail, should any courts or organs of judicial competence, during review of a case, note unconstitutionality of text in law, regulation or decision, the court is instructed to suspend the case and refer it to the Supreme Constitutional Court to decide on the issue of constitutionality.

of the rebuttal, it should adjourn the case and specify to whoever raised the rebuttal a date not exceeding three months by which to raise the case before the Supreme Constitutional Court to decide on the issue of constitutionality before the court makes its final judgement in the case.

The legislative texts in Bahrain, Kuwait and UAE give the individual the right to object on the ground of unconstitutionality of laws and regulations, although the objection is again made in an indirect way through raising the issue during the court's examination of the case. The person making the objection should be party to the case (article 4, para.b of the Constitutional Court Law in Kuwait and article 58/f/2 of the Federal Supreme Court in UAE and article 103 of the Bahraini Constitution). The individuals concerned do not have the right to go directly to the constitutional court, but the issue must be raised before the subject court, which should examine the seriousness of the rebuttal and if accepted, suspend the case, pending the judgement from the competent court for the judgement on constitutionality.

The procedure in Kuwait differs from that in UAE, since in the former, the court of the subject will transfer the case to the constitutional court directly, while in the latter, as in Egypt, the subject court will specify to the plaintiff a time within which the case should be raised before the Federal Supreme Court.If that time passes without the objection being raised, the rebuttal will be considered abandoned, and the case will continue. It is notable that the procedures applied in UAE regarding the objection on grounds of unconstitutionality, although it begins with the branch rebuttal before the court end up by a case before the Supreme Court, since if the subject court rejects the seriousness of the rebuttal, its rejection is not considered final, since the legislator guaranteed to the person making the rebuttal the right to appeal that decision.

Again, the mechanism adopted by the Kuwaiti and the UAE legislator varies. In Kuwait, there is a Committee for objections within the Constitutional Court, which is composed of the President of the Court and the membership of the senior chancellors in the court, before which the individual can object, if the court decides there is no seriousness in the objection. The Committee either decides to repeal the judgement of the subject court, if it sees seriousness and transfers the case to the Court, or rejects the rebuttal, confirming the judgement of the court of the subject. The decision of the Committee is final and no objection can be made. In the UAE, the legislator guaranteed to those concerned, to challenge the court's decision to reject the rebuttal on the grounds of seriousness, but accompanied it with the condition that the subject of the original case may be appealed to a higher court.

The question of the implications resulting from a decision or judgement of unconstitutionality varies. In Syria, for example, if the High Constitutional Court determines that a law or legislative decree infringes the Constitution, then the provisions which are contrary to the

Constitution will be considered to have been abrogated with retroactive effect. Likewise in Kuwait, according to the Kuwaiti Constitution, article 173, if a law or regulation is considered unconstitutional, *"it shall be considered null and void".*[225]

In other countries the judgement of unconstitutionality does not lead automatically to the repeal or annulment of legislation. In UAE, for example, the authority of the Supreme Court ends by judging the unconstitutionality of a legislative text, without extending to its repeal. This may be seen in para. 2 of article 101 of the Constitution which states that if the Court decides during its examination of constitutionality of laws, legislation or regulations, that a federal law violates the Federal Constitution, it will be the duty of the authorised power in the Union or the Emirate to take the measures necessary to correct this constitutional violation. This is confirmed by article 151 of the Constitution.

The jurisdiction of the Supreme Court does not extend to repealing an unconstitutional law, but only the judgement of unconstitutionality and abstention from applying the law in dispute. The law remains in existence, though deprived of its real force in practice, with the obligation of the federal or local authorities to take the measures necessary to correct the constitutional violation. This is not applied retroactively, but only from the date of the judgement of its unconstitutionality. Some justify this approach on the grounds that it takes into account practical considerations in maintaining and protecting legal positions created in the light of the law. In addition, neglecting the rights and obligations which arise under such a law during its application and before the judgement of its unconstitutionality could lead to material and moral damages.[226]

In contrast, in Kuwait, the judgement of repeal will extend to the date of promulgation of the unconstitutional law, in other words retroactively, eliminating all the implications of the repealed law. This approach could be justified on the grounds that justice could not be fully done without the amendment of the mistakes which arose from the application of an unconstitutional law from the date of its application, or else it could be objected on the grounds that such difficulties could not be amended. In other words, the law violating the constitution cannot be considered truly a law at all either formally or in substance, since it is a condition for the work of the legislative authority that it remains within the boundaries set by the Constitution.

225. Article 6 of the Kuwaiti Court Law states that : *"If the Constitutional Court decides on the unconstitutionality of a law or a decree-law, or the illegality of a regulation or administrative regulation to a law in force, the authorised authority should take the measures necessary to correct this violation and amend its implications retroactively".*

226. Ahmad Kamal Abu al-Majd [Control of constitutionality of laws in the USA and Egypt], 1960 pp. 223-224.

In this examination, we have seen how Arab legislators who chose judicial control of constitutionality have centralised control of constitutionality of laws and regulations, reducing the competence of other courts to consider the validity of rebuttals on grounds of unconstitutionality by any party to the dispute or any court, instead instructing courts to refer the matter to the organ concerned with constitutionality.

Since individuals may not go directly to the constitutional organ, cases must be raised through lower courts, and at this level, the courts are given the right to examine the seriousness of the rebuttal. This procedure clearly contains drawbacks in the length of time required and the possibility of rejection by the lower court. In addition, Tabataba points out that, in a sense, the right to reject it on these grounds constitutes an examination of the constitutionality of the text, which should not be the task of the lower court.

A possible safeguard in this respect is the procedure in some countries whereby the individual may appeal against the rejection on grounds of seriousness to the Supreme Court for wrong application or interpretation of law, though as we saw, the decision of bodies like the Committee in the Constitutional Court in Kuwait is final.

Review of constitutionality of legislation means the protection of the Constitution and prevention of violation of its provisions. The aim of upholding the supremacy of the Constitution cannot be achieved unless control of constitutionality extends to all original legislation and branch legislation, such as regulations.

We have seen in the Egyptian cases in which the judiciary ruled on constitutionality of legislation that their competence to do so is opposed by those who see in it a violation of the principle of separation of powers in line with the French approach, for example, the Tunisian government at the Human Rights Committee discussions, has commented that a judge may not declare a law unconstitutional in Tunisia due to the principle of the separation of powers. The reasoning of the Egyptian court, that such competence of the judiciary is in fact supportive of the principle and of the Constitution itself, is more convincing. It is clear that the Court, in favouring the constitutional text over a lower law, is not exceeding its authority and usurping that of the legislator, but simply carrying out its legal duty of determining the law which is applicable in the case of dispute of laws.

The fact of France's long constitutional experience on one hand, and the continuous process of modification to limit Executive powers on the other, are issues which the Arab counterpart did not and does not yet enjoy, thus one views this tendency with apprehension, if taken and accepted out of context.

We argued that the jurisdiction of the judiciary to review legislation within the Arab legal context was and remains of vital importance in protecting the rule of law and promoting effective reform. The following analyses of decisions given by the Egyptian Supreme Administrative Court and Supreme Constitutional Court are cases in point, in the sense that they illustrate on one hand, the importance of such organs in the legal order as a vital component in upholding the rule of law, by setting important principles for other judicial bodies, and on the other, shed light on how far judicial review in general and within the developing Arab legal order in particular, could contribute more positively to upholding the rule of law and protection of individual and collective rights than any other mechanism, in cases of Executive abuse.

As we saw, the Egyptian legislature took an important step in creating an independent body for the task of controlling and reviewing legislation to ensure its compatibility with the Constitution, regulating this task by Law no.48 of 1979.

This examination points out the competence of the Supreme Constitutional Court, when and how the Court's jurisdiction is established, as well as the implications which result from its decisions regarding legislation considered by the Court to be unconstitutional, and how the Egyptian Supreme Court has interpreted administrative objections, in the light of the Supreme Constitutional Court's decision. It also focuses both on the Court's interpretation of constitutional provisions concerning political rights, and principles of legality.[227]

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227. These Cases are published in the Egyptian Supreme Administrative Court Publications, issues No.5-6 for Year 63, and quoted in the Libyan magazine, [al-Mohamy] (the Lawyer), second issue, October-December, 1984, pp.43-67.
An analysis of Law no.48 may be found in A.'Atiyah ["A comparative and analytical study on the law bearing on the Constitutional Supreme Court (Law no.48/1979) L'Egypt contemporaine 70, no.375 1979, pp.15-52.

According to article 29 of the Supreme Constitutional Court Law, the Court is authorised to carry out judicial control of constitutionality of laws and regulations. Should any courts or organs of judicial competence, during review of a case, note unconstitutionality of text in law, regulation or a decision on a dispute, the court is instructed to suspend the case and refer it to the Supreme Constitutional Court to decide on the issue of constitutionality.[228] Also, if any of the litigants rebut during litigation before any court or organ of judicial competence on grounds of unconstitutionality of text, in law or regulation, and the Court or organ observes the seriousness of the rebuttal, it is instructed to adjourn the case and specify to whoever raised the rebuttal a date not exceeding three months by which to raise the case before the Supreme Constitutional Court to decide on the issue of constitutionality before the court makes its final judgement in the case.

In reviewing this law, one notes *inter alia* that according to article 49, the judgement of the Court in constitutional cases and its decisions in interpreting are binding on all the authorities of the state, and that these judgements and decisions should be publicised in the Official Gazette, within a maximum period of 15 days from the date of promulgation. It also provides that the result of the judgement of unconstitutionality of a legal text or regulation is that it may not be implemented from the day following publication of the judgement. However, regarding laws of penal nature, the judgement of unconstitutionality regarding a penal text means that the provisions which convict will be considered, according to this text, repealed *erga omnes* retroactively.

Under Case no.47 for the third judicial year constitutional registered in the Supreme Constitutional Court, several lawyers raised a case against the President of the Republic and the President of the People's Council as the authorities which promulgated Law No.125 of 1981, regarding the dissolution of the Bar Association, and the Minister of Justice's Decision No.2555/81, regarding the formation of a temporary Council for the Bar. They requested the judgement of the unconstitutionality of Law no.125 of 1981, and the unconstitutionality of both the Letter of the President to the President of the People's Council requesting investigation of issues relating to the Bar Council

228. The Supreme Administrative Court, in Case no.3949/35J dated 5th September 1983, confirmed that the Court's right in this matter is not limited to the occasion when one of the litigants in a case rebuts on the grounds of unconstitutionality, since the court, if it notices the unconstitutionality of text linked to the case, should suspend consideration of the case and refer the papers to the Supreme Constitutional Court for consideration.
Therefore, the Administrative Court's decisions to suspend the case and transfer it to the Constitutional Court to determine the constitutionality of law no.17/83 on the ground that this text is the source on which the challenged decision is based, cannot be considered a violation of para.B of article 29 of the Supreme Constitutional Court law.

and the People's Council's decision regarding the formation of an investigation Committee.[229]

The Supreme Constitutional Court, with regard to the challenge on grounds of unconstitutionality of the Letter of the President of the Republic and the decision of the President of the People's Council dated 13th July 1981, confirmed that the jurisdiction of the Supreme Constitutional Court in constitutional matters cannot be raised unless the Court is connected to a case in conformity with article 29 of the law which created it, that is to say, its jurisdiction applies only where other competent courts transfer a request to examine a constitutional matter, or any of the litigants in a case under consideration raises the unconstitutionality of a legislative text and the court of the subject considers its seriousness and allows him to raise a case before the Supreme Constitutional Court.[230]

Despite the Government's original objection[231] on the grounds of the nature of the Minister of Justice's decision for the formation of a temporary Bar Council,[232] it decided that the constitutionality of both this decision and Law no.125 of 1981 should be reviewed.

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229. When the claimants raised Case no.2479/35J before the Administrative Court, the Court held that the plaintiffs in Case no.2350/35 before the Administrative Court had requested urgently the judgement to suspend implementation of the President of the Republic's Letter to the People's Council, which includes the request of investigation of what he regarded as the *"Bar exceeding its mandate and correct activities as a professional association and syndicate, as well as their attitude towards the public interest"*, and the People's Council's decision dated 13 July 1981 to form the ad hoc Fact Finding Committee, and the Minister of Justice's Decision no.2555/81 forming a temporary Council for their Bar Association.

During the Administrative Court's review of this case, the plaintiffs raised another case, within the same Court, requesting urgently the judgement of suspension of the decision of dissolving the Bar and the decision of the Minister of Justice no.2555/81 of forming the temporary Council. Since the Supreme Constitutional Court Law, as we saw, requires that the dispute be referred by another court or judicial organ to be subject to its jurisdiction, they also requested the Court to refer the case of unconstitutionality of the legislation as a result of which these two decisions were promulgated, to the Supreme Constitutional Court.

The Court, observing the Constitutional Court's jurisdiction, decided in its session dated 11 August 1981 to adjourn judgement in the case for two months to allow the plaintiffs to raise their constitutional case. The plaintiffs raised the present case, amending their objective demands to include the respondent to pay compensation for damages resulting from these decisions.

230. In the light of this, the Court rejected the claim of unconstitutionality of the President's letter and its subject. Since the case documents do not indicate that the plaintiffs rebutted the issue in front of the Administrative Court, the Court rejected the claim of unconstitutionality, on the grounds that the Court's jurisdiction was not applicable according to the law.

231. The Government originally requested the rejection of the claim, subsequently called for the dispute to be considered as finalized and finally called for the dismissal of the case.

232. The Government objected to the claim of unconstitutionality of the decision of the Minister of Justice to form a temporary Council for the Bar, since in the Government's opinion, it did not exceed the Executive act in implementing the text of Article two of Law no.125 of 1981. It does not constitute an administrative decision, and therefore the administrative judiciary was out of jurisdiction in requesting the repeal of laws or in disputes of executive actions which do not qualify for the status of administrative decisions. Therefore, the government argued, the constitutional claim reached the Court by direct means in contradiction and nonconformity with law.

This rebuttal, in the view of the Court, must be rejected since the Court is not an appeal court to the court of the subject but of original jurisdiction. Its limit is the law which created /...

With regard to the unconstitutionality of Law no.125 of 1981, the Government subsequently argued that, in the light of the suspension of Decision no. 2555 and the promulgation of Law no.109 of 1982 and Law no.17 of 1983, which repealed both Law no.61 of 1968 and Law no.125,[233] which formed the subject of the claimants' request, it was now non-existent and its implications were finalised, since the lawyers' interest in pursuing the case no longer existed.

However, in the view of the Court, the legislator's repeal by Law no.17 of Law no.125 with retroactive effect does not prevent the Court from examining and deciding on its constitutionality in respect of those for whom this Law has been implemented, since it created legal implications for them, and they retain a personal interest in the rebuttal.

The Supreme Constitutional Court examined Law no.125 of 1981 regarding the Bar Association,[234] and referring to the plaintiffs' rebuttal to the first

... it, and a constitutional case cannot be raised to it unless a rebuttal has been made before the court of the subject or by the latter's referral to the Supreme Constitutional Court. Once it has been raised, it becomes independent of the subject case, because it treats a subject completely different from the original claim on which the plea to jurisdiction is based. Hence, the court of the subject -unlike the Constitutional Supreme Court - is the one of jurisdiction to decide and the issue of jurisdiction will not be before this court unless there is a jurisdiction dispute between the judicial organs or in the case of dispute regarding two contradictory final judgements promulgated by two different organs, when it is requested to point out the competent organ to view the dispute or which of the judgements should be executed in the light of paragraphs 2 and 3 of Article 25 of the Court Composition Law. Hence, the Administrative Court alone is the Court with jurisdiction to determine its own jurisdiction in the case before it, with regard to the primary and the secondary claim for compensation, subject to the Supreme Administrative Court, and therefore the Government's rebuttal on these grounds is incorrect and should be rejected.

233. The Government pointed out the promulgation of Law no.109 and the fact that another decision from the Minister of Justice had been promulgated, no.3309 of 1982, stipulating the formation of a new Permanent Bar Association Council as well as the promulgation of Law no.17 regarding the Lawyers' Law, including in its first article, the repeal of Law no.61 and Law no.125, with the result that the objective request and its implications are invalid after the repeal of Decision 2555 of 1981, and Law no.125, since this was the subject of the claimants' request. Thus, their interest in continuing the case does not exist, and the dispute is finalised.

234. The Court considered the legal principle that the implementation of a legal rule applies to matters which take place during its application, that it to say, from the day of its promulgation and entry to force to the date of its repeal. Once this rule is replaced by another rule, the latter will be that applicable, nevertheless, legal implications which emerged as a result of the previous rule remain valid, and so their effect could be the subject of examination.

Therefore, since Law no.125 was implemented, and its implication affected the objectors, the objective demand focused on the rebuttal against the unconstitutionality of Law no.125, and the Court considered that their interest remained in fact as far as the constitutional case is concerned, despite the subject of compensation which remains within the jurisdiction of the subject court. The matter is not affected by the Government's point with regard to the issue of compensation, that it was raised after the constitutional claim took place, since the interest in rebuttal of the unconstitutionality is that the judgement on it will affect the objective demands which are still the whole subject of the objective court, thus the request of considering the constitutional dispute void is not in its place.

This Law was publicised in the Official Gazette on 23 July 1981. After stating in its first article that it dissolved the Bar Council from its promulgation, its second article goes on to form a temporary council to the Bar enjoying all jurisdiction. Its third article provides that the temporary Council shall prepare a Lawyers' bill within a year of the date of this law, and within sixty days of the promulgation of the Lawyers' Law, elect the Bar President and members. Article four provides for the suspension of articles 12 to 19 of the Lawyers' Law no.61 of 1968, until the election of the Bar President and Council according to the third Article. The fifth article repeals any of the content of the previous law which conflicts with the present Law, while the final article provides for publication of this Law in the Official Gazette and its application from the day after publication.

article of this Law, which in fact finalized the tenure of elected president and members of the Bar Council before the specified date in the Lawyers' Law by replacing them with a temporary council appointed by the Minister of Justice, found that this amounted to infringement of Article 56 of the Constitution, which made the establishment of trade unions a guaranteed constitutional right, whose exercise is based on democratic foundations. This means that elections are the only means for the formation of trade union councils, hence the Court considered that the challenged Law, in dissolving the correctly elected council and in forming another by appointment amounted to violation of the freedom of trade unionism, contrary to the Constitution.[235]

The Constitution of 1971, in article 56, provides for the formation of associations, syndicates and unions with corporate personality on democratic grounds, a right guaranteed by law, and that law regulates, *inter alia*, the accountability of its members for their actions. The Court pointed out that the draft of the 1971 Constitution did not follow previous Constitutions by granting political rights and freedoms only,[236] but went further in emphasising the democratic principle as a basis for these rights and freedoms, including syndicalism. It provides that these associations should be formed on democratic grounds so that the democratic system will be deepened, as the Constitution built on it the foundation of the state, in line with its first article, which provides that : *"The Egyptian Arab Republic is a democratic and socialist state ..."*.

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235. Since the President and members of the Bar Council are elected by the members of the Bar, termination of their syndicate posts before the end of their term of office by means external to the electorate, which is the General Assembly of the Bar, thus undermined its right in selecting them. The law also prevented the assembly from electing new members to occupy the posts, as article 4 provided for the suspension of articles 12 to 19 of the Lawyers' Law in force, which dealt with candidacy and elections to the post of President and the Council, until the promulgation of the new Lawyers' Law and elections according to its regulations. Hence, article one constituted an infringement of article 56 of the Constitution, for its violation of the principle of free trade unionism and for its conflict with the democratic foundation which this text created as a rule for promoting syndicalism and unionism.

It is irrelevant that it was impossible for the competent general assembly to meet due to the withdrawal of confidence from the Bar Council, according to the applicable law at the time - which states in article 6, the necessity of the presence of half of the lawyers - since the constitutional remedy to this is the amendment of that article to what the legislature considers important to enable the general assembly to exercise its jurisdiction. Nor is it significant as the government claims, that professional syndicates, including the Bar Association, should be considered within the public domain and falling under state supervision to ensure its function and control of its activities, including its right to dissolve the Bar Council, since regulating the syndicates as part of public law is considered within the jurisdiction of the state as the guardian of general interest and the public domain. Nevertheless state regulation and supervision of syndicalism should be within the boundaries and according to the rules set by the Constitution, including those stated in article 56.

Hence the Court made its judgement of the unconstitutionality of article 1 of Law no.125, and since the rest of the articles of this Law depend on this first article, and the connection does not bear separation or division, thus the unconstitutionality of article 1 and nullification of its effect require in consequence the repeal of the whole law.

236. Article 55 of 1956 Constitution provides : *"The creation of syndicates is a guaranteed right. Syndicates have a moral personality in the manner prescribed by the law"*, in line with article 41 of the 1964 Constitution.

Muhammad Khalil The Arab states and the Arab League ... , 1962.

The Constitution lays emphasis, in several articles, on principles which specify the democratic conception which it firmly establishes and which constitute the fundamental characteristics of the society it seeks to establish, whether in relation to the emphasis on popular sovereignty - which the Court rightly describes as a core of democracy - or by guaranteeing rights and freedoms, which is its aim, or by popular participation in exercising power, which is its means.[237] When the constitutional legislator provided, in article 56, that associations and unions be formulated on a democratic foundation as a right guaranteed by law, in the view of the Constitutional Court,[238] the legislator meant to confirm that the principle of freedom of association in its democratic sense implied, *inter alia*, the right to choose freely and in person the union leaders who represent their will. Conversely, this article imposes an obligation on the ordinary legislature to observe this, which means that what it legislates must not conflict with legislation in respect of associations by contradicting the principle of freedom of association within its democratic sense.

For all these reasons, the Court found Law no.125 unconstitutional and by publicising this judgement in the Official Gazette, repealed it *erga omnes*.[239]

Further cases raised by the Bar Association deal with the constitutionality of legislation regarding the Bar Association in Egypt.[240]

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237. The Court further considered that, since freedom of opinion and choice form an essential part of public rights and freedoms, and the foundation of any coherent democracy, thus the Constitution provided, in its third Chapter, that freedom of opinion is guaranteed and that every individual has the right to express his opinion and declare it orally, in writing, by photographs or any other means of expression within the limits of the law, (article 74), and that the formation of associations and unions on a democratic basis is a right guaranteed by law, (article 56), and that to every national are guaranteed the rights to elect and be a candidate, to express opinions in referenda according to the law, with participation in public life regarded as a national duty (article 62).
The Court considered that the Constitution sought to facilitate citizens in exercising public rights, including their contribution in the choice of their leaders and their representatives in the governing process, and the protection of collective rights through elections at the national level such as the People's and *Shu'ra* Councils, as well as at the local level, in the People's Councils, according to articles 87, 162 and 169.

238. The Court referred to the opinion of the Joint Committee of the Manpower Committee and the Bureau of the Legislative Committee of the People's Assembly on this constitutional concept of article 56, in its report on the projected Law no.35 of 1976, in connection to the promulgation of Workers' trade unions which, in the Court's opinion, is an absolute provision applicable to all associations despite their nature, whether worker or professional.

239. The Egyptian Supreme Constitutional Court, case no.47/3, of 11th June 1983.

240. Case no.3949/37J dated 28th May 1983, raised by the President and the members of the elected Bar Council before the Administrative Court, and the Government's Case no.2742/29 dated 7th July 1983 before the Supreme Administrative Court, challenging the decision of the lower court.
The President and Bar Council demanded : firstly, as a matter of urgency, the suspension of the decision regarding the composition of a temporary Bar Council according to Law no.17 of 1983, of which the plaintiffs challenge the constitutionality, and request the transfer by the Court to the Supreme Constitutional Court; secondly, as a matter of urgency, and until the judgement of unconstitutionality of the two laws, no.125 of 1981 and no.17 of 1983, of imposing receivership on the Bar and appointing the legitimate Bar Council as guardian of its affairs; and lastly, the repeal of the challenged decision, and the judgement of obliging the Government to pay compensation to the plaintiffs as legitimate representatives of the Bar Association.

The Bar Council was dissolved by Law no.125, and a decision of the Minister of Justice was promulgated in respect of formation of a temporary Council. During its examination by the Supreme Constitutional Court, Law no.109 of 1982 - amending Law no.125 - and subsequently, Law no.17 of 1983 were promulgated, in the light of which the Minister of Justice promulgated another decision for the re-election of the temporary Bar Council. It seems that the Government meant by this amendment to prevent the Supreme Constitutional Court making its decision on the constitutionality of Law no.125. Law no.17, regarding the Bar Association regulations, included a text giving a Committee[241] the right to form a temporary Council for the Bar. This Committee was formed, and the plaintiffs alleged that this decision and Law no.17 infringed the Constitution, because discussion and acceptance of the projected law, containing more then two hundred articles, took place in four days, one day before the judgement of the Constitutional Court, indicating bad faith on the Government's part.[242]

On 14th June 1983, the representative of the claimants submitted the judgement of the Supreme Constitutional Court no.47/3JC, which establishes the unconstitutionality of Law no.125. The claimants also requested suspension of execution of the decision regarding the composition of a temporary Bar Council, and the decision of this temporary organ in executing Law no.17 specifying a date for the election of the temporary Council, preventing the legitimate Council from exercising its jurisdiction. Lastly, they demanded the repeal of these two decisions. The claimants presented a memorandum including the assertion that Law no.17 is an extension to Law no.125, and that the Supreme Constitutional Court's judgement therefore implies that it too is unconstitutional.[243]

241. This Committee was to be drawn from the judiciary, headed by the President of the Court of Cassation, and would appoint a temporary Bar Council of 20 members.

242. They also alleged that the intention in promulgating Law no.17 was not to organize the public domain, but was ideologically motivated as revenge on the Bar Council, and that this Law aimed at covering up an unlawful and unconstitutional act. This Law was also described as an outrageous violation by the Legislative and Executive authorities on the Supreme Constitutional Court by interfering in constitutional justice, since they participated in the drafting and promulgation of the law.

243. The lawyers also argued that, since the Supreme Constitutional Court published its judgement in the Official Gazette after the promulgation of the new law, this implies that the new law too is unconstitutional, since if the Court considered that Law no.17 had corrected the unconstitutionality of Law no.125, it need not have publicised its findings on Law no.125.

The claimants also challenged the legitimacy of the formation of the Council, which took place as a result of Law no.17, since the judgement cancelled every legislative text undermining the legitimacy of the elected Council, thereby returning the legitimacy which was withdrawn unlawfully and by an unjust law.

The claimants again requested the referral of their rebuttal on the unconstitutionality of Law no.17 to the Supreme Constitutional Court.

The Government argued, *inter alia*,[244] that the Court did not have jurisdiction to examine the case, since the objection to the decision of the temporary Committee to supervise the Bar Council elections and specify the date for the election of the new Bar Council was raised prematurely.[245]

On 5th July 1983, the Administrative Court announced its judgement, dismissing the Government's objections,[246] acceding to the urgent request for suspension of execution of the decision of the Committee created by article 2 of Law no.17 of 1983,[247] and adjourning the case, while its papers were

244. The Government called for rejection of the case, arguing that Law no.17 is the first democratic law since the revolution to regulate advocacy, as the previous regulations were promulgated by by-laws. This law was not promulgated by a person or persons, but by the People's Council, the legislative authority in the country, and according to the constitutional arrangement and standing orders of the People's Council, and this does not violate any of the Bar or the lawyers' rights, on the contrary, supporting them. Nevertheless, there is no foundation for the claims that the government promulgated this law to deprive the Supreme Constitutional Court of its right to exercise its control on Law no.125. Despite the proclamation of the mentioned law, the Court did not abandon examination of Challenge no.47/3J Constitutional.

245. The Government's legal characterisation of the request of the claimants was that as an objection to the provisions of Law no.17, it exceeds the competence of the administrative judiciary. In addition, the three-man Committee, which the legislator appointed to select the temporary members of the Committee, were drawn from the Presidents of the organs of the judiciary. Therefore, it cannot be considered an administrative decision. The Governemnt also stated that the decision which the three-man Committee promulgated on 19th May 1983, regarding the elections, does not count as an administrative decision. Nor does it go beyond a preparatory action which the legislator took to compose the Bar Council. according to the provisions of the law and the internal regime of the Bar, it is an action which does not create, repeal or amend a previous legal position, and therefore, the objection cannot be legally acceptable. The rules of the Lawyers' Law and the internal system of the Bar do not allow a challenge to the independence of a decision inviting the General assembly to meet to elect a President and members of the Bar Council. Nevertheless, it is important to wait until the election has been conducted before an objection can be raised against the whole matter.

246. The Court rejected the challenge against the competence of the judicial administrative organ, on the grounds that it exercised its jurisdiction as a public authority, and everything promulgated by it in this capacity is considered an administrative act. In the light of this, the jurisdiction in examining this case, which focuses on the exercise of this Committee in that capacity, *is* authorised to the administrative judicial organ, according to article 10/5 and article 14 of the Law of the State Council, promulgated by Law no.47 of 1972.

With regard to the grounds of time, the Court found that the claimants' intention in raising their case was to challenge the new procedures for organising the Bar, since they seem corrupt, in the view of the claimants, from their foundation, because of their promulgation by an authorised authority, based on a law suspected of unconstitutionality. Thus, the raising of the case is considered timely.

247. The Court's judgement on the suspension on the decision of the Committee was based on the principles of seriousness and urgency, existing in the request. The Court saw seriousness in the legal text, which appeared to it unconstitutional. The judgement of the Supreme Constitutional Court, of 11th June 1983, established the unconstitutionality of Law no.125 from the date of its promulgation (22/7/81), and thus returned the Bar Council which the previous law had dissolved. This leads to an examination of Law no.17 in the light of the Supreme Constitutional Court judgement, which returned the legal existence of the elected Bar Council. A review of Law no.17 indicates clearly that this Law did not consider the legal existence of the elected Council, according to its articles 2 and 3, paragraph 2 of article 4 and paragraph 1 of article 5. These texts are considered an extension of the implications created by Law no.125, and hence the Legislature commits the same constitutional infringement which the Supreme Constitutional Court had indicated.

These grounds were confirmed by the Supreme Administrative Court, when it rejected the Government's challenge of the Administrative Court's decision, confirming that its judgement pointed out that the challenged decision was based on corrupt legislation, most likely to be found unconstitutional and consequently repealed.

With regard to urgency, the Court found that the prevention of the Bar Council exercising its competence, as provided by law, in particular, its supervisory role on the election of the President and members of the General Bar Council within 6 months of the promulgation of the law, would give rise to implications which could not be amended if a judgement of unconstitutionality was made, and the decision was repealed.

transferred to the Supreme Constitutional Court to decide on the constitutionality of articles 2 and 3, and the second paragraph of article 4 and the first paragraph of article 5 of Law no.17.

The interpretation of the Supreme Administrative Court, in Case no.3949/35J, which confirmed the Administrative Court's decision to suspend the case and transfer it to the Supreme Constitutional Court on the ground that Law no.17 is the source on which the challenged decision is based, illustrates an important principle adopted by the lower court and confirmed, despite the Government's objection.

The Court found that there is no evidence that it is obligatory for the Court, when it notes the seriousness of a rebuttal on grounds of unconstitutionality to abstain from judging on these grounds, the suspension of execution of a decision that the premises of seriousness and urgency exist. Since, in the Court's opinion, the text in question was most likely to be judged unconstitutional and repealed thereafter, the Court saw no conflict between the judgement of suspension of execution of the decision and the judgement of suspending the case and referring it to the Supreme Constitutional Court, since each judicial organ has its own jurisdiction. The first judgement was based on the premises of seriousness and urgency, while the second, the judgement on the subject of the case, depends on the judgement on the question of constitutionality.[248]

Further, in confirmation of the subject Court's findings, the Supreme Administrative Court referred to the findings of the Supreme Constitutional Court, saying that Law no.125 has dismissed the elected President and members of the Bar Council from their positions before the end of their terms of office without the General Assembly of the Bar Council. Therefore, the legislator violated the principle of democratic organization, which should have been observed in the regulation of syndicates, both at formation and dissolution,the principle upheld by article 56 of the Constitution. In the Court's view, the reorganization of the associations sphere by Law no.17 is no justification for over-riding constitutional principles, since the legislator's object was not to create a Bar Association for the first time, by using exceptional texts, since he was dealing with a syndicate created in 1912. Even if the state has the right to organize existing syndicates, nevertheless this right should not violate the principle of democratic formation of syndicates.

248. In the view of the Court, the principle of legality in administrative decisions is measured by their compatability with the law according to which they are promulgated.
In order that the administrative decision be legitimate, the law which promulgates it should in turn be legitimate and that legitimacy cannot be divided. An administrative decision promulgated according to a regulation contrary to law, is considered an illegitimate decision. The decision which is promulgated according to unconstitutional law is likewise deficient, since the Constitution is the first to be respected in the hierarchical legal system.

Also of interest to the issue of judicial review of constitutionality of law is the Supreme Administrative Court's interpretation of article 191[249] of the 1971 Constitution. The Government had argued that the provisions of Law no.125, although violating the Constitution, would remain in force from the date of promulgation (24/7/81) until repealed or amended according to the rules and procedures of the Constitution, and that the judgement from the Constitutional Court on unconstitutionality did not repeal this law, on the grounds that this contradicted the provisions of article 191 of the Constitution.

The Supreme Administrative Court considered this interpretation unsound since the constitutional article deals with laws and regulations in force before the promulgation of the 1971 Constitution, and therefore not Law no.125 of 1981.

Further, article 49 of the Supreme Constitutional Court Law promulgated by Law no.48 of 1979, reviewed above, does not, as the challenge alleged, imply that the law found unconstitutional remains in force until the day following publication of the judgement. Rather, it means that the unconstitutional law should not be implemented from the day following the judgement, since at this point, knowledge of its unconstitutionality takes place. Nor does it mean that this law will remain valid and in force, despite the judgement of its unconstitutionality, until the day of publication of the judgement. Since the judgement of the Supreme Constitutional Court does not create a new situation but rather determines a situation which exists, therefore Law no.125, in the opinion of the Court, **was unconstitutional from the day of its promulgation**, and not from the day following publication of the judgement of its unconstitutionality, or else this would mean that the law was constitutional in one period and unconstitutional in another, under the same Constitution, which does not fit with either legal or logical understanding.

Therefore, the law judged unconstitutional will be considered so, and repealed *erga omnes* from the day of promulgation. This is not an exception limited to the penal sphere, as the objection implied, but a decisive factor in the principle that judgements reveal rather than create.

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249. Article 191 of the 1971 Constitution provides that : *"The provisions of all laws and regulations in force before the issuance of this Constitution will remain appropriate and valid. They may be abrogated or amended according to the rules and procedures established in this Constitution."*

# SECTION FOUR

# THE LEGAL ORDER IN TIME OF EMERGENCY

Chapter One examined the nature and extent of state of emergency in the light of international law. This section examines national legislation concerned with the state of emergency in the Arab countries, and its effect on the legal order and the rule of law, focusing on the legislation of certain states, which represent tendencies within the Arab legal order.

Although States have the right to declare state of emergency and to take the necessary legislative steps[249] in the light of their national and international obligations, depending on the nature and scope of the emergency situations, it is a fact that states of emergency have often led to the undermining of the normal legal protection of human rights, and emergency provisions, which should have limited duration, have become the norm rather than the exception in many states. In the Arab world, state of emergency merits special consideration for its severe effect on the protection of human rights and indeed, on the nature of the legal order itself. This section will consider only state of emergency declared in response to real or perceived threats to internal or external security, for its frequent use in the Arab world. In this context, temporary or emergency legislation seriously affects the legal order to varying degrees, and the extraordinary legal system has a great impact on the legal order, in terms of legislation and institutions.

In most Arab countries, Constitutions or special laws set forth legislation dealing with situations of crisis, including war or the threat of war, actual disruption or threat to public order, to the integrity of the nation, or to the functioning of organs of government.[250] The use of vague terms such as *"public security or order"* (Egypt), *"jeopardise the functioning of the constitutional institutions"* (Morocco), *"serious disturbance to public security"* (Iraq) represents a potential threat to the rule of law and human rights, since they are open to varying interpretation and may be subject to abuse.

As we saw in Chapter one, two important concepts which occur in legislation regulating the position of state of emergency are the idea that danger or threat must be imminent, and that the measures allowed are based on the theory of self-defence, and therefore should be proportionate to the threat and last only as long as the existence of the threat.

Constitutions and other laws in the Arab countries provide for emergency measures to be taken in situations which threaten the state territory,[251]

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249. This could depend on whether the state of emergency is the outcome of internal or external political crisis or *force majeure* disasters.

250. Arab legislation, as in other countries, also provides for state of emergency in other circumstances such as ; public disasters or the spread of an epidemic (Egypt); *"general epidemic or catastrophe"* (Iraq); *"danger to security or public order ... by reason of ... natural disasters"* (Syria).

251. The Moroccan Constitution, article 5, provides : *"when the integrity of the national territory is threatened, ... the King may, ... declare a state of emergency ... "*.
In Algeria, article 120 of the Constitution provides that *"when the country is threatened with imminent danger to ... its territorial integrity, the President of the Republic decrees a state of urgency"*.
The Jordanian Constitution, in article 124 provides that the *"Defence Act"* shall be enacted *"in the event of an emergency necessitating the defence of the realm"*.

security or public order,[252] and the functioning of institutions.[253]

Some legislation mentions no time-limit on the state of emergency, so that the state of emergency can remain in force as long as circumstances that warrant it.[254] Others include a time limit in several forms, for example, the time limit may be extended without condition other than a requirement for renewal,[255] or there may be limited extension, where the limit may depend on occurrence of some events.[256]

252. The Egyptian Constitution and the Emergency Act no.161 of 1958, (as amended in 1967 by Act no.60 and in 1972 by Act no.37) allow the imposition of emergency law *"whenever public security or order in the territory of the republic or in any of its regions is endangered."* The reasons for its proclamation are specified as : the existence of dangers resulting from the outbreak of war, a situation that threatens to lead to such an outbreak, the occurrence of internal disturbances.
CERD/C/149/Add.22 30th January 1987, p.16.
In Syria, Decree No 51 of 1962, which is taken almost word for word from the Egyptian Act of 1958, lists three conditions which permit the proclamation and application of a state of emergency : (a) a state of war; (b) the threat of war; (c) danger to security or public order, in all or part of Syrian territory, by reason of internal troubles or natural disasters.
States of Emergency : their impact on human rights. A study prepared by the International Commission of Jurists, 1983 p.281.
In Iraq, the Constitution empowers the Council of Ministers to proclaim a full or partial public emergency and terminate it by law, according to article 62, paragraph 9. It is regulated by the National Security Law no.4, 1965 (amended 1965, 1966, 1969, 1970), which permits the proclamation of a public emergency in all or part of Iraq if the danger of hostile raid is imminent, if war is declared, or breaks out, or if any situation threatening the outbreak of war arises; if a serious disturbance to public security, or a serious threat thereto takes place.
CCPR/C/1/Add.45 of 8th June 1979, p.24.

253. In Morocco, article 35 of the Constitution provides : *" when events occur which might jeopardise the functioning of the constitutional institutions the King may, ... declare a state of emergency ..."*
Article 46 of the Tunisian Constitution provides for a state of emergency as follows : *"in case of imminent danger threatening the institutions of the Republic, ... and impeding the proper functioning of the machinery of government, the President of the Republic can take exceptional measures ..."*
Article 113 of the Syrian Constitution provides that martial law may be imposed : *"in the event of grave danger, or a situation ... obstructing state institutions from carrying out their constitutional responsibilities"*.
In the Republic of Yemen, article 90 of the Constitution stipulates that the Chairman of the Reublican Council declares a state of emergency with the approval of the Republican Council, the Council of Ministers and the *Majlis al-Shura*, but does not specify the grounds or the procedures involved.
In Algeria, article 120 of the Constitution provides that *"when the country is threatened with imminent danger to its institutions ... the President of the Republic decrees a state of urgency"*.

254. In Syria, the duration is unlimited, and there is no requirement for periodic re-submission to parliament for approval. Likewise, the decree which institutes a state of emergency is unquestionable. (Decrees No 147 and 148 of 1967)
States of emergency : their impact on human rights. A study prepared by the International Commission of Jurists, 1983, p.281.
The Provisional Constitution of the United Arab Emirates does not specify the conditions in which martial law may be imposed, but provides that martial law is declared and terminated by decree, which must be approved by the Supreme Council. The imposition of martial law must also be approved by the President, the Federal Council of Ministers, and the Federal Council of Ministers at its first meeting, (article 146).

255. In Egypt, the Emergency Act no.37 of 1972 provides that the duration of the state of emergency must be specified in advance. There is an automatic procedure by which the declaration lapses if the National Assembly has been unable to reach a decision. The state of emergency is re-submitted to the People's Assembly for renewal. The present state of emergency in Egypt was renewed by the People's Assembly for the period from May 1988 to May 1991 on the grounds of a continuing security threat.
Impact International vol.18:7, April 1988.

256. Article 46 of the Tunisian Constitution provides that : *"the President of the Republic can take exceptional measures required by the circumstances ... These measures cease to be valid after the ending of the circumstances which gave rise to them ..."*. None of the measures of derogation provided by Decree no.78/50 of 26th January 1978 which specifies the duration of the state of emergency, may continue for a period of more than one month. The measures may be renewed only once by a Decree which must specifically state its duration.
CCPR/C/28/Add.5/Rev.1 of 2nd May 1986, pp.12-3 and annex.

Most systems provide that suspension of guarantees may apply to all or part of the territory. In the latter case, the area or locality must be expressly stipulated.[257]

Though a number of modalities have been identified in municipal law for the identification of guarantees subject to suspension or restriction,[258] most Arab legislation lists the rights and guarantees to be affected, in positive terms,[259] though these lists are not exhaustive.

As we saw, the Tunisian Constitution authorises the President to declare a state of emergency, and since independence, these provisions have been invoked on two occasions for internal reasons.[260] In Morocco, the

257. In Iraq, National Security Law no.4, 1965 (amended 1965, 1966, 1969, 1970) permits the proclamation of a public emergency in all or part of Iraq, issued through a Republican Decree, upon the consent of the Council of Ministers. This Decree should state the reasons for calling the state of emergency, and specify the area and the date on which it takes effect.
CCPR/C/1/Add.45 of 8th June 1979, pp.24-5.

258. The Special Rapporteur who prepared the Study on States of Emergency has identified three main cases : no provision expressly defines rights and guarantees subject to derogation or restriction; express provisions, listing in negative terms, the rights and guarantees that cannot be affected; reverse solution of the rights and guarantees to be affected listed in positive terms and exhaustively.
Study of the Implications for Human Rights of Recent Developments Concerning Situations known as States of Siege or Emergency, E/CN.4/Sub.2/1982/15 of 27th July 1982.

259. For example, the Egyptian Constitution provides, in article 48, that it is permissible during "*a state of emergency or war to impose limited censorship on newspapers, publications, and other information media in matters related to public safety or national security in accordance with the law*".
In Jordan, the Constitution provides, in article 15 (iv), that "*in the event of the declaration of martial law or a state of emergency, a limited censorship on newspapers, pamphlets, books and broadcasts in matters affecting public safety or national defence may be imposed by law*".
In Tunisia, Decree No.78/50 of 26th January 1978 contains the following provisions affecting rights in a public emergency : prohibition of the movement of persons or vehicles during specific hours of the night; prohibition of all strikes or lock-outs; control of people's residence and, in particular, local banishment of any person attempting to interfere with the actions of the public authorities in any way; power to commandeer persons and property needed for the proper operation of the public services of vital interest to the nation; power to order that arms and ammunition legally held by physical persons be given up for the period of the state of emergency; power to close any public place and, in particular, entertainment halls, licensed premises and places of assembly of all kinds; power to order the entering and searching of premises by day and by night; control of publication and broadcasting.
CCPR/C/28/Add.5/Rev.1 2nd May 1986 p.13.
In Syria, Article 4 of the Martial Law Decree (Legislative decree number 51 dated 22/12/1962) empowers the Martial Law Governor or his deputy to adopt the all or some of the following measures : (a) the placing of restrictions on freedoms of individuals with respect to meetings ... in specific places or at particular times. Preventive arrest of anyone suspected of endangering public security and order. Authorization to investigate persons and places. (b) the censorship of letters and communications of all kinds. Censorship of newspapers, periodicals, publications, drawings, printed matter, broadcasts and all means of communication, propaganda and publicity before issue; also their seizure, confiscation and suspension, the denial of their rights and the closure of the places in which they were printed. (c) the fixing of opening and closing times for public places.
Report from Amnesty International to the government of the Syrian Arab Republic, 1983, pp.50-51.

260. The first was in January 1978, following disturbances which were felt to threaten the lives of citizens and the existence of institutions. The decree proclaiming the state of emergency was not renewed, and in fact, some of its provisions were not applied, since the country soon returned to normal.
CCPR/C/28/Add.5/Rev.1 2nd May 1986 p.13 para. 42.
The second occasion was in January 1984, after the government's decision to raise the price of basic foodstuffs. Decree no.84/1 proclaimed the state of emergency, but on this occasion, the state of emergency was lifted before a month had elapsed. The Tunisian government notified the Secretary-General of the United Nations in accordance with article 4 of the Covenant, of the emergency measures taken.
CCPR/C/28/Add.5/Rev.1 2nd May 1986 Annex pp i-ii.

King exercised his constitutional right in June 1965, when he dissolved Parliament, assumed full legislative power and suspended the Constitution. The state of emergency lasted until 1970, when a new Constitution was promulgated.[261] In spite of the eight-year war with Iran, Iraq has stated that it has not proclaimed a general state of emergency during the period since the Covenant entered into force in 1976. However, it must be said that the Iraqi legal order, as we have seen, places restrictions on civil and political rights, on the grounds of national security, if not explicitly by emergency legislation.

An effect on the legal order of the state of emergency is to transfer power from other organs of government to the Executive. During this period, concentration of power in the hands of the Executive also undermines the principle of separation of powers by tending to encourage Executive interference in the judicial process. This is manifested in emergency measures which allow the Executive to order the arrest and detention of a wide range of groups on grounds of threat to security, and to interfere in the process of law by measures which provide that appeals are made to the Executive rather than to a higher court. Another way in which judicial safeguards are undermined by the state of emergency is by the creation of a parallel judicial system, regulated by emergency laws, and exercised through extraordinary courts, whether military or security courts, which are not bound by the ordinary judicial system.

To all this must be added the absence of an effective organ to supervise the constitutionality of laws passed during this critical period, either because it is weakened by Executive powers or because of the extremity of the emergency measures taken, for example, suspending parliament, which in some countries is the only organ which exercises control of constitutionality of laws.

We saw how emergency law grants the Executive special powers, for example, to defend the nation or safeguard internal or external security. Examples of the range of powers may be found in the legislation of several countries.[262]

In several countries, extraordinary courts have been set up to try those

261. Morocco : Amnesty International Briefing, 1977, p.3.

262. In Jordan, the provisions of Martial Law invest the Prime Minister as Martial Law Governor with wide powers to arrest anyone considered a threat to state security, and to suspend a broad range of civil and political rights guaranteed under the Constitution. Under Martial Law political prisoners are either held without trial or brought before military courts.
Amnesty International Yearbook 1980.

In Morocco, the declaration of a state of siege is potentially a threat to human rights as it provides that some crimes and offences will be transferred to the jurisdiction of military ... tribunals, according to a Dahir of 1st September 1939

In Syria, Article 4 of the Martial Law Decree (Legislative decree number 51 dated 22/12/1962) empowers the Martial Law Governor or his deputy to adopt several measures restricting individual rights (as we saw above), and try anyone who violates them in a military court.
Article 6 of the Decree provides that the following offences shall be referred to military courts: (a) contravention of orders issued by the Martial Law Governor; (b) offences against the security of the state and public order; (c) offences against public authority;... (e) offences which constitute a general danger.
Report from Amnesty International to the government of the Syrian Arab Republic, 1983, pp.50-51.

In Iraq, article 4 of the National Security Law gives jurisdiction to the Prime Minister to exercise the authority specified by law in the area under the state of emergency.

accused of crimes against national security and public order. Such organs include military courts,[263] State Security Courts[264] and so-called revolutionary courts.[265] Often these courts lack legal safeguards, and no right to appeal is provided. Revolutionary and military courts in Iraq, for example, operate outside national and international law, since they are not independent of the military and the *Ba'th* party, and their members have little or no judicial experience. A deficiency in such courts is the lack of an adequate right of defence, since it is reported that accused persons may not have access to lawyers until the day of trial. There is no right of appeal to a higher judicial body, even in capital cases, since appeals for clemency may only be made to the Office of the President.

Similarly in Syria[266] and Egypt,[267] certain courts have been established

263. Military courts, for example, in Tunisia consider both infringements of military regulations and ordinary crimes by military personnel. They establish competence *ratione personae* and *ratione materiae*. The composition of the court is four military judges presided over by a civilian, and it follows the normal Code of Penal Procedure. In contrast with other Arab countries, judgements of this Court may be reviewed by the Court of Cassation, with the addition of one military judge to the bench.
Military courts also operate in Morocco, under the Code of Military Justice of 1956. This Code empowers military courts to try civilians accused of offences against the external security of the state, as well as military personnel. This modification took place by Law no.2/71 on 26th July 1971.
Amnesty International Yearbook 1983.

264. For example, a Court of National Security dealing with cases of external or internal security was established in Tunisia in 1968. CCPR/C/SR.714 of 9th April 1987, pp.10-11.

265. Courts established outside the ordinary legal framework include the "*revolutionary*" courts set up in Iraq. According to Amnesty International, the Revolutionary Court in Baghdad is a permanent special court which tries crimes against internal and external security, and the Special Military Court in Kirkuk is a permanent military court which tries Kurds charged with political offences.
According to the Iraqi government, the Revolutionary Court in Baghdad was set up under Act no.180 of 1968. In composition, it is made up of three members, one of whom represents the Public Prosecutor, appointed by Presidential Decree. It applies the Code of Criminal Procedure, and is competent to examine cases involving the internal and external security of the state. The judgements of this Court are not subject to review, though death sentences are reviewed by a legal bureau in the office of the President, and the final decision is made by the President.
In Iraq, the Minister of Defence has the power, under Law no.32 (1966), to form Emergency Military Courts, composed of a President of a rank not below that of Lieutenant-Colonel, and two members of a rank not below that of Major. An assistant judicial counsellor, appointed by the Minister shall fill the post of Public Prosecutor in such courts. The courts may try persons assigned to them by the Minister of Defence, or by whoever he authorises to do so. The Minister shall be empowered to stop all legal investigations and order the closing of a case, for some or all of the defendants.
Amendment 32 to the National Security Law of 1965 provides, in article 1 that the Minister of Defence is empowered during military operations to form Military Inquiry Committees to investigate offences falling within the jurisdiction of Emergency Military Courts, as set forth in article 5 of the law. The Committees have the judicial power of examining judges. Article 5 of the Law rules that Emergency Military Courts may examine all offences allegedly committed inside or outside the area of actual operations, if they are related to a rebellion or mutiny within the area.
CCPR/C/1/Add.45 8th June 1979 pp.24-26.

266. Amnesty International comments that there is no legal right to challenge, for example, the lawfulness of arrest in court nor make any judicial appeal against wrongful detention, because according to Article 4 (a) of the State of Emergency Law, the Deputy Martial Law Governor decides whether to hold any arrested person in preventive detention, whether to refer the case to a military or state security court, or whether to order release, and appeals may only be made to the local security force commander, the Deputy Martial Law Governor or the President.
Human Rights Journal Vol 4 No. 1, pp.20-21.

267. In Egypt, Law 105 of the Establishment of State Security Courts, published in the Official Gazette on 31st May 1980, established that the State Security Court comprises three judges from the Court of Appeal, and provided for two officers of the armed forces to be added by Presidential Decree. According to Act No. 164 of 1981 which amended some parts of Act No. 162 of 1958, concerning the state of emergency, those detained under the Emergency Act could submit a complaint to the President or his representative, if they had not been released after six months. In the event of rejection, another complaint could be made after six months. These provisions were later amended by Act No. 50 of 1982, which transferred responsibility for supervision from the President to the Supreme Court / ...

during the state of emergency which deal with cases related to national security and public order.

Under emergency regulations in the Arab countries, a wide range of civil and political rights may be restricted on the grounds of threat to external or internal security. Emergency law provides for the arrest and detention[268] of those suspected of endangering national security or public order. Other rights which are restricted include : freedoms of movement,[269] assembly,[270] association, information and expression,[271] and the right to participate in political life.[272] We can see that the effect of the state of emergency on the legal order is to undermine many of the legal safeguards for people whose basic rights may be restricted in the name of security.

A number of civil rights are violated in practice during the state of emergency though they remain safeguarded in theory by constitutional provisions. As well as emergency regulations which restrict civil and political rights during the state of emergency, civil rights of persons considered a threat to national security or public order are widely violated during state of emergency, according to reports received by non-governmental organizations.[273]

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... of State Security, and shortened the period before an appeal may be lodged from 6 months to 30 days, initially. This Act states : *"Everyone arrested or detained under the Emergency Act ... may lodge a complaint against his arrest or detention to the Supreme Court of State Security ..."*
CCPR/C/26/Add.1 of 26th September 1983, pp. 5-6.

268. In Egypt, Article 8 of Act no. 34 of 1971 regulates detention, as follows: *"The public prosecutor is empowered to order the retention in custody of any person if there are cogent reasons to believe that the said person has committed acts detrimental to the country's external or internal security, prejudicial to the economic interests of the socialist society or the socialist achievements of the peasants and workers or likely to undermine the country's political life or endanger national unity ..."*
Egypt : violations of human rights An Amnesty International report, 1983, p. 20.

269. In Tunisia, under Decree No. 78/50 of 26th January 1978, the authority assumes : *"power to close any public place and, in particular, entertainment halls, licensed premises and places of assembly of all kinds; power to order the entering and searching of premises by day and by night; control of publication and broadcasting."*
CCPR/C/28/Add. 5/Rev. 1 2nd May 1986 p. 13.

270. In Egypt, the right to freedom of assembly may be restricted under the Emergency Act, according to article 3.
The Egyptian government has reported that no restriction has in fact been placed on this right, under current state of emergency legislation.
CERD/C/149/Add. 22 of 30th January 1987 p. 9.

271. As we saw, in Syria, Article 4 of the Martial Law Decree empowers the Martial Law Governor or his deputy to adopt the all or some of the following measures : (b) the censorship of letters and communications of all kinds. Censorship of newspapers, periodicals, publications, drawings, printed matter, broadcasts and all means of communication, propaganda and publicity before issue; also their seizure, confiscation and suspension, the denial of their rights and the closure of the places in which they were printed.
Report from Amnesty International to the government of the Syrian Arab Republic, 1983, pp. 50-51.

272. The right to participate in public life has been restricted under martial law provisions in Jordan, as the Chamber of Deputies has been suspended, and a new body, the National Consultative Council, has been formed. At its formation in 1978, it had comprised 60 members, though this number was increased to 75 in 1982. Its recommendations are advisory, and the government is not bound to adopt them. CCPR/C/SR. 362 of 15th July 1982, p. 9.

273. As we have seen, according to Amnesty International for example, there is often breach of emergency law procedures in Syria in respect of preventive arrest. Arrest without authorisation or legal warrants is allegedly carried out by the security forces.
Amnesty International Amnesty International Report 1984.
Amnesty International also reports the practice of long-term *incommunicado* detention under martial law in Syria, where there seems to be no limit to the period as it may range from a few days / ...

The following section draws heavily on discussions which took place with respect to state of emergency between representatives of the governments of Syria, Jordan and Egypt with the Human Rights Committee according to their obligation under article 40 of the Covenant. Bearing certain shortcomings in mind,[274] it is nevertheless useful to examine these discussions, in order to shed light on both States' attitudes to their obligations under the Covenant and to the effect of state of emergency on human rights.

With regard to the status of the Covenant within the national legal order of these three states, we have seen, that in Egypt and Syria, the Covenant became an integral part of national law.[275] In Jordan, however, the Covenant takes precedence over all other legislation, remaining subordinate only to the Constitution.[276]

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... to several years.
Report from Amnesty International to the government of the Syrian Arab Republic, 1983 pp. 22-23.
In Iraq, it is reported that political suspects are detained in the custody of the state security forces without charge or trial, and that arrest and detention procedures contained in the Code of Criminal Procedure were disregarded for political suspects.
Amnesty International Amnesty International Report 1984.
Under provisions of martial law in Jordan, there has been prolonged detention without trial of political prisoners. Under the provisions of martial law political prisoners may be held for long periods without trial and Amnesty International has information that some individuals have been held for more than four years.
Amnesty International report that in Morocco, under the procedure known as *garde à vue*, a detainee suspected of endangering internal or external security may be held *incommunicado* for up to eight days, with a possible four day extension, as a result of amendments to the Code of Penal Procedure of 1959. In practice, it seems that it may be indefinitely prolonged as the courts have often rejected appeals against prolonged detention. In 1982, according to Amnesty International, more than two hundred people were held in incommunicado detention under provisions of martial law.
Amnesty International Report of an Amnesty International Mission to the Kingdom of Morocco, 10-13 February 1981, 1982 pp. 8-9.

274. Firstly, it must be stressed that the reports submitted by the three Arab countries of particular interest in this section (Syria, Jordan and Egypt) were prepared and considered at a comparatively early stage in the life of the Human Rights Committee, while it was still developing its guidelines for the preparation of reports, and had not yet prepared the list containing subjects of particular and constant interest to the members of Committee.
These two deficiencies had the unfortunate effect that early reports were not as full as the Committee later requested, nor did they contain adequate information on all aspects covered by the Covenant. Likewise, the Committee's method of consideration of reports was still developing, with consequent repetition of questions and a tendency to focus on some issues more than others. Also, since the reports under consideration were the initial reports of States Parties (though supplemented in some cases by additional reports or oral discussion), the Committee, reasonably, did not press firmly for detailed information, commenting that such details could be supplied in later reports, the principal objective in the early stages being to establish a constructive dialogue with States Parties. For example, in consideration of its first report, the Committee expressed its appreciation of the desire on the part of the Egyptian Government to enter into a dialogue, though it stressed the point that the supplementary report within the context of Article 40 would require to contain not only the extent to which human rights were enjoyed in the country, but should also indicate the factors and difficulties affecting the full implementation of the Covenant.
CCPR/C/SR.500, of 4 April 1984, p. 4.

275. We have seen that the Egyptian Constitution stipulates that conventions to which Egypt accedes have the effect of law after they have been signed, ratified and published in accordance with the prescribed procedures. In Syria, we saw that it is implicit in the Constitution that international instruments, once ratified and promulgated, become part of the Syrian legal system. The Syrian government has stated on several occasions that there exists no contradiction between the provisions of the Constitution and the Covenant, and the Covenant has apparently passed into the Syrian domestic legal system, upon ratification by the People's Assembly.

276. As we saw, it seems that the international agreements which Jordan ratifies or accedes to have the force of law, and have precedence over all national legislation, with the exception of the Constitution, as several judgements of the Jordanian Court of Cassation have indicated, since it seems that the Court applies international law in precedence over domestic law, except in certain cases where public order is endangered. Jordan signed the ICCPR in 1972 and ratified it in 1975.

State of emergency legislation has long been applied in Syria, Egypt and Jordan, and remains in force today.[277] Syrian involvement in the Middle East crisis carries with it the constant threat of war, and continued occupation of her territory by Israel[278] sustains instability. Within this context, it seems,[279] martial law is maintained on the grounds that the life of the nation is threatened.[280] Similarly, Jordan proclaimed a state of emergency as a result of the 1967 war, and the consequent occupation of its territory by Israel.[281] However, the Egyptian government has stated that the grounds for the state of emergency in Egypt are *"to insure stability"*.[282]

Of the three countries, none has informed the Secretary-General of the United Nations either of the proclamation of states of emergency or of derogations made from the countries' obligations under the Political Covenant, according to article 4.[283] The present Syrian government has not notified the

277. Martial law has been in force in Syria almost continuously since independence, despite the promulgation of several Constitutions, and the state of emergency continues today.
The present state of emergency in Egypt has been in force since before the adoption of the present Egyptian Constitution in 1971.

278. It has stated that, owing to the fact that part of the Syrian territory is under foreign occupation, the government cannot implement the provisions of the Covenant, since it is unable to secure and protect the rights and freedoms of the inhabitants of its occupied territories.
Report of the Human Rights Committee, General Assembly, Official Records: Thirty-Fourth Session, Supplement No. 40 (A/34/40), p. 70.

279. The question of the existence of a state of emergency in Syria is unclear, as the government stated to the Human Rights Committee in 1979 that no state of emergency existed in Syria, when, during the Committee's consideration of Syria's report, the Syrian representative asked that the record of the meeting show his statement that the President of the Syrian Arab Republic had declared before the People's Council that there was no martial law and no emergency measures in Syria, except for reasons of state security.
CCPR/C/SR.160 of 8 August 1979, p. 12.
In response to questions, the Syrian government stressed that the conditions under which a state of emergency could be proclaimed were contained in a decree dated 22 December 1962. In accordance with this decree, a state of emergency may be declared in the event of war or in a situation conducive to war, when the security of the State or public order (*ordre public*) was threatened.
Report of the Human Rights Committee, General Assembly, Official Records: Thirty-Fourth Session, Supplement No. 40 (A/34/40), pp. 72-73.

280. *"Having regard to the nature of the enemy, who was threatening the life of the Syrian nation, and the escalation of the conflict as a result of Egypt's capitulation, which had destablilized the entire region and was endangering the right to life of the nation, groups and individuals. The human rights of the Syrian people, whether under occupation or not, were being systematically undermined by foreign occupation and by the plot hatched against the Arab nation by Egypt, Israel and the United States of America."*
CCPR/C/SR.158 of 6 August 1979, p. 3.

281. According to the Jordanian government in October 1981, the human rights situation could not be understood without an idea of the political, social and economic obstacles that the country had been facing since Israel had occupied the West Bank and Gaza Strip in 1967, which had caused an influx of many thousands of refugees to the East Bank. This grave situation had obliged the government to proclaim a state of emergency in accordance with the Constitution.
Report of the Human Rights Committee, General Assembly, Official Records: Thirty-Fourth Session, Supplement No. 40 (A/34/40), p. 41.

282. In response to questions from the Human Rights Committee during consideration of their country's initial report, the Egyptian government pointed out to the Committee that the proclamation of the state of emergency was *"a sovereign right of the State exercised by the People's Assembly"*, and that the measure was introduced *"to insure stability"*.

283. Again, in Syria, it is not clear whether the state of emergency has been officially proclaimed, since the Syrian government has stated (CCPR/C/SR.160 of 8th August 1977, p. 11) that a state of emergency was proclaimed by means of an act published in the Official Gazette and the present government, being popular, felt itself secure enough to have no need to proclaim a state of emergency. This statement does not make it clear whether the state of emergency in fact exists, or has been proclaimed through the Official Gazette. As we will see, it seems that a state of emergency does exist in Syria, and in the light of this, the failure to fulfil the duty of proclamation thereby violates national law, as well as the provision of the Covenant. With regard to the Syrian government's obligation under the Covenant when availing itself of the right of derogation, / ...

Secretary-General of the United Nations of any state of emergency.[284] Although Syria ratified the Covenant in 1969, the Syrian President has not officially informed other States Parties to the Covenant of any derogations as a result of the state of emergency.[285] Despite the Jordanian Council of Ministers' consideration of the obligation of notification[286] it has not informed the Secretary-General of the proclamation of a state of emergency, nor of any derogations from its obligations under the Covenant. The Egyptian government likewise has not taken steps to notify other States Parties of the existence of a state of emergency or of derogations from its obligations.

It is worrying that the states apparently do not consider themselves bound by the clear obligation of notification. Jordan's statement that the issue of notification was under review must be seen in the light of its continued failure to the present to take action. In these countries, where emergency law has been in force for some time, it seems that the governments consider that since the Middle East crisis is well known, the state of emergency requires neither proclamation or notification.

The imposition of state of emergency in these three countries over a long period has led naturally to its institutionalization by all governments, up to the present. This situation gives rise to grave doubts about the efficacy of the Constitution[287] and other legal safeguards for human rights.

In particular, questions arise as to the promulgation of special emergency legislation, derogation from civil and political rights, and above all, derogation from the normal application of the rule of law, with regard to arrest and detention, use of special courts and judges, sentencing and the right of appeal, as well as the independence of the judiciary and maintenance of the principle of separation of powers.

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... during consideration of Syria's first report in 1977, neither the Secretary-General nor the Human Rights Committee seems to have been notified. This failure of the Syrian government to observe a principle of international law, coupled with the apparent failure to proclaim the state of emergency at the national level, casts serious doubt on the legality of the state of emergency in Syria.

284. It is worthwhile to mention that the President who is constitutionally authorised to conclude treaties, is also recommended to take steps to ensure the implementation of Syria's international obligations. According to Article 104 of the Constitution, "*The President of the Republic concludes treaties and international agreements and abrogates them in accordance with the provisions of the Constitution.*"

CCPR/C/1/Add.31 of 12th July 1978 p.2; CCPR/C/SR.160 of 8th August 1979 p.8.

285. CCPR/C/1/Add.55 of 7th August 1981, p.2.

286. In response to the Committee's enquiry as to whether the state of emergency had been officially proclaimed in Jordan since the entry into force of the Covenant, the Jordanian government referred to article 124 of the Constitution, explaining that the reason for the emergency was defence of the realm in the context of the war with Israel, and that the time was not right for the abolition of the state of emergency, though the government kept the situation under review. It also confirmed that no notification through the Secretary-General to States Parties had taken place under article 4. The Jordanian representative stated that the legal authorities had informed the government of its obligation to communicate with the UN Secretary-General and States Parties according to article 4, paragraph 3 of the Covenant.

Report of the Human Rights Committee, General Assembly, Official Records: Thirty-Seventh Session, Supplement No.40 (A/37/40) pp.43-44.

It seems that Egypt too has failed to meet this obligation, since the Committee commented on the fact that, while the state of emergency had been in force before the Egyptians had acceded to the Covenant, Egypt had not, in April 1984, notified other States Parties of derogations from the Covenant.

287. "*Certain countries ... live under states of emergency which empty the constitutions of their content, as is the case in Egypt, Jordan, Iraq and Syria.*"

A. Youssoufi "Human rights in Arab countries" Review of the International Commission of Jurists, 39/1987, pp.33-35.

The Syrian government has confirmed that, once proclaimed, the state of emergency restricts such personal freedoms as those of assembly and movement and allows the preventive detention of suspects who may endanger the security of the State or public order.

With regard to judicial institutions, the government has confirmed that State Security Tribunals *are not* bound to conform with the procedures provided for in existing legislation in all procedural stages of investigation and judgement, though judgements are not executed unless approved by the Head of State.[288] This clearly represents a deterioration of legal safeguards for those detained under emergency law, through the establishment of emergency courts, the extension of grounds for detention, the failure to uphold established procedures and the potential for executive interference in the judicial process.

Of particular concern with respect to the state of emergency in Jordan are both the promulgation of temporary emergency measures,[289] extending the power of the executive in respect of detention on the grounds of security, and the continuing growth of the jurisdictional competence of military courts, now widely empowered to try civilians.[290] It is clearly unacceptable for military courts to have competence to try civilians, since their proceedings often fall short of the requirements for fair trial. However, the Jordanian government has confirmed that the military courts will continue to function as long as martial law remains in force.[291]

As in the cases of Syria and Jordan, in Egypt the state of emergency introduced by Act No.162 of 1958, and its amendments of 1981-2 has established a special Court of State Security. In addition, it seems that, under Act No.164 of 1981 and Act No.50 of 1982, concerning the status of persons detained under the original Emergency Act of 1958, the President has the power to review judgements and order retrials : although the public prosecutor may appeal against judgements, the role of the President could thus lead to interference in the judicial process in violation of the principle

288. Report of the Human Rights Committee, General Assembly, Official Records: Thirty-Fourth Session, Supplement No.40 (A/34/40), pp.72-73.

289. The "*martial administrative regulations*" of 1977 empower the Military Governor General (appointed by the Council of Ministers) to exercise all the functions delegated to him by the King to safeguard the kingdom and guarantee security. He is empowered to issue an arrest warrant without specific charge, though if the detainee is charged, he should be brought before a military court within 15 days, after investigation by the military prosecutor.
CCPR/C/SR.362 of 15th July 1982, p.2.
Despite the Jordanian government's statement that such persons suffer no discrimination : they had the right to be represented and be defended by a lawyer (appointed by the Court, if necessary), these exceptional powers of the Governor-General constitute a severe threat to the rights of civilians.

290. Military courts decide on crimes against state security, against the protection of state secrets, and secret documents, crimes with weapons and possession of weapons, membership of a banned political party, dealing with the enemy, infiltration or the sale of property to the enemy.

291. The Jordanian representative at the Human Rights Committee commented that although calls were growing from pressure groups representing professionals, such as lawyers, doctors, and engineers, for the abolition of the jurisdictional authority of the military courts over civil courts, this would not be possible in the current circumstances.
CCPR/C/SR.332 of 13th November 1981, p.12.

of separation of powers. The rule of law is also weakened by the fact that appeals against orders under the Emergency Act lie within the competence of the Minister of the Interior rather than the Minister of Justice. The Human Rights Committee has also commented that the provision that the President or Prime Minister might order the retrial before another court of a person acquitted by a State Security Court represents double jeopardy and is therefore contrary to the Covenant.[292]

It seems that the three countries share common characteristics : firstly, none of the three states has fulfilled its technical obligation of notification under article 4; secondly, each government connects the state of emergency, directly or indirectly, to the security of the state; thirdly, in all three countries, state of emergency seems to be interpreted in a way which falls short of international legal standards. With regard to the first point, there is the tendency of Arab governments apparently to consider the Middle East crisis as sufficiently well known to make the obligation of notification superfluous. The failure to satisfy the **principle of publicity** does not lie only within the belief that there exists a crisis of which international public opinion is aware. The intention of the rule of publicity goes beyond a public declaration of the existence of an emergency situation to some obligation to demonstrate the content of emergency measures imposed, and thereby, be subject to international scrutiny. Since it represents the only circumstance in which states may derogate from their obligation to protect human rights, in return, the international community expected the rule of notification to be observed in order to allow supervision of the nature and legality of derogation, and the extent to which rights and freedoms might be affected.

The three Arab states chosen to illustrate this difficulty are legally bound by a specific obligation of immediate notification, and even though the states may exercise a *"margin of appreciation"* in declaring a state of emergency when they judge it to be necessary, nevertheless in accepting international rules, they become bound to submit to international attention. The claims of state representatives to the Human Rights Committee that the government is popular enough not to need to proclaim a state of emergency, or simply to repeat that the fact of the crisis is well known internationally, is not supported by international legal understanding, as the comment of the Human Rights Committee in the Uruguay case shows.

The principle of notification is not to be understood merely as a technical procedure which may or may not be fulfilled, but it is a measure of the legality of the state of emergency, since the international community, represented by the Secretary-General and the Human Rights Committee exercise some supervision over the lawfulness of the departure from ordinary rules and the substance of derogation.

292. CCPR/C/SR.500, of 4 April 1984, pp.2-4.

On the remaining points, although the declaration of state of emergency may be understood within the context of the Middle East crisis, whether on the grounds of war or threat of war, there is no doubt that the criteria of legality are that the situation should contain a *real* and *immediate* threat to the life of the nation, and the measures taken should be proportionate to the danger. While avoiding the argument of the political nature of the conflict, one should say that the duration of the conflict no doubt required certain amendments to accommodate the dangers on one hand, and the basic rights of citizens to enjoy their civil and political freedoms on the other. It is not compatible with international legal understanding however to extend the state of emergency on the grounds of war to other areas of civil and political life which bear little relation to the state of war or a real threat to national security. The exercise of legitimate political rights by the population seems to be confused by governments to a greater or lesser extent with a threat to national security.

There is a tendency to integrate the extraordinary judicial process set up by emergency legislation with the ordinary legal system with the result of undermining the basic judicial order. Likewise, the basic constitutional order, which is the fundamental legal safeguard of the normal state mechanism, is undermined by the institutionalization of emergency measures, which empty the constitutional order of its value. In the absence or suppression of democratic institutions, the population finds itself surrounded by legislation which provides little protection of its rights. Despite how the government justifies emergency measures, the absence of ordinary judicial and other institutions of safeguard has led to the concentration of powers in the hands of the Executive which has undermined the fundamental principles of any democratic society, whether the separation of powers or independence of judiciary, undermining the rule of law in general.

# CHAPTER FOUR

# POLITICAL RIGHTS IN NATIONAL LEGISLATION

The discussion of international texts dealing with political rights focused on the international understanding, concentrating in particular on establishing criteria which may be used to evaluate political human rights in Arab national legislation and the extent to which the national legislature succeeded in providing legal protection.

The purpose in this Chapter is on one hand, to demonstrate the degree of recognition by municipal law of principles set by international legal standards, and on the other to evaluate them, by examining how far the Arab legal order responds to these legal conceptions in national legislation. This examination highlights the obstacles, in law, which exist within the Arab legal order in time of normality, as well as in time of crisis.

While constitutional provisions in many Arab countries have incorporated into the basic charter of government a recognition of political human rights, other countries lacking Constitutions instead regulate political life by relying on traditional mechanisms.[1]

1. As pointed out in the introduction, *Shari'ah* as a source of political rights is beyond the scope of the present study. The subject has been examined exhaustively by many writers, including S.H. Amin, Legal and political structure of an Islamic state : implications for Iran and Pakistan, Islamic law in the contemporary world, 1985; Abdel Karim Zidan, The individual in the Islamic Shari'ah, 2nd ed., 1970; Mohammed Fathi Authman, Human rights in the Islamic Shari'ah and western legal thought, 1982; M. Cherif Bassiouni, Introduction to Islam, 1985.

SECTION ONE

# FREEDOM OF OPINION AND EXPRESSION

# IN NATIONAL LEGISLATION

Arab Constitutions, republican,[2] monarchical[3] and traditional,[4] with the exception of Saudi Arabia and Oman, set the principle of freedom of opinion and expression. Most constitutional provisions, though mentioning the rights together nevertheless explicitly safeguard each element. Some, however, mention only one element of the right, for example, Syria, which provides explicit protection only for freedom of expression. While it might be argued that the right to freedom of opinion is thereby implicitly safeguarded, since the international provision explicitly mentions the two aspects of the right, and as we saw, the *travaux preparatoires* of article 19 of the Political Covenant highlight the distinct nature of the private and public rights, national law which fails to protect the right of opinion explicitly must be regarded as inadequate in falling short of full protection of the right within the context of article 19 of the Covenant. Conversely, the Iraqi Constitution, which contains no explicit safeguard of the right of freedom of expression, or the freedom of the Press (though this may be implied by *"freedom of publication"*), also falls short of full protection of the right as formulated in international law.

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2. For example, the Tunisian Constitution, in article 8, guarantees freedom of opinion and expression, when exercised in accordance with the law. Article 10 of Act no.83/112 of 12th December 1983 protects freedom of opinion, and it is extended to include agents of the state and officials, "... *providing that under no circumstances may the personal file of the official contain a reference to his political, philosophical or religious opinions*". The same provision appears in regulations relating to agents of offices, public institutions of an industrial and commercial nature and national corporations.

In Algeria, while the National Charter "... *guarantees public freedoms, particularly the freedoms of expression, of opinion, of thought ...*", the Constitution confirms, in article 53, its inviolability as a fundamental right. The Algerian legislature provided that "*freedom of conscience and opinion shall be inviolable*", and article 55 guarantees freedom of expression.

The Egyptian Constitution, in articles 47, 48 and 49, provides that : "*Freedom of opinion is guaranteed. Every person is entitled to free expression of his opinion and to its dissemination by speech, writing, photographs and so forth, within the limits of the law. Self-criticism and constructive criticism are a guarantee of the soundness of the national structure.*" (article 47); "*Freedom of the Press, printing, publication and information media is guaranteed. Censorship of the newspapers is forbidden. Warning, suspending, or proscribing newspapers by administrative means is also forbidden ...*" (article 48); "*The state guarantees citizens the freedom of scientific research and literary, artistic, and cultural creativeness and provides the means of encouraging these activities.*" (article 49).

The Iraqi Constitution, in article 26, guarantees the freedom of opinion and publication, while the Libyan Constitutional Declaration of 11 December 1969 provides, in article 13, that : "*Freedom of opinion is ensured ...*". In Syria, article 38 of the 1973 Constitution gives the right to every citizen freely and publicly to express his views through all means of expression.

The North Yemeni Provisional Constitution of 1974 provides, in article 12, that "*citizens have the right to express their thoughts by means of speech, writing or voting within the confines of the law*".

3. Article 9 of the Moroccan Constitution guarantees to all citizens " ... *freedom of opinion, freedom of expression in all its forms ...*".

Note : see Report of Human Rights Committee 37th session Supp. no. 40 (A/37/40) - comments of the Committee on article 19 of the ICCPR.

The Jordanian Constitution, articles 15 to 18, contains provisions obliging the state to safeguard these freedoms, in particular, freedom of expression in all its forms, within the limits of the law.

4. Here, the rights may find their protection at the constitutional level, as for example, in the case of the Provisional Federal Constitution of the United Arab Emirates, where article 30 provides : "*Freedom of opinion and expression, and the freedom to express by word of mouth or by writing, and all other forms of expressing this freedom shall be guaranteed within the framework of the law,*" and Kuwait, whose Constitution safeguards freedom of opinion, the Press and communication, within the context of "*the relevant laws*".

In Saudi Arabia and Oman, absolute monarchies without formal Constitutions, the rights are considered as provided for by *Shari'ah* which Saudi Arabia recognises as the main source of its legal order.

Most Constitutions provide that the exercise of these rights must be within the limits of the law. While it is acceptable that municipal law should regulate the exercise of freedom of expression to safeguard the rights of the community as a whole, nevertheless, according to international criteria, the right to hold an opinion may not be regulated or restricted in ordinary times. In the light of this clear understanding, the question of the ideological dimension as a factor restricting freedom of opinion and expression must be examined as, in the radical Arab republics, Constitutions and other legislation set the ideological context, socialist or revolutionary, in which such freedoms are exercised.

The Libyan Constitutional Declaration limits the protection of the right of freedom of opinion and its exercise with a vaguely worded ideological restriction when it stipulates, in article 13, that freedom of opinion is ensured *"within the limits of the interests of the people and the principles of the Revolution"*.

While the *"interests of the people"* might be a ground on which other rights may be legitimately restricted, freedom of opinion cannot justifiably be restricted even on this ground.[5] The restriction based on *"the principles of the Revolution"* is likewise unacceptable, and in addition, is clearly a potential source of abuse, as it is a vague concept.

Unlike the private right to freedom of opinion, the public right to freedom of expression may be restricted on a number of specified grounds. However, the vaguely worded ideological restrictions imposed on the exercise of this right even at the constitutional level in several Arab republics are contrary to international legal standards. For example, the article dealing with freedom of expression in the Syrian Constitution of 1973, goes on :

*"to help through control and constructive criticism to guarantee the security and development of the nation and homeland and to sustain the the socialist system."*

The context thus set in which the freedom may be exercised is ideological, and restricts the freedom in a way which does not match the restrictions acceptable in international law. In addition, it is clear that criticism may be negative as well as positive or constructive, and it is unreasonable to restrict the right on this ground alone. The criteria should be that a balance should be struck between the right of the individual to criticise and the interests of the community as a whole.[6] The Iraqi Constitution is open to criticism on both of these counts, as it links the practice of each of these rights with the *"revolutionary"* line of the state, in article 26, which states:

*"It shall guarantee the freedom of opinion, publication ... The State shall endeavour to provide the means required for practising these freedoms which are compatible with the nationalist and progressive line of the Revolution"*.

5. The article in the Covenant, as we saw, explicitly provides that the individual should be free to hold opinions *"without interference"*.
6. A member of the Human Rights Committee has made a similar point about this provision, and stressed that although a balance must be struck between the right of the individual and the legitimate / ...

Likewise, the article dealing with freedom of expression in the Algerian Constitution goes on to specify that *"they may not be used to undermine the bases of the socialist revolution"*. Furthermore, the article specifies that the freedom is subject to article 73, which provides for the *lapsing* of rights and freedoms for whoever *"uses such rights and freedoms to infringe upon ... the essential interests of the national collectivity, the unity of the people and the national territory, the internal and external security of the state and the socialist Revolution"*.

Again, the right is restricted on ideological grounds[7] : although *restrictions* on the right of freedom of expression are permissible on the grounds specified in international law, such as infringing on the rights and freedoms of others or threat to national security, the *lapsing* of this freedom is a violation of international principles, in the sense that the rights cannot be considered guaranteed. Like the Libyan provision, the term *"undermine the bases of the socialist revolution"* is vague, and therefore may be subject to abuse, particularly in the light of the lack of judicial review.

Socialist ideology, thus manifested in several Constitutions, leads to the undermining of legal safeguards of political rights in a way which is contrary to the spirit of the rights. Likewise, the revolutionary ideology of a state like Libya leads to weakening of legal safeguards at the constitutional level which stands at the centre of the legal framework which can protect human rights. This practical weakness leads to the self-imposed censorship of individual opinions, as well as undermining any mechanism of protection.

In order to evaluate the position of this right in municipal law, besides determining whether the rights to freedom of opinion and expression are guaranteed in the Constitution of a State, it is important to examine the rules which define the scope of the freedom, for example, by regulating the freedom of information. The right both to receive and impart information and ideas of any kind is to be found in national legislation, within both the republican and monarchy systems. For example, in the republic of Syria, freedom of information is safeguarded in article 38 of the 1973 Constitution, which provides that views may be expressed orally, in writing, and through all the other means of expression, and stipulates that the State guarantees the freedoms of press, printing and publication in accordance with the law.[8]

The Iraqi Constitution links the practice of this right with the socialist, *"revolutionary"* line of the state, as we saw, and goes on to regulate

... interest of the community, an individual should be entitled to criticise his government. CCPR/C/SR.26 of 18th August 1977, p.6 para.31

7. Article 75 of the Algerian Constitution goes on to provide that *"by his work and behaviour every citizen must ... respect the achievements of the socialist Revolution"*.

8. This is regulated by the General Law on Printed Matter which provides in article 1 that : *"Printing presses, bookshops and printed matter shall be free, whatever their category may be. This freedom can be restricted only within the framework of this law"*.

other spheres of the freedom of research and creativity.[9]

Article 8 of the Copyright Law No.3 of 1971 provides that authors have the right to publish, disseminate and produce works, and permits people to use, show publicly, transmit or recite them to the public through any suitable medium, in conformity with the law. Printing and publishing is carried out in Iraq by a number of governmental bodies, which have their own rules and regulations and are organized by Act no.206 of 1968 concerning publications, which also regulates the activities of the Press and journalists, setting penalties for offences.[10] This Code also lists subjects which may not be published, and are subject to the control of the censor.[11] The Press Code, in article 7 (b), regulates the granting of permits to daily and other publications, which must be proposed by the Minister of Culture and Information, and issued by decision of the Council of Ministers with the approval of the Revolutionary Command Council. Such a requirement for prior authorization runs contrary to article 19 of the Covenant, as we will see in other legislation, and it is clear that the role of the executive in the granting of permits is likely to lead to arbitrary interference in the free exercise of this right.

The *Ba'th* Party, in its 8th Regional Conference in 1974, reviewed its policy on the media, and its report indicates that the Party supervises the media with the intention of making its activity serve the objectives of the revolution.[12] Freedom of information is regulated in part by the Ministry of Culture and Information Act no.94 of 1981, under which the Ministry patronises culture and the arts in all fields of activity, and *"shall develop them in accordance with the principles of the Ba'th party and the aims of the revolution ... In the field of media and information, the Ministry shall propagate and deepen the ideology, principles, and stands of the Ba'th Party".*[13]

9. Article 27, in paragraph C, guarantees *"freedom of scientific research, promote and reward distinction and creativeness in all intellectual, scientific and technical activities and in various manifestations of popular genius"*. This is similar to the Egyptian Constitution which, in articles 49, guarantees freedom of scientific research and artistic and cultural creativity, and the Algerian Constitution which, in article 54, guarantees the *"freedom of intellectual, artistic and scientific creativity ... within the framework of the law"*.

10. CCPR/C/SR.748 of 22nd July 1987, p.4.

11. Article 16 of the law includes : criticism of the President, members of the Revolutionary Command Council, the President's close advisors or those who act on their behalf; defamation or criticism of the state or its apparatus, or news which may cause the devaluation of the national currency or government bonds or discredits their value in Iraq and abroad. Other subjects which require the approval of the censor, according to article 17, include statements attributed to the President or members of the RCC, discussions or decisions of the Council of Ministers or other officials; agreements or treaties concluded by the government of Iraq; criminal investigations; operations orders of the armed forces, police or any other national forces and their formation, organization, arms and tactics or decisions concerning price-fixing, importation, custom tariffs or currency exchange.
Freedom of information and expression in Iraq, Article 19, 1987, pp.19-20.

12. The report concluded that this objective had not been reached since *"most organs of information and culture lack competent and revolutionary executives ... many reactionary elements lurk in these organs and are unconcerned about the tasks called for by the Party ..."*.
Information, freedom and censorship : the Article 19 world report, 1988, p.256.

13. The Act also gives the Ministry the *"mission to supervise all media functions and activities, and to exercise cultural supervision over all public and private libraries, and to inspect and license the recording on tapes and discs of all music and vocal production used for commercial purposes."*
Information, freedom and censorship : the Article 19 world report, 1988, p.256.

Even these laws, regulations and statements of policy by the leading party in Iraq make it clear that freedoms of expression and information cannot be said to exist outwith the ideological boundaries set by the government and ruling party. This is a clear violation of the letter and spirit of article 19 of the Covenant. Other mechanisms of the control of information in Iraq make it clear that the right of expression is the monopoly of state and party organs.[14] Other procedures make it clear that Iraqi government organs and administrative authorities which regulate freedom of information and of expression have the power to control the free exercise of these rights.[15]

Severe ideological restrictions are imposed on these freedoms in the Algerian Constitution which, in article 19, lists the goals of the *"cultural revolution"* as including *"(c) the adoption of a lifestyle in harmony with ... the principles of the socialist revolution as defined in the National Charter"*. All these examples of ideological restriction on freedom of expression must be considered contrary to international principles, and undermine the exercise of the freedom to the extent that it cannot be said to exist in law, despite the guarantees at the constitutional level.

As we saw, freedom of information is safeguarded in the Constitution of Tunisia, which guarantees freedom of the Press and publication in accordance with the law. Nevertheless, the Press Code (Act no.71/32 of 28th April 1975) requires that new periodicals must be notified to the Ministry of the Interior.

Other publications must also be submitted to the Minister of the Interior who forwards a copy to the Ministry of Information and the Office of the Public Prosecutor. Publication without authorization from the Minister of the Interior constitutes an offence.[16]

This Tunisian regulation is not in the spirit of the Covenant since the applicant must secure permission to practise his right. While the international provision does allow for restriction by the state on certain grounds, this restriction should be exceptional rather than the general rule, since such restriction would tend to jeopardise enjoyment of the right itself.

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14. A Censorship Department has been established within the Ministry, and is responsible for all printing and publication. By Resolution no.95 of 1986, the Department's function was transferred to the Department of Home Information at the Ministry, which carries out censorship of Arabic and foreign publications, mail and cinema.
Iraqi Official Gazette, no.3151, 25/5/87, p.287.

15. The Press Code requires submission of 2 copies of all printed material before sale and distribution, in order to obtain a permit. The foreign media are also subject to a list of restricted topics, which include : propagation of imperialism in its old and new forms; *"uglifying the World Liberation Movements"*; propagation of racial movements such as zionism; propagation of animosity, hatred and dispersal among the individuals of the society, its national and religious sects.
Article 19 Freedom of information and expression in Iraq, 1987, p.21.

16. However, refusals giving reasons, or lack of response from the authorities may be appealed against to the Administrative Tribunal on the grounds of abuse of authority. Under the provisions of Act no.72/40 of 1st June 1972, there exists an administrative requirement which must be fulfilled prior to the appeal, namely that an administrative request for review to the authority concerned must be made.
Freedom of information and expression in Tunisia, Article 19, 1987, p.14

I share the view of Rosalyn Higgins that the condition of prior notification is incompatible with the Covenant, unless on one of the grounds specified in para. 3, for example, national security.[17] Even in these cases, restriction should only be applied to certain categories of publication, for a given period of time or else the State would be exercising a form of control incompatible with the Covenant. In contrast, the treatment of foreign periodicals is more compatible with the Covenant, as they require no prior notification, though they may be prohibited by the Minister of the Interior on the recommendation of the Ministry of Information, if they threaten public order or national security. These Tunisian regulations have the unusual effect of granting aliens a greater degree of freedom than Tunisians.[18]

Legislation in force in Morocco, Egypt, Jordan and UAE similarly regulates freedom of expression, including freedom of publication, the Press and censorship.[19]

As we have seen, most of the laws which regulate freedom of information in the Arab countries do not restrict this freedom by media, but embody the provision *"through any media"* in law. As for the other element distinguished in freedom of information, that its flow should be *"regardless of frontiers"*, in Iraq, for example, Act no.94 of 1981 of the Ministry of Culture and Information sets forth principles for the exercise of the freedom of information, from the standpoint in which culture and information are regarded as a means of dialogue between

17. CCPR/C/SR.715 of 11th July 1987, p.7.
18. This situation may have come about as a result of the reform of legislation restricting the import of foreign material, which led to such restrictions being abolished.
Ibid, p.4.
19. In Morocco, where article 9 of the Constitution guarantees to citizens freedom of opinion and freedom of expression *"in all its forms"*, these freedoms are extended to aliens, particularly in respect of freedom of the Press, regulated by the Dahir of 15th November 1958. The only restriction placed on aliens is that every foreign newspaper printed in Morocco must, under the provisions of article 28 of the Dahir, have a permit granted by decree.
CCPR/C/10/Add.2 19 February 1981 pp.4, 29.
In Egypt, all periodicals must be licensed, and licenses may only be issued to organizations or parties, who must prove considerable financial assets to qualify. A constitutional amendment of 1980 established a Press Council to regulate press freedom, censorship and the rights of journalists.
Information, freedom and censorship : the Article 19 world report, 1988, p.247
In Jordan, freedom of information is safeguarded in the Constitution, by article 15, which also obliges the state to safeguard freedom of expression in all its forms, within the limits of the law. The right, which may be restricted only within the law, on the grounds of national defence and public safety, is regulated by other laws. Article 2 of Act no.16 of 1955 provides that the Press, printing and publishing shall be free and that everyone shall have the right to express his opinion and disseminate truthful news and opinions through the publication media. This freedom shall not be restricted other than by the law. According to the Act, anyone may issue printed publications, like newspapers, provided, in the case of an alien, that he is resident in Jordan, and that there is a reciprocal arrangement regarding such matters between Jordan and the country of which he is a national. There are other conditions, for example, that the person should not have been convicted of a serious felony or misdemeanour. Freedom of the Press and publishing are safeguarded in that suspension of publication of a newspaper or suspension of a newspaper's licence must be as provided by law.
CERD/C/130/Add.3 1st April 1987 p.5.
The Court, in cases of Press offences, must deliver judgement within 3 days, and the Appeal Court should also deliver judgement within 3 days. CCPR/C/Add.24 13th April 1978 pp.1-3
In UAE, freedom of the Press, printing and publication is regulated by Act no.15 of 1980. CERD/C/130/Add.1 of 28th January 1986, p.13

peoples.[20]

Other countries, as we have seen, regulate the flow of foreign publications to varying degrees, with Tunisia as most liberal as it does not require prior registration for foreign journals.

As we have seen, the importance of freedom of expression and of information is such that it may in principle, bear restrictions on its exercise in the light of the duties and responsibilities it carries. Since the final aim of this possible restriction is to strike the right balance between the individual's rights and those of the community as a whole, certain restrictions might be acceptable if they relate either to the interests of other persons or to those of the community, on condition that they do not jeopardise the right itself. Thus the boundaries of such restrictions are that they should be *"provided by law"*, and necessary for the respect of the rights and reputations of others, and other public interest, such as public order, national security, public safety and so on.

The Libyan Constitutional Declaration does not mention in the article protecting freedom of opinion that restrictions should be provided by law, since the legislator seems to be concerned to a greater extent with ideological limitation.[21] However, as we saw, the Declaration states elsewhere that other legislation in force will continue to regulate rights and freedoms save where it contradicts the Declaration. Thus, one can say that on one hand, the revolutionary legislator used existing laws such as the Penal Code and Code of Penal Procedure,[22] and created other legislation on the other.

The first category of restrictions necessary to protect the rights and reputations of others are regulated by laws which deal with libel, slander, abuse and defamation. Throughout the Arab world, the law regulates the crimes of insult and defamation.[23]

Some countries base these provisions on *Shari'ah*, in general, the laws define insult in Penal Codes, in respect of individuals and organizations.

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20. CCPR/C/37/Add.3 18th July 1986 p.40
It must be noted that this is a statement of the ideology of the *Ba'th* party, within which the Ministry must operate according to Law no.142 of October 1974 on *"The Leader Party"*, which obliges all ministries to adopt the Political Report of the 8th Regional Conference of the *Ba'th* Party.

21. Article 13 sets the context as *"... interests of the people and the principles of the Revolution."*

22. Existing legislation restricts the freedom of expression for the respect of the rights and reputations of others, or public morals. Restrictions may be found in the Penal and Penal Procedure Codes in the case of insult, causing offence to persons or their morals, defamation, incitement to disobedience of the law and provoking religious hatred and hostility, incitement to commit a crime, display of indecent material or indecent acts or obscene speech.
These restrictions are to be found in articles 438, 471 and 472, 439, 318, 317 and 318, 500 and 501 of the Penal Code respectively.
CCPR/C/1/Add.20 of 24 January 1978, pp. 9-10.

23. In Algeria, articles 296 and 297 of the Criminal Code define defamation and insult. The latter is defined as *"any offensive remark, term of disparagement or invective which does not involve the imputation of any act"*, according to article 297 of the Algerian Criminal Code.
CERD/C/131/Add.3 of 18th June 1985, p.9.
The Iraqi legislator outlined the offences of slander and abuse. The law which regulates these crimes is the Law of Publication No.206 of 1968 which prohibits, in article 16, the publication of anything that may be regarded as slander or libel against others. Article 15 of the same law provides for a right of reply for the person slandered. The crime is also covered by a penal / ...

The last category is of concern since in some countries criticism of the government or ruling party may be regarded as a crime of insult, and criticism of an individual may be regarded as a crime against the state, if the person or actions of the Head of State is criticised.

In Tunisia, restrictions may be imposed on the mass media by law in the interests of the rights of others. Act no.75/32, as we saw, regulates publication, and imposes certain obligations.[24] The Code penalises crimes committed through the Press, such as defamation and insult, and the penalties for such crimes are more severe, when they involve official bodies. The effect of Penal Code article 245, which includes in its definition of defamation a public allegation impugning an established body, is to make criticism of a government body an offence,[25] which is a restriction of freedom of expression which goes beyond those established and allowed in international law.[26] The offence of libel against members of government, provided in the Penal Code, article 50, also presents the opportunity for suppression of hostile criticism.[27]

In several traditional Islamic countries, as elsewhere in the Arab world, Codes regulate slander and defamation.[28]

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... provision, in article 28 of the Penal Code, where the punishment specified may be imprisonment or a fine, or both. Compensation may be sought according to the Civil Code, under article 205. CCPR/C/1/Add.45 8th June 1979 p.74.

Similarly, libel, defined as "*the ascription of a certain incident to another person, through one of the publicity media, which would, were it true constitute a punishable offence or lead to despise of that person by his fellow citizens*", and abuse, defined as "*the levelling at others of any allegation, not necessarily involving an incident, which may soil their honour or dignity, or may hurt their feelings*", may be punished by imprisonment or fine, or both.

24. For example, directors of periodicals are bound to grant a right of reply or denial of statements or acts wrongly attributed. The Code prohibits the publication of indictments before they are heard publicly or certain trial proceedings concerning private life, and the defamation of public figures.

25. Article 50 of the Press Code also contains this definition, but adds that, even if the allegation is expressed with an element of doubt or if the body is not directly named, but is identifiable, it is nonetheless defamation. Equally, since it is a crime to disseminate false information, a journalist might be prosecuted for publishing information which he did not know to be false.

26. Mr Mommersteeg, a member of the Human Rights Committee, has commented that the restriction on the grounds of the rights and reputations of others should not be extended to include governmental bodies. CCPR/C/SR.715 of 11th July 1987, p.5.

27. "*Any insulting expression uttered against the President of the Republic, the President of the Assembly, a member of the government*" is a punishable offence. Libel is defined, in article 54, as "*any offensive expression, term of contempt or invective which does not involve an imputation of a specific fact*".

An Egyptian case which illustrates this approach is briefly discussed in Mark N. Cooper, The transformation of Egypt, 1982, p.173.

28. For example, in the UAE, where the provisions of existing Criminal Codes remain in force, an example may be found in Articles 116-77 of the Criminal Code in force in the Emirate of Abu Dhabi which stipulates, *inter alia*, that: "*Any person who in any way writes about, publicizes, broadcasts or alludes to any occurrences or characteristics likely to bring another person into disrepute commits the offence of defamation ...*". CERD/C/130/Add.1 of 28th January 1986, p.10.

Articles 257-259 specify the penalties for libel and slander. For example, article 257 specifies : "*Any person who unlawfully disseminates in printed, written, drawn or photographic form, or by any means other than a mere gesture, verbal utterance or sound, libellous material derogatory to another person with a view to bringing the latter in disrepute shall be punished by ... A person shall be deemed to have disseminated libellous material if he causes such printed, written, drawn or photographic libellous material to be submitted, transmitted or distributed to the libelled person or to any other person. Transmission by open letter or postcard shall constitute dissemination regardless of whether the letter or the card is sent to the libelled person or to any other person.*" CERD/C/130/Add.1 of 28th January 1986, p.11.

The Kuwaiti Press and Publications Act no.3/61 prohibits the publication of any material likely to prejudice the dignity or individual freedoms of persons. CERD/C/149/Add.16 of 14th November 1986, p.5.

As we saw, in some Arab republics, legislation exists which makes criticism of the government or ruling party or its aims, a crime, for example, Decrees Nos 6 & 7 in Syria, and RCC Resolution no.840 in Iraq. Likewise, in Morocco, criticism of the King or his family may be regarded as a crime. Since this category of legislation also contains some reference to threats to national security, it will be examined in the following section which deals with restrictions on the grounds of threats to the public interest.

The second category of lawful restrictions which may be imposed on the rights in the interests of the community include those providing for the protection of national security and public order (*ordre public*).

Radical republics impose a range of restrictions on ideological grounds, for example, as we saw, the Syrian Constitution places an ideological restriction on the rights, in article 38, which allows criticism which will *"guarantee the security and development of the nation and homeland and ... sustain the socialist system"*. Other Syrian legislation in force prescribes severe punishments for *"actions ... incompatible with the ... socialist order"*, whether oral or written.[29] By implication, criticism which is not considered to *"guarantee"* the development of the homeland or *"sustain"* the socialist system, or statements *"incompatible with the ... socialist order"* are considered to threaten national security and public order. This comment could apply equally to any of the republics which limit constitutional protection of political rights within an ideological framework.[30] Other legislation imposes restrictions compatible with the Covenant, for example, according to the General Law on Printed Matter, article 39 under the heading *"restrictions"* :

*"it is prohibited to publish anything which is contrary to public morals or public order or which endangers the safety and the freedom of citizens and judicial institutions, or anything affecting the security of the army, its operations and armaments. Any breach of these regulations shall be indictable."*

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29. Decrees Nos 6 & 7 of January 1965 - still in force - prescribe a mandatory death penalty for certain specified forms of collusion in verbal or physical acts hostile to the aims of the Ba'thist revolution ... ; a non-mandatory death sentence for *"actions held to be incompatible with the implementation of the socialist order in the state whether they are written, spoken or enacted, or come about through any means of expression or publication"*.

30. In Egypt, Act no.34 of 1972 concerning the protection of national unity guarantees freedom of expression *"... provided that such is not prejudicial to the freedoms of others or to the constituent elements of society"*.
CCPR/C/26/Add.1/Rev.1 of 16th March 1984 p.5.
Legislation in force in Libya imposing severe restrictions on this right includes Law No.71 of 1972, which prohibits any activity which contradicts the aims or principles of the Revolution of September, or as Article 2 of this law states : *"... aims to endanger its constitutional foundations whether openly or secret, or whether the concept on which it is based is written or not written"*. With regard to restrictions provided by law for public order and national security there exist the Revolutionary Command Council Decrees. Of particular interest is the Decree of 11 December 1969, Concerning the Protection of the Revolution, while Law No.71 of 1972, prescribes the punishment of imprisonment for whoever undertakes certain activities against the republican system of 1st September 1969 Revolution. These activities include the incitement of hostile propaganda against the ruling revolutionary republic, the provocation of unrest and disunity between social classes, the spreading of information or rumours which are different from the political or economic situation of the country, and participation in demonstrations or strikes with the aim of opposing or endangering the republican system.
Amnesty International Violations of Human Rights in the Libyan Arab Jamahiriya, 20 November 1984.

It seems, according to the information provided by the Syrian government to the Human Rights Committee, that press censorship is imposed only in the state of emergency. It must be repeated that state of emergency legislation has remained in force in Syria, Jordan and Egypt for a long period, and we have seen the effect of restrictions imposed on freedom of expression in these countries.

We have seen how the Iraqi Constitution sets ideological limitations on these rights. It seems that the Iraqi legislator aimed to protect this right within the boundaries of the goals of the Revolution, which clearly undermines its protection. The legislator also allowed restriction on the exercise of this right for the protection of national security, public order,[31] public health or morals. For example, Law no.64 of 1973 on censorship of classified material and cinema, stipulates that independent film-makers require a licence from the Ministry of Culture and Information. In order to obtain a licence, film-makers must function within the ideological boundaries of the Revolution.[32]

In November 1986, article 225 of the Penal Code was amended by RCC Resolution no.840 to prescribe the death penalty for publicly insulting the President of the Republic or the deputy, the Revolutionary Command Council, the Arab Socialist Ba'th Party, the National Assembly or the government with the intent of mobilizing public opinion against the authorities.[33]

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31. Censorship (undertaken by a Committee composed of representatives from the Ministries of Information and Culture, Defence and the Interior, whose decisions implement the ideological objectives of the *Ba'th* party), said to be based on the Iraqi concept of public order which "*cannot allow a film or document to be published on the pretext of reflecting freedom of thought if, in fact, such a film would be harmful. Iraq's goal is to guide instructively individual development*".
Information, freedom and censorship : the Article 19 world report, 1988, p.247.

32. It also prohibits the display and sale of imported slides, microfilm, records, recording tape, scripts of film stories, cinema films of all kinds, commercial and private video tapes, on certain specified grounds. Locally produced films are also subject to censorship, and their display, sale or export is permitted only by licence. The Minister of Information is empowered to suspend the display of film or other material legally licensed if new circumstances appear. Articles of the Penal Code also penalise possession of banned political material, such as leaflets.
Law no.64, article 2, a,b,c and d specify among others: "*propagating for reactionary, chauvinistic, Sha'ubite (populism), racialism or regionalistic thoughts or favouring of defeatism, serving imperialism and zionism and their supporters or not serving the masses' objectives, interests and aspirations; offending the Arab nation and its goals and causes of destiny or to brotherly or friendly countries, or deforming or offending the National Liberation movements in the world; low intellectual and artistic standard as it may offend the public taste and not dealing with a useful subject.*"
The Penal Code, in article 208, imposes imprisonment or a fine "*for anyone who possesses or obtains written, printed or recorded material that contains incitement to, advocacy of, or propaganda for any of the offences defined by article 200 of the Penal Code, if such were prepared for distribution, publication or viewing by others. For anyone who possesses any means of printing, recording, publicising which is to intend to print, record or broadcast calls, songs, or propaganda for faith, an association, a committee or an organization that aims at committing any of the offences mentioned in article 200.*"
CCPR/C/1/Add.45 of 8 June 1979, pp. 80-82
Information, freedom and censorship : the Article 19 world report, 1988, p.259

33. "*He shall be punished with life imprisonment and confiscation of movable and immovable properties whoever insults by any way of publicity the President of the Republic, whoever acting on his behalf, the Revolutionary Command Council, the Ba'th Party, the National Assembly or the government. The penalty shall be death if the insult was flagrant and aimed to stir public opinion against the authorities. He shall be punished with imprisonment for a period not to exceed seven years anyone who publicly insults the courts, the armed forces, or other public authorities or government institutions.*"
Official Gazette no.3124, 17/11/86, Decree no.840

Legislation penalising criticism of the government is also in force in Egypt,[34] though it must be said that certain types of criticism are punished more severely when combined with other violent or illegal acts.[35] For example, according to article 98A (bis) of the Egyptian Penal Code, imprisonment and a fine may be imposed on anyone who propagates opposition to the fundamental principles upon which the socialist regime is based. The same punishment is prescribed by article 98B (bis) for possession of printed material intended for distribution, which is considered contrary to the basic constitutional principles of the state or its political or social system.[36] Other articles of the Egyptian Penal Code restrict freedom of expression on grounds more compatible with the permissible restrictions in international law,[37] by using the term *"public security"*, and providing that the action specified should be combined with violent or terrorist action.[38]

In the modern Arab monarchies, certain criticism of the government, and in particular, of the King or his family is considered to be an offence. For example, in Morocco, parliamentary immunity from prosecution is not provided where the views expressed *"challenge the monarchy or the Muslim faith, or constitute a breach of the respect due to the King,"* according to article 37 of the 1972 Moroccan Constitution. Likewise, article 23 provides that the King's person is *"inviolable and sacred"*, and therefore, his actions and statements may not be criticised. Article 28 goes on to state that : *"the content of his messages [to the nation and parliament] cannot be subject to debate"*.

34. Under the 1980 Press Law, it is an offence to advocate opposition to or hatred of state institutions, or to publish abroad false or misleading news or information which could damage Egypt's interests.
Information, freedom and censorship : the Article 19 world report, 1988, p. 247.

35. A more severe punishment is prescribed by article 98/B for disseminating or preparing by whatever means materials advocating change of the basic constitutional principles of the state or its political or social systems or the dominance or liquidation of a social class or the overthrow of the basic social or economic order of the State when the use of force or violence or any other illegal means is evident.

36. This penalty applies for possession of printing or recording machinery used for the above purpose.

37. Similarly in Tunisia, acceptable restrictions are determined by law, principally, the Beylical decree of 9th February 1956, supplemented by the Act of 28th April 1975.
CCPR/C/28/Add.5/Rev.1 2nd May 1986 p.37.
Articles of the Tunisian Penal Code and Press Code, Law 154 of 7th November 1959 and Law 33 of 12th June 1969 prohibit the distribution of false information and the distribution of an illegal newspaper. Article 62 of the Press Code regulates seizure of publications presenting a danger to public order and morals, by providing : *"Sont interdites la distribution, la mise en vente, l'exposition aux regardes du public et la detention en vue de la distribution, de la vente, de l'exposition dans un but de propagande, de tracts, bulletins et papillons d'origine étrangère ou non, de nature à nuire à l'ordre publice ou aux bonnes moeures."*
Judicial review of such administrative acts represents the safeguard for this freedom in Tunisia.

38. For example, Article 102 (bis) specifies the punishment for disseminating false news or statements affecting public security.
Article 174 provides the punishment of imprisonment for anyone who commits the following acts : (1) incitement to overthrow the regime in Egypt or incitement to hatred or contempt of it, (2) the propagation or dissemination of doctrines aiming to change the fundamental constitutional principles or the basic social order by force or terrorism or other illegal means. Punishment is the same for whoever encourages the above either materially or financially.
The penalty is increased to imprisonment and a fine if the offence is committed in a time of war. the same penalty applies for possession of printed materials relating to the above if intended for distribution and for possession of printing or recording machinery intended for dissemination of the above.

This restriction is entirely in contradiction not only with article 9 of the Constitution, but also with any understanding of freedom of expression, in undermining the rights of the nation and its elected representatives to debate their affairs.

In view of the legal provision in Morocco, contained in article 3 of Dahir of 15th November 1958 (modified by Dahirs of 28th May 1960 and 10th April 1973), which declares that an association formed with what it describes as an *"illicit objective ... designed to impair ... the monarchical form of the State shall be null and void"*, the question arises as to whether this implies that to express such views would also constitute a crime. Since this legislation apparently prohibits any form of expression if it criticises the monarchical political order, this is clearly in breach of freedom of expression in international law.[39]

Article 77 of the Dahir imposes restrictions on the freedom of the Press and publication, providing for example, that the Minister of the Interior may order the administrative seizure of any issue of a newspaper whose publication is *"likely to disturb the public order or undermine the political and religious institutions of the Kingdom"*.[40] This law also provides that a licence must be acquired for publication of newspapers and magazines. Although prior censorship is not explicitly mentioned in the Law of Public Freedoms of 1958, this law has been used to restrict the publication and distribution of information. Prior censorship of the press was carried out by the Censorship Branch of the Ministry of Information, and later by the Ministry of the Interior.[41]

In Jordan, all political parties were dissolved in 1957, and the government claims that it has received no application since then for the formation of a political party.[42] The banning of political parties clearly represents a restriction on the freedom of expression, as well as on the right of association. A more specific ban restricting freedom of information and of expression is connected to the banning of specific political parties as we will see. These legislative restrictions are undoubtedly in contrast with the statement of the authorities in Jordan as far as the right to hold an opinion is concerned,[43] as well as national and international guarantees.

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39. The question has been put to the Moroccan government by the Human Rights Committee as to whether this provision implies that to express such views would constitute a crime. The Committee has observed that, "*if so, this could be considered to be in breach of the provisions of the Covenant*".
CCPR/C/SR.328 of 9th November 1981, p.9.

40. This Dahir was issued by the French authorities during the Protectorate, and was used to repress nationalist liberation, according to Omar Bendourou.
"The exercise of political freedoms in Morocco" in Review of the International Commission of Jurists, 40, 1988 pp.31-41

41. Information, freedom and censorship : the Article 19 world report, 1988, p.276.

42. CCPR/C/SR.362 of 15th July 1982, p.6

43. The Jordanian Prime Minister is reported as saying "*that people may not be detained simply for holding an opinion (or "ideology"), but only when they transform this ideology into action*".
Amnesty International Yearbook 1985, p.320.

The Kuwaiti Press and Publications Act no.3/61 empowers the government to impose fines and imprisonment for the publication of prohibited materials, including material considered *"an incitement to hatred or overthrow of the system of government"*.[44] Restrictive amendments to legislation were decreed by the executive after 1986,[45] empowering the Cabinet to close down any newspaper on certain grounds. The minister may suspend any newspaper for three months *"when necessary"*. Prior censorship is imposed on all newspapers, and prison sentences are prescribed for violating certain restrictions on publication.[46] As in Morocco, direct criticism of the Amir or ruling family is prohibited.

Several traditional states of the Gulf, within the Gulf Cooperation Council (GCC) have adopted a security agreement, prohibiting any country tolerating *"hostile propaganda"* against another, while the Council's "Charter for Honour in Information" commits member states to banning any publication prohibited in any other member state,[47] a tendency which in itself contradicts international principles, while undermining the enjoyment of freedom of information in the region.

In Chapter one we saw that restrictions may be imposed on freedom of expression to prohibit propaganda for war, and advocacy of national, racial or religious hatred. Law which prohibits acts or statements on these grounds may be found throughout the Arab world.[48] In addition, several Arab states are party to the International Covention on the Elimination of All Forms of Racial Discrimination, and have taken legislative and other measures to comply with its provisions.[49]

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44. The law requires official government approval for the establishment of a periodical and empowers the public authorities to prevent distribution of foreign publications *"to preserve public order or morals"*. Permission is also required before any publication, other than periodic and commercial, may be printed. Information, freedom and censorship : the Article 19 world report, 1988, pp.271-2.

45. In 1986, the Amir assumed legislative power and suspended parts of the Constitution of 1962, dissolving the National Assembly after a period of hostile criticism and disputes between opposition deputies and the government. The Middle East, no.149 March 1987, p.9.

46. For example, that it *"serves the interests of a foreign state or organization, whose policy conflicts with the national interest, or which receives help, support or benefit in any form and for any reason from any other state or source without permission from the Ministry of Information"*.

47. Information, freedom and censorship : the Article 19 world report, 1988, p.274

48. For example, propaganda for war is prohibited by article 118 of the Jordanian Penal Code, which provides that any person violating measures adopted by the state for the preservation of its neutrality in war shall be punished by imprisonment. Article 142 provides that any person who incites sectarian strife or civil war is liable to the punishment of hard labour for life.
CERD/C/130/Add.3 of 1st April 1987, p.1
The Libyan Penal Code too, prohibits propaganda for war, while no legislative provision expressly prohibiting propaganda for war exists in Tunisia.
CCPR/C/SR.715 of 11th July 1987, pp.39-40

49. Among them are Algeria, Libya, Kuwait, Qatar, United Arab Emirates, Syria, Jordan, Tunisia and Egypt.

The Islamic foundation of legislation in several states forms the basis of prohibition of racism or religious hatred.[50] Legislation in most Arab countries prohibits incitement of national, racial or religious hatred.[51] In some countries, such as Algeria and Tunisia, incitement to racial or religious hatred are dealt with according to legislation covering insult and defamation.[52]

50. In Qatar, where *Shari'ah* underlies the legal system, it provides the basis for provisions in the Constitution (articles 1, 7 and 9) which are considered sufficient in the absence of positive law to prohibit racial discrimination. Both the Qatari and the Kuwaiti legal systems also use international conventions which have passed into domestic legislation with binding force, and may be used by the judiciary to prohibit and punish such crimes. This procedure means that no positive criminal provisions exist in Qatari law for the punishment of such crimes, though they are treated by the *Shari'ah* courts as offences under the CERD, with the penalty at the discretion of the magistrate.
CERD/C/156/Add.2 7th March 1988, pp.2-3 & CERD/C/149/Add.16 of 14th November 1986.
Other states whose legal structure is based on *Shari'ah*, like the United Arab Emirates and Kuwait, also prohibit racial discrimination by positive law, such as for example, Article 111 of the Kuwaiti Penal Code which provides : *"Any person who propagates, by any of the public means specified in article 101, views that ridicule, scorn or belittle a religion or a religious confession by discrediting its beliefs, practices, rites or teachings, shall be punished ..."*
CERD/C/149/Add.16 of 14th November 1986, p.5.
The Criminal Code of Abu Dhabi, in article 169, stipulates that : *"Any person who : (a) disseminates any printed or handwritten tract, photograph, drawing or symbol likely to offend the religious feelings or insult the religious beliefs of other persons; (b) utters, in a public place, or within hearing of another person a word or sound likely to offend the religious feelings or beliefs of other persons, or deliberately and publicly commits any act derogatory to the religious beliefs of other persons, shall be punished ..."*. CERD/C/130/Add.1 of 28th January 1986, p.11
51. For example, the Libyan Penal Code prohibits incitement of national, racial or religious hatred, the provocation of a civil war or seeking the elimination or domination of one social class by another in articles 206, 302 and 318 which also set the penalties for these crimes.
CCPR/C/1/Add.20 of 24th January 1978, p.10
The Iraqi Penal Code prohibits acts advocating racial, national and religious hatred. Article 200 of the Code imposes a penalty of imprisonment on anyone who instigates others to overthrow, hate or disdain the declared system of the government in Iraq, or incites sectarian or religious hostilities, advocates hostility among sects or ethnic groups, or arouses hatred and hostile feelings among the inhabitants of Iraq. Advocacy of such hostility may be punished by imprisonment or a fine, according to article 203 of the Code. Article 208 imposes imprisonment of up to 7 years and/or a fine on the following grounds : anyone who possesses or obtains, in bad faith, written, printed or recorded material that contains incitement to, advocacy of or propaganda for any of the offences defined by articles 200 and 203. The same penalty is prescribed for possessing means of printing, recording or publicising intended to print, record or broadcast songs or calls for a faith, association, committee or organization that aims at committing any of the offences in articles 200 and 203.
CCPR/C/1/Add.45 of 8th June 1979, pp.83-84
In Egypt, article 98 of the Penal Code, penalises the exploitation of religion to promote or advocate extremist ideologies by word of mouth, in writing or in any other manner in order to stir up sedition, disparage divinely revealed religion or prejudice national unity or social harmony.
Article 150 of the Jordanian Penal Code sets restrictions on freedom of expression, where the written or spoken expression gives or is intended to give rise to religious or racial bigotry, or seeks to promote strife among the communities and races of Jordan.
52. In Algeria, the Criminal Code deals with incitement to racial hatred or discrimination under the provisions dealing with insult and defamation, examined earlier. The Algerian legislator considers racism as based on unfounded ideas and thus treats any racist statement as insult. Article 298 prescribes a more severe penalty for the offence of defamation when it is carried out with the intention of inciting *"hatred between citizens or inhabitants"*. In Tunisia, advocacy of hatred, hostility or violence is punished by law. The Press Code, in articles 44 and 48, prohibits the use of the Press for propaganda to provoke racial hatred or offences against a religion, subject to penalty. Defamation and insult against a racial or religious group intended to stir up hatred are more severely punished than similar offences against individuals, according to articles 53 and 54.

# SECTION TWO

# THE RIGHTS TO FREEDOM OF ASSEMBLY AND ASSOCIATION, INCLUDING TRADE UNIONS IN NATIONAL LEGISLATION

This section examines the position of the rights to freedom of assembly and association within Arab municipal legislation, where laws have addressed these rights at different levels. As pointed out during the examination of these freedoms at the international level, there is a deep and fundamental link on one hand, between freedoms of opinion and expression, in their broad sense, whether for individual or public expression, and the rights of assembly and association on the other. While the people's expression can find its translation in political parties in dealing with and promoting the effective exercise of all aspects of the right of association, the right to assemble as a fundamental element of trade union rights has an effective role to play in today's political life.[53]

The section examines the regulations governing membership of associations and the laws which govern the procedure of their establishment. Since associations require statutes, it reviews the scope allowed to organizations to formulate their own constitutions and programmes. This leads to an examination of legislative restrictions on the aims of associations, which are examined with reference to the restrictions permissible in international law. Finally, the section reviews dissolution or suspension of associations by public authorities, and available remedies.

53. Freedom of assembly is considered important not only as a fundamental human right, but perhaps as vital for the life of the whole nation as far as the political life of the Arab population is concerned. Not surprisingly, the right to assembly is considered "... *an essential part of the activities of political parties* ..." by the European Commission. The importance of defining the nature of the right of association has been highlighted, in particular, in the case of the right to form and join trade unions, for the important role of trade unions and professional associations in the Arab countries, in promoting and protecting human rights, where their role extends far beyond economic and social concerns.

Beginning as before, with the radical republics, the right to freedom of peaceful assembly is recognized at the constitutional level, for example, in Syria,[54] and Iraq.[55] Both these constitutional provisions also mention the right to demonstrate, which as we saw, may be implied in the international provision, though it is not explicitly stated. The Egyptian Constitution, in article 54, stipulates that citizens have the right of *"orderly private meetings"* and are permitted to organise public meetings, processions and gatherings within the limits of the law.

The Tunisian Constitution recognises freedom of assembly, (article 8), which is also protected in the Constitutions of the modern monarchies.[56] In the traditional monarchies, the right of assembly may be proclaimed in the Constitution, as in the United Arab Emirates Provisional Federal Constitution,[57] though this right is restricted in practice in Saudi Arabia, the most conservative Islamic monarchy, as public demonstrations are prohibited.[58]

Constitutional protection of the right is regulated by other laws.[59] The two principles of requirement of prior notification and prior authorization are found in Arab legislation regulating freedom of assembly. It is a fact that the individual's right to exercise this freedom cannot be absolute, since it might threaten the rights of the community, and so some limitation must be expected on its exercise. Although the application of the principle of notification might be acceptable to allow the authorities to maintain public order and public safety, the application of the principle of prior authorization may not be considered acceptable since it is open to abuse, if the refusal of the authorities is not subject to review, preferably by judicial organs. The measure of whether the right is unreasonably restricted must be the extent to which the right may be enjoyed without undue administrative interference.[60]

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54. In article 39, which states: *"The citizens enjoy the right of assembly and peaceful demonstration within the context of constitutional principles. The law regulates the exercise of this right."*
55. The Iraqi Constitution, in article 26, guarantees *"freedom of ... assembly and demonstrations, in accordance with the objectives of the Constitution and within the limits of the law."*
56. *"The [Moroccan] Constitution guarantees to all citizens: ... freedom of assembly. No restriction may be placed on the exercise of these freedoms save by law."* (art. 9), while the right to hold meetings is found in article 16, para.1 of the Jordanian Constitution.
57. Article 33 of the Constitution provides : *"Freedom of meetings ... shall be guaranteed within the limits of the law"*.
58. Georgia Journal of International and Comparative Law, v.12:31 1982, pp.84-5
59. For example, in Iraq, the Public Assembly and Demonstrations Law No.115, 1959, grants freedom of assembly and demonstration within the limitation of the law, while in Tunisia, the Act of 24th January 1969 (69/4) regulates public meetings, processions, parades, demonstrations and crowds, and in Morocco, two Dahirs, of 15 November 1958 and 10 April 1973 regulate the freedom.
60. As we saw, the case law of the ILO Committee on Freedom of Association on trade union exercise of the right indicates that the authorities should not interfere in the exercise of the right of assembly in a way which could restrict their rights as organizations. The lawful exercise of this right should be protected from any arbitrary presence of, or undue interference by the authorities.

One of the Arab countries whose laws require prior authorization for meetings and demonstrations is Iraq, where the general limitation is that a licence for holding an assembly or organising a demonstration must be obtained from the administrative authority prior to holding or organising such assemblies.[61] The procedure for obtaining a licence is detailed in the Act.[62] While some organizations are allowed to hold meetings on their own premises without prior authorization, the implication of the provision seems to be that only duly licensed organizations in fact enjoy the right as legal entities of freedom of assembly in Iraq. Thus, the conclusion should be drawn that individuals who are not members of such organizations may not freely exercise the right of assembly in Iraq.

In a number of other Arab countries, the requirement is for prior notification of meetings to the public authorities.[63] For example, in Tunisia, Act of 24th January 1969 (69/4) provides that public meetings, processions, parades, demonstrations and crowds may be held without prior authorization, but they are subject to certain formalities, such as advance notification to the authorities. For each meeting a Committee must take responsibility for maintaining order, and preventing breach of the law. An official is assigned by the security authorities to attend each public meeting, and he may declare the meeting closed at the request of the Committee, or if acts of violence occur.[64]

Several grounds are provided by Arab legislation for the restriction of the right of freedom of assembly which may be considered generally compatible with restrictions allowed in international law, though it must be noted that in some countries, ideological bias may be observed. In Syria, the limitation on the enjoyment of the right is that it should not be used for terrorist or subversive ends, or endangering general security to the extent that public gatherings can no longer be described as peaceful.[65]

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61. Article 4 of the Public Assembly and Demonstrations Law No.115, 1959
CCPR/C/1/Add.45 of 8th June 1979, pp.85-87

62. Article 3 of the Law provides that : *"Parties, trade unions, and other legally licensed social organizations are required to inform the competent administrative authorities at least 48 hours prior to holding a public assembly or a demonstration of the time, place and purpose of such an assembly. Meetings and assemblies held by these organizations in their headquarters of branches are exempted from this."*

63. In Jordan, as we have seen, the Constitution protects the right to hold meetings, providing their objects are lawful and their means are peaceful. In order to hold a public meeting, it is necessary to notify the provincial governor 48 hours before the meeting. The notification has to be counter-signed by at least five well-known persons, and must specify the time, place and purpose of the meeting. The Supreme Court re-affirmed this provision in a judgement on 13th July 1985, case no.172/1984
CERD/C/130/Add.3 1st April 1987, p.6.
As we saw, the Dahir of 15 November 1958 and its amendment of 10 April 1973 regulate the freedom of assembly in Morocco, as follows: they do not require previous authorisation, but an announcement to the local authorities is required, giving the day, time, place and purpose.

64. CCPR/C/28/Add.5/Rev.1 of 2nd May 1986, pp.40-41.

65. The Penal Code sets the penalty for *"any person who attends a meeting not classified as private and causes a disturbance by shouting, or chanting or by brandishing inflammatory signs or who instigates a demonstration disturbing public order ..."* and provides some definition of whether a meeting is public or private, *"either by virtue of its aims and intent or the number of persons invited to participate, or by virtue of the place where it is held if the place in question is a public place or if the public has access thereto or if it is in view of the public"*.
CCPR/C/1/Add.1/Rev.1 of 1st July 1977, p.6

In Tunisia, under Act 69/4, the Minister of the Interior has the power to prohibit by decree any meetings likely to disturb public order or safety. Apart from armed processions,[66] parades and processions may be held freely, though prior notice is required. As before, the authorities may prohibit any procession on the grounds of public safety or order.[67]

In Iraq, according to the Public Assembly and Demonstrations Law no.115, the authority may refuse permission to hold a meeting or organize assemblies, if it believes that it will threaten public safety or is *hostile to the democratic republican system.*[68] While a restriction on the classical ground of protecting public safety is acceptable, one must observe that an element of the right of assembly may be the expression of criticism against any system or its policies, and the second restriction mentioned might be open to administrative misuse if it is used to suppress hostile criticism.

In some countries where legislation provides that prior authorisation or notification is required for public meetings, the law may provide for administrative or judicial review, or both, of a decision by the public authorities to refuse or deny the right to hold a public meeting. In Iraq, for example, according to the Law no.115, the authority's refusal of permission to hold a meeting or organise assemblies is subject to judicial supervision.[69]

In Tunisia, under Act 69/4, the Minister of the Interior may prohibit by decree meetings on the grounds mentioned above, against which appeals may be made to the Administrative Tribunal on the grounds of *ultra vires* action.[70]

Legislation in many Arab states, despite the political nature of each system, has incorporated into the basic charter of government a recognition of the right to freedom of association, some explicitly using the term *"association"*, others the term *"societies"*. A significant addition to these provisions, in some Constitutions, is the declaration that laws protecting human rights are regarded as having a supra-constitutional or organic nature, and are thereby protected from legislative impairment.[71]

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66. CCPR/C/28/Add.5/Rev.1 of 2nd May 1986, p.41.
67. Likewise, in Morocco, for public assemblies, it is prohibited to carry weapons or explosives. CCPR/C/10/Add.2 of 19th February 1981, p.29-30.
68. Article 5 of the Public Assembly and Demonstrations Law No.115, 1959 CCPR/C/1/Add.45 of 8th June 1979, pp.85-87.
69. The refusal of the authority to grant permission for a meeting must be communicated within 24 hours of the planned meeting. Such a refusal can be objected against within five days, when the objection along with the observations of the administrative authority, is submitted to the highest judicial authority in the area, which gives a final decision within five days. (Article 6 of Law No.115, 1959)
70. CCPR/C/28/Add.5/Rev.1 of 2nd May 1986, pp.40-41.
71. For example, Tunisia, Algeria, Morocco (See f/n 156, ch.3)

The legislation of a number of countries[72] contains definitions of the term *"association"*, and these may serve as a starting point for the examination. Each of the definitions uses a different term for the members of the association : Syrian legislation stipulates *"individuals or bodies corporate"*, Algerian law *"any group ... among persons"*, and Tunisian legislation *"two or more persons"*. According to all three definitions, the association must not be profit-making in intention,[73] while the Syrian and Algerian definitions differ from the Tunisian in the time span of *"association"*, since the former stipulate *"over a specified or unspecified period"* and *"an unlimited or finite period"* respectively, while the latter provides that the *"association"* is *"on a permanent basis"*. Only the Algerian definition goes on to specify details of regulations governing associations, such as its statutes, its name and object, but similar provisions may be found throughout national legislation governing association. Some countries possess separate legislation governing political and non-political associations, while others regulate freedom of association within the framework of the governing ideology. Although some laws apparently do little more than regulate the formation of associations and political parties, other laws seem to restrict the rights to a greater or lesser extent, as we will see.

In the Arab republics, the right of freedom of association may be found in the Constitutions and other laws.[74] The Iraqi Constitution, in article 26, guarantees the formation of political parties and associations in accordance with the objectives of the Constitution and within the limits of the law, but sets the ideological boundaries in the same article where it provides that *"the state shall endeavour to provide the means required for practising these freedoms which are compatible with the nationalist and progressive line of the revolution"*. Hence, the right cannot be enjoyed outside the ideological framework of the Ba'thist revolution. A similar tendency is illustrated in the other Arab republics, in differing degrees.[75]

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72. In Syria, article 1 of Act no. 93 of 1958 defines association.
CCPR/C/1/Add.31 of 12th July 1978, p.3.
In Algeria, Act no.87/15 of 21st July 1987, article 2 contains a definition of association.
CERD/C/158/Add.6 of 14th October 1987.
In Tunisia, Act 59/154 of 7th November 1959 defines association.
CCPR/C/28/Add.5/Rev.1 2nd May 1986, p.41.

73. The Syrian Act specifies that it must not be *"organised for purposes of gain"*; the Algerian Ordinance , that it should have *"a ... non-profit-making purpose"* and the Tunisian Act that it should have *"a purpose other than sharing the profits"*.

74. Article 55 of the Egyptian Constitution gives the right to form associations, providing that citizens may form societies in the manner prescribed by law.
The Algerian Constitution recognises freedom of association, in article 56, exercised in accordance with the law. It must be recalled that, in Algeria, the National Charter is the *"fundamental source ... of the laws of the state"*, and so freedom of association must be viewed within this context.
Freedom of association is also guaranteed by the Tunisian Constitution, in article 8.

75. For example, while article 48 of the Syrian Constitution safeguards the right of *"popular sectors"* to *"constitute trade union, social, and professional organizations and cooperative production or service associations"*, it goes on to provide that *"the law determines the framework of these organizations and their relationships as well as the limit of their activities"*. The ideological difficulties inherent in this last provision become more clear in article 49, where one of the *"endeavours"* of such organizations is defined as *"the building of Arab socialist society and the protection of its regime"*.

In Algeria, as we saw, the National Charter is the fundamental ideological document organising and determining the scope of all activities. Again, its effect can be seen in the Constitution, which provides in the Chapter headed *"The Political Function"* that *"the fundamental principle of the Algerian institutional system is that of the single party"*, (article 94), and that *"the National Liberation Front is the single party of the country"* (article 95).[76] As we saw in Chapter 3, the FLN, which is described as *"the avant-garde force of leadership and organization of the people"* constitutes the *"guide of the socialist revolution and the leading force of society"* (article 97). Article 97 goes on to make it clear that the FLN, like the *Ba'th* in Iraq, dominates the sphere of political association, so that the right can only be said to exist within the context of the FLN. This is confirmed by article 100, which stipulates that *"mass organizations are charged with the mobilization of ... the people in order to realize the major political, economic, social and cultural tasks which condition ... the success of socialist construction"*. Without entering on an evaluation of the Algerian ideology, it is clear that the principle of freedom of political association does not exist in Algeria, and freedom of association can only be said to exist within the social sphere.[77]

As for the monarchies, the right is to be found, for example, in the Moroccan legal system as article 9 of the Constitution, which guarantees to all citizens freedom of association and freedom to join any political organization of their choice. Likewise, the Jordanian Constitution protects the right to form societies and political parties, (article 16), which are entitled to address the public authorities on matters concerning public affairs.

In the emirates, the right may be found in the Constitutions, for example, article 33 of the Provisional Federal Constitution of the United Arab Emirates, which safeguards the right of association, provided it is practised within the limits of the law.[78]

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76. Article 95 goes on to describe the FLN as *"the avant-garde constituted by the most conscious citizens, animated by a patriotic and socialist ideal, who freely united within the National Liberation Front under conditions determined by the statutes of the Party"*.
These statutes, as quoted in Mohammed Bedjaoui's Law and the Algerian revolution (1961, p.86), make membership of the FLN conditional on *"fighting for the objectives of the organization"*. This represents a potential restriction on free association and political participation on ideological grounds.

77. This freedom, like all freedoms safeguarded in the Algerian Constitution, is subject to the restriction in article 73, which provides that such freedoms lapse, if used to infringe upon *"the Constitution, the essential interests of the national collectivity ... and the socialist Revolution"*.

78. In the Emirates, there are a number of organisations, covering social and professional fields. They are governed by Acts such as Federal Act no.12 of 1972 and Federal Act no.6 of 1974.
CERD/C/130/Add.1 28th January 1986 p.5.

Besides constitutional recognition, most Arab countries have promulgated other laws[79] to deal specifically with associations and other groupings and institutions pursuing social objectives with, in most cases, a vague restriction on their right to engage in political activities, which are regulated by other provisions. Most countries[80] possess separate legislation governing political and non-political associations, while others regulate freedom of association within the framework of the governing ideology. The formation of political parties in Egypt is subject to Act no.40 of 1977, amended by Act no.36 of 1979,[81] which in article 2, describes a political party as *"... organized grouping based on common principles and goals which seek to achieve objectives relating to the political, economic and social affairs of the state, and to assume the responsibilities of government"*.

It must be established in accordance with the provisions of this Act and seek to achieve its objectives by democratic means.[82]

79. In Syria, for example, the law grants institutions, organisations, trade unions and private committees the right to form associations, by Act no. 93 of 1958, and in Iraq, Act no.1 of 1960 governs associations, and contains the regulations, procedures and conditions to be applied. Political parties follow the same procedures and must fulfil the same conditions as other associations.
CCPR/C/SR.748 of 22nd July 1987, p.9
In Algeria, the freedom has been subject to several laws, such as Ordinance No. 71-79 of 3 December 1971. In 1987, the Algerian legislator adopted Act no.87/15 of July 1987), relating to associations, the purpose of which, as stated in its first article, is to determine the framework in which freedom of association is exercised, and it goes on to define association, in article 2, which states : *"an association is any group set up for a specific, non-profitmaking purpose among persons who, to that end, combine their knowledge, activities and means for an unlimited or finite period. It is an agreement governed by the laws and regulations in force and by its statutes drawn up in conformity with model statutes established by regulations. The object of the association must be stated unequivocally and its name must be in conformity with it"*.
CERD/C/158/Add.6 of 14th October 1987, p.1
In Egypt, private associations and institutions pursuing social objectives (stressed in an explanatory note attached to the Act, which highlights their social function, and the role they play in social welfare) are regulated by Act no.32 of 1964, which stipulates that such associations *must not* engage in political activity, since this is the sphere of political parties, whose formation and activities are governed by a separate act.
In Tunisia, Act 59/154 of 7th November 1959 defines and regulates association, as we saw, while association in Morocco is regulated by the Royal Charter of 8th May 1958, and by Dahir of 15 November 1958 (amended 10th April 1973). A new draft Labour Code in Morocco contains a provision permitting working married women to belong to professional organisations. It is not clear whether this draft, when it becomes law, will also safeguard the right of unmarried women.
CCPR/C/28/Add.5/Rev.1 2nd May 1986, p.41 & CCPR/C/10/Add.2 of 19th February 1981, pp.3, 11
In Jordan, the Social Clubs and Associations Act no.33 of 1966 regulates the establishment and operation of charitable associations, and social clubs. All Jordanians may join associations, and may also join with others in their establishment. Despite the constitutional provision in Jordan, which protects the right to form and to join political parties, in fact the exercise of freedom of association seems to be limited to the social sphere, as no party has been formed in Jordan since their general abolition in 1957.
80. Although political parties in Tunisia presently derive their authorisation from the Act governing association, an Act recently tabled by the government proposed that political parties be subject to special regulations, which would impose obligations concerning the rights of the Tunisian community. Parties may be authorised to bring together Tunisian citizens to participate in national affairs under a political programme, and to participate in elections. They should act in accordance with the Constitution and the law, shunning violence and fanaticism, and must defend the republican system and the sovereignty of the people, and safeguard, for example, the principles embodied in the Code of Personal Status, and human rights. CCPR/C/28/Add.5/Rev.1 2nd May 1986, p.41.
81. Article 1 of the Act provides that: *"Egyptians have the right to form political parties and every Egyptian is entitled to join a political party"*.
82. In Egypt, the Constitution gives the right to form associations provided that the activities of such associations are not clandestine, of a military nature or directed against the social order.

Alongside these laws which regulate the exercise of the right, legislation in several Arab countries tends to prohibit membership of organizations on certain religious or political grounds.[83] For example, in Libya in 1972, the RCC issued a decree prohibiting the formation of political parties other than the Arab Socialist Union.[84], and according to (Art.206) of the Penal Code (as amended August 1975), it is a capital offence to belong to an illegal political organisation which aims to overthrow the government. Law no.71 of 1972 describes political party activities as a *"betrayal of the right of the nation"*,[85] and prescribes capital punishment for anyone who calls for, sets up or is in any way associated with organizations prohibited by this law. This law clearly violates the right of free association, undermining organised political life in Libya. It also illustrates the striking phenomenon of the criminalisation of aspects of political organisation, which prevents the development of organised political life in several Arab countries.

The international legal principle of non-discrimination may be found in the legislation regulating association in several countries.[86] Although the formation of political parties in Egypt is lawful provided that their membership is not restricted to a particular social class, category, sect or geographical area,[87] this legislation has been questioned by the Human Rights Committee, since it extends restriction to categories beyond those mentioned in the Political Covenant, perhaps restricting the right, for example, of farmers to organise in a political movement.[88] Clearly, such a provision extends restrictions beyond the scope envisaged in international standards.

Freedom of association in Algeria, as we saw, is regulated by Act 87-15 of 1987. Specific restrictions on those who may establish, administer or direct associations include general requirements of nationality, age, possession of civil rights and good morals.[89] However, another specific condition has a discriminatory tone which therefore undermines the

83. For example, in July 1980, the Syrian Peoples' Assembly ratified Decree No. 49 of July 1980 (which is retroactive), which makes membership of the Muslim Brotherhood a capital offence.
Report by Amnesty International to the government of the Republic of Syria
Similarly, in Iraq, *Al Da'wa al-Islamiyya* (Islamic Call) is banned, and, since 31st March 1980, it has been a capital offence to be a member of, or to be affiliated to this party. Revolutionary Command Council Resolution no.1370 re-affirmed the death penalty for several offences, including joining *al-Da'wa al-Islamiyya*.
84. Gisbert H. Flanz & Ahmed Rhazaoui Libya in Albert P. Blaustein & Gisbert H. Flanz (eds) "Constitutions of the Countries of the World", February 1974, p.12.
85. The law defines party activities as : *"any gathering, organization or group of whatever kind or whatever the number of its members, which is based on a political concept opposed in its aims or means to the principles of the Fateh revolution of September, or aims to endanger its constitutional foundations whether openly or in secret, or whether the concept on which it is based is written or not written, or whose subscribers and supporters have used material or other means"*.
Amnesty International Violations of human rights in the Libyan Arab Jamahiriya 20th November 1984, Appendix C.
86. For example, in Morocco, the Constitution provides that associations must be open to all Moroccans without discrimination as to race, creed or origin.
87. As we saw, article 1 of Act no.40 of 1977, as amended, provides that "... *every Egyptian is entitled to join a political party*".
88. CCPR/C/SR.499 of 6th April 1984, p.7.
89. CERD/C/158/Add.6 of 14th October 1987, p.3.

right of association, in article 8 of the Ordinance, which states, in paragraph 5, that such a person must not *"conduct himself in a manner contrary to the interests of the liberation Revolution and to the fundamental choices and options of the country"*. Like legislation we have already seen in other countries, this provision contains an ideological restriction on the free exercise of the right by excluding a category of the society, which undermines its protection in national legislation and cannot be considered compatible with international legal principles.

The limitation on the exercise of the right of freedom of association is unlike the limitation on the right of assembly in that it specifies particular groups in society, and explicitly restricts their exercise of this right. A general restriction on the rights of members of the armed forces, the police, and, arguably, administrative staff[90], may be found in international law.[91] Thus, restrictions on the right of these groups are acceptable, and several Arab countries have legislation which provides this. In addition, it is common for law to restrict the right to associate freely of public employees,[92] which as we saw is also acceptable in international law. This is important in the Arab countries since public sector employment plays such a large role. This restriction on the right of certain categories must be viewed with some concern, since although when used in the public interest it should not unduly restrict the right, in certain countries, where the scope of *"public service"* is extremely wide,[93] it might be misused to restrict the rights of large sections of the population.

Vaguely worded restrictions may be seen in legislation such as the Moroccan Dahir of November 1958 (amended by the Dahir of April 1973), which restricts the right of association of *"persons subject to coercive measures for activities of an anti-national character"*.[94]

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90. cf. European Convention on Human Rights article 11, para. 2.
*"No restrictions shall be placed on the exercise of these rights ... This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State"*.
91. GAOR Annexes 20th September - 20th December 1955, p. 56, para 151.
92. According to Dahir of 15 November 1958 (as amended), there is a restriction on membership of political associations for members of the armed forces, magistrates, employees of the public authorities, police officers.
CCPR/C/10/Add. 2 19th February 1981, pp. 29-30
In Tunisia, restrictions are placed on the right to form and to join trade unions of some categories. These include the armed forces and internal security forces, who are prohibited from forming or joining a political party or association, or forming or joining trade unions. This category may be authorised to join social, cultural or sporting associations.
CCPR/C/28/Add. 5/Rev. 1 2nd May 1986
93. This point has been discussed by the ILO Committee on Freedom of Association who have stressed, that the scope of *"public service"* must not be unreasonably wide.
94. CCPR/C/10/Add. 2 19th February 1981, pp. 29-30.

*"Activities of an anti-national character"* is again a vague term, which may be subject to administrative abuse, and it must be borne in mind that in Morocco, as we have seen, *"anti-national"* activities would include for example, calling for the establishment of a republic. Other restrictions which are clearly ideological can be found in Arab legislation. For example, in Iraq, as well as restrictions on the right of association of the armed forces, there are also restrictions on former members of the armed forces and former members of the *Ba'th* party.[95]

As we have seen, several categories of legislation regulate the formalities of establishing and organizing associations in the Arab legal order. A common tendency is for political associations and trade unions to be regulated separately by decree or other laws, while associations of a social or sporting nature, for example, are controlled by general provisions. Registration may be the first step in the creation of any association, and the legislation of several countries requires prior authorisation,[96] a refusal of which, in some countries, may be subject to judicial review.[97]

Some countries, like Algeria,[98] require that the statutes of an association must be drawn up in conformity with model statutes established by regulation. As we will see in the examination of trade union freedoms, while it is acceptable that such statutes serve as a model for new associations or as guidelines for their establishment, if the rules of an organization must conform to government specifications, this might constitute a violation of the right to associate freely, as it provides scope for administrative interference.

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95. Resolution 1244 of 20th November 1976 (Act no.245) amended article 200 of the Penal Code to make membership of, or affiliation to, a political party other than the *Ba'th* party a capital offence for members of the armed forces, for men who retired or left the armed forces after 1968, for members of the *Ba'th* party, and for former members of the *Ba'th* party.
An official of the Iraqi government has explained that this resolution does not apply the death penalty for *"differences of opinion"*, but rather to punish the offence of *"deceiving public opinion by attempting to infiltrate the Ba'th party while belonging to another party"*.
CCPR/C/SR.746 of 22nd July 1987, p.8.

96. In Tunisia, the deposit of a declaration of the name, purpose and headquarters of the association, as well as the full name, date of birth and nationality of each of its officers is required. Copies of its regulations must also be deposited. Their legal existence is subject to authorisation by the authorities. Foreign associations may also obtain permission to operate in Tunisia. (Act 59/154 of 7th November 1959)
CCPR/C/28/Add.5/Rev.1 2nd May 1986, p.41.
In Algeria, certain organizations only are subject to prior authorisation, while this is not the general rule.
CERD/C/158/Add.6 of 14th October 1987, p.2.

97. In Iraq, Act no.1 of 1960 provides that if a request to form an organization is rejected, the founder members may appeal against this decision before the Court of Cassation, whose decision is final.
CCPR/C/SR.748 of 22nd July 1987, p.9.

98. Act 87-15 of 21st July 1987, specifies, in article 2, that : *"[an association] is an agreement governed by the laws and regulations in force and by its statutes drawn up in conformity with model statutes established by regulations."*
CERD/C/158/Add.6 of 14th October 1987, p.2.

The laws of some countries merely require that the association satisfies certain criteria as to aims and activities. The legislation of most countries connects the legality of associations to the nature of their aims, though the approach varies. Some merely restrict associations whose aims are contrary to law, morals or public order,[99] a category of restrictions comparable to those allowed by the international standard, while other legislation goes beyond these classical restrictions to connect the legality of associations to the state's political policies. Such legislation restricts the freedom, as we have seen already, to the ideological framework set by, for example, the party or the government. Act 87-15, which regulates association in Algeria, specifies that associations may be prohibited for several reasons, including restrictions which are acceptable in the light of the international provision.[100] Other restrictions, which must be examined in the light of international standards, include purposes *"contrary to the established institutional system"* or *"such as to undermine the ... fundamental options and choices of the country"*. While the first restriction appears neutral, no more than a reflection of the sovereign right of any state to protect its constitutional order and institutions, such a provision must be viewed in the light of the ideological nature of the constitutional order and the legal remedies available within the Arab legal order. Such a provision may be used, in Algeria as elsewhere, to restrict the rights of what could be regarded as legitimate political opposition groups.

The tone of the second restriction is also neutral, but it contains scope for the imposition of wide-ranging restrictions on the right of freedom of association for political reasons. The *"fundamental options and choices of the country"* must refer to the Algerian population's *"choice of socialism"* administered by the FLN, mentioned in the National Charter. It cannot be compatible with the international understanding of freedom of association that this right may be restricted on grounds so closely connected to the interests of a single ruling party.[101]

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99. In Tunisia, Act no.154 of 7th November 1959 provides : *"the cause and object of such an agreement shall, under no circumstances be contrary to the law or to morals, likely to disrupt public order or detrimental to the integrity of the national territory, or to the republican form of the state."*
CCPR/C/28/Add.5/Rev.1 2nd May 1986, p.41
The Syrian Constitution restricts the practice of these rights, as we have seen above, footnote 75
Article 55 of the Egyptian Constitution guarantees freedom of association, provided their *"activities are hostile to the social system, secret, or of a military nature"*.

100. Purposes which may be : *"Such as to undermine the integrity of the national territory, national unity, the State religion, the national language ..."* ; *"Contrary to the laws and regulations in force"*; *"Contrary to public order and morality"*.
CERD/C/158/Add.2 of 3rd April 1987, p.13
*"Precautionary"* measures may be taken against associations which fall into any of these categories. These include : prohibition of meetings, closure of premises, freezing of accounts, placing of property under seal.
CERD/C/158/Add.6 of 14th October 1987, p.2

101. The openly ideological intent of provisions elsewhere in the Ordinance which governs association in Algeria makes it clear that the rights of association of the FLN alone are to be free. Article 30 states explicitly that the provisions of the Act shall not apply to *"associations which have a political purpose and whose activity is connected with that of the National Liberation Front party and subsidiary organizations and unions"*.
CERD/C/158/Add.6 of 14th October 1987, p.6

Moroccan law also contains restrictions on the two lines identified in Algeria. These are compatible with international law and provide explicitly that associations must observe international standards,[102] while others focus on the institutional structure of the state.[103] A member of the Human Rights Committee has rightly commented that this law is not justified under any of the restrictions in article 22 of the Political Covenant, unless such an association would be a threat to national security, bearing in mind that the Covenant is neutral on questions of ideology and forms of state or government.[104]

It is a general principle within most Arab countries that the rights of political associations are severely restricted or curtailed, as we will see, unless they are in line with the dominant political philosophy. In the Moroccan case, for example, we saw that opposition to the monarchical form of state would constitute a crime. This cannot be compatible with the international understanding of this right. It is also clear that laws in Arab countries provide scope for the misuse of concepts such as national security and public order, since, as we will see, the rights of opposition groups are paralysed for being regarded as a threat to the nation, though they would be more correctly described as a threat to the ruling authority.

Some restrictions imposed on the right of freedom of association by Egyptian legislation are compatible with those allowed by international law.[105] As we saw, the formation of political parties in Egypt is subject to regulations which, for example, prohibit the formation of parties based on racist or sectarian ideologies. Act no.40 of 1977, amended by Act no.36 of 1979, provides Egyptians the right to form political parties, provided that they are not opposed to national unity and that they do not pursue a policy of discrimination, according to article 4.[106]

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102. Dahir of 15 November 1958 (amended 10th April 1973), provides : "*that any association entered into for the purpose of furthering illicit cause or pursuing an illicit objective contrary to the law and morality, or designed to impair the integrity of the territory of the nation ... shall be null and void.*" It also provides that such associations may carry out activities subject to certain conditions : their activities must be open and advance notification given; they must observe Moroccan law and regulations; they must have due regard for law and order, and for the rules of morality generally accepted in Moroccan society; they must respect the international human rights conventions to which Morocco is a party; they must be open to all Moroccans without discrimination as to race, creed or origin.

103. CCPR/C/10/Add.2 19th February 1981, p.30.
Dahir of 15 November 1958 (as amended), provides "*that any association entered into for the purpose of furthering illicit cause or pursuing an illicit objective ... designed to impair the ... monarchical form of the state shall be null and void.*"

104. CCPR/C/SR.327 of 9th November 1981, p.11.

105. In Egypt, the Constitution gives the right to form associations provided that their activities are not clandestine, of a military nature or directed against the social order.

106. Anyone who violates the provisions of this article is liable to penalty prescribed by law, (article 176 of the Penal Code and articles 4, 22 and 23 of Act no.40 of 1977, amended by Act no.156 of 1981).
CERD/C/149/Add.22 30th January 1987, p.7.

Other restrictions seem to be designed to restrict organised opposition to the government.[107] For example, article 4 of Law no.40 states that no political parties, their programs or leadership should be opposed to, *inter alia*, the principles of the revolutions of 23rd July 1952 and 15th May 1971, or the principles of the referendum on the peace treaty with Israel since 2nd April 1979.[108]

These restrictions cannot be considered compatible with the aim of the protection of the right of freedom of association, nor do they fall into any of the categories of restriction specified in the international instrument, if carried out peacefully. They seem to be designed to protect the authorities in Egypt from organised opposition challenging the ruling ideology, identified as the *"revolutions of 23rd July 1952 and 15th May 1971"*. The article in the Penal Code explicitly prohibits opposition to the principles on which the socialist regime is based, implying that any opposition group which does not share this ideology is illegal. Although international law, as noted, is silent on questions of ideology and form of state, nevertheless this clearly contradicts the principle of individual freedom of choice.

In most Arab countries, the public authorities exercise the power to suspend or dissolve an association on several grounds, such as violating public order or morality. Such orders may be the subject of review, whether by administrative or judicial organs. Clearly, judicial review is the most secure impartial safeguard against abuse, since conciliation committees, for example, may not adequately safeguard freedom of association. In Morocco, the Dahir of November 1958- as amended in April 1973 - allows the government to suspend political parties for a limited period, unlike the original legislation, according to which parties could be dissolved only through the courts.[109]

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107. As we have seen, article 98A (bis) of the Penal Code provides the punishment of imprisonment for those found guilty of organising an association which aims to oppose the fundamental principles upon which the socialist regime is based or incitement to hatred or contempt of it, or going against the alliance of the popular working forces or incitement to opposition to the public authorities. Such activity is punished more severely when combined with the use of force, terrorism or other illegal means.

If force, violence or terrorism is evident then the punishment is increased. Imprisonment for a period not exceeding five years is the penalty for membership of such an association or organization. Article 98A of the Penal Code sets the punishment for *"any person who sets up, founds, organizes or administers associations or organizations seeking the dominance of one social class, or to overthrow the basic national, social and economic orders, or to destroy any of the fundamental orders of society, or to favour any of the preceding actions if the use of force or terrorism or any other illegal means is evident."* The term of imprisonment may be up to ten years with hard labour. Paragraph 3 of the same article provides the punishment of imprisonment for membership of, or participation in such an organization. A maximum penalty of five years' imprisonment may be imposed on a person who has direct or indirect contact with the organization or its branches.

108. Under article 22, activity connected with illegal political organisations is punishable by life imprisonment with hard labour.

109. Omar Bendourou, "The Exercise of political freedoms in Morocco" in Review of the International Commission of Jurists, 40, 1988.

Recent Algerian legislation illustrates two approaches to administrative action against associations. Under Ordinance 71-79 of 1971, the legality of an administrative order by the Ministry of the Interior or a judicial decision to dissolve an association was subject to the supervision of the Supreme Court, by appeal.[110] However, in the present Ordinance (87-15 of 1987) governing association, there is no provision of judicial supervision of an administrative order to dissolve an association,[111] which means that the right of suspended associations is no longer safeguarded by the judiciary. One expects, however, that the ordinary channel for appeal against administrative decisions remains open to organizations.[112]

110. CERD/C/131/Add.3 of 18th June 1985, pp.12-13.
111. CERD/C/158/Add.2 of 3rd April 1987, p.13.
112. Ibid. Annex.

Both radical and moderate Arab states lay emphasis on the role of trade unions,[113] not surprisingly, since workers' and employers' organizations represent a significant force within the Arab society. It is notable that several Arab countries are parties to ILO instruments guaranteeing the rights of workers and employers.[114]

The role of trade unions in the Arab world is regulated by law,[115] with recognition at constitutional level in most countries.[116] Other laws[117] regulate the formation of trade unions, their activities and scope.

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113. For example, the Iraqi report to the Human Rights Committee lays great emphasis on the promotion and encouragement of trade unions in Iraq, since they are *"regarded as one of the important manifestations of the practice and assertion of popular democracy."*
CCPR/C/1/Add.45 of 8th June 1979, p.87.
Article 3 of the Moroccan Constitution also emphasises the role of *"... trade union organizations ... [which] contribute to the organization and representation of the citizens"*.

114. For example, Iraq has acceded, among other labour conventions, to the ILO Convention on Freedom of Association and Protection of the Right to Organise, and Tunisia has acceded to and ratified the same Convention.

115. The examination of Arab national legislation begins with the rights of citizens to establish and to join organizations, including the extent to which organizations can draw up their own constitutions and rules, how far they are free to elect their representatives and organise their administration and activities, formulating their own programmes. It examines the extent to which organizations are protected against dissolution or suspension by the public authorities, and how far organizations are allowed to establish and join federations, including the degree to which Arab trade unions may affiliate with regional as well as international organizations. Since this right bears the imposition of restrictions of special nature, such legislative restriction is also examined.

116. In Egypt, the Constitution of 1971 and its amendments of 1980, permit the establishment, on a democratic basis, of trade unions and syndicates which enjoy corporate personality, (article 56).
Article 60 of the Algerian Constitution stipulates that trade union rights are exercised within the framework of the law, as does article 8 of the Tunisian Constitution, which also provides for syndicalism : *"le droit syndical est garanti."*
The Iraqi Constitution, in article 26, guarantees the right to form trade unions within the legal and ideological framework described before, in other words, in accordance with *"the nationalist and progressive line of the revolution"*, while article 48 of the Syrian Constitution states that: *"The popular sectors have the right to establish social and professional trade union organisation and production of service co-operatives. The framework of these organisations, their relations and the scope of their activities shall be defined by law"*. The Moroccan Constitution, in article 9, and the Jordanian Constitution, in article 23 (f) guarantees all citizens freedom to join or to form unions.

117. As we saw, Syrian law grants institutions, organisations, trade unions and private committees the right to form associations, for example, Act 317 of 1956 on Co-operatives grants consumers' and producers' cooperatives the right to form associations. Act 68 of 1968 governs the right to form trade unions or professional organisations, which have their own statutes. Trade union organisation in Syria is regulated by Legislative Decree 84 of 1968 (amended by Legislative Decree no.30 of 1982).
Trade union rights are regulated by articles 242-271 of the Tunisian Labour Code, promulgated in 1964, which lays down maximum working hours, provides for rest days, paid vacations, and regulates a minimum wage, social security, pensions and other wage provisions. Equality between the sexes in employment is also guaranteed. The right is protected for all categories : public officials have the right to form trade unions under article 4 of Act 83/112 of 12th December 1983. Other workers are guaranteed the right to organise under the Labour Code and the Basic Collective Convention approved in 1973. Article 242 of the Labour Code provides that trade unions or professional organisations may be formed freely. The only formality to be completed is the deposit of its statutes with the headquarters of the governate or *"délégation"*, which is competent for the territory.
Aliens may join trade unions, but may not be appointed to administrative or executive posts, without the approval of the Minister of Labour, (article 251). Trade unions are represented on the Economic and Social Council, a body set up under the Constitution to advise on economic and social matters. They are also authorised by law to make labour agreements with employers.
Trade union rights in Morocco are regulated by the Dahir of 16th July 1957, according to which they may only be prohibited by the decision of a court. CCPR/C/10/Add.2 of 19th February 1981, p.3
In Jordan, formation of trade unions is guaranteed by the Labour Act, article 69 (a). Legislation has also been enacted entitling the formation of professional associations, and under article 79 of the Act, employers are prohibited from making the employment of any worker subject to the condition that he must refrain from joining or give up his membership in a trade union.
CCPR/C/1/Add.56 25th January 1982 p.18 & CERD/C/130/Add.3 1st April 1987, p.7.

In the traditional Arab monarchies, it seems that some legal systems safeguard the right, while others do not allow trade unions to be formed, instead regulating workers' rights by a Labour Code. An example of the first category is Kuwait, where article 43 of the Constitution provides freedom to form unions on a national basis in accordance with the law. Chapter XIII of the Private Sector Labour Act no. 38 of 1964, makes provision for freedom of association, including the right to form trade unions, in article 69.[118]

In contrast, in the state of Qatar, the right to form trade unions is not exercised; nor is the right to strike or to engage in collective bargaining. Instead, the Labour Act provides for the establishment of committees for the settlement of disputes and consultative committees, (article 66 and 67), as well as establishing a Labour Court.[119] As in Qatar, trade unions and labour federations do not exist in the United Arab Emirates. Instead, employment-related rights of workers are safeguarded by law.[120]

As we saw, there is grave cause for concern in countries where the law imposes a single trade union system at all levels, and prohibits pluralism locally and nationally. Only one organization and national trade union may be established for each category of workers, or for each region. Such organizations are often compelled to join a single national confederation, designated by law. Such systems may be linked to different socio-economic and political principles, though the imposition of such a system may be achieved through explicit legislation or through a set of provisions. This is the case in several Arab countries, including Syria,[121] Egypt,[122] Iraq, Libya,[123] Kuwait, Yemen.

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118. This article provides the right of employers to form associations and the right of workers to organise trade unions, in accordance with the provisions of this Act, which enjoy corporate personality, and the provisions of these articles apply to persons working in the governmental sector, similar to Tunisian legislation.

119. For example, Act no.4 of 1962 established a Labour Court, which considers affairs between employers and employees, and is solely competent to rule in disputes. Cases are heard by the Court in accordance with its Code of Procedure (promulgated under Act no.5 of 1962). Article 17 of this Act states : *"The judge of the Labour Court shall be independent and, in his administration of justice, shall be subject to no authority other than of the law in accordance with which his rulings shall be issued and implemented"*. CERD/C/156/Add.2 7th March 1988, p.12.

120. CERD/C/130/Add.1 28th January 1986 p.5.
The Provisional Federal Constitution of the United Arab Emirates however, provides in article 20, that it intends to protect the rights of workers by legislation, with the help of international labour legislation.

121. As we saw, trade union organisation in Syria is regulated by Legislative Decree 84 of 1968 (amended by Legislative Decree no.30 of 1982). Like comparable Egyptian legislation, section 7 of the Decree imposes the system of single-trade-union structure, and Legislative Decree no.250 of 1969, establishes a single system for the establishment of associations.

122. In Egypt, despite the constitutional provision, the Trade Union Act No.35 of 1976 amended by Act No.1 of 1981 imposes a single-trade-union structure at all levels
CCPR/C/26/Add.1/Rev.1 16th March 1984, pp.4-5.

123. In Libya, it is imposed by Act 107/75, and in Iraq by Law no.151. In Iraq, Law no.129 of 1969 (amended by Law no.38 of 1983), Law no.178 of 1969 and Law no.70 of 1980 establish trade unions for artists, journalists, academicians and writers in Iraq respectively.
These laws specify the aims of the unions, and define their activities and programmes within the ideological principles of the Ba'th party. Writers and artists, for example, may not work independently but must belong to the specified union. On the promulgation of Law no.70 of 1980, all existing non-governmental cultural, artistic or scientific organizations were dissolved.
Freedom of information and expression in Iraq, Article 19, 1987, pp.17-18, 28.

The Egyptian government has explained that the single-union structure is *"imposed"* by the statute of the Organisation of African Trade Union Unity of which Egypt is a member, since it specifies the principle of a single national trade union structure. This principle conflicts with that in the ILO Convention that workers must be free to set up organizations independent of the established trade union structure. Clearly, in this respect, the international provision represents a stronger safeguard of the freedom than the statute of the regional organization, which restricts this right. While it was never the intention of the ILO Convention to make diversity of unions an obligation, nevertheless, as we saw, the possibility of diversity must be safeguarded.[124]

A number of laws allow for interference by the public authorities in the establishment and administration of trade unions.[125] The minimum number of members required by law to establish an organization varies : for example, in Kuwait, the Labour Act of 1964 requires a minimum number of members,[126] and in Syria, Legislative Decree no.84 specified that an organization might only be set up by fifty members employed in the same undertaking.[127] Other legislation requires that the law shall set the structure of organizations by occupation or branch of activity, for example, in Libya by Act no.107/75, in Iraq by Labour Law no.151, in Jordan, by the Labour Code, and in Sudan, by the Employees Trade Unions Act 1977.[128]

Legislation in several Arab countries restrict eligibility for trade union office on grounds such as occupational requirements, nationality, political views or activities, penal record[129] and re-election, which may prevent qualified persons from carrying out union duties. While such regulations may be in the interests of trade union members, in Libya, Act No.107/75, and Syria, Legislative Decree No.84, seem to go

124. Report of the Committee of Experts on the Application of Conventions and Recommendations, General Report and Observations concerning Particular Countries, Report III, (Part 4 A), International Labour Conference, 70th Session, 1984, pp.137-138.

125. In Kuwait, Chapter XIII of the Private Sector Labour Act no.38 of 1964 falls short of international legal standards in a number of ways. For example, section 72 provides that a certificate of good reputation and good conduct must be obtained before a person may join a trade union and section 74 provides that a certificate must be obtained from the Minister of the Interior stating that he has no objection to any of the founding members before a trade union may be established.
Similarly, registration of trade unions is obligatory by law in Libya, according to the Trade Unions Act of 1975.

126. Freedom of Association and Collective Bargaining : general survey by the Committee of Experts on the application of conventions and recommendations. International Labour Conference, 69th session, 1983, p.36, para.112.

127. Legislative Decree no.30 of 17th September 1982, amending provisions of Legislative Decree no.84 of 1968, abolished the provision in section 2 that a minimum of 50 workers was required for the establishment of a trade union, and in section 9, for the establishment of an occupational trade union in a province.
Report of the Committee of Experts ... , 1984, pp.157-8.

128. Freedom of Association and Collective Bargaining ... , 1983, p.41, para.125.

129. As we saw, while some legal systems contain provisions disqualifying persons who have been convicted of almost any type of criminal offence, the Tunisian Labour Code disqualifies those convicted of certain crimes which are incompatible with the position of trust in trade union office.
Freedom of Association and Collective Bargaining ... , 1983, p.54, para.163.

beyond this limit, to restrict the right in a way contrary to the international legal standard,[130] for example, where some provisions stipulate that candidates for trade union office must belong to the occupation represented by the organisation or be actually employed in this occupation, and in certain cases, the period of employment determines eligibility for office.

While some Arab legislation may require an additional qualification of eligibility for office, like in Libya,[131] Algeria and Morocco, where trade union laws require that the candidate be a national,[132] others, like the Tunisian Labour Code, allow the authorities to use discretionary power to grant exemptions from the statutory conditions of nationality. Allied to restrictions on eligibility on the ground of nationality is the more serious restriction on trade union membership of non-nationals. This question is of particular importance to the Arab countries, in the Gulf states above all, where the trade union movement does not exist or is strictly regulated, and the work force is predominantly non-national.[133] Migrant workers are particularly vulnerable to several forms of exploitation, and this danger is increased by the denial of the right to associate.

In Syria, trade union affiliation of non-Arab workers is subject to a residence qualification of one year, according to Decree no.84 of 1968, while in Kuwait, it is subject to possession of a work permit plus five years consecutive resident employment in Kuwait.[134]

As we saw, formalities imposed by national law concerning the constitutions of trade unions are not incompatible with international standards, as long as they do not impair trade union rights. Though, in developing countries, the state may provide guidance neverthless, this should not impose an obligation to accept compulsory statutes, as in the Egyptian case, where trade union legislation may not be in conformity with this principle, since Law No.35 of 1976 seems to impose a compulsory model constitution on the trade union.[135]

Another aspect of interference by the authorities may be seen in the area of union finances and extensive control over the administration of funds. This phenomenon manifests itself strongly in national legislation where this establishes, for example, in the Iraqi Labour Code, the

130. Ibid. p.52, para.157.
131. In Libya, restrictions may be imposed on trade union membership on the discriminatory grounds of nationality as, according to the Workers Trade Unions Act no.107 of 1975, membership is restricted to Arab workers, while non-Arab workers may join trade unions in accordance with conditions laid down by the Minister of Labour and Public Service in agreement with the Workers Trade Union Federation.
132. For example, in Libya, Act.No.107/1975, Algeria, Labour Code, Book III, and the Moroccan Dahir of 16 July 1957.
Ibid, p.53, para.159.
133. Estimates of Arab and other foreign migrant workers in the five Gulf Cooperation Council states in 1980 placed the figure at 2 135 000. According to the Ministry of Labour and Social Affairs in the Sultanate of Oman, in 1980 the total number of migrant workers in Kuwait was 793 500, in Bahrain 116 400, in Qatar 180 000, in the United Arab Emirates 780 000, and in Oman 265 000.
Migrant workers in the Gulf. Minority Rights Group Report no.68, Appendix, p.19.
134. Freedom of Association and Collective Bargaining ... , 1983, p.31, para.96.
135. Ibid, p.51, para.153.

minimum contribution of members, or specifies the proportion of union funds that has to be paid to federations, or as in Syria, where the law requires that the budget, expenditure or investment of a trade union be approved by the public authorities.[136] Another type of legislation exists in the Libyan Act No.107/1975, and the Syrian Decree No.84 and Legislative Decree No.250 and the Kuwaiti Labour Act, where the Ministry of Labour may request information or inspect books of account at practically any time.[137] Since the principle is that organizations should be free to administer their own affairs, legislation which allows the authority entire discretion to investigate internal affairs of a union cannot be acceptable.

Legislation in the Arab countries places restrictions on the scope of trade union activities, which are not compatible with the international standard. For example, in Tunisia, the Labour Code provides that the activities of trade unions must be limited exclusively to defending the economic and social interests of their members. This provision, although identical to that in the Economic and Social Covenant, nevertheless falls short of the Political Covenant and ILO Convention 87, to which Tunisia is party,[138] and which set the international standard. Likewise, in Kuwait, the Private Sector Labour Act no. 38 of 1964, restricts the freedom of trade unions to formulate their own programmes, in section 73, which provides that trade unions are prohibited from engaging in any political or religious activity.[139]

Restriction of trade unions' freedom to organise their activities and formulate programmes by legislation which severely controls union involvement in political activity may be incompatible with the international legal standard since it may in practice considerably restrict the scope of trade union activity. As far as Arab unions' political activities are concerned, restrictions are the rule, though the legislatures apply this in different ways and to different degrees, where for example, the Kuwaiti Labour Act, explicitly imposes a total ban on political activities in all forms,[140] others are less explicit.

We saw that legislation establishing close links between the unions and the ruling party, often established by legislation providing for the single-trade-union structure, is incompatible with the exercise of trade union freedom. Such legislation is widespread in the radical Arab republics, as for example, in Algeria,[141] Libya,[142] Syria and Egypt.

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136. Legislative Decree no.250 of 1969 provides that the regulation of the financial affairs of associations are subject to ministerial review, for example, in section 6 (c), which provides that the financial rules of associations must be adopted by ministerial authorities.
Report of the Committee of Experts ... , 1984, pp.157-158.
137. Freedom of Association and Collective Bargaining ... , 1983, pp.58-59, paras.185, 186.
138. CCPR/C/28/Add.5/Rev.1 of 2nd May 1986, p.42.
139. Section 73 of the Labour Act no.38 of 1964.
Report of the Committee of Experts ... , 1984, pp.146-7.
140. Freedom of Association and Collective Bargaining ... , 1983, p.61, para.193.
141. Ibid. p.44 para.135.
142. CERD/C/172/Add.2 of 12th January 1988, p.2.

It is clearly illustrated in Iraq, in the rules of the Artists' Union, established under Law no.70 of 1980, which provide that its activities must conform to *Ba'th* party principles.[143]

A general prohibition of strikes,[144] and restriction of the right to strike[145] occur in a number of Arab countries. In Libya, trade unions' right to strike is potentially restricted severely by the Decree of December 1969, concerning the Protection of the Revolution, as article 2, paragraph d, prohibits strikes, if the intention is to oppose or endanger the *"revolutionary republican system"*. Even though it might be understood, by implication, that strikes for other reasons may be lawful, the provision may clearly be used to impose far-reaching restrictions.[146]

The right to strike may also be inhibited by the imposition of compulsory arbitration procedures as, for example, in Algeria, by Act no.82/05 and Sudan, by the Industrial Relations Act of 1976, and in Tunisia by the Labour Code[147]

In contrast with the principle that organizations should be protected against dissolution or suspension by the public authorities, a number of Arab countries have legislation which permits such dissolution by administrative authority, as for example, Yemen[148] and Syria.[149]

International principles aimed at securing the benefits of inter-occupational or inter-regional association are also violated by legislation in Arab countries which prevents federations of unions representing different occupations, such as the Kuwaiti Labour Act of 1964, which is incompatible with this aim,[150] or by a requirement of prior authorisation of affiliation to international organizations, as in Libya, where Act no.107 of 1975 imposes such a restriction, as well as by legislation, often associated with the provisions we examined leading to single-union system, allowing the establishment of only one federation for an occupation.[151]

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143. Freedom of information and expression in Iraq, Article 19, 1987, p.28.
144. For example, the Syrian Agricultural Labour Code prohibits strikes.
Report of the Committee of Experts ... , 1984, pp.157-8.
145. Restrictions focus on, for example, the purpose of the strike, or on certain categories of workers. In Syria, Lebanon, Morocco and Kuwait, the right of public employees to strike is withheld.
Freedom of Association and Collective Bargaining ... , 1983, pp.64-5, para.211.
146. Violations of human rights in the Libyan Arab Jamahiriya, Amnesty International, App.C.
147. In Tunisia, the Labour Code allows the requisitioning of workers on strike. This legislation also provides that strikes may be called only as a result of a collective labour dispute. Strikes should be preceded by a conciliation procedure, announced ten days in advance and approved by the trade union federation.
Freedom of Association and Collective Bargaining ... , p.67, para.215.
148. Ibid, 1983, p.71, para.229.
149. In Syria, Legislative Decree 84 of 1968 amended by Legislative Decree no.30 of 1982, in section 49 (c), empowers the General Federation to dissolve the managing body of any trade union on several grounds.
Ibid. pp.56-57, para.176.
150. Ibid, p.76, para.242.
151. A General Federation of Academicians and Writers was established under Law no.70 of 1980 in Iraq, as the only mechanism for exercising trade union rights for artists and writers.
Freedom of information and expression in Iraq, Article 19, 1987, p.28.

Throughout the Arab legal order, the rights of certain workers' and employers' unions to form federations and confederations is restricted. In line with international principles which allow the imposition of lawful restrictions on the rights of certain categories of workers, again, Arab legislation restricts the rights of, for example, the armed forces, public service employees,[152] and the police.[153]

152. Several countries do not recognise the right of public service officials to form trade unions, according to the Labour Act in Jordan and the Labour Code in Yemen, while in Sudan, fire service personnel and prison staff are prohibited from forming trade unions. In Egypt, the right of public service employees at higher or managerial levels to join organizations is restricted.
153. In Morocco, the police and security forces may not join trade unions, although they may form and join their own associations. In Tunisia, the police may organize in the same way as other public servants.
Freedom of Association and Collective Bargaining ... , 1983, p. 27, paras. 85-9.

# SECTION THREE

# THE RIGHT TO POLITICAL PARTICIPATION IN NATIONAL LEGISLATION

## POLITICAL PARTICIPATION

As we saw, the contemporary Arab political framework has been shaped to a large extent both by the legacies of the past[154] and contemporary ideologies. We have already seen the effect of secular and religious ideology on the constitutional background of Arab states, and now in order to evaluate the participation of the population in political life, it is essential to examine how new formula set the structure within which political participation takes place. As we saw, besides constitutional provisions which establish the framework of political participation, ideological texts,[155] such as the National Charter in Algeria and the Declaration of the Authority of the People in Libya, play a role, while religion forms the basis of authority in the Gulf and Saudi Arabia.

Despite the political nature of each system, constitutional provisions in most countries incorporate in the basic legal text a recognition of the right to take part in political life. Some Constitutions use the system of *"People's Chamber"*, while others establish *"National Assemblies"* and others still have a *"People's Council"*. Since independence, Libya has moved from a parliamentary monarchy to *"direct popular democracy"*, through *"the Basic Popular Congresses"*, all represented again in the *"General People's Council"*.[156] Saudi Arabia[157] and some Gulf States maintain traditional forms of political participation and one form or another of political consultation, far from any modernity.

Various measures have been taken in Arab countries to address the role of the population in political participation through legislation, though the administrative reality and application of laws have been severely restricted or limited - as we saw in the case of the other rights. Legal measures are to be found in fundamental constitutional provisions and other laws dealing directly and indirectly with the right to participate in the political life of the nation. In the socialist Arab republics, the rights of political participation are organised through systems of so-called *"popular democracy"*. The chosen political system normally appears in Constitutions, Declarations or Charters, and the political formula varies between countries, for example in Algeria, it is *"socialist democracy"* while in Libya, the phrase is *"direct popular democracy"*.

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154. One striking legacy was a political framework, maintained by successive governments, which was unable to translate the aspirations of the people to true participation in political life. In the absence of a stable constitutional and legal framework, in which all categories of society could participate in supervising the development of the new political order, the gap grew between the aspirations of the population and the aims of the ruling élite.

155. As we saw in the section *"Ideology"*, these include the Report of the 5th Congress of the National Front Political Organisation in Yemen and the Political Report of the 8th Regional Congress of the Ba'th Party in 1974 in Iraq.

156. Libya's political evolution is briefly charted in Jacques Roumani "From republic to Jamahiriya : Libya's search for political community" Middle East Journal 37 1983, pp.151-168. A brief description of the structure of People's Congresses may be found in Jonathan Bearman, Qadhafi's Libya, 1986, pp149-156. See also, Henry Habib, Politics and government of revolutionary Libya, 1975.

157. As we saw, legislative responses to political development in the kingdom are reviewed in Aharon Layish "'Ulama' and politics in Saudi Arabia" in Islam and politics in the modern Middle East (Metin Heper and Raphael Israeli eds.), 1984, pp.29-63. See also, Emile Nakleh, "Political participation and constitutional experiments in the Arabian Gulf : Bahrain and Qatar" in Tim Niblock (ed) Social and economic development in the Arab Gulf, 1980, pp.161-76.

Iraq and Syria are each led by opposing wings of the *Ba'th* Socialist Party, and its ideology is reflected in their political framework. According to Iraq's government[158], the Arab *Ba'th* Socialist party *"was able to define the general framework for its theory of democracy as direct popular democracy ..."*, while the Syrian Constitution of 1973 proclaims the Syrian Arab Republic to be a democratic, popular, socialist and sovereign state. The Syrian legislator chose *"popular democracy"* as the system of governing, as the preamble to the Constitution describes *"popular democracy [as] the ideal formula which ensures for the citizens the exercise of their freedom, which makes them dignified human beings capable of giving and building ..."*. The Syrian political system is based on the People's Assembly as legislative body, and People's Councils,[159] while executive power is exercised by the President and ministerial Cabinet.

The Iraqi Constitution of 1970, as others, describes the people as the source of power and its legality, and this power is exercised by the organs of the Revolutionary Command Council and the National Assembly.[160] As far as political participation is concerned, this has been organised through People's Councils, which have *"been regarded as an important step towards expanding and developing the democratic practices in society"*. The right to participate in public life is exercised through two channels in Iraq : the national assembly and the participation of representatives of popular organizations in legislative and administrative decision-making. According to the National Assembly Act no.55 (1980), subsequently amended, the Assembly, elected for four years, exercises several functions, including the proposal of draft legislation, promulgation of legislation, as well as approval of the Budget and the National Development Plan. The second channel for participation is utilised by representatives of popular organisations, who attend meetings of the Council of Ministers to express their views on general issues considered by the Council as well as issues affecting their own sectors, and address the National Assembly on legislation affecting their sectors.[161] The Iraqi Constitution illustrates a basic limitation imposed by the ideological framework, in article 26, which provides as we have already seen, that political rights are guaranteed in accordance with the objectives of the Constitution ... *"The State shall endeavour to provide the means required for practising these freedoms, which are compatible with the nationalist and progressive line of the revolution"*.

158. For example, in its statement to the Human Rights Committee. CCPR/C/1/Add.45 of 8th June 1979, p.103.
159. Article 10 of the Syrian Constitution describes the People's Councils as autonomous institutions, elected in a democratic manner, through which the citizens exercise their political rights, insofar as the administration of the State and the leadership of the society are concerned.
160. Article 37 provides that the Revolutionary Command Council is the supreme organ of the state, which is competent to legislate under article 42. Although the Constitution, promulgated in 1970, contains provisions for the function of the National Assembly, this organ was not in fact set up until 1980, so until that date, the Revolutionary Command Council was in fact the sole custodian of power in Iraq.
161. CCPR/C/37/Add.3 18th July 1986 p.48.

The Algerian National Charter describes how the state dynamic gains authority from the people's assent, and functions through popular participation, stressing that political participation is both the right and the duty of every citizen, an emphasis it shares with other radical republics. The National Charter emphasises that socialism is the programme compatible with Algerian aims and aspirations, as it states : *"based on socialist democracy, the Algerian State guarantees real freedom of the individual ... Socialist democracy ... prepares the objective conditions that enable citizens to exercise their fundamental freedoms and their rights ...".* The Constitution too, emphasises the Algerians' choice of socialism, as we have seen. The population take part in public life through an elected popular assembly, which like the Iraqi assembly, exercises the legislative function under the provisions of the Constitution. People's assemblies operate also at wilaya level, and their members are elected at the local level, though, the influence on the political dynamic of the ruling National Liberation Party is manifest in the National Charter, and other laws.[162]

Similarly, the Egyptian Constitution describes the political formula as a *"socialist, democratic system ... based on alliance of the working forces of the people ...",* and its preamble outlines its objectives in similar terms. Chapter Two regulates the People's Assembly and section III of Chapter Three regulates the local administration structure and ensures citizens' public rights, including their right to participate personally in the choice of their leaders and representatives, at the national level, through elections to the People's Assembly and Advisory Council, and at the local level, through elections to the People's Councils. The People's Assembly Act no.114 of 1984, amending Act no.38 of 1972, introduced the system of proportional lists for the election of members to serve in the People's Assembly and the Advisory Council.[163]

The ideological framework in Libyan political life has evolved since the present leadership came to power in 1969. At an early stage any connection with ideology was denied as it was said that in the Revolution's objectives of *"Freedom, socialism, unity", "socialism"* was a local phenomenon, distinct from alien ideology.[164] As we saw, article 6 of the Constitutional Declaration states *"... the Libyan revolution aims to achieve socialism by implementing social justice ...".* Similarly, freedoms are ensured *"within the limits of the interests of the people and the principles of the Revolution."* A major change in the Libyan political order was the announcement in March 1977 of the establishment of the People's Authority,[165] from the text of which several conclusions may be

162. CERD/C/158/Add.2 of 3rd April 1987, pp.5, 16.
163. CERD/C/149/Add.22 30th January 1987, p.8, 11.
164. The Constitutional Declaration describes its inspiration as its *"Arabic and Islamic heritage ... and the specific conditions of the Libyan society".*
165. *"The Libyan Arab People ... in keeping with the first Declaration of the revolution ... guided by the principles set forth ... the Constitutional Declaration issued on 2 Shawwal 1389 A.H. (11th December 1969) ... believing in the objectives of the glorious revolution ... to establish a system of direct democracy ... which embodies the rule of the people over the land of the glorious revolution of 1st September and establishes the authority of the people, which is the only authority ...".*

drawn. The Declaration, regarded by some as the new Constitution of Libya, announces a system of *"direct democracy ... which embodies the rule of the people"*,[166] and may therefore be more accurately described as a basic organizational law. Syndicates and professional associations play their role in political life as part of the General People's Congresses.[167] Although popular direct authority is the basis of the political system, the people exercise this authority by law, which defines the function of people's organizations.[168]

The effect of the Islamic ideology on the political structure is most striking in the traditional countries of the Gulf and to a lesser extent, the monarchies of Jordan and Morocco, where it forms the background to the political structure and legitimises the ruling family. In Morocco, King Hassan II exercises authority as leader of the political as well as the religious community as *"Amir al Moumine"*.[169] The Saudi regime, for which Islam continues to provide the ideological basis and legitimacy,[170] is unique in the region as no national assembly or parliament has ever been created as in other traditional monarchies or Emirates.[171] In the absence of parliamentary assemblies, political parties or trade unions, traditional channels of tribal authority are the only mechanism through which citizens participate in political life. Political participation is principally practised through the *Majlis* and *Shura*, and Saudi plans for a consultative assembly during the past thirty years have not yet come into being, as we saw in Chapter Three.

In other traditional States, such as Kuwait and Qatar, some measure of political participation may be found in Constitutions. For example, the 1962 Constitution of Kuwait introduced a parliamentary system through an elected National Assembly, which has powers to promulgate laws. Potentially, it may over-rule the Amir, since, according to article 66, a law must be promulgated if it gains a two-thirds majority of the Assembly. Qatar's Provisional Constitution describes its form of government as democratic, and provides for the election of a Consultative Council, which is in fact only an advisory body.[172]

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166. Article 10 of the Declaration provides that Basic People's Congresses, which meet every three months for deliberation, discussion, expression of opinions and voting, are to be the basic institution of direct democracy.

167. Article 11 of the Declaration provides *"the authority of the people is comprised of the following : (1) People's Congresses, (2) People's Committees and (3) Professional unions. Together they form the General People's Congresses"*.

168. C. Bezzina, The Green Book : practice and commentary, 1979, pp.66.

169. Under the 1972 Constitution, the King is the Head of State and Commander of the Armed Forces. He has the right to appoint and dismiss members of the Government. This unity in the king's function is proclaimed by article 19.

170. Again, see J.L. Esposito, Islam and politics, 1985, pp.100-111, Aharon Layish "'Ulama' and politics in Saudi Arabia" in Islam and politics in the modern Middle East" (Metin Heper and Raphael Israeli eds.), 1984, pp.29-63, and Bryant W. Seaman "Islamic law and modern government : Saudi Arabia supplements the Shari'ah" Columbia Journal of Transnational Law 18, 1980, pp.410-453.

171. Like Saudi Arabia, Oman is an absolute monarchy, where all authority is vested in the Sultan. A Consultative Council of appointees of the Sultan was set up by Royal Decree of 19th October 1981. See Dale F. Eickelman "Kings and people : Oman's State Consultative Council", Middle East Journal 38, 1984, pp.51-71.

172. S.H. Amin Middle East legal systems, 1985, pp.298-301.

Legislation in most Arab countries regulates the right of participation in public life directly and indirectly at both national and local levels. The Tunisian population, for example, may play a direct role in decision-making, through national referenda. Indirect participation through the election of representatives to national and local bodies is also regulated by law in most countries, as we have seen. For example, representative institutions have been established in Morocco at the national and local level. A Dahir of September 1976 contains the *"Charter of the Communes"*, to organise local political activity.[173]

National assemblies are in general elected by universal and equal suffrage,[174] and in most countries, national and local assemblies, councils and committees are elected on a periodic basis.[175] Electoral law also governs the process of elections and regulates voting.[176]

In most countries, Constitutions and laws such as Electoral Codes specify the regulations and restrictions on the exercise of the right to participate in public life in terms of who is eligible to vote, and who is eligible to stand for election, with most electoral law regulating the right to vote by qualifications related to age, nationality or citizenship,

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173. The Dahir provides that : *"communes are territorial communities of public law, endowed with legal personality and financial autonomy"* and that *"the affairs of the commune shall be managed by communal councils."* It also provides that the council shall direct the affairs of the commune, aided by the state and other public bodies. Councils may also intervene in other matters to express an opinion, if this is required by the regulations, or at the request of the administration.
CCPR/C/10/Add.2 of 19th February 1981 pp.34-6

174. For example, the Jordanian Constitution provides, in article 67, that suffrage is direct and secret, and in Tunisia, the Constitution, as well as article 1 of the Electoral Code provide that: *"Suffrage is universal, free, direct and secret"*.
In Syria, the Constitution provides, in article 50 (2), that the members of the People's Assembly are elected by universal suffrage, indirect, equal secret ballot, in accordance with the provisions of electoral law.
In Iraq, the National Assembly Act no.25 (1980), provides that the Assembly contains 250 members, (The proportion is 1 member to every 50,000 of the population) freely elected by secret public ballot, and according to article 3, each member represents all the people of the republic of Iraq.
In Syria, article 52 of the Constitution contains a similar provision, specifying that : *"A member of the People's Assembly represents the people as a collectivity."*

175. For example, in Iraq, according to Act no.25 of 1980, the Chamber of Deputies is elected for five years, as are municipal councillors. In Morocco, according to the Dahir of September 1976 containing the *"Charter of the Communes"*, members of the communal councils are elected by relative majority in a single round, by direct universal suffrage, for a period of six years.
CCPR/C/10/Add.2 of 19th February 1981 pp.34-6
Chapter five of the Jordanian Constitution deals with the Chamber of Notables in articles 63 to 66, and the Chamber of Deputies in articles 67 to 74. Article 68, paragraph 1 provides for elections to this Chamber every four years.

176. For example, article 57 of the Syrian Constitution states that the electoral law must include provisions guaranteeing : *"1. freedom of voters in electing their representatives and integrity of the elections; 2. the right of the candidates to watch over the voting; 3. punishment for those who tamper with the will of the voters."*
In Tunisia, electoral campaigns are governed by law : voting, counting of votes, and announcement of results are regulated by electoral law.
CCPR/C/28/Add.5/Rev.1 of 2nd May 1986, p.48.
Sections of the Algerian Electoral Act contain penal provisions covering actions undermining the process of voting, such as electoral fraud and the use of violence to influence voting.
CERD/C/158/Add.2 of 3rd April 1987, p.17.

and other legal requirements.[177] For example, the Egyptian Constitution of 1971 guarantees the rights of citizens to vote without discrimination on the grounds of religion, origin or sex, as article 62 states that :

*"Every citizen shall have the right to vote ... and to express his opinion by way of referendum in accordance with the provisions of the law. Participation in public life is a national duty".*[178]

The Algerian government has made a similar statement, saying that participation in political life is *"not only a right but a duty of the citizen and worker".*[179]

Restrictions are imposed by law on the right to vote of certain groups within Arab society. These fall into several categories : those who have been convicted of certain crimes;[180] members of the police, armed forces[181] and, in some countries, the judiciary.

177. For example, in article 54, the Syrian Constitution provides that : *"All citizens over eighteen years of age, who are listed on the civil status register and fulfil the requirements of the Electoral Law shall be electors".*
In Iraq, the National Assembly Act no.55 (1980), article 12, stipulates that : *"Every male and female Iraqi who meets the conditions specified in this act shall be entitled to vote or stand as a candidate."*
This law is quoted in S.H. Amin Middle East legal systems, 1985, pp.157-8.
In Algeria, constitutional protection of the right to vote in elections appears in article 58, which states that : *"any citizen fulfilling the legal conditions is entitled to vote ..."* Act no.80-08 of 25th October 1980 constitutes the Electoral Code, which defines the conditions and rules for elections. For example, article 4 of this Act provides: *"All Algerian men and women who are over eighteen years of age on election day enjoy civic and political rights and are not subject to any of the cases of incapacity provided for by the present Act shall be electors."*
In Tunisia, the qualifications for voting are contained in the Constitution and the Electoral Code. Article 20 of the Constitution provides : *"Every citizen who has possessed Tunisian nationality for not less than five years and is over twenty years of age shall be an elector,"* and the second article of the Electoral Code specifies that the right to vote is guaranteed to Tunisian men and women in possession of their civil and political rights.
The Moroccan Constitution of 1972, article 8, provides : *"All citizens of either sex who are full age and in possession of their civil and political rights shall be entitled to vote"*, and according to the Dahir of 1st September 1959, article 1, with amendments, articles 6 and 7 of Dahir of 9th May 1977 which promulgates an organizational law on the composition and election of the House of Representatives, and the Dahir of 19th March 1977 concerning the establishment of new municipal electoral registers, every national who is over twenty-one years of age, and listed on an electoral register is entitled to vote.
CERD/C/148/Add.2 15th October 1986, p.10.
The right to participate in elections, by voting, is outlined in the Jordanian Electoral Act, of 1960, and the draft amendment to the Act, (prepared in 1985). The new draft Electoral Act permits every Jordanian over the age of nineteen to vote, while the 1960 Act restricts this right to persons over twenty years. Women are permitted to vote, according to an amendment promulgated in 1974. The Municipalities Act promulgated in 1982 gave women the right to vote in elections to the municipal councils.
CERD/C/130/Add.3 1st April 1987, pp.2-3.
The right to vote in elections is guaranteed to Qatari citizens on a footing of equality, without discrimination on the grounds of colour, sex, nationality or national origin. Naturalized citizens of Qatar enjoy the right of voting ten years after naturalization.
CERD/C/156/Add.2 7th March 1988, p.7.
178. Elections to the People's Assembly were conducted on this basis in April 1984.
179. CERD/C/158/Add.2 of 3rd April 1987, p.15.
180. For example, according to article 3 of the Tunisian Electoral Code, undischarged bankrupts, and those have been convicted of offences and sentenced to unsuspended terms of imprisonment of more than 3 months, or suspended terms exceeding 6 months may not vote.
Similarly, in Algeria, article 6 of Act no.80-08 of 1980 lists the main categories of people who are not allowed to vote as : those convicted of crimes, (those given suspended sentences or sentences committed through negligence are not excluded from the electoral list) those sentenced to a term of imprisonment of more than 6 months, which prohibits the exercise of their electoral rights, in accordance with article 14 of the Criminal Code, persons in contempt of court or bankrupts who have not rehabilitated.
181. Members of the Tunisian armed forces are not permitted to vote.

Restrictions on the right of such groups may be compatible with international principles, however other restrictions on, for example, political grounds are not. The exclusion, for example, of *"all individuals who adopted a political, economic or intellectual position that was hostile to the Revolution and its programme ... from the democracy"* is a clear violation of the principle of access without unreasonable restrictions to the political process.[182]

Restrictions in the Algerian Electoral Code also include an extra-ordinary provision which excludes from the electoral list *"persons whose behaviour during the war of national liberation was against the interests of the country"*. This restriction, though not specifying the definition of *"behaviour during the war .."*, or *"against the interests of the country"*, adopts two conditions which are prior to the establishment of the legal order, and so violates the principle of non-retroactivity of laws. It also excludes a category of the population from enjoying an important freedom safeguarded by national legislation, whether the Charter or the Constitution, which states that it gives Algerians their rights and freedoms, through *"socialist democracy"*.

The right to stand for elections in the Arab countries is likewise regulated by laws which impose restrictions on similar grounds, of age, sex, nationality, and other legal requirements.[183]

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182. CCPR/C/SR.748 of 22nd July 1987, p.10.

183. The Iraqi National Assembly in its Act No.55 of 1980, article 12 provides that: *"Every male and female Iraqi who meets the conditions specified in this act shall be entitled to ... stand as a candidate."*

The Egyptian Constitution guarantees the rights of citizens to stand for elections, in article 62, which states that : *"Every citizen shall have the right to ... stand as a candidate at elections ... in accordance with the provisions of the law. Participation in public life is a national duty"*.

The Algerian Constitution, in article 58, states that : *"any citizen fulfilling the legal conditions is entitled to ... be elected."* Article 68 of the Electoral Code states : *"All electors who are over 25 years of age on election day shall be eligible for election."* The same article limits eligibility for election to the National Assembly on the grounds of age, since candidates must be over 30 years of age. Election to the communal People's Assemblies is restricted on the grounds of original nationality, to native Algerians, although those who have acquired Algerian nationality may stand for election to the communal and wilaya people's assemblies ten years after acquiring Algerian nationality. CERD/C/158/Add.2 of 3rd April 1987, p.17.

In Tunisia, according to the Electoral Code, any voter of the Commune who has reached the age of 25 may stand for election to the municipal council subject to certain conditions; for elections to the legislature, any male citizen over the age of 28, who is a voter and the son of a Tunisian father is eligible, subject to certain restrictions; in Presidential elections, any Muslim male citizen over the age of 40 who is a voter, whose father and grandfather were Tunisian nationals without interruption, and who has been a Tunisian national since birth is eligible to stand.
CCPR/C/28/Add.5/Rev.1 2nd May 1986, pp.47-49.

Any Moroccan may stand for election, provided he or she meets the following requirements : Moroccan nationality, be over 25, have no record of convictions, be listed on an electoral roll.

In Jordan, the right to participate in elections, by standing, is outlined in the Electoral Act, of 1960, and the draft amendment to the Act, (1985). The former document affirms the right of Jordanians, who have held Jordanian nationality for 5 years, to stand for election to the House of Representatives, the latter document increased this limit to 10 years. According to the draft Act, public officials may not stand for election to the House of Representatives, unless they resign from their posts at least one month before the election. Women are permitted to stand for election to the House of Representatives, accordng to the amendment of 1974. The Municipalities Act promulgated in 1982 gave women the right to stand for election to the municipal councils.
CERD/C/130/Add.3 1st April 1987, pp.2-3.

The right to stand as a candidate in elections is guaranteed to Qatari citizens on a footing of equality, without discrimination. Naturalized citizens of Qatar enjoy the right of standing for election ten years after naturalization.
CERD/C/156/Add.2 7th March 1988, p.7.

Restrictions are also imposed on the rights of certain categories to stand for election. For example, in Morocco, law enforcement officers, magistrates and serving members of the armed forces (police, gendarmerie), may not become candidates. While restrictions on the right of such categories is compatible with those in the international standard, other restrictions are clearly based on ideological grounds and are unacceptable, in that they exclude opponents of the governing ideology from participation in political life.

A particularly striking example may be found in the National Assembly Act (1980) of Iraq, where it was stipulated, *inter alia*, that any candidate for the National Assembly in 1980 must believe in the principles and objectives of the July 17-30 Revolution (1968) as well as being of Iraqi nationality and not married to a foreigner.[184]

In most Arab countries, the right of access to public office, on general terms of equality, is recognized by the Constitution, and may be specified in other laws, such as the Civil Servants Acts. Certain legislation tends to emphasise that public office and participation in the administration is the duty of the citizen. For example, the Algerian state, throughout the Constitution and other legislation, lays great emphasis on the role of the population in decision-making and administration. Two articles of the Constitution stress the importance of popular participation in the management of public affairs. For example, article 27 describes the active participation of the people in the administration and management of the State as *"an imperative of the Revolution"*, and article 34 provides that the organization of the State is founded on the effective participation of the popular masses in the management of public affairs. Similarly, in Iraq, the Provisional Constitution stipulates that : *"Public office is a sacred trust and a social service based on faithful and conscious devotion to the interests, rights and freedoms of the masses ... "*.

184. Abida Samiuddin "The Beginning of Parliamentary Democracy in Iraq: a case study" Middle East Studies October, 1982, pp. 400-410.
Provisions from Law no. 55 are quoted in S.H. Amin, Middle East legal systems, 1985, pp. 224-225.

The Yemen Arab Republic Constitution of 1971 describes public service as the *"duty of those undertaking it"*, in article 18.[185] Likewise, legislation in force in the United Arab Emirates stresses that public office carries responsibility. According to article 35 of the Provisional Federal Constitution :

*"Public office shall be a national responsibility assigned to those holding it. Furtherance of the public interest shall be the sole aim of civil servants in the discharge of their functions".*[186]

Equality of access to public service is safeguarded by law, at the constitutional level in general terms, and in other laws, which specify qualifications required in some detail.[187] Qualifications may be based on age, nationality, special aptitudes and so on.

185. It goes on to provide that, in performing their duties, government employees should aim at the public interest and at serving the Nation.

186. CERD/C/130/Add.1 28th January 1986 p.5.
Similarly, in Libya, article 4 of the Constitutional Declaration provides that *"public functions are the duty of those who are put in charge of them. The goals of the state employees in discharging their duties is to serve the people"*.
In Egypt too, article 14 of the 1971 Constitution provides that *"public duties are a right of citizens and responsibility for those who undertake them in the service of the people"*.

187. For example, the Iraqi Constitution stipulates that: *"Equality of access to public office is guaranteed by the law"*, as does other legislation, which provides for equality of access to public office, for example, the Civil Service Act No.24 of 1960, see CCPR/C/37/Add.3, 18 July 1986, p.9.
In Tunisia, the Civil Servants General Status Act no.83/112 of 12th December 1983 allows access to public service to all citizens over 18, who possess citizen rights, and are of good moral standing.
In Algeria, access to public service is regulated by Act no.78/12 of 5th August 1976, and Decree number 85/59 of 23rd March 1985, which regulate conditions for workers in public institutions. Conditions for recruitment, in article 31, include general restrictions based on nationality, the enjoyment of civic rights, moral character, qualifications, age and physical aptitude. Another condition is that the candidate should give *"a satisfactory account of his situation in respect of national service"*.
CERD/C/158/Add.2 of 3rd April 1987, p.18.
According to article 22, paragraph 1 of the Jordanian Constitution, every Jordanian has access to public service, while in Morocco, the right to equal access to public service is protected by the Constitution, which states: *"All citizens shall have access to public service, and to public employment under the same conditions,"* and this is confirmed in article 1 of the Dahir of 24th February 1958, which provides : *"All Moroccans shall have access to public office on an equal footing, save as otherwise specified in the provisions of this statute or of special statutes, no distinction shall be made between the two sexes in the application of the present statute"*.
CCPR/C/10/Add.2 of 19th February 1981, p.11.
Article 35 of the Provisional United Arab Emirates Constitution provides that : *"public office shall be open to all citizens on a equal basis under the conditions and in accordance with the provisions prescribed by law"*. Legal remedy for the violation of these rights is provided in article 41, which states that: *"Every person shall be entitled to file a complaint with the competent authorities, including the judiciary, in respect of any violations of rights and freedoms provided for in this chapter"*.

# CHAPTER FIVE

# SUMMARY, CONCLUSIONS AND CONTRIBUTION

In the course of this study a number of factors have been identified inhibiting the legal order's ability to protect the rights of Arab individuals and groups. Among the first of these are factors which shaped the emergence of the contemporary legal order. We have seen that the legacy of foreign domination of the Arabs was deep and lasting : centuries of foreign rule disrupted traditional society, creating divisions in territories and communities which remain today. We saw how the political and administrative policies of the foreign powers who colonised Arab territory shaped the emerging constitutional framework. Their policies had a lasting impact on features of traditional society, such as religious and tribal authority structures, and gave rise to other such negative results as the poor quantity and quality of administrative institutions and personnel at independence.

We have also seen the impact of colonial policies on the political life of the region, interrupting the development of political thought and activity, retarding the development of political organizations, and inhibiting the growth of conventional forms of political participation, in some states.

The colonial response to nationalist calls contributed to making the new constitutional order more authoritarian, as well as bringing about a crisis of political leadership. The political favour shown to certain groups meant in some countries that minorities came to exercise political power, while the failure of the political framework created by the colonial powers to encompass all groups deepened divisions between ruler and ruled, and led nationalist forces in several countries to seek power in alliance with the military, as the only force capable of bringing about reform. Belief in the democratic process as a vehicle of change faltered with the failure of political institutions to provide a mechanism through which political parties could bring about change responding to national needs.

Some deficiencies in the contemporary constitutional order have their roots in its framing by the colonial power, which in some cases confirmed the legal status of a ruling minority, or failed to reform the feudal economic structure. Continuing external influence after "semi-independence" coupled with the radicalisation of Arab politics in the sixties led to the assumption of power by radical socialist regimes, whose ideology continues to have a striking influence on the legal order today. This ideological influence must be regarded as one of the principal factors undermining the ability of the contemporary legal order to uphold the rule of law and to protect individual and collective rights, in the political sphere as elsewhere. Although this study does not address questions of political ideology, it has nevertheless repeatedly highlighted the harmful nature of ideological interpretations of principles of the rule of law and restrictions on political human rights based on ideology.

Equally damaging to the full enjoyment of political rights are the legal frameworks which give rise to the pre-eminence of executive power, whether this characteristic results from the influence of French constitutional tradition or is based on an interpretation of Islamic doctrine which secures the hereditary power of an elite. Constitutional and other provisions which establish the pre-eminent position of a single ruling party likewise distort the legal framework and inhibit the enjoyment of political rights.

Naturally, in the years following independence, the ruling groups in the Arab countries have been connected to the nationalist movement, which retains legitimacy from its struggle for independence during colonial rule. The identity of the ruling elite, it seems, is less important than its ability to identify itself with these nationalist aspirations. For example, the ruling family in Morocco were able to profit from a connection late in the day with the nationalist movement. In Algeria, the legitimacy of FLN is clearly linked to its role in the War of Independence, though the identity of the leading personnel changed, shifting from civilian to military leadership.

We saw how military rule has shaped the emergence of the contemporary political order in some countries. While the role of the military may not be paramount or even clear in government, in most states it continues to be important, and has affected the political order and other spheres to a great extent. The constitutional order, in particular, has been affected by military intervention, which has also precipitated the progress from monarchy to republic in several countries. Nationalist programmes implemented by military leaders have also deeply affected the new constitutional order, since they stress radical elements of nationalist doctrines.

Weaknesses in the constitutional framework of several countries have been identified, ranging from the absence of a Constitution altogether to the provisional nature of several Constitutions. We have also seen that although military regimes may recognise the rule of law and so do not abolish the Constitution itself, martial law or other emergency legislation tends to abrogate constitutional provisions. In some cases, martial law has become more permanent than Constitutions themselves. We saw how emergency legislation tends to focus power in the hands of a strong executive, also a common phenomenon in military regimes.

Within constitutional texts, there is a worrying tendency to enhance executive power at the expense of other powers in the state and, more disturbing, the absence or weakness of any mechanism to control or counter-act its harmful effects. Coupled with this deficiency in some countries, is the lack of or limited judicial review. In particular, many of them lack a mechanism for judicial review of constitutionality of legislation or acts. The French-inspired system of review by the Legislature is not considered appropriate within the Arab context, since, among other reasons, legislation often permits the authority's interference in the mechanism.

A further cause for concern was identified in the review of the judicial system of several Arab countries. Despite the existence of constitutional provisions upholding principles of the rule of law, including the independence of the judiciary, the examination revealed the disturbing phenomenon of the existence of a parallel judicial structure alongside the ordinary courts. In several countries, this parallel structure is military in nature or connected to the principle of national security, but in some countries, extra-judicial courts have an ideological nature, with the so-called revolutionary or people's courts. While many states operate a system of military justice, this normally has jurisdiction only over military personnel, crimes of a military nature, or is associated with a state of emergency. In some Arab countries however, such courts try civilians alongside ordinary courts, legislation provides for the punishment of acts considered to be contrary to the existing ideology, such as crimes against the revolution, and such legislation may create special courts and prosecutors, which are unable to provide proper safeguards of fair trial.

If the examination of the emerging legal order indicates its potential weakness in upholding principles of the rule of law and individual rights, it is not surprising that the examination of municipal legislation governing political rights likewise illustrates far-reaching weaknesses, deficiencies and divergence from minimum international standards.

In some states there is no constitutional recognition of important political rights, such as association, while in others, constitutional texts are deficient in that they do not give full and unambiguous recognition of political freedoms, since even where elements of political rights are safeguarded at this level, there are a number of potentially serious omissions. For example, while trade union rights are recognised to varying degrees in most countries, in others trade union rights do not exist, and the relation between worker and employer is regulated by ordinary legislation. Again, a number of Constitutions and basic laws do not explicitly recognise the right of all, on a basis of equality and without unreasonable restriction, to participate directly or indirectly in political life.

Constitutional provisions also limit the scope of political rights on grounds which undermine the exercise of the rights themselves, in particular by imposing restrictions on ideological grounds. As with the other political rights, ideological restrictions undermine the scope of freedom of association, particularly in the political sphere, and other legislation restricts membership of organizations on religious or political grounds, in violation of the principle of non-discrimination. Legislation also imposes restriction on political participation on ideological grounds in, for example, constitutional provisions which seek to restrict a role in public life to those who accept the ideological principles of the ruling authority.

In addition, restrictions are imposed which go beyond what may be regarded as necessary to secure the right itself, by achieving a balance betwen individual rights and the interests of the community. For example, legislation in radical and conservative countries alike demonstrates abuse of restriction on freedom of expression on the grounds of protecting the reputation of others, by extending the scope of "others" to include not only public bodies, but ruling institutions and Heads of State.

The exercise of certain political rights is also regulated to an extent which threatens the enjoyment of the rights themselves. For example, systems of censorship operated by administrative organs of the governments of all Arab countries severely undermine the freedoms of expression and information. Legislation also restricts the enjoyment of these freedoms, whether by imposing state control of the media, requiring prior authorisation of publication or permitting the Executive to order the closure of a newspaper or the seizure of a publication. Examples of legislation which unreasonably restricts the exercise of the right of freedom of association include the requirement that the statutes of an association must be drawn up in conformity with model statutes established by regulation, the connection of the legality of associations to their adherence to the governing ideology, and requirements governing eligibility to stand for trade union office which prevent qualified persons from carrying out union duties. Other legislation provides scope for administrative interference in the internal affairs of associations, restricts the scope of trade union and professional associations' activities, particularly their involvement in political activity, and restricts unduly or prohibits strikes, directly or indirectly.

This research has shown that despite substantial progress, neither local nor national objectives, stated in all constitutional preambles, Charters, Conventions and Declarations, of freedom and equality for all, regardless of faith, race, sex or belief, have yet been achieved. At the national level, delay frustrates the legitimate hopes of individuals, impedes important local and national programmes, and seriously hinders development of our national strength. Internationally, the violation of the basic and fundamental human rights of the Arab people confirmed by the Hammamat Declaration, subject not only the Arabs but Muslims in general to racist, or more exactly, orientalist interpretations, and charges by the international community that our nation is not equal to the high promise of our Islamic and Arab heritage, which is based in justice and equality.

The achievement of these principles demands urgent effort, not only from the authorities in Arab countries, but also from the people themselves. In particular, the intelligentsia has a historic role to play today for the future of their peoples, despite the sacrifices demanded. Again, the effort must be based on frankness and full understanding of the challenge that confronts developing nations.

This research has attempted to address specific aspects of the authority crisis and the stagnation of contemporary Arab political life, and to contribute by suggesting some guidelines for action for the development toward real democracy and protection of human rights and freedoms based on the rule of law and a spirit of cooperation with the international community to facilitate their achievement. The research deals separately with political human rights problems, suggesting a number of remedies. There are also common themes, observations and premises underlying the recommendations of several local, national, regional and international non-governmental organizations.

Thus the assertion that the crisis of authority and representation in the Arab countries, with its inability to achieve true democracy on the one hand, and the stagnation of contemporary Arab political life as a result of the violation of human rights on the other, is to a great extent true. This study has added another dimension by indicating that many factors have contributed to the continuing problems of political development in the Arab context.

This examination has demonstrated the validity of the proposition that the contemporary Arab legal order is unable to provide a framework in which the rule of law may effectively be upheld and the exercise of human rights, political or otherwise, sustained and developed. Political will is required along with legislative, judicial and administrative action, to permit the Arab nation and its people to shift from their present position to a stage of stable and effective development.

The roots of the current difficulties lie, as we saw, in the structure and content of the emerging legal order, while the contemporary effects of secular and religious ideology have also undoubtedly contributed to the weakness of legal and political institutions, in part through bringing about a decline in public awareness of the functions and duties of citizenship. The suspension of the normal legal order in favour of states of emergency in several countries also contributes to the weakness of a large sector of the population's sense of civic responsibility. Most serious and far-reaching is the use of the legal order as the tool of the Arab leadership in the maintenance of authority, apparent in the use of law and legal institutions to suppress and minimize the effectiveness of popular movements by the control of almost every aspect of political life.

Calls for reform emphasise that without the establishment of a political framework which allows the people to express their aspirations, it will continue to be impossible for states to achieve their goals in social, economic or political development, as events confirm that without adequate protection of human rights, no real development can be sustained or achieved; that to be effective in sustaining political participation, the legal order must be based on the principles of the rule of law, and give expression to political rights and freedoms. In this context, the need is apparent for securing basic human rights for the Arab people, focusing on particular rights, such as freedom of opinion, expression and information, assembly and association, including trade union rights, and on the right to political participation.

For these conclusions and the underlying assumptions, it is beyond any doubt that far-reaching reforms are essential to ensure the rule of law and the protection of rights and freedoms. Essential elements of legal reform required throughout the contemporary Arab legal order range from fundamental reforms at the constitutional level, which have potentially far-reaching consequences in terms of the form of government, to reform of other legislation, organs and policy.

At the constitutional level, there is an urgent need for the promulgation of a written Constitution in the Omani Sultanate and the kingdom of Saudi Arabia, where since the adoption of the Hijaz Constitution of 1926, repeated attempts to draft a basic law in the kingdom have been unsuccessful. Developments in other traditional countries in the region provide examples of Constitutions based on *Shari'ah* principles.

Elsewhere, such as for example, in Libya, provisional or interim constitutional texts must be replaced as a matter of urgency with formal and complete permanent Constitutions. Where Constitutions have been suspended as a result of crisis, it is essential that this situation be rapidly brought to an end, with the restoration of the permanent constitutional order, to as complete a degree as circumstances permit.

Within the Constitutions of the Arab legal order, it has become apparent in the course of the study, that far-reaching legal reform is required within the texts themselves. Such reform encompasses the inclusion of additional safeguards, amendment of existing provisions and the repeal of many provisions undermining principles of legality. In all Arab Constitutions, principles such as the separation of powers, independence of the judiciary, provision for judicial review of the constitutionality of legislation and administrative acts, and the legality of punishments must be enacted. These fundamental texts should include an unequivocal statement of the rights of citizens, how these are to be regulated, and establish the mechanism by which they are to be protected. Repeal and amendment of existing constitutional provisions should include the removal of arbitrary limitation and restriction, particularly those based in ideology.

With respect to human rights in particular, an urgent positive reform is the explicit adoption and incorporation of the provisions of international human rights intruments within municipal law. Constitutions must specify unambiguously the mechanism by which international instruments are incorporated and gain validity within domestic legislation, in particular, clarifying the position in case of conflict of laws and specifying explicitly how international provisions become available to the judiciary.

In this respect, besides the Political Covenant, a most important international instrument, which can only have a beneficial effect within the Arab legal order, is the International Convention on the Elimination of All Forms of Racial Discrimination, to which many Arab countries are already party. These countries are bound, for example, by article 2 (c) to *"amend, rescind or nullify any laws and regulations ..."* which create or perpetuate discrimination on racial grounds. Many Arab countries have participated positively in the work of the Committee established by article 8, which according to article 9, considers reports submitted by States Parties reporting on *"legislative, judicial, administrative or other measures, which they have adopted ..."* to give effect to the Convention's provisions. The positive participation of several "traditional" countries, such as Qatar, the United Arab Emirates and Kuwait, is particularly welcome, though this positive development is to be encouraged across the political spectrum.

In the broader context of the international legal principle of non-discrimination, the recommendation is that a constitutional text unambiguously embodying this principle be enacted where it does not exist, as indispensable to the work of the judiciary in safeguarding individual and collective rights. The further recommendation is that such provisions be framed comprehensively, encompassing the contents of article 2 of the Universal Declaration of Human Rights and article 2 of the Political Covenant, with particular reference to the prohibition of discrimination on the grounds of political or other opinion.

The incorporation of such a provision into the supreme legal text of each Arab country is urgently recommended in order to bring about the full participation of all members of the community, their organizations and other groupings, in political life, enabling them to participate wholeheartedly and effectively in development. This is particularly relevant to the issue of minorities in the broadest sense, since measures which allow all groups to participate should minimise the tendency to secede or revolt, since all are secured the opportunity to contribute positively to the development of the nation.

Reform in the Arab legal order must proceed hand in hand with respect for the principle of legality and adherence to the rule of law as a starting point, and we have seen that an important aspect of this principle is that authority must regulate its actions according to law and principles of justice. Constitutions must not only uphold the principle of separation of powers by explicit text, but this principle must not be compromised by other provisions explicitly or implicitly allowing interference or undue restriction which could lead to an alteration in this balance. As well as controlling the conduct of Executive, Legislative and Judicial powers, constitutional provisions must not empower the Head of State or highest organ to interfere in the legislative or judicial spheres, or where this is unavoidable, it must be subject to strict and continuous review as a first step towards true legality of the rule of law.

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The judiciary under the legality of the rule of law requires in all Arab countries urgent reform at one level or another. The need for its independence is not satisfied by a constitutional text recognizing the principle alone, but must be embodied in a clear definition of its duties and respect to its jurisdiction, as well as by the adherence of the executive and legislators to its judgements, decisions and principles of case law, and its interpretation of the rule of law in society. Therefore, its independence implies the satisfaction of several elements, more comprehensive in scope and content than appears to be the case in most Arab countries.

In this connection, consideration of the principles enunciated in the Draft Principles on the Independence of the Judiciary, (E/CN.4/Sub.2/481/Add.1 of 4th August 1981) prepared by a Committee of Experts drawn from non-governmental organizations is recommended.

One striking and immediate requirement is limitation of the extent to which the Executive as well as the Legislature may claim responsibilities on judicial exercise of the judicial function. Secondly, non-interference, particularly where the appointment or selection of judges is concerned, must be ensured, to avoid risks to the independence of the judiciary as a whole and judges in particular, because of the dangers inherent in exclusive appointment by the Legislature, Executive or Judiciary. It is also important that the proposed reform takes into account the necessary steps to safeguard the stability, security and immunity of the

judiciary and its personnel, to allow them to assert their independence. However, if the exercise of the legislature's responsiblity in fixing the general framework is deemed necessary as the safest mechanism, this should not, under any circumstances, become an indirect device for the Executive to undermine the independence of the judiciary under the pretext of ideological or other reasons for appointing, promoting or indeed removing judges, in the republics in particular.

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It is essential that the legality of the criminal process as an aspect of the rule of law be upheld, in practice as well as by text, through observation of the rules regarded as the minimum necessary for fair trial. Guidance may be found in article 14 of the Political Covenant, which lists what can be regarded as the minimum requirements. Countries which lack constitutional recognition of principles such as presumption of innocence, *habeas corpus*, fair and public hearing among others, should take immediate steps to enact provisions which give effect to them.

Even though the right of defence may be found in the legislation of most Arab countries, in order that this rule is effective, legislation must establish a system of legal aid, exercised through the courts, particularly in cases where the accused has no access to counsel. Legislation should not undermine the freedom of the legal profession in exercising its vital function of defending rights. Therefore, the repeal or amendment of legislation restricting or abolishing the free legal profession, such as Law no.4 of 1981 in Libya and the amendment of laws such as Law no.39 of 1961 in Syria, are strongly recommended.

Similarly, the principle of non-retroactivity of legislation should be upheld in practice as in law. Most Arab countries set this principle by constitutional text, but we have seen that the practice indicates its breach, for example, in the policy of criminalisation of acts of a political nature. Reports of practices also indicate that the phenomenon of retrial of convicted persons or those who have completed their sentences is not uncommon, and this is clearly in breach of the principle *non bis in idem*, which requires urgent remedy.

Again, although we saw that the right to appeal is safeguarded in almost all Arab countries, in practice and in specified circumstances, this fundamental right is not secured. Immediate steps must be taken to ensure the availability to all of full legal remedy, within the judicial framework, and without undue interference by the Executive.

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As far as control of executive actions is concerned, it is vitally important, not only that constitutional provisions recognize and specify the organs which undertake this task but that there should be an explicit recognition of the organ and its jurisdiction at the constitutional

level. More important is the recommendation that control and review be carried out by the judicial power rather than by the legislature, especially when clear definition of delegated legislative powers is severely lacking or simply does not exist. This proposition undoubtedly represents a stronger safeguard, for more than one reason, as was highlighted in Chapter Three. This extremely important task should be referred to the highest judicial organ in the hierarchy of the courts, where a division of the Supreme Court should be the minimum authorized body. Nevertheless, it would be more useful if a particular body such as a Constitutional Court is created specifically for this purpose, both because the organ would quickly build up a body of expertise and could act promptly on issues referred to it. The Egyptian experiment of a Constitutional Court has proved successful in its early stages, and represents a useful model for other Arab states.

It is equally important that efficiency in quality and quantity be taken into account: thus, the judges of these bodies should be selected from the Supreme Courts judges or those at the highest level of the judiciary, through elections. Where such organs do not exist, the selection could be made from Appeal Courts judges and other legal experts and jurists, such as university lecturers and so on.

As far as the scope and nature of this control is concerned, it should be clear that their power should include review of any existing or proposed legislation, its conformity with the Constitution as well as principles of justice translated by international treaties, in particular, instruments concerned with the rule of law and protection of human rights which set the minimum legal standard which all parties are legally obliged to observe. This power should include the right of the Constitutional Court either to repeal legislation or require from the legislature the necessary amendment. Where the repeal of legislation by a judgement depends on its publication in the Official Gazette, this procedure is vulnerable to interference where other legislation could prevent or delay its publication. In any case, such legislation as Law no.78 of 1977 in Iraq must be repealed as a matter of urgency, as it represents a threat to the principle of legality, as well as undermining the efficacy of judicial review.

This control should also include its jurisdiction in all legal spheres, that is to say, in individual applications for any alleged violation of rights and freedoms, directly or by any other party, and any other form of abuse of power, which should include violation resulting from legislation authorising any administrative action, despite the decisions of other administrative courts, that is to say that this review should permit the Constitutional Court the jurisdiction of examining the subject as well as wrong implementation or interpretation of laws.

It is also important that the findings of this organ, judgements, interpretations and decisions, are binding on other divisions, civil, criminal, administrative and so on, of the Supreme Court itself, as well as other courts and institutions. It is also vital that executive or adminstrative action be suspended during this review.

Thus its role cannot be confined to review of constitutionality of

promulgated legislation but should be extended to individual and group petitions against legislation or acts taken by the Executive and the Legislature alike if they constitute assaults on their rights and freedoms.

It is vitally important in the Middle Eastern context in general and in particular in Syria, Egypt, Jordan and Lebanon, for the Constitutional Courts to be empowered in an emergency to exercise all necessary control over executive and legislative actions, to provide protection and safeguard of the rule of law and individual liberties, and to supervise all legislation and organs deemed necessary. It is also vital for the Court to be empowered to monitor any deviation of the executive and other institutions, and maintain review of emergency conditions as far as the national security and national interest are concerned. The Supreme Court in Jordan has already demonstrated the exercise of this vital function.

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In view of the continuing crisis of the Middle East and its implications for the region in general, and in particular for the countries of Syria, Jordan and Egypt, where external and internal threats have led to the long term use of emergency legislation, the effects of the institutionalization of state of emergency on the legal order and individual liberties, which became clear during this examination, are an obvious cause for concern and call for reform at several levels. Most obvious is a re-examination at the political level of the continuing need for state of emergency so that, even if circumstances prevent the lifting of emergency law, other steps may be taken to lessen its impact on political life and the rights of individuals. At the level of legal reform, where the causes of state of emergency have changed over time, there is an obvious need to review the appropriateness of emergency measures. For example, while the initial reason for the emergency in Egypt was the state of war, after the Camp David treaty, emergency law was retained to deal with threats to internal stability. Clearly the legislative measures demanded by the two cases are quite distinct, so an immediate safeguard recommended for Egypt is clarification in the legislative text of the measures appropriate to each situation.

Another tendency in the region is the use of emergency measures in circumstances of political change. This phenomenon was clearly illustrated in Morocco during the seventies, when emergency provisions led to the suspension of the Constitution during adjustments of the political framework, and in Libya at the Declaration of Zwara of the Abrogation of the Laws, which amounted to a virtual state of emergency, despite its description. Clearly, a stable and secure legal order, which is able to uphold individual and collective rights, is the more appropriate background to continuing political change and development in the region, since it allows the achievement of effective reform while upholding the rule of law and the rights of the population.

Most Arab Constitutions, as we saw, contain provisions regulating the conditions in which a state of emergency may be declared and the procedures which accompany such a declaration, however, it is notable that

several Constitutions do not adequately specify the powers of the various branches of government in this situation. Nor do they make clear the extent to which emergency provisions may undermine constitutional safeguards or provide a list of inalienable rights, from which no derogation is tolerable in emergency circumstances. The minimum list of such rights should comprise those regarded as non-derogable in international law, though clearly, within the Arab context, the list should be considerably extended to include due process of law, legality of punishments, and those political rights which do not threaten public order or national security. In this context, the protection of non-governmental institutions, such as a free Press, free trade unions and professional associations such as independent Bar associations, is of paramount importance, as such institutions have a vital role to play in counter-balancing the executive monopoly of power. However as we have seen in the Arab countries, in the words of the International Commission of Jurists :

*"a pattern which is unfortunately familiar is one in which the executive has assumed all legislative authority, purged and intimidated the judiciary, forbidden all criticism, banned or assumed control of professional organisations and trade unions ...",*

as events, for example, in Syria, Libya, Egypt and Morocco have confirmed.

The constitutional provisions which describe the grounds for proclamation of a state of emergency should be clear and explicit, embodying the principles distinguished at the international level, of exceptional and imminent threat to the nation. Types of emergency should be distinguished : natural disasters may not require the same measures as the threat of war. Similarly, the measures called for by external threat and internal disorder are quite distinct and the difference should be reflected in the constitutional provision. For example, the characteristic use of military forces in situations of domestic disorder in the Arab countries is not appropriate and often leads to excesses, including extra-judicial executions, as in Syria in the early eighties. Naturally, the Middle East crisis has brought about the development of militarist psychology, but it is clearly inappropriate that the armed forces should play the dominant role in dealing with domestic unrest.

In most Arab countries, constitutional provisions determine the procedure for the imposition of a state of emergency. The recommendation is that ultimate responsibility should fall principally upon the legislature. Where the President or King may impose a state of emergency, this should cease to have effect if not ratified by the legislature within a specified period. States of emergency declared when the legislature is not sitting should automatically bring the legislature to session for their consideration and ratification. Likewise, requests for renewal or extension should be subject to ratification by the legislature, in the absence of which the state of emergency should cease forthwith. Few Arab Constitutions or other legislation contains provisions which explicitly specify the duration of state of emergency and provide for regular review by the legislature, though it goes without saying that these must be regarded as essential requirements. The experience of parliamentary life in the Arab world is such that a

specific fixed period after which the state of emergency ceases if not renewed by the legislature must be considered the minimum legal safeguard.

The judiciary too has a vital role to play during states of emergency, although restriction of the jurisdiction of ordinary courts is a common practice, in the Arab world as elsewhere, which makes it more difficult to control abuse of emergency powers. Judicial review during this period remains essential to uphold the rule of law and prevent the concentration of power in the executive. Normal judicial remedies should remain for all rights not restricted by the state of emergency, and the ordinary judiciary should retain competence to review detentions in order to ensure that they remain compatible with the aims of the extraordinary measures. This competence has been asserted by the Jordanian Supreme Court, but remains unregulated by the judiciary in most Arab countries. As already noted, in normal times the executive must refrain from interference in the judicial process, and naturally, in time of emergency, this restraint is more vital. Likewise, ordinary courts rather than military or exceptional courts should retain jurisdiction over alleged abuse of power by the security forces, and as the Human Rights Committee rightly pointed out to the Jordanian government, the ordinary judiciary should retain jurisdiction over the cases of civilians charged with security offences. Along with the rights of appearing in person, the right to defence, and the recording of proceedings, it is particularly important that the right to appeal criminal convictions be retained, since more severe punishments may be imposed during the period of state of emergency. In that time, as at all other times, the independence of the judiciary, in particular in the security of its judgements from executive interference, must be upheld in order to protect the rule of law and the rights of individuals.

It is clear from the examination of political human rights in the previous chapter that urgent legal reform is required to bring the legislation which secures and regulates these rights into conformity with the minimum international legal standards identified in the first chapter.

At the basic level of recognition, reform is required of constitutional texts, in order to secure full and unambiguous recognition of these freedoms at this level. Urgent reform is also required of texts regulating these freedoms in order to ensure that constitutional safeguards are not emptied of their meaning by other legislation or regulations. In particular, the repeal of legislative restriction on ideological grounds is a priority. The scope of restrictions must be outlined in general terms at the constitutional level, in particular, those on grounds of public order, national security and rights of others. Restrictions at this level based on ideology, such as "socialist aspirations" and "the nationalist line of the revolution" must be avoided, as susceptible of abuse. Conventional restrictions, such as on grounds of public order and national security, though lacking precise definition, are more suitable for judicial interpretation than the revolutionary concepts found in radical constitutional texts.

Another common tendency of Arab Constitutions is the addition to constitutional provisions recognising individual liberties of the proviso that restrictions are to be applied "by law". Although this represents a welcome recognition of the principle of legality, a better safeguard would be the inclusion of clauses indicating the scope of such lawful restrictions.

Another disturbing phenomenon in several Arab countries is the persistence of legislation dating from as early as the forties and fifties, and some from the colonial period, which imposes severe restrictions on the exercise of political rights.

With respect to provisions dealing with emergency, there seems no reason why the list of inalienable rights should not include the right of freedom of opinion and the rights of political participation.

Even though the rights of freedom of opinion, expression and information are safeguarded at the constitutional level in Arab states, there are a number of potentially serious omissions, for example, the right to freedom of opinion is not explicitly recognised by the Syrian Constitution, while the right to freedom of expression does not find constitutional recognition in Kuwait, Libya or Iraq. Clearly, there is an urgent requirement for amendment of constitutional articles to add the components not yet included. Also urgent is the repeal of provisions which qualify these rights and their exercise by ideological restraints, to be found particularly in the radical Constitutions, but also in the

Constitutions of Morocco and Kuwait.

As the international understanding is that the right to hold opinions may not be restricted on any grounds or under any circumstances, the special status of this right should be recognised in the constitutional text.

Clearly, restrictions envisaged by constitutional and other provisions should not extend beyond those permissible according to the international standard. Restrictions may be imposed on freedom of expression in order to achieve the balance between the right of the individual and the interests of the community, notably on the grounds of securing respect for the reputation of others and on conventional grounds such as public order, public safety, national security and so on. However, legislation in the Arab countries, radical and conservative alike, demonstrates a misuse of this exceptional rule on the grounds of protecting the reputation of others, by extending the scope of "others" to include not only public bodies, but ruling institutions and heads of state. This undermines the ability of Arab public opinion to play a meaningful role in developing political life, by stifling dissent and constructive criticism by the people and their representatives alike. It also contributes to the growth in self-censorship by the Arab intelligentsia, even where legislative restriction, such as that in Morocco which prohibits debate on the statements of the King, is absent.

In the light of the vital importance of freedom of information in the life of developing nations, in increasing public awareness and civic responsibility, all restriction on freedom of information within the Arab legal order must be viewed as an obstacle to development of countries and population alike. In this context, the systems of censorship operated by administrative organs of the governments of all Arab countries should be immediately ended, and competence for limited censorship of all forms of information and expression on clearly specified grounds be transferred to the judiciary, or special organs of judicial nature.

A first step is to end the requirement for prior authorisation of publication, whether of foreign or Arabic materials. Necessary censorship, on clearly specified grounds relating to public morality, public order, national security and so on, should be exercised by judicial organ only after publication, as a rule, or by injunction obtained by the government from a judicial organ. Again, an important step is to end the power of the Executive in a number of states, Kuwait for example, to order the closure of a newspaper or the seizure of a publication. Again, legislation throughout the Arab world which provides for state control of the media should be repealed, and administrative action inhibiting the free flow of information, whether by blocking of external radio and television transmissions, restriction of the use of telecommunication facilities or the seizure of publications should be brought to an end. All requirement for prior authorisation and registration of communications equipment such as typewriters,

computers, photocopiers and tape recorders should likewise be ended.

Legislative recognition at the constitutional level of the right to freedom of assembly may be found throughout the Arab legal order, with the right to hold meetings and processions widely safeguarded, and regulated by other legislation. However, in the light of the growing tendency for constitutional provisions to recognise explicitly the right to demonstrate, the inclusion of this important mechanism of public expression in basic legal texts should be considered by Arab legislators.

Regulation of freedom of assembly within the legal order is organised by the principles of prior notification and prior authorization. Since the individual's right of freedom of assembly cannot be absolute, the application of the principle of notification is acceptable to allow the authorities to maintain public order and public safety. However, the application of the principle of prior authorization gives potential for abuse, where the refusal of the authorities is not subject to review, or judicial review is limited. Where legislation provides that prior authorisation or notification is required, judicial review of decisions by the public authorities to refuse or deny the right to hold a public meeting is preferred.

As with freedom of expression, legislation imposing restrictions on ideological grounds is unacceptable and must be repealed or amended. While a restriction on the classical ground of protecting public safety is acceptable, an element of the right may be the expression of criticism against any system or its policies, so lawful restrictions must not be abused to suppress criticism. Administrative requirements for advance details of planned meetings should not be such as to restrict the exercise of the right, for example, authorization or notification should not be required long before the planned meeting. Again, the attendance of public officials, such as the police, at public meetings, while acceptable on the grounds of maintaining public safety, should not impose any restriction on the exercise of the right, and police actions taken to safeguard the public should observe the principle of proportionality.

Again, Arab legislation in a number of states safeguards and regulates freedom of association within the particular context identified in the previous chapter. Clearly, in states such as Saudi Arabia or Libya, where political and other association is banned or severely restricted, urgent legal reform is required to repeal or amend such legislation.

As with the other political rights, ideological restrictions which undermine the scope of freedom of association, for example, in Iraq and Morocco, should be amended in order to secure the enjoyment of this right in conformity with the international standard, and allow the achievement of the true ends of free association, particularly in the

political sphere. Likewise, legislation which restricts membership of organizations on religious or political grounds must be repealed immediately, in accordance with the internationally recognised principle of non-discrimination. Legislation upholding this principle should be promulgated or maintained at the constitutional level, and observed in administrative practice. In accordance with this principle, legislation such as that in Morocco and Algeria, which restricts membership of associations on discriminatory grounds should be repealed, since they exclude a category of the society unjustly.

Restrictions on the right of groups such as the police, armed forces and public sector are acceptable, and several Arab countries have legislation which provides this. However, as noted, the scope of "public service" should not be so wide as to exclude large sections of the population.

Legislation which requires that the statutes of an association must be drawn up in conformity with model statutes established by regulation, represents a potential violation of the right to associate freely, as it provides scope for administrative interference. Such legislation should be amended to ensure the freedom of associations to pursue their lawful goals. Model statutes which are not obligatory should nevertheless seek to encourage associations in pursuing their aims. While legislation which merely restricts associations whose aims are contrary to law, morals or public order are acceptable, legislation which goes beyond these restrictions to connect the legality of associations to their adherence to the governing ideology, such as Act 87-15 in Algeria and the Dahir of 15 November 1958 in Morocco must be repealed.

In most countries, the public authorities may suspend or dissolve an association on several grounds, and such orders may be the subject of review, whether by administrative or judicial organs. Clearly, judicial review is the most secure impartial safeguard against abuse.

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While in most Arab countries, trade union rights are recognised to varying degrees, in others, such as United Arab Emirates, Qatar and Saudi Arabia, trade union rights do not exist. In contrast with the view of certain governments that it is sufficient to regulate the relation between worker and employer by ordinary legislation in the light of the undeveloped nature of industry in their countries, it cannot be considered acceptable in the light of the growing numbers of migrant workers, a majority of whom are Arabs, in oil and related industries. A priority therefore, for such states, is to amend constitutional provisions explicitly to recognise and safeguard trade union rights to help in the development of their national economies. In addition, other legislation conforming to international standards is vital to safeguard a growing number of Arab workers. Such international standards as the ILO conventions on association should be incorporated and upheld in full by States Parties to these treaties. It goes without saying that States

Parties should respond positively and swiftly to their obligations and in particular to the recommendations of the Committee on Freedom of Association, to modify and enrich labour legislation. Similarly, it is clear that States not party to these labour conventions should immediately take steps to sign and ratify them.

As we saw, there is grave cause for concern in countries where the law imposes a single trade union system at all levels, and prohibits pluralism locally and nationally. Clearly, the priority in states such as Syria, Egypt, Iraq, Libya, Kuwait and Yemen is to amend legislation and regulations, and bring to an end administrative practises which impose and enforce the single trade union structure. While, as we saw, voluntary association in a single organization is acceptable, in contrast, if the only channel for trade union association is to be part of a single organization, the international legal principle is violated.

As with all political rights, it is an urgent priority to bring to end by the amendment or repeal of legislation and the modification of administrative practice any qualification or impairment of trade union rights on ideological grounds, such as the constitutional provision in Iraq.

As we saw, states remain free to provide such formalities in their legislation as appropriate to ensure the normal functioning of industrial organizations, however, at this level, a number of recommendations can be made. Requirements governing eligibility to stand for office should not prevent qualified persons from carrying out union duties by imposing strict conditions of nationality, which might restrict the rights of migrant workers, or other occupational requirements. Although the imposition of reasonable requirements is permissible, the principle remains that these should not be such as to impair the enjoyment of the right. Legislation such as Act No.107/75 in Libya and Legislative Decree No.84 in Syria should be amended as soon as possible.

Again, although there may be a requirement that union rules comply with a national statutory requirement, the principle remains that unions should be free to draw up their own constitutions and rules. Thus, a legislative or administrative obligation on trade unions to base their constitutions on a compulsory model should be discontinued. It may be appreciated that, in developing countries, the state should provide guidance for organizations in establishing constitutions, neverthless, as we have seen, such models should not be compulsorily imposed.

Another area where the scope for administrative interference must be minimised is that of union finances and extensive control over the administration of funds. Legislation, for example, which establishes the minimum contribution of members, specifies the proportion of union funds to be paid to federations or requires that the budget, expenditure or investment of a trade union be approved by the public authorities, should be amended. Legislation which allows the public authority entire discretion to investigate the internal affairs of a union should be modified to make any such investigation subject to judicial review.

Again, the activities of the Egyptian Constitutional Court confirm the important role of the judiciary in safeguarding trade union rights during the transitional period of reform.

Amendment is also recommended of legislative provisions placing restrictions on the scope of trade union activities. The complete freedom of trade unions to organise their activities and formulate programmes is in practice restricted by legislation which severely controls union involvement in political activity. We have already seen that the task of repressing possible abuse is best left to the judicial authorities, without legislation prohibiting in very broad terms the political activities of unions. For example, the action of the Syrian government in dissolving professional associations on the grounds that they "exceeded their mandate" should have been subject to judicial review.

Legislation which establishes close links between the unions and the ruling party, such as Law no.70 of 1980 in Iraq, which provides that the activities of the Artists' Union must conform to Ba'th party principles, is incompatible with the exercise of this freedom and must be repealed as a matter of urgency.

While recognising the necessity of some restriction of the right to strike, particularly of certain categories, the fact remains that in developing countries as elsewhere, the right to strike is one of the essential means available to workers to promote and protect their economic, social and other interests. Legislation which restricts unduly or prohibits strikes as well as indirect prohibition by legislation which provides that disputes must be settled through compulsory arbitration leading to a final binding decision, for example, by a Labour Court, or by a decision at the discretion of the public authority, should be amended, with appeals against decisions as to the lawfulness of strike action passing to the ordinary judiciary.

Again, there should be immediate repeal or amendment of legal provisions which allow dissolution or suspension of trade union organizations by the public authorities. In any case, both legislature and executive should abstain from suspending or dissolving any organization.

In order to permit Arab trade unions and professional associations to benefit from inter-occupational or inter-regional associations, legislation which prevents federations of unions which represent different occupations, such as the Kuwaiti Labour Act of 1964, or requires prior authorisation of such a federation should be repealed, along with restrictions which make affiliation to international organizations subject to prior authorisation, as in Libya.

While recognising that questions of political ideology lie beyond the scope of this study, it must be pointed out that the phenomenon prevalent in the Arab world, of the single ruling party, is a denial of the principle of free association, as it removes the possibility of freedom of choice, which is inherent in the idea of free association. The predominance of a single ideological viewpoint, let alone the exclusion of

important sectors of society from participation in the political life of the nation, inhibits development at all levels.

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We have seen during this examination a range of political structures, styles of government and leadership along with the varying effects of ideology. Again, it must be emphasised that the form of government or political programme in itself is outwith the scope of this research, where the concern is to determine the minimum legal safeguards of participation in public life. Clearly, constitutional and other legislative provisions aimed at securing effective popular participation must enshrine the principles of equality and non-discrimination. Other legislation, such as Electoral Codes, must likewise ensure access to public office and the right to stand and to vote in elections on a basis of equality.

Where Constitutions and basic laws do not explicitly recognise the right of all, on a basis of equality and without unreasonable restriction, to participate directly or indirectly in political life, needless to say swift legislative action must be taken to remedy this situation. This has important implications for a state like Saudi Arabia, where political participation continues to be organised on traditional lines. In the Gulf countries, in particular, where access to public life may not be secured to large sections of the population, urgent action is needed to widen participation in order to achieve political development and secure stability. Again, without going beyond the scope of the study to challenge particular forms of government, it is hard to see how the Arab political structures based on theocratic monarchical rule can achieve the measure of democracy required in order to secure full participation in political life. Legislation which assures the extraordinary position of the King in Morocco, for example, securing his right to control all other constitutional institutions, must be repealed forthwith.

Clearly, such proposals pose a threat to the short-term interests of those who presently hold power, but this threat must be balanced against the continuing threat of *coup d'état* or violent political change, which destabilises the region, and will continue so long as there is undue restriction on true popular participation. Continuing political instability in the post-independence period in the Arab region has illustrated the vulnerability and fragility of governments which do not allow scope for popular participation at all levels, or severely restrict the possibility of legal opposition.

To reiterate once more the theme of this study, the most secure safeguard of national security and stability during such far-reaching political change is the determination to achieve political reform while continuing to uphold principles of legality and respect for the rule of law.

In order to achieve these ends, other steps must be taken. There is an immediate striking need for the repeal or amendment of legislation which

imposes restriction on political participation on ideological grounds, for example, the constitutional provisions of the Arab republics which seek to restrict a role in public life to those who accept the ideological principles of the ruling authority. In this context, the exclusion in Iraq of "all individuals who adopted a political, economic or intellectual position that was hostile to the Revolution and its programme ... from the democracy" is a clear violation of the principle of access without unreasonable restrictions to the political process, which should be remedied immediately. Other restrictions which unreasonably exclude groups or individuals from political life, such as restrictions in the Algerian Electoral Code which excludes from the electoral list "persons whose behaviour during the war of national liberation was against the interests of the country", should be repealed.

With respect to the principle of non-discrimination in political life, the question of legislation requiring that the Head of State be both Muslim and male, thus imposing restrictions on grounds of religion and sex, must be addressed. In absolute terms, upholding this principle would require legislative reform to remove discrimination, however political realities in the Arab context, as elsewhere, require a more pragmatic approach. In view of the serious issues confronting the developing political systems of the Arab world, the question is virtually irrelevant, since the stagnation of political life is due to causes far deeper and more complex than discrimination at this level. Recent political events in the Muslim context in any case have confirmed that a woman may hold the office of Prime Minister in a Muslim country. In the Arab context, it is extremely doubtful whether legislative provisions securing the right of women or non-Muslims to hold the highest office in the government would in fact secure this position to either category. Despite the absence of restrictive legislation in western democracies, the fact remains that is almost inconceivable that a Muslim or Jew could hold the office of Head of State in such developed democracies as the United Kingdom or the United States.

Since restrictions on the ground of sex at other levels of political life inhibit true participation in government, regulations such as the Tunisian Electoral Code, which specifies that only males may stand for election to the legislature, should be amended to overcome this discrimination.

In order to secure the absence of discrimination, the establishment of administrative organs in the field of elections with the task of constant review of provisions and practices which might undermine political participation on a basis of equality, is recommended. In addition, the task of ensuring full enjoyment of political rights should be assigned to the judiciary, through their competence to hear claims and appeals against provisions or administrative acts inhibiting individual or group's exercise of their rights.

Legislation securing the right to participate in public life, and to vote and stand for election without unreasonable restriction, remains

meaningless without periodic and genuine elections in which the population may participate. Constitutional and legislative provisions which provide for periodic elections to the legislature and to high office, such as the Head of State, must be implemented strictly, as must regulations which govern the re-election of the same person to this office. Where such legislative provisions do not exist, legislation which embodies the minimum legal safeguards identified in international texts must be promulgated as a matter of urgency. There is also a pressing need for other legislation, which already exists in Algeria and Syria, which guards against interference in the electoral process, through coercion or corruption, to be promulgated throughout the Arab legal order. Provisions which guard against interference by administrative or executive actions are essential, and compensation in respect of such acts should be capable of being secured from both officials and authority, through the judicial process.

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Arab states are party to a range of international agreements and treaties, and have indicated on many occasions their acceptance of the principles of international law, though this varies in degree. The conservative countries of the Gulf have shown their willingness to participate positively in international instruments from the Universal Declaration of Human Rights to the draft Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation amongst others, and it is to be hoped that they will continue to broaden the scope of their international participation. A number of Arab states, including Sudan and Egypt, have gone so far as to recognise the compulsory jurisdiction of the International Court of Justice on specified issues.

In particular, most of the countries described in this study have signed and ratified international instruments concerned with the recognition and protection of human rights. Needless to say, such participation in human rights protection at the international level is welcomed and further action must be encouraged. Without doubt it remains an urgent necessity for those Arab states not party to important international instruments such as the Covenants on Human Rights or the Convention on the Elimination of All Forms of Racial Discrimination to participate in them. In general, it is preferable that Arab states participate in such instruments subject to any reservations they may feel are required, than that they continue to hold back from such participation. Similarly, states which have signed but not yet ratified key international texts should take immediate steps to do so, to bring about further integration to international standards.

A number of specific recomendations must be made for those States already party to the ICCPR. Firstly, those states should take every action to meet the obligations undertaken by signature of the

instrument. Principally, this means that they should, in the words of article 2 of the Covenant, "take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect ..." to the rights it contains. Such measures which may involve the repeal or amendment of provisions of existing legislation, should be taken at once to enhance and safeguard the enjoyment of human rights in those countries.

Another important recommendation is the timely fulfilment of the obligation of reporting on measures taken to facilitate the enjoyment of human rights to the Human Rights Committee under article 40 of the Covenant. The record of a number of Arab states is far from positive in this respect, as reports long overdue have not yet been received. Arab states were among the earliest both to submit and to have considered reports on progress in achieving the aims of the Covenant, and this factor goes some way to excusing the inadequacy of early reports from countries such as Syria, Egypt and Libya, since the Committee had not, when these countries' initial reports were submitted, prepared guidelines on the preparation of reports. The early reports tend to consist of broad descriptions of the theoretical domestic legal framework along with references to constitutional and other provisions protecting civil and political rights. Little reference is made to restrictions which in practice inhibit the enjoyment of these rights, and few early reports make any reference to the difficulties faced by governments in achieving the aims of the Covenant.

Early discussions which took place between the Human Rights Committee and certain Arab government representatives were also rather unsatisfactory since, as noted in the examination of such discussions in Chapter Three, the Committee had not at that stage prepared guidelines on the consideration of reports. Nevertheless, the comment must be made that the response of some government representatives was far from satisfactory. Often requests for information were met with a promise to supply further information after consultation with the government, and in several cases, the information requested was never in fact received, a tendency which must be remedied. Discussions between the Human Rights Committee and Arab governmental representatives have varied quite widely in quality, since some representatives have been willing to make detailed and informative replies to the questions posed by members of the Committee, while others have replied evasively or simply failed to respond.

Although a number of Arab governments have failed to submit their second and third reports under article 40 despite repeated reminders, it must be noted that later reports submitted by Iraq and Tunisia in 1987 have demonstrated a marked improvement in the presentation of the required information, where legislative provisions and administrative procedures are described in more detail than before.

Needless to say, immediate recommendations in respect of reporting and discussions are that full and timely reports be presented to the Human

Rights Committee as requested, and that positive and honest discussions be conducted with the Committee as a matter of course. Naturally, an indication of the nature of the governments' commitment to human rights is the rank of the officials who represent them in such discussions. Clearly, senior members of the judiciary as well as senior officials of the Ministry of Justice are best qualified to inform the Committee both of progress in achieving the aims of the Covenant and the difficulties states may face in the process.

With respect to States' obligations under article 4, we saw in Chapter One how notification through the Secretary-General of other States Parties of the imposition of a state of emergency is not only a technical obligation but forms an essential element of the right itself, because of the importance of the principle of publicity for supervision. As we have seen, of the Arab states who have experienced state of emergency since the entry into force of the Covenant, Tunisia alone fulfilled its international obligation in 1984, by informing States Parties of the imposition of a state of emergency, and the measures taken thereby. The Tunisian action is in striking contrast to that of the other Arab countries currently under a state of emergency, none of whom have informed States Parties of its existence or the measures taken derogating from provisions of the Covenant. Discussions of the issue with the Human Rights Committee indicate serious misinterpretation by the governments of Jordan, Syria and Egypt of their international obligations, as well as the questionable nature of the grounds for a state of emergency in Egypt, where the Camp David peace treaty ended the state of war with Israel which was the initial reason for its declaration. There is clearly an urgent need in all three countries both for an immediate review of the need for state of emergency, as we have seen, and of fulfilment of the obligation of notification of States Parties to the Covenant.

It is particularly important that the provisions recognising human rights in the international Covenants as in other instruments be available to the judiciary and to the population, in order to serve as a protection, and in this context, a particular recommendation is that consideration be urgently made of giving international treaties and agreements precedence over municipal legislation, including the Constitution, as in Morocco. In several countries, the status of such treaties is already higher than all municipal legislation save the Constitution, but the recommendation is that this status be further enhanced.

Finally, with respect to the Political Covenant, it is extremely important that States Parties give urgent consideration to ratification or accession to the first Optional Protocol, since in the absence of national and regional guarantees of human rights, it represents an important safeguard for individuals. No Arab country has yet acceded to this instrument, though a number of countries have indicated that the question is under consideration. Claims that signature is not urgent

must be rejected, as signature in fact represents a test of the sincerity of governments.

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In respect of other activities in the field of international legal protection of human rights, it is recommended that Arab governments participate in and cooperate fully with the work of international bodies, such as the Commission established under the Convention on the Elimination of All Forms of Racial Discrimination to examine reports submitted under article 9 of the Convention, and the ILO Committee on Freedom of Association. Full cooperation should also be given to Special Rapporteurs appointed by the Subcommission on the Prevention of Discrimination and the Protection of Minorities to investigate any issue.

Furthermore, positive cooperation is recommended with international non-governmental organizations concerned with the rule of law and human rights, such as the International Commission of Jurists and Amnesty International. Of particular concern for the protection of Arab human rights is the hostile attitude adopted by Arab government representatives, for example, toward the candidature of the Arab Lawyers Union for consultative status within ECOSOC, since this positive development was blocked by the action of an alliance of Arab monarchies and republics in 1987. Within the Arab countries too, governments have proved hostile to the aims of this organization in, for example, banning its congress in 1987, at which a report on the Arab human rights situation was due to be adopted. Arab governments are called upon to end all hostility to this organization, nationally and internationally, and instead support the valuable contribution it renders to the development of Arab human rights protection.

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From the first it must be said that all efforts should be made to encourage further cooperation and understanding between Arab countries, particularly at the level of bi-lateral and multi-lateral treaties. These may facilitate movement, communication and commerce between countries, with a view to the development of the region. Nevertheless, Arab governments must not continue to conclude treaties or agreements which constitute, in whole or in part, an assault on principles of international law by, for example, facilitating the return of political refugees, or undermine the protection of individual liberties, even where national or security interests are involved. The Arab legislative powers have an important role to play toward this end, in abstaining from ratification of treaties or agreements which could undermine the promotion or protection of the people's rights and freedoms. Any collective or bi-lateral treaties must observe the international undertakings of the Parties, as well as international legal

standards requiring States Parties to instruments at the international or regional level to observe and respect obligations willingly undertaken.

Since, in most cases, Arab Heads of State are authorized by constitutional provision to conclude treaties and agreements, therefore, an important recommendation is that all treaties be subject to review to ensure their compatiblity with the Constitution and international commitments. The minimum recommended requirement is a degree of control by the Legislature through the process of ratification, (verification) preferably carried out by a special organ of judicial and legal expertise, such as a constitutional commission within the legislative authority and thereafter, to be subject to ratification by the latter.

In addition, the authorities in the Arab countries are urgently demanded to abstain from concluding treaties which wholly or partly undermine or violate other higher international instruments, but to uphold the principles of their declared foreign policy and their international undertakings. For example, the Egyptian government's claim that in the light of its obligations as a member of the Organization of African Trade Union Unity, the single-union structure which operates in Egypt is "imposed" by the statute of that Organization must be reviewed. This requirement is in direct conflict with Egypt's other obligations under international law, according to the International Covenants and ILO conventions. This requirement must therefore be rejected by the Egyptian government, which should work for the amendment of the Statute, as Arab workers must not only be free to set up organizations but also be able to exercise a degree of choice in joining other associations. These rights are denied by the single trade union structure, where the only channel left for trade union association is to be part of a single organization in which Arab governments play the dominant role in shaping its programme and activities.

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A most encouraging development at the regional level in recent years has been the adoption and entry into force of the African Charter of Human and People's Rights, which was opened for signature to the members of the Organization of African Unity, of which seven Arab states are members. Of these, six Arab countries have signed and ratified the human rights Charter, which entered into force in 1986. This positive development has important implications for the development of protection of human rights within these Arab countries, as among the contents of this treaty are an undertaking to *"adopt legislative or other measures"* to give effect to the rights it contains and provision for the establishment of a Commission of Human and People's Rights empowered to receive communications from states as well as from organizations and individuals alleging violation of the Charter. Like article 40 of the ICCPR, the Charter establishes a reporting procedure by which states undertake to submit reports on legislative and other measures taken to

give effect to the contents of the Charter.

The Commission was established in 1987, and Arab members were elected to serve in their personal capacity, with the Egyptian representative elected to serve as vice-president for two years. The competence of the Commission to receive individual or other communications alleging violation of the Charter was confirmed by the Commission's Rules of Procedure, adopted in February 1988.

Clearly, these developments represent an important step forward in the protection of human rights in the region and Arab governments are urged to contribute positively to this experiment, since it is an important indication of third world aspirations to promote and protect human rights. They are urged to comply fully and honestly with the reporting requirements established by article 62 of the Charter, and to contribute at all stages to the promotion of human rights.

Arab governments are also urged to exercise their right under article 68 to propose amendments to the Charter, for example, in respect of article 60, in order to allow the Commission to benefit from the findings and interpetations of the Inter-American Commission on Human Rights, and the European Court and Commission of Human Rights, for the valuable light they shed on the understanding of such issues as the state of emergency. Other recommendations include the enhancement of the quasi-judicial function of the Commission in the absence of a Court, and measures to ensure the independence of serving members from governmental pressure or interference.

Of immediate striking importance in the light of the circumstances of many States Parties to the Charter, is the adoption of provisions comparable to those in international treaties in respect of measures of safeguard during time of state of emergency. These should include the obligation to communicate the decision to impose state of emergency to other States Parties along with information on its impact on human rights protection. With regard to political rights, the proposal should be made to clarify the wording of article 9, which deals with freedom of information and expression, in order to secure the right to impart as well as to receive information, by any media and regardless of frontiers. As we have seen within Arab municipal law, a further important safeguard is the recognition of the absolute right to freedom of opinion.

In respect to freedom of association, immediate clarification must be sought of the meaning and scope of restrictions on the grounds of the "obligation of solidarity" provided for in article 29. If this restriction is incompatible with other obligations imposed by international provisions, Arab governments must take steps to seek to amend the regional convention, or make reservations in respect of this measure. The provisions of article 13 should also be amended to provide explicitly the right to vote and stand in elections, and to encompass the requirement for "genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot" embodied in international

provisions to guarantee the free expression of the will of the people.

A further development at the regional level of protection of human rights, which was touched upon briefly in Chapter One, is the proposed Arab Human Rights Covenant. This document, which resulted from Arab League Decision no.2605 of 1970, has suffered what is hoped to be a temporary set-back in the decision of the Council of the Arab League (Decision no.4458) in 1985, that the text be set aside pending the outcome of the study by the Organization of the Islamic Conference of human rights in Islam. The urgent recommendation is that Arab governments press on with the proposed Covenant in order to provide a regional safeguard stemming from the Arab context and the Islamic heritage.

A number of recommendations may be made as to the substance of the draft Covenant. Firstly, it is proposed that the Covenant should be legally binding on States, and that it should enter into force on the signature and ratification of a simple majority of the member States of the Arab League.

With respect to organs and procedures, provisions should be added as a matter of urgency providing for the creation of a Commission and Court of Arab Human Rights along similar lines to the American and European regional developments. Also extremely important in view of the particular circumstances of certain Arab states is the principle that communications from individuals, groups and non-governmental organizations alleging violation of the Covenant should be admissible as well as communications from member states. With regard to the particular circumstances of some Arab states, a number of special principles should be observed with regard to the right of the individual to communicate. These include the principle that the competence of the Commission to consider allegations from an individual of violation of the Covenant by a state should not be conditional on that state's acceptance of the Commission's jurisdiction, as in the Inter-American Commission on Human Rights, and the principle that the competence of the Commission should not rely on its acceptance by a minimum number of member states.

Further, it is important to point out that the principle of prior exhaustion of local remedies is not wholly appropriate to the circumstances of the Arab world. It is suggested that the principle be interpreted with a degree of flexibility, allowing, in line with article 50 of the African Charter, that local remedies where they exist need not be exhausted where it is clear to the Commission that the procedure would be impossible or unduly prolonged. In some Arab countries, it is difficult or sometimes impossible for a individual to practise his right to a local remedy, either because there is no such remedy available or because he is detained or in exile. This is not intended to replace the general principle of exhausting available local remedies, but rather to provide an additional safeguard to the rights of individuals at risk.

Unlike the African Charter, the draft Covenant is to be praised for taking into account the protection of human rights during the state of emergency, and in particular for limiting the scope of circumstances warranting the imposition of states of emergency to *"threats to the life of the nation"*. Also worthy of comment is the inclusion of a list of inalienable rights which may not be derogated from in such circumstances.

It is to be hoped that any Commission or other organ established in connection with the proposed Covenant is able to play a more effective role than the existing Permanent Arab Commission on Human Rights, whose activities have focused on investigation of alleged human rights abuses in the Occupied Territories. While accepting the importance of such activities, it is hoped that this organ will in the future broaden its scope to investigate alleged abuse of human rights elsewhere in the region. Perhaps a stipulation that any new Commission be composed of persons of legal expertise acting in a personal capacity will enable such an organ to function more effectively, as its neutrality and independence will be assured.

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