

Guarantees of the Right to Litigation in Jordanian Legislation

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Abstract

The Right to Litigation is considered one of the basic rights in the constitution as well as one of the agreed upon principles in International Law. The Right to Litigation is basically a human right being of great importance because it directly affects the human being in his life and future. International Human Rights Law has made clear progress beginning with the Universal Declaration of Human Rights, Charters and Covenants, and International Conventions, most notably International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. The gap of this research lies in the legal status of this principle in internal judiciary and the extent to which it applies to this international legal arsenal and the extent of the complimentary role of the international judiciary in protecting human rights.

Keywords: Human Rights, Independence of the Judiciary, Impartiality of Judiciary, International Law, International Judiciary.

INTRODUCTION

Human being is considered the core area of concern by all political, legal and social systems, for whom such systems have been founded to protect him and ensure his development. It's well established that honoring the individual is linked to his humanity since he is a human being regardless of his gender, color, origin, nationality or any other consideration.

Therefore, his birth, since he is a human, shall guarantee his right, as human rights are born with the birth of the human, and associated therewith wherever he is apart from the state or the legal system applied to the individual. Therefore, human rights are distinguished for being unified and similar in spite of the differ of applicable legal regulations, and if there is any difference in the applicable legal regulations, such difference is mainly due to the circumstances of emergence of each society and so on to the clarification of values, custom and traditions inherited to each nation .

Since the recognition of the deeply rooted dignity among all human being family and their equal and established fact are the basic of freedom, equality and peace, and since the difference and duality of human rights gave rise to the creation of a kind of savagery harmed the human consciousness, and since it's of great importance that the law takes the lead to protect the human rights in order not eventually to rebel.

And since the UN people apparently stressed in the charter once again their belief in human rights and individual's dignity and equal rights for both men and women, and since the member countries undertook with collaboration of the United Nation to ensure and consider human rights and respecting his basic liberties.

The world realized that there is no hope in securing and respecting these rights unless getting world public opinion and attention, and all countries and governments to collaborate and work together to streamline their efforts to confirm this respect and making available

necessary international bodies to achieve this objective. Respecting and enforcing human rights and his basic liberties requires mutual collaboration of all related individuals, groups, authorities, corporations, governments and global international organizations together with other bodies and authorities concerned with human rights both internationally and nationally.

It's clearly that the actual protection of human rights starts from the internal judiciary system, i.e. it's achieved through the national judiciary and states' national systems and organizations. If such national organizations failed to protect human rights, then comes the role of international organizations and authorities to do the job and can be approached openly for human right protection.

Previous Studies:

1. Khayati Al Mukhtar, the Role of International Criminal Judiciary in Protecting Human Rights, master thesis, Common International Law, Faculty of Law and Political Sciences, Mouloud Mammeri University, year 2011 AD, but this study focused on rights protection from assaults of more criminal merit.
2. Ziouy Khair Eddin, Merge of International Conventions in the Algerian Internal legal System, pursuant to constitution of year 1996, master's degree thesis in International Law and Relations, Faculty of Law, University of Algiers, 2002/2003. This research examined the internal and international protection of human rights on a spatial scale which is Algeria in terms of stressing the need to activating the international agreements while application before the national courts.
3. Naseri Maryam, the Effectiveness of Punishment on Major Violations of Humanitarian International law's rules, master's degree thesis, Major: Humanitarian International Law, Faculty of Law, Hadj Lakhdar University, Batna 2008/2009, This research addressed The Controversy Between Countries' Joining Humanitarian International Law Treaties and Non-commitment of Applying their Rules Internally..

The Importance of the Study

The importance of the study lies in the judiciary and human rights subject matter which is considered of great importance since it touches the human being directly in his life and future. The International Human Rights Law has achieved a noticeable progress initially with the Universal Declaration of Human Rights, Charters and Covenants, together with International Treaties, most notably International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. It noteworthy while talking about human rights is to talk about the internal judiciary and to what extent it applies this International Legal Arsenal to eventually reach the complementary role of the international judiciary in protecting human rights.

Reasons Behind Choosing Subject

1. The clear and important emerge of the International Human Rights Law in establishing and laying down clear rules to protect human rights.
2. Measuring the extent of integration between the international and internal courts in relation of human rights cases.
3. The impact of international treaties on national legislations.
4. How efficient are the national legislations to conduct fair trials in the field of human rights?

Research Delimitations

The main topic of this research will be international treaties and agreements in relation to human rights, Jordanian constitution and books and studies discussing human rights subjects at both national and international levels.

Research Plan

The study plan is formed in an introduction and two topics, entitled: The original Jurisdiction of Internal Judiciary in Protecting Human Rights as below: -

First Topic : The Judiciary guarantees to protect human rights

Second Topic: The application of International Law Rules of Human Rights by the National Judge

Research Methodology

I relied in this study on the analytical and critical and sometimes the descriptive approaches, we find that this research requires from one side an analysis for the content of the judiciary guarantees to protect human rights as well as the principles on which the interpretation is based on, and the integrative application techniques and how compliant to the international legal development .On the other hand, referring to some definitions and some important concepts in this subject.

The Original Jurisdiction for Internal Judiciary in Protecting Human Rights

This study is related to one of the guarantees that meet respect of human rights that can be achieved in not violating the national laws of the provisions of International Human Rights Conventions. Logically, the states are left with the chances of self-control opportunities to implement and enforce their international commitment in the field of human rights through achieving a kind of balance between their own laws and such commitments. Besides, the judiciary authority has the right to control achieving this purpose, i.e. controlling of non-violating the laws, and the jurisdiction of public authorities for international law provisions related to human rights, where in principle it's the role of international judiciary to protect human rights.

The protection of human rights by the internal judiciary requires some guarantees that ensures fair trials as well as right implementation of international treaties related to human rights.

First Topic: The Judiciary Guarantees to Protect Human Rights

Undoubtedly, the authority entrusted to protect human rights and liberties and ensure legality

in any country is the judiciary authority. It ensures the respect of rights and liberties and defend violation thereof. It's not enough only to make laws, but rather enforce and impose them over all in a way that ensure actual protection of rights and liberties. This authority while performing this duty must observe guarantees in order to carry out this duty properly and such guarantees can be limited to independence, impartiality and equality of judiciary.

First Subject: Independence of Judiciary

Independence of the Judiciary is meant to be that the judge may refer to law only while performing the judiciary among people as per the applicable law and not to be subject to no other laws, where the duty of the judge while enforcing the law requires the will of the legislator to properly and at the right manner and this principle is associated with the general political climate in the state as well as it has its own guarantees and essential fundamentals.

First sub-topic: Guarantees of the Independence of Judiciary

Firstly: Constitutional Guarantees: Constitutional guarantees of the independence of the judiciary means that the constitution should conclude in its capacity as the nominal document some essential basics and principles denote independency and set forth the mechanisms necessary to ensure respect and adherence thereto when it comes to practicing the same. In fact, the value of act of law in the constitution itself lies in the hierarchy rank the constitution enjoys amidst others within the laws' pyramids. Even though modern constitutions varied in terms of to which extent they explicitly referring to the concept "The Judiciary Authority", yet they paid special attention to The Judiciary in all its ranks and branches stressing its functional and physical independence.

On the other hand, they set forth some mechanisms that contribute to better enhance this status and maintain the same from being affected by any means of pressure, touch or violation whatsoever which it or its subsidiary stuff and individuals may encounter.

Secondly: Political Guarantees: Political Guarantees are meant to be those provided by the political context surrounding the Judiciary body.

Second Sub-topic: Pillars and Principles of The Independence of The Judiciary

The Independence of the Judiciary is considered a constitutional principle that enables the judge to pass his judgement away from any other influencing pressures and refer to his good conscience and what the law imposes. The Independence relies on many pillars, such as the respect of all authorities or individuals to it, considering privilege of the law and arbitration thereto, abiding by all the decisions and provisions issued by judiciary through states' different bodies and the adherence of all individuals and entities across the state to such provisions at all times and places.

Nevertheless, securing the judiciary independence alone can't get the job well done but rather requires other guarantees complete each another to secure stability and solidity for the justice and equality balance with the aim of securing individuals' basic needs and liberties. Such guarantees include the impartiality of the judge and equality before law.

Second Subject: The Impartiality of The Judiciary

The Impartiality and integrity of the Judiciary means that the judge may not sympathize or stand during any dispute to the side of any of the opponents and only apply the legal rules that achieve justice. This is not restricted to the opponents only but also to handle the dispute subject matter itself, where the judge is required to arbitrate objectively during the dispute and his judgment may not be affected with any favor or interest or any previous or other influencing opinion or point of view.

This Impartiality has some guarantees and principles which are based thereon.

First Sub-topic: Guarantees of the Impartiality of the Judiciary

The Impartiality of the Judiciary can be defined as "The Judge may not have previous opinions about the subject matter dispute and has no interest to the result to which the case will end up with". In this regard, the United Nations Committee entrusted with human rights sees that Impartiality means that the judge may not show any previous opinions on the subject matter dispute before him and may not take any path favoring one opponent over another. Impartiality guarantees lie in preventing the judge from performing any non-judicial practices where this contradicts with performing political and commercial practices.

Second Sub-topic: Impartiality Guarantee Acknowledgement Basis

The basis of acknowledging the guarantee of the Impartiality of the Judiciary is not to appeal against the judge's integrity or doubting his probity and honesty, where the suspected dishonest judge is not eligible to stay at his post, but rather the judge may be deemed incapable of passing his judgement to a specific case without favoring any of the opponents. Therefore, the aim of such guarantees is to keep the withstanding concept of impartiality with which the judge shall enjoy and show before the opponents and public.

Third Subject: The Right to Litigation

The Jordanian Constitution stressed this right where article (101) states that "The courts are open for all and protected from interference with their own affairs". Therefore, the right to litigation is one of the natural rights of human being that even the law can't breach. Without it, individuals will not be able to keep their liberties or even defend themselves from any abuses happen thereof. This right is considered one of the key guarantees to protect human rights, if individuals have the right to present before the judiciary, this requires to apply the principle of equality between the two opponents and achieving the same whether through the application of the law or within application procedures to the opponents.

If the judge is the key factor in implementing these guarantees, still he is not the only body since the role of the judge is determined while

enforcing the law. Therefore, supervision over executing the Judicial guarantees leads us to further investigate how far the law is clearly enforced by the judge.

Second Topic: The Application of International Law Provisions Related to Human Rights by the National Judge

The internationalization of human rights has a major role in pushing forward and supporting the progress of these rights worldwide and directing the same to the aspired and desired objectives.

The methodology of applying the international rules related to human rights is distinguished from the application of any other international rules, where this law is highly associated with nations' domestic rules and may extend sometimes to a degree of integration, merging and amending therewith. Therefore, the enforcement of this law takes two aspects; either through direct international means which is known as international means to activate human rights within the context of enforcement and protection by direct international means, or through the more efficient steering power to activate such rights in details naming the states' internal law.

When it comes to Jordan, the country took care of human rights cases since long years, and was one of the leading countries that responded with human rights conventions in pursuant with the Jordanian Constitution issued in 1952 which includes all the basic and essential principles stated in the Universal Declaration of Human Rights and what follows of charters and treaties.

The second chapter of the constitution has allocated (articles 5-23) to the rights and obligations of the citizens such as; the private liberties, equality among citizens before the law, not to discriminate among them in rights and obligations, banning of deportation, freedom to choose their place of residence, freedom of opinion, freedom of assembly and establish societies and political parties. In accordance with article 8 "No one can be arrested or put in jail but under the provisions of Law".

Article 15 of the constitution guaranteed the freedom of speech "Each Jordanian has the right to express his thought verbally, in written or visually as well as through other expression manners provided that they are within the limit of the law. The newspapers may not be suspended, or their privileges canceled except under the provisions of law. In accordance with the currently applicable law (law # 10 for the year 1993), press and printing are free, and the freedom of opinion is guaranteed for every Jordanian citizen where he/she can freely express their thoughts. Article 14 resolved the Freedom of Belief "The state protects performing religious rituals and beliefs in accordance with the applicable traditions across the kingdom as far as they are not against the law and order or public Morals".

All above tend to be within the framework of the constitution and accomplishment of equality and justice and equality in opportunities among all the citizens men or women without any discrimination whatsoever.

Jordan has joined six out of the key seven United Nation Agreements related to human rights, naming: "The two International Covenants: International Covenant on Civil and Political Rights and the International Covenant on Economic and Social and Cultural Rights (1975);, International Convention on the Elimination of All Forms of Racial Discrimination (1974), and "Convention on the Elimination of All Forms of Discrimination Against Women" (1992), and " Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (1991), and "Convention on the Rights of the Child " (1991). In addition, it signed the two optional protocols of Convention on the Rights of the Child regarding the involvement of children in Armed Conflict and Sale of children, Child Prostitution and Child Pornography (2000).

Jordan also signed seven out of eight International Labour Organization's conventions related to the human rights, naming: convention (98) related The Right for Union Organizing and Group Negotiation (1968), and the two conventions (29) and (105) related to the Compulsory Work (1958) and

(1966) respectively, and “ convention (100) concerning Equality in Remuneration (1966)”, and “ Convention (111) with regard to Discrimination in Respect of Employment and Occupation (1963), and convention (138) concerning Minimum Age for Admission to Employment (1998), and “convention (182) related to the Worst Forms of Child Labour. (2002). Nevertheless, Jordan had some reservations to the provisions of some conventions which he joined.

Within some limits as this study necessitates, I will discuss in this topic on how International Human Rights Law is implemented from the other portrait.

Normally, the question of dealing with the provisions of the international principles related to human rights is still pound to the domestic laws within the state. Based on which, such laws indeed determine whether the provisions of this law are autonomously applied without any need for a legislative interference, or on contrary there is a need for an intervention for application sake.

To this end, we find several methods for applying differ from one country to another based on its theoretical point of view while considering the relation between the international and national laws.

Therefore, will be shedding light in this research at first subject, the possibility of direct application of international conventions related to the human rights, and at the second one, the judge himself and the way of interpreting the international conventions related to human rights, and at the third and the last one, will highlight the principle of reciprocity in the rules of International Human Rights Law.

Frist Subject: Direct Applicability of Conventions Related to Human Rights

When it comes to individual protection, the judges are held responsible for applying local and international human rights laws if this law is relative to the subject matter, where the judge in this case can directly apply the international rules of human rights.

This pattern is based on what the international rule states directly at the international aspect without any domestic legislative procedure that may include reshaping the international rule or giving it the possibility of internal validation . Firstly, will discuss the context of the direct applicability of international conventions related to human rights and secondly the conditions of direct applicability.

First Sub-topic: The Context of Conventions' Direct Application

Convention's provisions direct applicability means that they contain specific provisions subject to autonomous application before national judge without the need to issue other legislation that may complete it or even make it more challenging. In other words, they should be clear and specific allowing direct application. The Anglo-Saxon jurisprudence names stimulatingly valid conventions after this type of conventions. It's noticeable that the conventions' provisions rarely subject to autonomous application. In General, they contain in addition to the pending provisions in the local law other provisions addressing the existing bodies in charge of foreign relations at the state.

Furthermore, conventions are not usually drafted accurately and precisely as the domestic legislations, where it comes a s result of reconciliation attempts among the opposing stands on a specific subject matter. Some judges consider that the autonomous application of the conventions within the local system grants the provisions of conventions rights and obligations for the opponents.

From another jurisprudence's point of view, the convention can be applied directly within the local law without state's intervention. Accordingly, the convention is directly liable to applicability in accordance with constitutional provisions, so attestation on the convention is considered internationally sufficient in pursuant with international provisions and requires commitment validity, When it comes to the practicality of the international law, the provision of any conventions is considered self-applicable unless requires other additional

practices issued by the executive authority for the contractual country, with the aim of entering the conventions' provisions the scope of validity including as well individuals' rights and obligations and to be applied with immediate effect.

Second Sub-topic: The Direct Applications Conditions of the Conventions by the National Judge 1

Even if the state opens space for its internal law system to the international legal rules, the latter are not necessarily subject to direct application, and the international legal rule doesn't enjoy the self-application capacity unless it includes two substantial features, one of which is autonomous and the other is substantive. The autonomous feature lies in the intention of the contractual parties to grant the convention the possibility of direct application, whereas pertaining to the substantive condition for the convention's direct application, it comes as a result of the autonomous condition, which means the intention of parties to directly enforce the convention and request to apply the same before courts as it necessitates.

Second Subject: The National Judge and the Conventions' Interpretation

Application of international treaty by the national judge requires sometimes interpreting due to the fact that it may contain some texts and phrases needs to be further clarified and text lacks overall reference to reach the desired perception which may rise some difference in views words' denotations that requires interpretation of convention provisions' meaning and specifying precisely its scope, where interpretation problems normally occur upon application and enforcement.

If it turns out that the application process requires initially interpretation process, then does the local judge have the right to amend the same by himself? and also what are the interpretation rules and methods he will be adopting to do so?, or shall he leave the job for the government to handle and hold adjudication of the case filed before him till the governmental interrelation is issued. In other words, Will the local judge take the lead to the

mission personally? or Shall he seek support by other entities?

To answer this question, will approach the concept of the judiciary interpretation of conventions from the jurisprudence perspective.

First Sub-topic: The Context of Conventions Judiciary Interpretation

When the convention merges within the internal legal system it becomes an integral part thereof, and thus the local judge's duty is to enforce its provisions. If the judge refuses that, he will be considered perpetrator of justice denial crime. If the treaty contains clear or interpretative provisions or attached with an interpretation annex, then there is no issue. If the conventions or some parts thereof are vague or obscure, then the local judge interpretation of the international convention option will be considered. The interpretation is considered an overall process in which we identify the meaning of a file or a specific text in terms of describing its scope and severity and make clear all its obscure points and unclear expressions. Simultaneously, any convention requires a measure of interpretation and sometimes it's difficult to clarify the meaning of the used expressions.

Interpretation is considered an intellectual process based on identifying the meaning of legal procedure and clarity of obscure points by relying on group of basic principles of interpretation emphasized by the jurisprudence and the provisions of international courts, being included in Vienna Convention on the Law of Treaties for the year 1969 articles (31-33) most importantly the good intent, non-interpretation of the text which is self-explanatory, highlight the useful and fruitful effect and aspect of the treaty, giving phrases their natural and real meanings.

Second Sub-topic: The Jurisprudence Attitude of the Judiciary Interpretation of International Conventions related to human rights

What can be said regarding the question of interpretation of international conventions related to human rights while applying to the

disputes on ground is that the international law didn't clearly set forth that the concerned body should action the same domestically. Whether this interpretation is under the jurisdiction of the local judge or Foreign Ministry, it is not considerable internationally if it's against the goodwill and intention of the contractual countries because the internal interpretation of the convention doesn't dictate the international interpretation.

This resulted in the existence of jurisprudence opinion supporting the judiciary interpretation for such conventions with the pretend that concluding treaties is considered a legislative act which the local judge can interpret as any other legislation. This opinion is since courts specialized in interpreting the provisions to be applied on the filed disputes, also they are specialized in interpreting the conventions if this interpretation is considered necessary to solve the subject matter disputes. The Jurisdiction in some country like France and Egypt got influenced by this approach.

Based on what previously stated, it is clear that the application of the conventions requires sometimes interpretation thereof and then the one who shall apply the treaty has the right to interpret it to expedite disposition of the judiciary cases as long as this interpretation is necessary to solve the subject matter disputes. The judge is obliged while interpreting to consider the basic principles in the interpretation that the afore-mentioned Vienna Convention contained so that the judge's interpretation is free of any personal tendencies.

Conclusion

To ensure the efficiency and independence in protecting human rights, it requires that all those concerned about human rights at all levels are fully aware of the limits of judiciary overall system for human rights protection and its contradictions. Therefore, and without the active interference giving rise to recommendations, the international protection of human rights will not be able to perform its job properly and efficiently. Accordingly, this

study came up with a few results and recommendations supporting the theme of the study and at the same time contribute to find solutions in activating the international protection of human rights.

Results and Recommendations

1. The need to remerge and re-streamline in harmony all the national bodies to protect human rights effectively and to develop and reform them to be more active towards the service of the rights of individuals, minorities and nations.
2. The limited role of judiciary in applying the human rights principles, where the study recommends activating this role on a wider scope that goes in line with international principles of human rights.
3. Insufficiency of guaranteeing the right to litigation for all. Therefore, this study recommends to focus on the importance of role of the legal and judiciary assistance for individuals through preparation of an overall comprehensive manual includes the importance of procedures and guidelines for the citizens with the aim of spreading awareness and making him fully aware of rights and obligations stipulated in the constitution and the applicable bylaws. Besides, to be fully aware of the judiciary procedures which he may stand in need whether while filing a case or through its formalities' progress or implementation of resolved provisions. No doubts, this will pave the way for individual to get their rights.
4. Difficulty in the judiciary procedures and long-life litigation process before the local courts. Therefore, this study recommends the easiness of response to the judiciary procedures to enable the individuals from accessing their rights whether through the state or other entities smoothly and quickly.
5. The national local may pass their judgement based on the national laws without considering the provisions of the international charters with which the state is committed thereto. Accordingly, this study recommends

the necessity of widening the scope of judge's experience in the field of treaties and conventions such as; the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and the International Covenant on Economic and Social and Cultural Rights, Convention on the Rights of the Child, International Labour Conventions ...etc. this will be achieved through preparing of courses and seminars to train the judiciary authority members in this field.

6. In general, the judiciary did not consider the decisions made by constitutional court. Therefore, the study recommends enhancing the role of the constitutional judge as an independent judiciary body in his capacity as the guardian of legitimacy and as the custodian on the constitutional legitimacy.

7. The same judge is overloaded with cases that results in devaluating the case overall necessary consideration and attention. Therefore, the study recommends providing enough judiciary bodies to consider cases and appeals for desired smooth and quick judgment.

8. Qualification of judges and manpower at the judiciary bodies and train them to deal with individuals at first place as a human being and from a humanitarian perspective before dealing with them as found accused or convicted.

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