

Judiciary and Arbitration in Bahrain
Historical and Analytical Study

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**THE BAHRAIN JUDICIARY SYSTEM
A HISTORICAL AND ANALYTICAL STUDY**

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ABBREVIATIONS

PR	:	The British Political Resident in the Gulf.
PA	:	The British Political Agent in Bahrain.
BG	:	The British Government.
BGI	:	The British Government of India.
BOIC	:	The Bahrain Order in Council.
BBS	:	Bahrain Bar Society.
BSE	:	Bahrain Stock Exchange.
CCPL	:	The Civil and Commercial Procedures Law.
CCP	:	The Code of Criminal Procedure.
HEC	:	High Executive Committee.
The Ministry of Justice	:	The Ministry of Justice & Islamic Affairs.
The Minister of Justice	:	The Minister of Justice & Islamic Affairs.
The Ministry of Labour	:	The Ministry of Labour & Social Affairs.
The Minister of Labour	:	The Minister of Labour & Social Affairs.
The Government	:	The Government of the State of Bahrain.

NOTE ON TRANSLITERATION OF ARABIC

In transliterating the Arabic words into English I have followed the scheme that is commonly used and pronounced by the English-speaking people. For example the following letters are transliterated in the manner shown below:

- ‘a’ for the letter ع as in ‘Ali’ and ‘Abdulla’.
‘i’ for the letter ع as in ‘Isa’.
‘th’ for the letter ث or ذ as in ‘Thani’.
‘t’ for the letter ط as in ‘Taha’.
‘o’ for the letter و or " ' " as in ‘Moayyed’ or in ‘Mohammed’.
‘dh’ for the letter ض as in ‘Kadhi’.
‘y’ for the letter ي as in ‘Yusif’.
‘sh’ for the letter ش as in ‘Sharia, Shaikh and Shia’.
‘kh’ for the letter خ as in ‘Khalifa’ and ‘Khalid’.
‘h’ for the letter ح as in ‘Hamad’ and ‘Bahrain’.
‘q’ for the letter ق as in ‘muqallad’.

I have used the double letter system for the Arabic ‘Shaddah’ "◌◌" as in ‘Mohammed’.

When I have quoted directly from a transliterated text, I used the same transliteration provided by those texts.

PREFACE

Many communities and states came into being in the Gulf and Arabian Peninsula region from the early 19th century to the early 20th century. During the 20th century, oil played a major role in the emergence of such communities and states. However, Bahrain, as a geographical, social and civilised entity, has an age-old history which is recorded in books and annals dating back to the Delmon Civilisation, around 3000 years before Christ.

Of course the existence of a judicial system is the basic criteria for measuring the civilisation of societies. The idea behind this thesis is based on the study of this civilisation measure, the judicial system, in this State “Bahrain” which is modest in terms of size and population, but can boast of a diverse history and rich social traditions.

The purpose of this study is to evaluate the civilisation status of Bahrain by studying its judicial authority. I deemed it necessary to confine this study to empirical and objective criteria in review and analysis. To achieve this objective, I decided that the study should consist of two parts which the reader can see from the organisation of chapters, the first of which is historical, which examines the origins of the existing judicial system, and the other which is a critical and objective study of this modern system.

According to the structure of the courts and judicial bodies and their jurisdictions, I traced the roots of this structure in order to identify the reasons and origins of their existence. Thus, I found myself going back to the rule of the judges of the Shia Jaafari jurisprudence (Fiqh) and then to the rule of the tribal traditions and the rule of the Sunni Sharia law. These three types of rule played a role in the formation of Bahrain’s modern society on which the modern State was established.

Despite the establishment of the judiciary based on comparative international law, drawn from modern international laws and legislation, there are other trends in this system, as in the case of Personal Status Law, which is dealt with by religious and sectarian courts,

using both Sunni and Jaafari Fiqh, as well as the courts which hear disputes between members of the ruling family (Al Khalifa) which is left to a special body, “*The Ruling Family Council*” which is a tribunal of tribal roots.

In order to conduct the historical study, the task was difficult, particularly since before the famous British Law, the “*Bahrain Order In Council*” in 1913, there was no organised judicial system. Therefore, I had to go back to historical documents and contemporary works, or at least to theses dealing with the issue available at well-known universities in order to get as much information as possible.

As to the study of the modern system, I relied basically on the laws and legislation in practice which are issued by the competent legitimate authority according to the Constitution of the State of Bahrain issued in 1972, as well as the rulings and court precedents issued in pursuance of this legislation.

In order to achieve the purpose of this study in examining and analysing the existing judicial institutions and the legislation organising them, I highlighted their positive and negative sides and analysed whether they complied with the practical and objective standards in this study.

Obtaining reliable documents was not an easy task, and I relied heavily on the documents for the historical section kept in the Indian Office Library in London, with their systematic organisation and easy access, as well as historical books and contemporary periodicals which were mostly found in the SOAS Library at London University.

The analytical and critical study of the current system, was far easier and I was helped much in this by being a professional lawyer who has at his disposal all required legislation and court precedents. This greatly facilitated the work at hand.

I attempted to remain objective in my research, however I may not have been able to resist national emotions in some places but I hope such feelings will not prejudice the overall objective criteria of analysis and criticism.

INTRODUCTION

I. Bahrain is a modern nation that now enjoys a modern and developed judicial system based upon the principle of the separation of powers guaranteed according to the Bahrain Constitution. Article 32 of the Constitution provides as follows:

“The system of government shall be based on the principle of separation of the legislative, executive and judicial powers, functioning in co-operation with each other in accordance with the provisions of this Constitution. None of the three powers may relinquish all or part of its competence prescribed in this Constitution. However, legislative authorisation, limited for a certain period and in respect of a specified matter or matters, may be made, and shall be practised in accordance with the law of authorisation and the conditions thereof.”

The judicial system is regulated mainly by the Judicial Law promulgated pursuant to Legislative Decree No.13 of 1971. It regulates the courts’ structure in general by specifying their types, degrees, jurisdiction and persons of judges. It sets forth the conditions to be fulfilled by judges, procedures governing their appointment and disciplinary action for them. The law also deals with judicial or legal assistants such as lawyers, experts and public prosecution authorities. In addition, there are the judicial authorities, notably the Supreme Judicial Council, provided for in Article 44 of the said Law.

It should be noted that this Law was enacted a short time before the introduction of the Bahrain Constitution, the declaration of Bahrain’s independence and the organisation of its political and administrative structures. For example, this Law uses such terms as “*Department of Justice*” that was replaced after independence by the “*Ministry of Justice*” and “*Chief of the Justice Department*” who was replaced by the “*Minister of Justice*”. The law includes certain shortcomings with respect to the interference of certain executive powers represented by the Minister of Justice in the powers of the judicial authority that should rather be exercised by an organisation representing the judiciary as provided for in the Constitution.

The Bahrain lawmaker has sought to develop the country's legal system and fill in the missing requirements on a continuous basis since independence thirty years ago. The degree of independence and competence enjoyed by the judiciary in Bahrain is highly appreciated by those involved in the judicial system.

In addition to the ordinary courts of law established according to the Judicial Law, there are other courts governed by their own laws and dictated by certain necessities of law. These include the Ruling Family Council, Military Law Court and State Security Court.

The law courts may be classified according to the Judicial Law and other governing laws as follows:

1. Sharia Courts:

These are personal status courts that examine litigation involving personal status for Muslims. The term personal status means all matters relating to issues of concern to Muslim families such as marriage, divorce, family relations, inheritance, custody, wills and gifts ¹.

2. Courts with General Jurisdiction:

These are set up according to the laws governing the creation of civil law courts but their competence covers all matters beyond the scope of the Sharia judicial competence. Their jurisdiction encompasses civil, commercial, criminal and personal status matters for non-Muslims.

Each of these groups of courts is divided into several types with each competent to hear certain kinds of law-suits. Based on the qualitative, quantitative and degree of litigation, they are classified into junior, senior, high appeal and cassation courts.

¹ Personal status is a literal translation of the Arabic expression "Al ahwal al shakhsiah", which includes matters of matrimony, divorce, maintenance, nursing, kinship, inheritance, wills and waq'f (religious trust).

Other laws combined with the Judicial Law serve to determine the powers of such courts. The most important of such laws are the Civil and Commercial Procedures Law, Code of Criminal Procedure and Court of Cassation Law. The classification and powers of these courts vary as follows:

Junior Courts:

These are competent to hear civil and commercial claims the value of which (at present) does not exceed BD5,000 in the first instance. Further jurisdiction is given to such courts by the Civil and Commercial Procedures Law that I will deal with in Chapter 8 of this thesis. As for criminal cases, they are competent to deal with misdemeanours and offences. It should be mentioned that the Execution Court , which is empowered to execute judgements of different courts, is classified as a junior court.

Senior Courts:

These are the courts that have jurisdiction to hear civil and commercial law-suits in the first instance where they are not heard by the Junior Courts including cases involving claims of BD 5,000 and above as well as all the law-suits concerned with personal status for non-Muslims. For criminal cases, they are initially competent to hear the felonies and are also competent to deal with powers derived from various laws that I will discuss in detail in Chapter 7 of this thesis. In addition to their powers in the first instance, they are also competent to hear appeals of all cases decided by the junior courts.

High Court of Appeal

This is the Court competent to hear appeals of all judgments handed down in the first instance by the Senior Courts including criminal, civil, commercial and non-Muslims personal status cases.

Court of Cassation:

This particular Court is regulated by a special law “Court of Cassation Law” promulgated by Legislative Decree No.8 of 1989.

It is competent to hear challenges of final judgments rendered by all Courts of Appeal. However, its jurisdiction is limited to ensuring the valid interpretation of legal provisions and their application to the merits of cases. This Court does not examine the facts of such cases.

Ruling Family Council:

It is established pursuant to Amiri Decree No.12 of 1973 with respect to Inheritance of the Emirate. It provides in Article 19 thereof that it is empowered to provide custodianship for the minor persons of the Ruling Family. It is also concerned with dealing with all personal status matters involving members of the Ruling Family. It has the authority to handle financial affairs and disputes of all members of the Family.

Military Law Courts:

They are established by the Military Code and are competent to hear crimes provided for in this Code involving military personnel.

State Security Court:

It is within the structure of the High Court of Appeal and comprises a single tier court with no appeal. It consists of three judges and has the jurisdiction to hear crimes affecting State security. Chapter 7 will deal with this Court.

II. Judicial duties are undertaken by persons whose qualifications, remuneration, supervision and disciplinary action against them in case of any breach are governed by the law. The key persons involved in the judicial activities are the judges,

lawyers, representatives of Public Prosecution, experts and translators. They are defined as follows:

Judges

The Judicial Law regulates the methods of selecting judges. The law requires that candidates must be university graduates holding B.A. or B.Sc. degrees. A Sharia Court judge must be a holder of a certificate from religious institutes equivalent in their level to the university degree. Although there is no training scheme for judges, a newly appointed judge starts his training in one of the chambers of the Senior Civil Court that usually comprises three judges. He joins the panel of judges to get proper practical training before he is appointed as a single Junior Court judge. The Judicial Law requires a judge before his appointment to have spent two years in a legal profession before joining the judiciary to become a Junior Court judge. For the Senior Court judge, the law requires that the period of such practice should be six years or to have spent at least three years as a Junior Court judge. In the case of a High Court of Appeal judge, his practice period should be at least 10 years after graduation or to have spent at least 3 years as a Senior Court judge. A judge of the Court of Cassation is required to spend a practice period of 15 years after obtaining his academic degree. Such period shall be 4 years if the judge works as a High Court of Appeal judge.

The law requires a judge to be a Bahraini. However, if qualified Bahrainis are not available, non-Bahrainis may be appointed. A candidate for employment as a judge must have no criminal record.

The law outlines the judges' rights and obligations. The key rights include a monthly salary and immunity against prosecution in criminal matters. These points will be discussed in detail in this thesis.

The Law lays down rules of supervision of judges' duties and disciplinary action against them. These points are discussed in detail in Chapter 9 of this thesis.

III. The Bahrain judicial system has solid foundations. According to the law and general practice, this system has general features that characterise it. The main features are as follows:

1. Independence of the judicial authority and the law courts towards the executive and legislative authorities according to the provision of Article 32 of the Constitution as mentioned earlier.

Such independence is conclusively confirmed by the provision of Article 101 of the Constitution that states:

“The administration of justice by judges shall not be subject to any authority. No interference whatsoever shall be allowed in the conduct of justice.”

This is further confirmed by the provision of Article 2 of the Judicial Law which states:

“Judges shall be independent, with no power over them in their discharge of their duties except that of the law.”

There are limited exceptions dictated by legislative or practical requirements or probably due to the lack of legislation or a fault in such legislation. Such instances are reasonable in a new and modern state that goes through complex geographical and political conditions. However, the lawmaker must make serious efforts to eliminate any of these that are no longer appropriate to the social, economic and cultural development of Bahrain.

2. Equality of People Before the Law: According to Article 18 of the Constitution people are equal in human dignity, and citizens shall be equal in public rights and duties before the law, without discrimination as to race, origin, language, religion or belief. Article 101 of the Constitution underlines that justice shall be the basis of government and guarantee of rights and freedoms.

Recourse to the law courts is guaranteed for every individual without any restrictions and under rules and procedures which are clear and available to everyone without exception. Facilities offered in the judicial process go as far as to provide exemption from payment of the prescribed fees for litigation or deferring their payment for those who cannot afford them.

Such equality before the law courts includes the government and its institutions. Any person, whether a local citizen or a foreign resident, can enter into litigation against the Government, its institutions and organisations. Such equality extends to the symbols of the state and ruling regime including the Amir, who is the head of state and system of government. Bringing legal action against the Amir does not take place in a direct personal manner but the Amiri Court, as defendant which is then treated in the same manner as any other defendant

3. Several Degrees of Litigation: This is one of the main features of a modern state as there are low and high degrees of law courts. If a litigant is not satisfied with the ruling handed down by a court that has heard his case, he may contest such ruling. There are three degrees of litigation in Bahrain:

First Instance: A court of law hears a case in the first instance and concludes its proceedings by delivering a judgement. A court decides that it has jurisdiction to hear a case and then proceeds with hearing it depending upon the claim amount or issue of the litigation in civil cases and depending upon the seriousness of the crime in criminal cases. According to the aforesaid principle, courts of first instance are divided into junior courts and senior courts.

Appeal Stage: If a party to the litigation is not happy with the ruling given by the court of first instance, he may challenge such ruling by filing an appeal with the competent court of appeal. If a junior court delivers the judgement, he may file an appeal with the Senior Court of Appeal. If a judgement is handed down by a Senior Court, he may file the appeal with the High Court of Appeal.

Cassation Level: This is the highest level of the judicial hierarchy that allows any party to file challenges with it by way of appeal (before the Court of Cassation) against any judgement delivered by a Court of Appeal. However, the jurisdiction of the Court of Cassation is limited to supervising the proper interpretation of the law and its application to court cases. However, it is not competent to hear the facts on the basis of which the judgement is reached unless it clearly appears from the challenged judgement that it is contrary to the facts of the case.

4. Sources of Deducing Judgements: These mean the sources upon which a judge bases his judgement. They are indicated according to the Judicial Law as follows:

Codified Laws which cover most areas of business activities, civil matters, penal cases, criminal matters, labour and social protection such as the Contract Law, Civil Wrongs Ordinance, Law of Commerce, Commercial Companies Law, Penal Code, Traffic Law, Labour Law and Social Insurance Law.

The procedural laws are covered by the Civil and Commercial Procedures Law, Criminal Proceedings Law and other such laws.

Islamic Sharia: It is a second source upon which a judge relies in generally deducing his judgement where he does not find a specific provision in the written laws. The only exception applies to commercial matters where he must give precedence to special or local custom and usage, then general practice and usage and later the general principles of civil legislation.

Custom and usage are the third source of deducing judgements except in the case of commercial matters where they are the second source. Also special custom and practice are given precedence over general practice in the case of a particular business activity or certain occupation.

Rules of Justice and Good Conscience: These mean the conclusion reached by a judge by his own rational thinking and good conscience if he does not find any of the above sources.

5. Public Nature of Court Hearings: This principle is underlined by Article 102 of the Constitution which states: “*Court hearings shall be held in public save in exceptional cases prescribed by the law.*” The law gives a judge the discretionary power to hold court hearings in camera according to the requirements and rules of public order and ethics as provided for in Article 4 of the Judicial Law.

All of the above will be dealt with in detail in Chapter 7 of this thesis.

IV. The Constitution of the State of Bahrain, introduced in 1973 after independence from Britain, and the Judicial Law did not come about by coincidence but were the result of national and popular demands made after independence. The people of Bahrain gave their vote of confidence to a system of Government led by an Amir in a referendum held and organised by a United Nations mission which asked the people of Bahrain whether they wished to be annexed to Iran or to become independent under an Amiri rule. The people of Bahrain opted for the latter by a unanimous vote. Then, the Amir ordered the formation of a Constituent Assembly to draw up the country’s Constitution. Two thirds of the members of this Assembly were elected by a free ballot and the Amir appointed one third of the members. This process took place in 1972.

Before the referendum and the building up of the Government and its institutions, there was a popular movement led for a long time by the High Executive Committee (“HEC”), whose key demand was the mounting of judicial reforms as documented in its statements. This movement was the outcome of a growing national awareness and a pan-Arab culture that clearly grew in Bahrain in the early 1950s as a movement opposed to the British domination of Bahrain at that time. This progressive nationalist movement was represented by the emergence of national cultural clubs that had a political and nationalist character. There was also the publication of a number of pan-

Arab and nationalist newspapers and magazines. These local clubs and newspapers carried to the outside world the message of Bahraini people regarding their suffering and ambitions.

This emerging movement brought about the formation of an organised structure in the shape of the HEC which was in opposition to the well-known British Advisor to the Government at that time, Charles Belgrave. The Organisation put forward its demands from the early 1950s in clear terms and these led to the legal and judicial reforms.

Although the Government backed by Belgrave ordered the dissolution of this Organisation, arrested its leaders and gave them prison sentences, the political leadership led by the Amir gradually adopted their demands as we will see reflected later in other events. This resulted in achieving the country's independence, the issuing of the Constitution and the setting up modern judicial institutions.

It should be noted that by the end of the 1950s, the position of the British Advisor became less important and subsequently Belgrave left the country. With his departure, the national aspirations and leadership were worked out and a transformation took place in terms of the development of legislation and the judicial system. The early beginnings of such changes were in the formation of the Administrative Council in 1956 for running public administrative affairs in the country to replace the Advisory Department led by the British Advisor at the time.

The powers of that Council were divided and given to several departments that formed the nucleus of the modern state's ministries. The green light was given at that time to the enactment of laws and legislation governing all walks of life.

V. While the British Advisor played a negative role in opposing the nationalist and pan-Arab movement calling for independence at that time, it is imperative to evaluate his positive role in building up the institutions of the newly born state, especially the organisations of the judicial system after his appointment by the "*Ruler*", which was the old title of the Amir between 1926 and independence. There was a contradiction in

Belgrave's role as an advisor to the Ruler of Bahrain stemming from the fact that he was British. This linked Bahrain to the British domination by liaising with the British authorities in the country represented by the British Political Agency. The latter was given responsibility by the British Government to maintain its domination of the island. This role will be further illustrated when I discuss in detail the relationship between the Advisor and Ruler on the one hand and the British authorities on the other hand with all the points of agreement and disagreement between them.

During the Advisor's era that began in the early 1920s and ended in the late 1950s, I will highlight the importance of the popular and nationalist movement in influencing events and subsequently legislation and the organisation of the State structure, especially the judicial institution.

Belgrave was employed as Advisor to the Ruler of Bahrain by a contract of employment signed between them. The person who interviewed him and selected Belgrave for this job was Major Clive Daly, the then British Political Agent.

His contract of employment did not contain specific job duties but he was responsible for carrying out the duties entrusted to him. He gained more power by becoming the officer involved in legislation, a regulating authority of the judiciary and in charge of public administration.

What I will be concerned with in this thesis is to discuss the Advisor's role in building up the judicial system by attempting to develop an independent Bahraini national judiciary that was separate from the mixed law courts which was organized at the time under the Bahrain Order in Council issued by the British Government. The nucleus of the national courts was the so-called Shaikh's Court that was set up by Shaikh Isa Bin Ali in 1922. The Judge of that Court was the Crown Prince at that time, Shaikh Hamad who was enthusiastic about reforms, especially about reforming the judicial system. At that time, Shaikh Hamad found Charles Belgrave a useful assistant and so he appointed him as a judge of that Court.

In 1927 the Advisor formed what was called Office of The Advisor of The Government of Bahrain. He started work in co-ordination with the British authorities on the island for the creation of a local judicial and legislative authority. As will later appear from the study of this period, the Advisor proceeded with dominating the religious judicial system by keeping it under the umbrella of the general system of the law courts. He started with the appointment of Sharia judges and allocated sites for the hearings of those judges, thus establishing the Sharia organized judiciary in addition to the national civil law courts constituted by the Shaikh's Court.

The Advisor faced, especially in the 1930s, a movement opposed to his reforms in the judicial and legislative fields constituted by three groups of people, namely: (i.) The Shia movement that had special demands for administrative reforms calling for the enactment of clearly defined legislation. This movement was of a social nature given that the Shia were a social group that had special characteristics at that time (as I will discuss in detail later in Chapter 5 of this thesis). (ii.) The Conservative religious movement which was opposed to the modernisation of the judiciary and the law in a manner that could deviate from the fundamental principles of Islamic Sharia. This movement was mixed, representing both the Shia and Sunni sects. (iii.) The Reformist national movement that was represented by groups of Bahraini intellectuals who introduced new methods of expressing their demands in the form of political leaflets that focused on the need to *“form a legislative assembly, to reform the police and to carry out reforms in the judicial system”*.

In 1937 the Advisor formed a committee chaired by Abdul Wahab Al Zayani who was a prominent figure in the reformist movement. This group was entrusted with proposing a *“judicial system”*

On 7th December, 1938 the Advisor issued the well-known Proclamation No.34/1357 with respect to Organisation of the Judiciary in which he divided the law courts into degrees of litigation as follows:

Bahrain Senior Court

Bahrain Junior Court

Bahrain Representative in the Joint Court

Majlis Al Tijarah
Chief of Court Clerks
Court of Appeal

The Advisor appointed judges of these courts and organized their panels. This Proclamation was followed by measures for development of the judicial system that were crowned by the Judicial Law of 1971.

VI. The Employment of the Advisor as mentioned earlier and the gradual creation and development of the judicial system in Bahrain came about as a result of conflicts between the British authorities (that dominated life in Bahrain) and the Ruler - especially during the reign of Shaikh Isa Bin Ali who always insisted upon independence of the Bahraini judiciary from the British authority and its remaining under his control.

The British laid down a special system for administration of justice in Bahrain under the well known legislation, "*The Bahrain Order in Council*" (BOIC) issued by Buckingham Palace on 12th August 1913.

The above legislation was introduced following many communications and discussions involving the various concerned parties, namely the Ruler of Bahrain, the British Government of India and other foreign governments that wanted to ensure protection of their citizens who lived in Bahrain and to guarantee their rights.

Britain was actually exercising judicial power when the need arose on the basis of a legislation that was issued in 1890 entitled "*The Foreign Jurisdiction Act*" by which Britain gave itself judicial powers over the countries under its control and in those countries where an organised system of government did not exist. In addition to this Law, Britain relied on Bahrain in the exercise of judicial power upon the terms of "*The Friendly Commission*" concluded between Britain and the Ruler of Bahrain, Shaikh Mohamed Bin Khalifa, that gave the power to the British Political Resident to exercise judicial power over the citizens and British dependent subjects.

Some of the incidents and attacks against Europeans, including the well-known attack against employees of the German trading firm of Wounkhaus involving a German man called Bahnson in the early twentieth century (the Wounkhaus incident took place on 29th September 1904) resulted in an exchange of communications and talks between the British and German Governments on the one hand and the British Government and the Ruler of Bahrain on the other hand. Eventually, Britain introduced a special law, the BOIC, governing the judiciary directly and providing guarantees to foreigners in explicit terms.

Accordingly, legislation was introduced regulating the practice of law in Bahrain and making the law courts mainly competent to deal with criminal matters as follows:

1. The principal court was the Chief Court which had jurisdiction to hear matters of crimes and also to hear appeals of judgements handed down by Majlis El-Urf, the District Court and the Joint Court.
2. District Court: It was concerned with offences and misdemeanours as well as civil cases where all the parties were foreigners. It was presided over by the Political Agent.
3. Joint Court: It consisted of a judge appointed by the Political Agent and a judge appointed by the Ruler of Bahrain. It had jurisdiction to hear civil and criminal law-suits where one of the parties to the case was a Bahraini and the other a foreigner.
4. Majlis Al-Urf: It was a civil court concerned with all matters of civil cases referred to it without delimitation and its members were appointed by mutual agreement between the Political Agent and the Ruler of Bahrain. The law courts used to refer cases to this Majlis.

5. Sharia Judge: He was appointed by the Ruler of Bahrain and was competent to hear all civil and commercial court cases involving Muslim parties. If one of the parties was a non-Bahraini Muslim, his trial would be attended by a representative of the Political Agent. The Order gave the power in such case to the Chief Court to issue judgment but it had to refer the issue to the Ruler for approval.
6. Salifah Court: It was concerned with examining disputes relating to the diving and pearl industry.

VII. It is noted that the BOIC strengthened the administration of justice upon foreigners by the British administration represented by the Political Agent and Political Resident. It also maintained the local traditional judicial authorities represented by the Sharia Judge, Majlis Al Urf and Salifah Court.

The introduction of this legislation did not resolve the dispute between Britain and the Ruler of Bahrain over the issue of jurisdiction. There was a continuous conflicts over determination of the persons who should be subject to the British judicial jurisdiction and who should be immune from such jurisdiction. However, in one way or another Britain compelled the Ruler of Bahrain to relinquish his authority over foreigners making him use a wording that could be liable to various interpretations. In his letter to the Political Agent dated 16th July 1909, he said *“if a case involves foreign nationals and Bahrainis, a communication should be made between ourselves and yourselves”*. The interpretation of Shaikh Isa Bin Ali of the word *“communication”* was totally different from the interpretation of the British authorities. Furthermore, Shaikh Isa Bin Ali deliberately sought to obtain the approval of the neighbouring Arab states to make their resident nationals in Bahrain subject to his jurisdiction in an attempt to broaden his authority over a larger number of residents in Bahrain. In his pursuit, Shaikh Isa was seeking to strike a balance between his determination to exercise his right to jurisdiction and his flexibility in dealing with the more powerful Great Britain in an intelligent and effective manner as will be seen from Chapters 2 and 4 of this thesis.

VIII. While Britain imposed its jurisdiction and exercised judicial power according to the BOIC and earlier legislations, it could not deny the existence of a system of justice and law courts in Bahrain prior to that established by Britain. Since the arrival of the Al Khalifas in 1771, Bahrain had an established judicial system representing a pragmatic mixture of pure judicial institutions and tribal judicial structure that took an advanced form of legal institutions such as the Majlis Al-Urf and Salifah Court.

Owing to the difficulty of studying the judicial system in the pre-BOIC period, I have tried to develop an understanding of the shape of that structure and its institutions through the available documents and reports about that era. The most important of these documents was the report written by Colonel Ross in 1882 about Bahrain's prominent figures, some of whom were involved in the judicial system.

The judicial institutions at that time may be summed up in the following:

1. Sunni Sharia Judiciary: It was represented by two judges of whom one had a seat in Manama and the other was based in Muharraq. Each was appointed and financed by the Ruler. A judge used to hand down his judgements according to the teachings of the Islamic Maliki sect. His judgements could be appealed against before the Ruler.
2. Shia Sharia Judiciary: It was presided over by more than one judge and it was available in various villages. The Ruler played a role in approving the judge's practice but he did not appoint nor finance them. A judge used to be financed by the so called "*Sharia rights*" which are financial commitments paid by Muslim Shias to the religious leader. The judge used to deliver his rulings according to the teachings of the Jaafari Shia Islamic sect without any opposition from the Ruler.
3. The Ruler: He used to personally resolve the issue of jurisdiction personally. When he used to receive a complaint, his job was to decide the competent judicial authority. Appeals against judgements handed down by the different judicial authorities used to be referred to him.

4. Princes: Their status was similar to that enjoyed by the Ruler. They used to be appointed by the Ruler over certain areas giving them judicial powers in respect of criminal and civil matters that were not related to trade nor pearl diving. Their judgements could be challenged before the Ruler.
5. Salifah Court: It was competent to hear disputes arising between the pearling masters or between them and their employees. The Ruler used to appoint members of that Court.
6. Majlis Al-Urf: It was also called Majlis Al Tijara and was competent to hear purely commercial matters that used to arise between the traders especially if one of the parties involved was a foreigner. The Ruler appointed members of this Majlis with a balanced membership of Bahrainis and foreigners.

All these issues will be discussed in detail in Chapter 2 of this thesis.

IX. Bahrain used to extend geographically into what is now Saudi Arabia, on a part of the Eastern coast of the Arabian Peninsula, and included settlements such as Al Ehsa and Qatif. The country was unstable in terms of administrative conditions and there was no clearly defined judicial system. In fact, there was no evidence of the existence of proper towns or urban developments. The Bahrain community was made up of a number of villages whose inhabitants earned their living from farming, fishing and other primitive occupations.

From the available publications and books depicting this era, which are the only source of this investigation, it is evident that the majority of the population were Arabs called "*Baharnas*" who embraced the Shia sect, as opposed to the Arabs who came from inside the Arabian Peninsula. The Persian domination of Bahrain during the Safavid's era helped achieve the stable influence of that majority in spite of the disharmony prevailing at the time (as will be discussed in detail in Chapter 1 of this thesis) between the Persian Shia government in Iran and the religious (ruling) authority in Bahrain at that time.

From a study of this era, we will deduce that the administration of justice was based upon pure religious Islamic Sharia principles including the Shia theory of government and judiciary. Such principles may be summed up as follows:

1. The only ruler and lawmaker is Allah “The Almighty God” who has sent his Prophet Mohamed to guide Muslims to the laws and rules required for life in this world and in heavens (i.e. way of life for the ruler and way of worship).
2. The man who is entitled to enforce the law is the Imam who must be descending from the prophet’s family on the side of his daughter Fatima. The twelfth Imam has been absent and is still absent for divine reasons but will appear at the end of time to make justice prevail.
3. The rule on the absent Imam’s behalf must be undertaken by competent jurists “*Faqih*” who can issue “*fatwas*” (opinions). A *Faqih* is someone who can undertake administrative matters and judicial issues. The basis of this theory has developed into the *Faqih*’s responsibility according to the books of Shia jurisprudence, where every worldly judgement is considered invalid. The sitting judges used to be Sharia judges with the most senior *Faqih* appointed to act as their leader to handle judicial and administrative matters.

By invoking this theory, there was a clear animosity between the Safavid State government and the persons acting as judges and administrators in Bahrain. The latter were often displeased with intervention in their affairs by the Persian ruler.

As part of this system, a judge had more than just judiciary authority as he had to deal with financial and administrative matters in addition to civil status issues and family matters.

These will be discussed in detail in Chapter 1 of this thesis.

The above is a brief account of the contents of this thesis. It should be noted that in my analytical study of the judicial system, I will also review the arbitration system in Chapter 10 as arbitration is an integral part of the judiciary and its structure. This is also due to the fact that arbitration gains an increasing significance in Bahrain especially in the field of trade and business since Bahrain is an important and vital financial, banking and trading centre.

Part I

The Origins of the Modern Judicial System

Chapter 1

BAHRAIN BEFORE THE AL KHALIFA

1. The Safavid and the Judiciary

In 1631 during the epoch of Shah Abbas I the Safavid, the Persians, with the assistance of the British forces, attacked the Portuguese in the Gulf and were able to occupy the Island of Hurmos.¹ The people of Bahrain, fearing the ensuing struggle between influential European powers to dominate the Gulf, sought protection of the Safavid Persian state. Thereupon Shah Abbas I sent an army to Bahrain and evacuated the Portuguese therefrom bringing Bahrain under the control of the Persian Safavid.² The Persian domination of Bahrain, represented by the Safavids and their successors, continued from the middle of the seventeenth century until they were ousted in 1783 by the Utub tribes under the leadership of Al Khalifa, the existing rulers of Bahrain, whereupon a new era started in the history of Bahrain.³

The Persian domination of Bahrain was interrupted at certain intervals when it was ruled by local and emigrant rulers, e.g. the reign of Sheikh Al Jabri from Hasa, (in 1112 Hijri, corresponding to 1701 A.D.) the domination of the Omanis, (1718-1751) and the reign of the Hawala (1751-1753).⁴ However the Persian domination was most predominant.

The Safavid state during the reign of Shah Tahmasb, the son of Shah Abbas I who invaded Bahrain, completely adopted the Shia religious creed and as a result it was embraced by the majority of the people of Bahrain.⁵ He particularly applied its principles on state affairs. Shah Tahmasb brought together a group of enlightened Shia jurists from various parts of the Islamic world. The most prominent of them was a jurist who came from Iraq, Ali Al Karki, but who was of Lebanese origin.⁶ Shah

¹ Belegrove, C.D. *The Pirate Cost*, p. 11; Farougy A. *The Bahrain Islands*, p. 64. (750-1951)

² Al Nabhani, *Al Tuhfa Al Nabhaniya*, p. 73.

³ Lorimer, Historical, IB, p. 839.

⁴ Ibid., p. 839.

⁵ Al Nabhani, Ibid p. 74

⁶ Al Jabiri, A.H. *Al Fikr Al Salafi Ind Al Shia Al Ithnaa Sharia*, p. 256.

Tahmasb entrusted Sheikh Ali Al Karki with governmental powers and conferred upon him such authority that it is quoted he said to him: “*You are more entitled to rule than me as you are the deputy Imam while I am the one who abides by your orders and prohibitions*”.¹

Shah Tahmasb made a similar offer to another Shia jurist Ibrahim Al-Qatifi. He was a friend of Ali Al Karki who had lived with him in Najaf in Iraq (c 1130 A.H./1720 A.D.). Ibrahim Al-Qatifi rejected the offer of the Safavid state and criticised Ali Al Karki for accepting the appointment by a temporal ruler. However, when Ali Al Karki moved to Persia, Ibrahim Al-Qatifi returned to Bahrain and resided there.² It appears that Ibrahim Al-Qatifi’s decision to finally live in Bahrain was based on the understanding that it would provide a retreat for him to spend time in intellectual thought and personal judgement as Bahrain was then full of Shia religious schools.³ Yet it is recorded that the Persians used to seek the opinion of the jurists of Bahrain in certain intricate matters.⁴

The fact that the Persian system had a Shia administration assisted the Shia jurists and enabled them to take control of the judiciary and its administration under the Safavid regime. The presence of distinguished jurists in Bahrain, such as Ibrahim Al-Qatifi, also had considerable impact on the Safavid state causing it to relinquish the internal governmental affairs in Bahrain to the Shia religious jurists there.

To understand the role of Shia jurists and judges in Bahrain and the powers they exercised during the Persian Safavid domination we must briefly set forth the Shia doctrine of government and administration of law.

¹ Al Bahrani Yousif, *Luluat Al Bahrain*, p. 153.

² Ibid, p. 160; Al Jabiri, Ibid., p. 256.

³ Al Bahrani, Ibid., p. 159; Al Biladi, A.H. *Anwar Al Badrain*, p. 282.

⁴ Al Fadhoi, A.H. *Nail Al Amani*, p. 24.

2. The Shia Doctrine of Government “*Al-Imamah*” and the Judiciary

The basis of this doctrine is that Rule is principally for God who legislates for human beings who should not legislate for themselves. God delegated Prophet Muhammad to administer justice among people in accordance with the rules of God. God has not only passed the laws and legislations but also appointed the persons who should implement them. God did not allow human beings to choose the person who would apply the laws but initially entrusted Muhammad with “*Prophethood*” and he served as the direct link between the legislator “*God*” and human beings who are the “*servants of God*”. God did not allow human beings to elect Muhammad’s successor after his death but himself elected a suitable person for the office; this being Ali Ibn Abu Talib who was entrusted with “*Al Imamah*”, i.e. the presidency of the Islamic state. Then God appointed eleven successor Imams after Ali, from Ali and his wife Fatima, the Prophet’s daughter. These Imams were infallible by means of their descent, so that they could carry out the affairs of the government. Everyone of those infallible Imams would govern people with ability and knowledge so as to ensure justice without any objective or material fault.¹

The Shia believe that the twelfth and last Imam appointed by God disappeared from sight but he still exists and will eventually return to resume the direct rule of God. In his prolonged absence someone must act in his place and should have basic qualifications to assume this important office, i.e. he must be conversant with religion and justice.² This means sovereign power over the community is for the religious jurist only.

The source of legislation under the above doctrine is the Quran and “*Sunna*” of the Prophet, i.e. his sayings and doings. The Quran is eternal and existent while the Sunna must be proved by quotation or narration from an infallible Imam. Individual judgement and consultations by a jurist are limited to the interpretation of the Quran

¹ Ibn Khuldun, *Muqadima*, p. 196; See also Al Khumaini, R.A. *Aqd al Bai*, p. 460.

² Al Khumaini, *Ibid*, p. 465.

and the Sunna and their application on issues of fact. No person shall make an individual judgement relating to legislation. In this connection the famous Bahraini jurist Hussain Al-Usfur (d. 1216 A.H. / 1796 A.D.) says: “*The perception of the details of individual judgement procedure is uncontrollable and frequently subject to contradiction due to disarray of the mind. Many outstanding jurists retract their consultations and therefore individual judgement should not be taken as a source of legislation*”.¹

Accordingly the Shia consider legislative rules as made directly by God and the role of the jurist is restricted to their interpretation and application while exercising his authority.²

In the opinion of the Shia the judge should be the equitable jurist who can interpret and apply the rule of the Quran and the prophetic Sunna narrated by the infallible Imams. In the case where the system of government is based upon the Shia doctrine, (i.e. sovereign power is in the hands of the jurist who is the most learned) the president of the state is the chief justice or the grand judge. All other judges are under his chairmanship and their proper selection is ensured.

If the system of government is temporal, which is the ordinary system of state, the conditions for holding the judicial office are very specific, as will be made clear by the following:

When the temporal ruler is himself equitable any jurist can hold the office as judge. If the ruler is unjust it is still possible to hold judicial office, provided that the judge is able to do justice in accordance with the concepts of the Islamic Sharia doctrine.

The jurist, Al Tusi (d. 460 A.H. / 1068 A.D.), whom the Shia call “*Sheikh Al Taiifa*”, (i.e. the chief of the sect) says in the acceptance of the judicial office by a judge:

¹ Al Usfur, H. *Al Mahasin Al Nafsaniya*, p. 33; See also Al Khumaini, p. 461.

² Khuri, F. *Tribe and State in Bahrain*, p. 68.

“Accepting the post under the rule of justice and authority which preaches good virtues and orders the prohibition of sin and vices and keeps things in order is permitted and appreciated and could be obligatory. In case the authority is unjust but there is a certainty or possibility that if the judge accepts appointment he will be able to determine the rules of God, order the prohibition of sins, resolve the payment ‘Khums’¹ and by doing so he would not be in default of his duties nor would he be committing anything rendering him worthy of blame, it is thus appreciated that the Qadi, i.e. the judge, accepts such appointment by the authority. However, if the Qadi knows, or he is in doubt that he can perform his duties, or if his duties are prejudiced, or if he fears that he may commit something immoral by accepting such an appointment, he is thereby not allowed to accept such appointment even though his refusal would harm him or cause him to suffer damages. However, if such refusal threatens his life, his family, or property of his own, or of some Muslims, he shall thus be permitted to accept such office in the judiciary and shall make all endeavours to put things in order.”²

The above is a brief summary of the Shia doctrine of sovereign and judicial powers. On an understanding of the Shia philosophy of the Safavid state, the standard of knowledge and the remarkable standing of the jurists of Bahrain, we can formulate an image of the relationship between the Persian Safavid state and the jurists in Bahrain.

3. The Relationship Between the Safavid Rulers and the Jurists in Bahrain and its Effect on the Judiciary

The biographers of jurists who lived during this period show that the Shia judges had great authority and independence in Bahrain which was not merely restricted to the judiciary but also extended to cover executive power. In his book *Luluat Al Bahrain*, which contains the biographies of contemporary and earlier jurists, Yousuf Al Bahrani (d. 1186A.H. / 1772 A.D.) describes instances of the power and independence exercised by the judges who held office in Bahrain during the Safavid rule. In the biography of Saleh Abdul Karim Al-Karzakani, who was entrusted with the judiciary during the reign of Shah Sulaiman, Yousuf Al Bahrani says that Al-Karzakani refused to wear a robe sent to him by the Shah, and adds:

¹ Khums: One fifth of the annual savings of a person which according to Shia sect must be paid to the Bait al Mal (Public Treasury).

² Al Tusi M Bah, *Al Nihaiyya*, p. 356.

“This jurist was very virtuous and devout and was very strict in enforcing the rules laid down by God. When he took over the authority, he ordered the prohibition of sin and preached moral principles, spreading his teachings all over the country, and received a very good response from the local population for his virtuous behaviour and efforts to disseminate knowledge and promote education”.¹

He says about the jurist Ali Bin Salman (d. 1064 A.H. / 1654 A.D.):

“He was a judge in Bahrain and took over responsibility for ‘Hasbiya’ (i.e. administrative) matters and indeed he performed his duties perfectly. He was always there to stop the tyranny of rulers and corrupt officers in those days and in general he rendered justice amongst human beings”.²

He also says about the jurist Hashim Al Allama (d. 1109 A.H. / 1697 A.D.):

“He took over the position of a judge succeeding Muhammad Bin Majid. He undertook the judicial duties in the country and was particularly efficient in handling ‘Hasbiya’ matters and in checking the oppression of tyrannical rulers. He promoted the principles of virtue and ordered the prohibition of sins from being committed. He did not have any regard for anyone blaming him for his conduct. He was indeed a very devout person but very strict and harsh towards rulers and Sultans”.³

It may be deduced from these biographies that the Bahraini judges had absolute power in the administration of judicial affairs and the enforcement of the rules. They did not only deal with judicial matters but also with the affairs of ‘Hasbiya’. ‘Hasbiya’ was an administrative and judicial religious position mainly based on the concept of the command of right doing and the interdiction of sin. The person who performed the duties of Hasbiya was called “*Al Muhtasib*” and was appointed by the Khalifa or the ruler. His competence covers the preservation of public order and ethics, to oblige the people to abide by and respect the laws and to punish the perpetrators thereof. His authorities in this sphere were quite extensive and embraced the introduction and

¹ Al Bahrani, Y., Ibid. p. 68.

² Al Bahrani, Y., Ibid. p. 14; Al Biladi, Ibid p. 119.

³ Al Bahrani, Ibid p. 63; Al Biladi, Ibid pp. 126, 236.

propagation of rightful doing, alarming, preaching, censuring, warning and finally penalizing by whipping and imprisonment.¹

The Shia judges derived their influence mainly from a religious spiritual obedience by people. According to the Shia juristic doctrine every legally capable individual “*mukalaf*” (i.e. he who has attained puberty and is free from the exemptions of legal liability) should imitate in his daily activity, whether religious or secular, a learned jurist and should follow his opinions and theories. Such imitation is not optional but compulsory and every act done by a legally capable individual which does not rely on the opinion of an imitated jurist “*muqallad*” is null and void.²

A Shia jurist, in order to be worthy of the imitation by the public, should have a high level of knowledge to qualify him as a legist jurist “*mujtahid*”. In his book “*Aayan Al Shia*”, Muhsin Al-Amin states the conditions for the status of the jurist. He should be learned in the Quran, that is

“He must know the general and the specific, the absolute and the conditional, the authentic and the obscure, the compendious and the detailed, the abrogating and abrogated Quranic verses relating to rules.

He must be learned in the Sunna, that is

“He should know narrators, matters of consensus and difference of opinion, rational proof, conflicting evidence and preponderance. He must be acquainted with the Arabic language, its grammar and morphology. He should have such faculty to enable him to derive branches from sources and it is not enough for him to learn by heart.”³

To prove his juristic capability the jurist would write a thesis in jurisprudence covering his ideas in religious matters “*Al-Ibadat*”, in secular matters “*Al-Muamalat*”, and in penalties “*Hudud*”. Some of these theses which were written by Bahraini jurists are still in common use and the most famous surviving are three theses, viz. “*Al Hadiq Al*

¹ Ghirbal, M.S. *Al Mawsu a Al Arabiyya Al Musawara*, p. 717; See also Ibn Khuldun, *Muqadamat Ibn khuldun* p. 225.

² Al Amin, Muhsin, *Aayan Al Shia* , Vol. 1, p. 110.

³ *Ibid.*, p. 111.

Nadhira fi Ahkam Al Utra Al Tahira” by the jurist Yousuf Al Bahrani (d. 1186 A.H. / 1771 A.D.), “*Sadad Al ibad*” by the jurist Hussain al Usfur (d. 1216 A.H. / 1801 A.D.) and “*Mutamad Al Sail*” by Abdullah Al Sitri (d. 1281 A.H. / 1864 A.D.).

Each one of these theses consists of three main parts: firstly, a part for “*Al-ibadat*” wherein the jurist expresses his opinion on how to worship God by prayer, fasting, alms, pilgrimage and the course of action to be followed to ensure acceptance by God; secondly, a part for “*Al-Muamalat*” wherein the jurist gives his opinion on civil and commercial transactions, the principles of contracts, commercial companies, agencies, guarantees, weights and measurements and so on; and thirdly, a part which usually deals with crimes, their elements and proof, punishments and the conditions and means of their infliction, stay or execution, exemption therefrom and all other related matters called by the jurists “*Al Hudud*”.¹

Under the religious conception outlined above the rule of the Shia jurists prevailed in Bahrain for a certain period of time. Although the beginning of that religious rule cannot be precisely defined, its gradual decline can be followed until its subjection to positive law by the Al-Khalifa, the existing ruling family, when they took power.

4. Factors of Independence of the Shia Jurist in Bahrain

The independence of the Shia jurists in managing the internal affairs of the judicial and administrative divisions of the state had been encouraged by a number of factors, the most important four of which are the following:

1. The nature of the religious structure of the Persian state since the Safavid reign and its respect to the jurists of Bahrain.

¹ The Shia in Bahrain still rely on the remaining books of their jurists, particularly the books of the above mentioned three jurists. However, a new generation of young scholars has started to follow jurists other than the ancient Bahraini jurists, particularly the Persian jurists who became more influential after the Iranian revolution in 1979.

The presence of Sheikh Ali Al Karki in the position of Deputy Imam in Persia and the presence of his friend, and equal jurist, Sheikh Ibrahim Al Qatifi, among the jurists of Bahrain since the beginning of the Safavid rule greatly affected the policy of the Persian Safavid state towards Bahrain from the beginning of its domination in Bahrain. It was natural that the Persian rulers were keen to refrain from any intervention in the affairs of the ruling jurists in Bahrain, either because they trusted them or wanted to avoid any conflict with them.

2. The relatively tolerant attitude of Shah Abbas I the Safavid.

When Shah Abbas I took over power Bahrain was joined to the Persian Safavid state. At that time the propagandistic war by the Ottoman state against the Safavid state was at its climax. The Safavids were accused of ideological fanaticism and the oppression of other ideologies and religions. This made Shah Abbas I act in a relatively tolerant manner towards other religions to ward off the accusation. It was more natural for him to act in such a tolerant manner with the jurists of Bahrain who were the people closest to him in ideology and thought.¹

3. The intellectual standing of the Bahrain jurists in the opinion of the Shias.

Bahrain was considered an intellectual centre by the Shia in Persia. Biographical writings indicate that the Persian jurists used to seek the opinion of Bahraini jurists in certain religious matters. As an example we refer to the episode when some Persian jurists resorted to the Bahraini jurist Sheikh Hassan Al-Damistani. It is cited in some biographies that certain queries on matters were submitted by the jurists of Isfahan (the capital of the Safavids) to the ruler, who sent his men to seek the opinion of Bahraini jurists, among whom was Sheikh Hassan Al-Damistani.²

¹ Al-Jabri, *Ibid.*, p. 301.

² Al Biladi, A.H. *Anwar Al Badrain*, p. 219; Al Fadhuli, A.H. *Nail Amani*, p. 24.

4. The lack of resources and wealth inside Bahrain which might tempt the Persian authorities to interfere in the internal affairs of Bahrain.

Until the discovery of oil in the 1930s there was no local wealth in Bahrain except modest agriculture.¹ Pearl beds were located in territorial waters outside the island and neither Persia nor any other state was interested in the internal domination of Bahrain in order to exploit the pearl beds or to control the water passages.

The above conclusions are consistent with the opinion held by historians that successive Persian states did little to affect the social structure and the cultural identity of the Southern Gulf territories. These successive Persian states “*did not dominate the Arab territories which were quite independent. The Persian authorities were content with headquarters on the coast guarded by Persian military garrisons.*”²

After the defeat of the Safavid state by the Afghanis in 1720, it was under the control of Afghan rulers until 1725 when Russia attacked it and occupied parts of the Ottoman Empire and other parts of the state. The Ottoman Empire and Russia entered into an agreement in 1726 whereby they divided some parts of Persia among them but that agreement was not enforced. In 1730 Nadir Shah brought an end to the Afghan domination and appointed himself as Shah in 1736. He was assassinated in 1747 and succeeded by Ádel Shah who was overthrown by his brother Ibrahim Khan in 1748. Thereafter came Shah Rukh and then Karim Khan Zand who ruled until 1798 to be succeeded by the Al-Qajars led by Agha Muhammad Khan who was crowned in 1796 and assassinated in the following year. In this manner Persia experienced continuous internal struggle during the period which followed the downfall of the Safavid state.³

¹ See old report about Bahrain e.g. Lorimer, *Gazetteer Geographical*, Vol. I, p. 272; Al Wathiqah, Vol. 7, 4 July (1985), p. 36; Report on Bahrain dated in 1824.

² Omar, Farooq, *Arabian Gulf in the Islamic Period*, p. 336.

³ Wilson Sir Arnold T. *The Persian Gulf*, p. 171.

It was natural that the internal struggles tearing up Persia weakened its control over its Gulf territories, including Bahrain, which was then exposed to domination by different regimes. The Sultan of Oman, Sultan Bin Said, occupied Bahrain in 1717 and after that it was governed by local rulers such as Sheikh Al-Jabri.¹ The reign of the Hawala State from 1751 to 1753 was when the Persians resumed power. In 1782, Al-Utub, who were led by the Al-Khalifa, were able to dominate Bahrain and expelled the Persian ruler, Nasr Bin Madkur, whereupon a new era began in the history of Bahrain.²

References to identify the nature of the judicial power in Bahrain during this period are scant. There seems to be little or no evidence relating to the changing nature of judicial power. In this connection Lorimer says:

*“There is no information regarding the internal affairs of Bahrain during the Persian occupation re-established in 1753”*³. Nevertheless, it will be noted in the next chapters on the history of the administration of justice how the Shia jurists continued to control the judiciary.

¹ Al Nabhani, *Al Tuhfa Al Nabhaniya*, p. 74.

² Al Rumaihi, M.G. *Ibid* p. 11.

³ Lorimer, *Gazetter, Historical, IB*, p. 387.

Chapter 2

FROM THE ARRIVAL OF THE AL KHALIFA UNTIL THE BEGINNING OF THE TWENTIETH CENTURY

1. The Conquest of Al Khalifa

In 1782 the Al-Utub tribes, led by the Al Khalifa, the existing rulers of Bahrain, launched an attack on Bahrain from the Arabian Peninsula, namely, from the Al-Zubarah region where they used to live. In this attack the Al Khalifa and their allies were able to defeat Nasr Bin Madkur who was the ruler appointed by the Persian state. Consequently they expelled the Persians and created the early nucleus of the present Bahrain State.¹

The arrival of the Al Khalifa in Bahrain coincided with the newly emerging interest in the Gulf shown by Britain. At the time Britain was satisfied merely with the presence of its fleets in Gulf waters in order to protect its interests and shipping in this strategic waterway. In fact, from the 17th century, the British had had vital interests in the entire region, not only in Gulf waters. When the East Indian Company of Britain established factories in Bandar Abbas, Basra and Bushire, full control over the lands became essential. The presence of the Dutch and the French in the region had caused Britain to become more concerned with the Gulf.² When France occupied Egypt in 1798 it was inevitable for Britain to enhance political and strategic presence in the Gulf. I.B. Kelly says about this period “*at this juncture the purely commercial interest in the Gulf was replaced by new political and strategic considerations.*”³

¹ Al Nabhani, *Al Tuhfa Al Nabhaniya*, p. 87; Al Rumaihi, M.G. Bahrain a study on Social & Political Changes, p. 3; Lorimer, *Gazetter Historical*, BI, p. 839; Thomas, R.H. *Arabian Gulf Intelligence*, Bombay Government Records. Series No. XXIV-1856.

² Wilson, Sir Arnold, T. *The Persian Gulf*, p. 11; Farah, T. *The Protection & Politics in Bahrain*, p. 15; Lorimer, *Gazetter Historical*, IB, p. 838.

³ Kelly, J.B. *Eastern Arabian Frontiers*, pp. 16, 57.

In 1798, the British forced the Ruler of Muscat, Said Sultan Bin Ahmed, to sign the first treaty with them in the area, and this was followed soon after by the conclusion of the 1801 Agreement with the Persian Shah.¹ Thus Britain established a direct political presence for itself in the Gulf region.

In fact, Britain had shown a great deal of interest in Bahrain since the start of its presence in the area and such concern can be seen in the letter written by Mr. Thomas Aldworth, who was a senior employee of the East India Company of Britain, when he informed the company in 1513:

“I have made diligent enquiries concerning the state of Persia and with conference of man ye that come thence, I fynd there is a sea port towne called Bareyn (Bahrain) where unto a shippe of 2 or 3 hundred tonnes may come. I understand this country spend much cloth, for the Venetians bringe it over land and carry with them again all sorts of Persian silke, which trade is, as it where, offered us, and surely I thinke in short time will be able to vent as much cloth as Surrat”²

We also find Britain’s concern with Bahrain is reiterated in the correspondence of senior officials of the said company during the 18th century. Mr. Owen, who was the agent of the company in Persia (1700-1701), wrote to the company suggesting that it should have a presence in Bahrain in order to preserve its concessions, to enhance the marketing of the Persian products and to expand its commercial activities.³

The emerging British trend in the Gulf to establish a political and a strategic presence together with Britain’s commercial activities, embraced Bahrain from the beginning. Britain’s excuse for its intervention in the affairs of the Gulf principalities was on the pretext that it was resisting piracy and slave trade.

¹ Belgrave, C. *The Pirate Coast*, p. 21.

² E/3/1/ Original Correspondence, pp. 198-199; Thomas Aldworth to Company 9 November 1613; See Tuson, P. *The Records of British Residency* p. XIII.

³ Lorimer, *Gazetter, Historical, IB*, p. 838.

The exchanged correspondence between the Shaikhs (the Chiefs) of the Al Khalifa in Bahrain and the British authorities from the end of the 18th century to the beginning of the 19th century, together with the ensuing events, disclose a successive progress in the scope of British intervention in the affairs of Bahrain. Such intervention reached its climax during the period from 1816 to 1820 when the British authorities warned the Al Khalifa that they would take the same measures against them as they had taken against Al-Qawasim. Britain had attacked the Al Qawasim's fleet in 1819, completely destroying it.¹ In a report written by Lieutenant Bruce in 1817 he stated that Bahrain had become a principal market for the sale of plundered goods by pirates. In 1818 the Shaikh of Bahrain, Shaikh Abdulla, was accused by the British of offering the Egyptians, who were stationed in Al-Ahsa, facilities for the passage of their military forces. The British authorities also received a report in 1819 showing that seventeen Indian women were brought from Ras Al-Khaimah and sold as slaves in Bahrain. This incident caused the naval captain, Captain Lock, of the British ship Eden, to sail to Bahrain and redeem the seventeen Indian women by way of exchange of prisoners with Shaikh Abdulla, the Shaikh of Bahrain.²

2. The Early Treaties and the Rule of Justice

By the end of 1820 Britain forced both Shaikh Salman Bin Ahmed and Shaikh Abdullah Bin Ahmed, the Shaikhs of Bahrain, to sign a preliminary treaty whereby the sale of plundered goods by pirates was banned, the supply of goods to pirates was prohibited and all Indian prisoners were to be surrendered. This treaty was signed on behalf of the two Shaikhs by their agent in Sharjah, Al Sayed Abdul Jahil, on 5th February 1820. On the 23rd February 1820, the Shaikhs of Bahrain were forced to sign the General Treaty of peace for non-aggression between the Shaikhs (Chiefs) of the principalities in the Gulf.³

¹ Ibid., p. 846.

² Ibid., p. 846.

³ Aitchison No. VIII, p. 233; See also Lorimer, *Ibid.*, p. 848; and Thomas, *Arabian Gulf International Services*, XXIV, p. 373.

Britain kept watch over the conduct of the Shaikhs of Bahrain and directed their policies in writing, particularly their relations with the external powers in the region.¹ In 1839, when the leader of the Egyptian forces in the Arabian Peninsula expressed his intention to attack Bahrain on the allegation that it was part of Najd, Britain challenged the allegation. When Persia renewed its claims over Bahrain in 1847 Britain rejected the Persian claim to sovereignty over Bahrain. In 1856 Shaikh Muhammad Bin Khalifa, Shaikh of Bahrain, signed an agreement with Britain whereby he undertook to seize and deliver to British vessels of war slaves brought to his territories from any quarter whatsoever and to put an embargo on any vessel belonging to him or his subjects which might be ascertained to have carried slaves.²

In 1861 Britain forced Shaikh Muhammad Bin Khalifa, the Shaikh of Bahrain, to sign a “*Friendly Commission*” whereby he undertook to honour all his previous agreements with Britain.³ The “*Friendly Commission*” gave Britain the right to settle maritime disputes affecting Britain or anyone of its subjects. The British Political Resident was responsible for keeping security in the Gulf and had judicial competence to settle these disputes.

The “*Friendly Commission*” prohibited the Shaikh of Bahrain and his followers from inflicting any punishment or ordering compensation for offences or violations which might be committed. It was obligatory to inform the Political Resident of these incidents so that he could act in the manner he deemed appropriate. The “*Friendly Commission*” made the Shaikh of Bahrain responsible for any violations or contraventions committed by his subjects and he was obliged to treat British subjects in a special manner “*and in respect of the treatment and consideration of the subjects and dependants of the most favourable people*”.⁴ This agreement also provided that duty imposed on British subjects and dependants should not exceed 5%.

¹ I.O.R. R 15/2/29 Correspondence on Bahrain 1826-68.

² Aitchison No. IX, pp. 236, 191.

³ Al Rumaihi, M.G. Ibid., p. 18.

⁴ Aitchison, No. X, p. 234; Kelly, *Britain and the Gulf*, (Arabic-Omani Government’s translation), p. 219.

The above mentioned agreement represents the beginning of the British intervention in the internal affairs of Bahrain and the beginning of the British concern about judicial matters and its intention to intervene therein. The Shaikh was deprived of his judicial competence over British subjects and dependants in criminal, civil or commercial actions and competence was vested in the British Political Resident.

Britain directly observed the conduct of the Shaikhs of Bahrain and British officials in the Gulf regularly wrote to the Shaikhs to ensure that they were honouring their obligations towards the British government and, if necessary, they warned them regarding any violations or behaviour unacceptable to the British authorities.¹

The external policies of Shaikh Mohammad Bin Khalifa and his relations with the powers in the region were unstable. His individualistic attitude towards the administration of government affairs sometimes led him to enter into alliance with the Persians and at other times to negotiate with the Ottomans. On certain occasions he hoisted on his vessels the flag of another state.² This attitude caused the British to be more concerned with the internal affairs of Bahrain and they became so suspicious of his conduct that they considered him a “*flighty and capricious person*”.³ In 1867 a dispute arose between Shaikh Muhammad Bin Khalifa and certain tribes in Qatar whereupon Shaikh Muhammad attacked them without consulting the British. The British regarded this act as a breach of the 1861 “*Friendly Commission*” and considered that the continuance of Shaikh Muhammad in power would be a source of trouble and therefore decided to remove him, by force if necessary. Accordingly a British sea force led by Colonel Lewis Pelly, the Political Resident in Bushire, embarked for Bahrain and asked Shaikh Muhammad Bin Al Khalifa to surrender power. When Shaikh Muhammad refused, the British force attacked him in the Arad fortress where he was taking refuge but escaped.

¹ I.O.R. R 15/2/29 Letters to Shaikh Isa Bin Ali from the Political Agent dated 12/3/1975 instructing and directing Shaikh Isa Bin Ali on foreign policy particularly in connection with the mainland, i.e. Kingdom of Saudi Arabia.

² Aitchison, p. 192.

³ See Secret Department Report to Lieutenant Colonel A.B. Kembell C.B. R/15/2/29 p. 6; and Report No. 127/1866 from Political Resident to the Secretary to Government of Bombay dated 18th December 1866, p. 16.

The Political Resident then declared the appointment of Shaikh Ali Bin Khalifa, the brother of the deposed ruler, as a ruler of Bahrain.¹ The escape of Shaikh Muhammad Bin Khalifa from Bahrain was not a final one as he was making plans in Al Qatif, on the mainland, to attack Bahrain and resume his authority. He did in fact launch a sweeping attack in September 1866 and killed his brother Shaikh Ali. However, he did not continue to rule for a long time as some of his followers moved against him and put him in prison, whereupon his cousin, Muhammad Bin Abdulla, assumed power. The conflict between the supporters of Muhammad Bin Khalifa and those of Muhammad Bin Abdulla persisted until the British authorities decided to intervene directly to settle the situation in November of the same year, when Colonel Pelly, the Political Resident, again led a sea force to Bahrain and brought an end to the battles between the two conflicting parties. Both Muhammad Bin Khalifa and Muhammad Bin Abdulla were exiled to India and Isa Bin Ali, the son of Ali Bin Khalifa, who was the ruler appointed by the British in 1868, assumed power.²

During the epoch of Isa Bin Ali a new period of British intervention in the internal affairs of Bahrain began, particularly with respect to judicial affairs, which will be considered in the next chapter.

Although the events described in this chapter have no direct relationship to the position of the judiciary, such a political account is necessary to identify the British role in Bahrain which started well before the beginning of the twentieth century. It is regrettable that sources about the judicial situation during this period are almost non-existent. All the writings are concerned with political history, namely, the relationship between Bahrain and the great powers of that time, of which Britain is the most important. It is therefore inevitable to analyse the circumstances which affected the judicial structure and to consider the various situations of the judicial set-up during that stage of Bahrain's history.

¹ Al Rumaihi, M.G. *Bahrain a Study on Social and Political Changes*, pp. 11-18.

² Lorimer, *Gazetter, Historical, IB*, p. 898; Zayani Amal, *Al Bahrain Bayn Al Istiqlal Al Sayasi wa Al Intiqal Al Dawli*, p. 87.

3. The Main Factors Which Influenced the Judicial Situation in This Period

The few available sources concerning this period permit to deduce that the main factors which affected the judicial situation are the following:

1. Supremacy of Tribal Institutions

The arrival of the al Utub tribes in Bahrain changed the demographic structure of the islands of Bahrain. It was natural that migrants from the Arabian Peninsula, headed by the Al-Utub tribes together with their allies, servants and slaves, would move to Bahrain and reside therein.¹ These tribes brought with them their economical styles of life, social habits, customs and most importantly, the system of the tribal chief. This chief enjoyed absolute sovereign powers over the tribe. According to this system the tribal chief controlled the tribes' affairs and settled disputes between individuals.

He derived such power from his parental authority over the tribe as he was considered the father of the tribe and the most influential person in managing its affairs.² It was logical that the chief of the Al Khalifa tribe was the chief of all the tribes as he was the leader of the Al-Utub alliance and consequently the senior Shaikh of tribes in Bahrain. These tribes were the influential ones and the chief of the Al Khalifa being their leader was called "*Al-Shoyoukh*". Amongst circles of tribal origins the term Al-Shoyoukh also meant the Head of the State of Bahrain.³

The Shoyoukh of Bahrain, whom the British called at the beginning "*Chief of Bahrain*", exercised his administrative and judicial powers at a private court in his house "*Majlis*", which was convened automatically on a daily basis. The "*Majlis*"

¹ Ibid., Geographical Vo. II, p. 237; Kelly, Britain & The Gulf, Arabic Edition, p. 51. Palgrave, W.G. *Narrative of A Year's Journey Through Central and Eastern Arabia*, p. 211; Khourif, *Tribe & State in Bahrain*, p. 13; Miles, S.B. *The Countries and Tribes of Persian Gulf*, p. 421.

² Hay, Sir Robert, *The Persian Gulf States*, p. 29.

³ Khouri F., Ibid., p. 36; See also IOR R/15/1/130 From P.R. Chief Secretary to Government of Bombay 20th January 1852 and other correspondence in the same file.

used to be attended by all tribal chiefs to deliberate all important matters. The resolutions and orders passed by this “*Majlis*” were considered as binding laws to be communicated through the tribal chiefs to all individuals of the tribes who were obliged to act thereupon.¹

In addition to Al Shoyoukh other tribal institutions which were basically of tribal origins also emerged and were subsequently developed into institutions of vocational character, e.g. “*Al Majlis Al Urfi*” and “*Salifah Court*”. The Amirs, from the Al Khalifa family, and their assistants also exercised judicial powers by delegation from the ruler and within the framework of the tribal institution.²

2. The Demographic Change

The rule of the Al Khalifa and British intervention coincided with foreign migration to Bahrain. Beside the tribes that came from the Arabian Peninsula other migrants came from the Persian coast and from India. The Bahraini community became consequently a mixture of peoples from Persia, India, Iraq and other regions.³ These migrations changed the demographic structure of the islands of Bahrain and the inhabitants were no longer homogenous villagers and farmers who had one religious belief and one language. There emerged a population of different origins, beliefs, languages, customs and even uniforms.⁴ This demographic change caused a change in the geographical set-up of the islands. Towns such as Manama, which were inhabited by merchants and tradesmen started to grow and the features of civilised society began to appear by the end of the eighteenth century, both in Manama and in Muharraq and also in the villages on the islands where the original residents of Bahrain dwelt.⁵

¹ Ibid., p. 36; See also Ryhani Amin, *Around the Coast of Arabia*, p. 265; Zwemmer, *Arabia the Cradle of Islam*, p. 108; and Proceedings of the Royal Geographical Society, Vol. XII, 1890, p. 5.

² See I.O.R. R/15/186 Lieutenant Colonel E.L. Ross, Report, 1882.

³ Zwemmer, - *Arabia – The Cradle of Islam*. p. 109.

⁴ Palgrave, W.G. *Ibid.*, p. 211.

⁵ *Ibid.*, p. 211; See also Lorimer, *Ibid.*, p. 212.

The distinction between the demographic groups and the emergence of civilised society led to plurality in judicial competence. Each group had its own “*Qadi*” to whom it referred its disputes. Thus, while the Shia adhered to the competence of their judge, on the basis of the doctrine of the Deputy Imam previously referred to, the Sunnis established their own judicature and, therefore, each group submitted to the competence of its judge.¹

3. The presence of foreign interests

The British subjects and dependants, particularly Indian merchants who migrated to Bahrain, had direct interests which Britain had to protect. Britain was, in fact, not satisfied with a general political protection but acted in such a manner so as to secure judicial protection as well as in order to preserve the rights of its subjects and dependants inside Bahrain. Accordingly Britain incorporated in the 1861 agreement (*the Friendly Commission*) with the Shaikh of Bahrain, Muhammad Bin Khalifa, some provisions which empowered the Political Resident to adjudicate on disputes and violations in which a British subject or dependant was a party. These provisions prevented the Chief and his assistants from issuing judgements in such disputes and violations.²

4. Formation of the Independent Bahraini State

It can be deduced from the exchanged correspondence and the agreements between the British authorities and the Shaikhs of Bahrain that although the British authorities recognised Bahrain as a politically independent sovereign system, they were keen to impose their domination on that system, represented by the Shaikhs, by means of unequal agreements.

¹ Zwemmer, *Ibid.*, p. 108; I.O.R. R/15/186 Lieutenant Colonel E.L. Ross, Report, 1882.

² Aitchison, No. X, p. 234; See also p. 26.

4. The Judicial Institutions in this Period

The above four factors clearly affected the organisation and reorganisation of the judicial structure. There is a sparsity of contemporary source material dealing with the judiciary in this period. However, a vitally important document is the report written by Lieutenant Colonel E.L. Ross in 1882 about certain dignitaries in Bahrain, filed in the Indian Office Library & Records as document No. 10R/15/186. He identified five Bahraini institutions as having a judicial nature and exercising a judicial competence during that period. A later report of 1907 identified a sixth institution.

1. The Sharia Sunni Judicature. The said report dealt with two judicial personalities from the Sunni judges: Shaikh Abdul Rahman Bin Shaikh Abdul Latif and Shaikh Qasim Al Mihzaa. The report stated that Shaikh Abdul Rahman Bin Shaikh Abdul Latif was born in Ahsa in 1253 A.H. (c. 1837 A.D.). He fled from Al Ahsa to Bahrain where he was appointed by its rulers as a judge in the town of Muharraq to administer justice according to the Islamic Maliki school of thought. As regards Shaikh Qasim Al Mihzaa, the report mentioned that he was born in Manama town in 1266 A.H. (c. 1849 A.D.) and that he was responsible for the judicial council in Manama and used to pass his judgement according to the Islamic Maliki school of thought. It is understood from the report that the rulers appointed the Sunni judges and that there was a judge for the Muharraq area and another for the Manama area.

The report pointed out that Shaikh Qasim Al Mihzaa adjudicated minor cases personally and his judgements were final. However, in major cases his judgements were subject to the approval of Ruler which means that judgements passed by the Sunni judges were appealable before the Ruler who was the highest political, judicial and administrative authority.

2. The Sharia Shia Judicature. The report also dealt with two judicial personalities from the Shia judges: Shaikh Muhammad Ali Bin Shaikh Abdulla and Shaikh Ahmed Bin Shaikh Salman. The report stated that Shaikh Muhammad Ali Bin Shaikh Abdulla was born in Jid Ali in 1242 A.H. (c. 1826 A.D.) and that he was devout, dignified and patient and adjudicated in matters of the Shia. Regarding Shaikh Ahmed Bin Shaikh Salman the report stated that he was born in 1257 A.H. (c. 1841 A.D.) and was appointed by the rulers as judge for the Shia to adjudicate between them according to the Shia sect.

Although the report stated that Shaikh Ahmed Bin Salman was appointed by the rulers it referred to the financing of these two Shia judges as being made through gifts and donations given to them by Shia citizens only. The report did not refer to any means for appealing judgements passed by these two judges.

In connection with conflict of jurisdiction between Sunni and Shia citizens the report pointed out in the section dealing with Shaikh Ahmed Bin Shaikh Salman that if a Sunni and a Shia were in dispute a Sunni judge would resolve such a dispute, whereas if both the plaintiff and defendant were Shia, Shaikh Ahmed would try the case. From this text it can be inferred that whenever one of the parties in a dispute was a Sunni then the Sunni judge would be competent to look into the dispute.

3. The Ruler. It is noted that the said report was written during the reign of Shaikh Isa Bin Ali who was imposed by the British in 1868 as the sole ruler of Bahrain thereby bringing the dual system of power to an end. From this time the ruler started to be called the "*The Ruler of Bahrain*", instead of the title "*Chief of Bahrain*" which had previously been attached to him by the British.¹ This title applied to both Shaikh Isa during the start of his rule and to successor Shaikhs of Bahrain until independence in 1971.

¹ Proceedings of the Royal Geographical Society, Vo. XII, 1890, p. 5.

The report described the powers exercised and duties performed by Shaikh Isa Bin Ali as follows “*The administration of justice by him was based in certain instances on the Sharia and in other instances on Salifat Al-Goas*”.¹ In the section dealing with Shaikh Qasim Al Mihzaa the report said: “*He adjudicated minor cases without confirmation by the Ruler of Bahrain and decided major cases by order from the confirmation of the Ruler.*”

It can be concluded from the above that the litigants could submit their disputes and conflicts directly to the Ruler who consequently referred them to the competent Sharia judge or Salifat Al-Goas, whichever he deemed to be the proper judicial authority, and he entertained appeals against judgements issued by the Shia judge.

4. Amirs. The report dealt with a personality called Saad Bin Amer who was born in Bahrain in 1250 A.H. (c. 1834 A.D.) and mentioned that “*his adjudication in minor cases was final without confirmation by Shaikh Isa, the Ruler of Bahrain, and in major cases by confirmation from him*”. The report added that Saad Bin Amer charged fees for suits filed by plaintiffs at the rate of 10% of the value of the claim. This rate might be reduced if the dispute was settled through conciliation. It is evident from this report that Saad Bin Amer exercised extensive judicial powers.

The report spoke about a number of Amirs appointed by the Ruler in the different regions and villages of Bahrain.

It stated that some of them exercised judicial powers when it used the expression “*his judgements were commonly observed*”. This is the expression used to describe the judgements issued by Shaikh Ahmed Bin Ali, the brother of the Ruler and his representative in Manama town, when it stated: “*his judgements were commonly observed in the two islands and the village*”.

¹ “*Salifat Al-Goas*” may also mean the rules governing pearl diving.

This is also the same expression used to describe judgements passed by Shaikh Khalid Bin Ali, another brother of the Ruler and his representative in Sitra Island, Nabeih Saleh and the village of Jabalat Habshi. It is noticeable that the report designated these two Amirs with such expression to the exclusion of other Amirs considered in the report which evidenced that those two Amirs were vested with authorities of a judicial nature.

5. Salifat Al-Goas. This body, dealt with in a later chapter of this thesis, was an institution responsible for resolving disputes between pearl divers and their employers. Reference was briefly made to it in the aforesaid report but its role became more distinctive at a subsequent stage in the history of Bahrain's judiciary as shall be seen later. Despite the fact that the said report dealt with specific persons it is the only document which casts light on the judicial situation during the last quarter of the nineteenth century. The wording of the report gives the impression that the situation had been stable for the period of time that had elapsed since then.

6. Al Majlis Al Urfi (the Trade Council) This was an institution organised by the Ruler and consisted of outstanding merchants of different nationalities in Bahrain. Its competence covered the resolution of disputes where one of the parties was a foreigner. There is no mention of this council in the report of Lieutenant Colonel E.L. Ross but in a report submitted to the Political Resident, it is stated that it had become common practice, for forty five years or more from the date of the report, to organise the said council and to refer to it disputes where one of the parties was a non-Bahraini.

In 1907, when the report was written, the council consisted of six members, two Bahrainis, one of whom was Sunni and the other was Shia, two members from the Arabs of Najd and the remaining two members were British Indians.¹ The important role played by this council was apparent at a subsequent stage of the judicial organisation in Bahrain.

¹ I.O.R. R/15/2/6/ p. 3.

The above is the information available about the judicial system during this period. However, assumptions about the nature of the administration of justice at that time should not be made. Zwemmer, the head of the American Mission put an opposite view when he said “*the administration of justice is none, and that corruption, blackmail and bribery were universal and with the exception of the regulation of commerce and the prohibition of slave trade Britain did not make any reforms.*”¹

¹ Zwemmer, *Ibid.*, p. 108.

Chapter 3

EARLY TWENTIETH CENTURY TO THE REFORMS IN THE TWENTIES

1. The Development of British Interference in the Administration of Justice

The “*Friendly Commission*” which was earlier referred to, and which concluded in 1861, laid down the first formal basis for the exercise by the British Political Resident of judicial powers over British subjects and dependants.

On 4th August 1890 the British Government passed the famous consolidating legislation, cited as the Foreign Jurisdiction Act, whereby Britain laid down the conditions for exercising jurisdiction over the territories subject to its control. Section 2 of this Act states as follows:

“It is and shall be lawful for Her Majesty the Queen to hold, exercise and enjoy any jurisdiction which her Majesty has or may at any time hereafter have within a foreign country in the same and in as ample a manner as if Her Majesty had acquired that jurisdiction by the cessation or conquest of territory.”

Furthermore, the Act confers upon the British Crown by Section 3, the power to enjoy and obtain jurisdiction over British subjects in any country where there is no regular government. This Section states as follows:

“Where a foreign country is not subject to any government from whom Her Majesty the Queen might obtain jurisdiction in the manner recited by this Act, Her Majesty shall by virtue of this Act have jurisdiction over Her Majesty’s subjects for the time being resident in or resorting to that country, and that jurisdiction shall be jurisdiction of Her Majesty in a foreign country within the meaning of the other provisions of this Act.”

Section 3 of the Act considers that the acts and things done and taking place in accordance with this legislation are valid as though they are carried out in accordance with local laws in force in Britain.

It was presumed that this jurisdiction was exclusively enjoyed over British subjects in accordance with the understanding of the concepts of British jurisprudence at that time and according to the practices of British authorities in the Gulf area.¹ Although there were no court cases relating to foreigners in Bahrain, it may be gathered from the acts of the British Political Agent and Political Resident in Bahrain that they exercised judicial powers and the exercise of such jurisdiction was applicable to non-British subjects.

Two examples taken from the India Office files exemplify how this jurisdiction was exercised in practice.

Example 1

In 1897 a local trader fled from a prison belonging to the Chief (The Shaikh) of Bahrain. This trader, who was a Bahraini citizen called Sayyed Khalaf, was bankrupt. At that time he sought shelter at the residence of the British Acting Political Agent, who was then Muhammad Khalil. The Shaikh's Prison Warden, a man called Sharida, learnt about the escape of the prisoner Sayyed Khalaf and of his seeking shelter at the residence of the Acting Political Agent. So the Prison Warden entered the residence of the Acting Political Agent with the help of one of his assistants and arrested Khalaf by force, in spite of the protests of the Acting Political Agent. The Political Resident came to learn about what Sharida had done, and although the former had admitted that he did not "*have jurisdiction over Sayyed Khalaf for being a Bahraini national*", he inflicted a penalty against Sharida and his assistant via the payment of a fine of Rs. 500

¹ Hull, W.E., *A Treaties On the Foreign Power and Jurisdiction of the British Crown*, p. 222; See also Foreign Department to Secretary of State, No. 188 dated 14 November 1907, I.O.R. 15/2/6, p. 47.

which was paid by them and deposited in the Treasury of the British Government of India through the Office of the Political Resident in Bushire.¹

Example 2

In another incident some Bahraini persons raided the store of an Anglo-Persian firm called Fracis, Times & Co. and attempted to steal. They also attacked the security guards. Afterwards the perpetrators were discovered but as mentioned by Lorimer the Shaikh “*showed great reluctance to deal properly with the case*”. The British authorities intervened, brought direct pressure to bear, and passed a verdict against the offenders to pay a fine of Rs. 1,000, of which Rs. 400 was paid to the company and Rs. 50 was paid to the security guard who was wounded while defending the store. The balance was transferred to the Government Treasury.²

From these two incidents it can be seen that the Political Resident and the British authorities used to exercise absolute judicial powers which were not restricted solely to foreigners but at times extended to Bahraini subjects as well.

On the occasion of discussing the Bahrain Order in Council, Major A. P. Trevor wrote in 1915 to the Political Agent in Bahrain saying: “*Successive Political Agents have for ten years past been exercising magisterial and judicial functions.*”³

It seems that Major Trevor meant the beginning of the Political Agent’s exercise of the judicial powers, but it was established that the Political Resident in the Gulf used to actually exercise such authority a long time before that in pursuance of the powers granted to him under the Foreign Jurisdiction Act of 1890 and pursuant to the 1861 Agreement.

¹ Lorimer, Gazetteer I Hist, Part IB, p. 923.

² Ibid., p. 923.

³ I.O.R. 15/1/299, Major, A.P., Trevor to P.A. Bahrain 5/5/1915.

Nevertheless, the British interest in judicial affairs with respect to non-British subjects was scarcely noticeable until 1904 when an incident took place prompting Britain to directly interfere in judicial affairs.

On 29th September 1904 some men described as the followers of “*Ali*” (who was a relative of the Ruler) attempted to remove a local employee of a German merchant, Mr. Wounkhaus, in order to impose upon him a forced labour. They broke into the building where the German's business was located and assaulted a European employee called Mr. Bahnson and also some local staff members in the firm. On 14th November of the same year Ali's men were further accused of attacks against Persians working in the service of Abdul Nabi, the Chief Persian Merchant in Bahrain.

This incident caused a great deal of civil strife between the Persians and the followers of Ali which angered the Shah's Government in Persia. So the Shah asked the British authorities to protect the Persian citizens in Bahrain. Meanwhile, the European employee, Mr. Bahnson, filed a complaint with the German Consul in Bushire. The latter wrote a letter to Shaikh Isa Bin Ali, Ruler of Bahrain, asking for justice to be done to the complainant. In turn, Shaikh Isa referred this complaint to the British authorities.

On 30th November, Major Cox, the British Political Resident in the Gulf arrived in Manama, the capital of Bahrain, and immediately started to hear the case. On 14th December he passed a judgement against the defendants to pay a compensation in the sum of Rs. 1,000. Four leaders of the civil strife were sentenced to flogging in public and exile from Bahrain.

Later, after Shaikh Isa Bin Ali questioned the British authorities' jurisdiction to deal with the defendants as regards the complaint filed by the Persians, Major Cox returned to Bahrain on instructions from the British Government on 23rd February 1905 accompanied by a naval force. Measures were taken for the trial of six persons described as the leaders of the civil strife in addition to the four people who had been

previously put on trial in the case of the German company's employee. Judgements were passed for the payment of compensation amounting to Rs. 2,000 to be paid to the Persians through the British Political Agent. A verdict was also passed sending Ali into exile outside Bahrain for a period of five years and for the final expulsion from Bahrain of the ten defendants who were Ali's supporters. Furthermore, Major Cox issued in his judgement an order prohibiting the subjection of all foreigners residing in Bahrain to forced labour.¹

This was not however the last of the problems.

In January 1906 a Persian who was residing in Bahrain committed an offence² on board a British ship while it was docked in the Bahrain Port. This incident was of concern to the British authorities and was a subject of discussion between the Political Resident in the Gulf and the British Government of India. The British Government of India considered that the offender should be sentenced to two years of imprisonment, but the Secretary of State drew attention to the practical difficulty in enforcing such sentence, as this would inevitably raise the issue of jurisdiction by the Persian Government.³

It is understood from the correspondence between the Political Resident in the Gulf and his Government that the question of the attack against Mr. Bahnsen, the resident employee of Wounkhaus, did not end concern after the punishing the defendants accused of committing the assault. The incident drove the German authorities to pay attention to the conditions of their nationals in Bahrain, not only from the security point of view but also in terms of protecting their financial and business interests. Dr. Listeman, the German Consul in Bushire, followed up the matter with the Political Resident and discussed it with him in detail.

¹ Lorimer, pp. 938, 941; Farah, T.T., *Protection and Politics in Bahrain*, pp. 131, 145; Al Rumaihi, M.G., *Bahrain Social and Political Changes Since the First World War*, p. 225.

² The nature of the offence is not made clear in the report.

³ Bidwell, R., *The Affairs of Arabia 1905-1906*, Part VII, p. 4J; Farah, T.T., p. 171.

In his report referred to the Government of India on 25th February 1906, Major Cox said that Dr. Listeman personally discussed with him the status of the German subjects, should they be subject to any attack. The British authorities told Dr. Listeman not to have direct recourse to the Ruler of Bahrain, but that the victim should refer his case to the British authorities on the understanding that the Ruler's foreign affairs were in the hands of the British under the agreement between them. Major Cox promised Dr. Listeman that his compatriots would enjoy the same treatment previously given to Mr. Bahnsen when he was attacked. As for the civil, financial or commercial cases, Cox advised Dr. Listeman to refer them to "*Al Majlis Al Urfi*" which he described as a "*prominent committee of responsible native merchants appointed for the settlement of commercial disputes, which is a feature of the administration of justice in Bahrain*". However, Dr. Listeman expressed his reservation about this "*Majlis*" considering that the interests of Europeans might be prejudiced by referring the matter in dispute to a purely native tribunal.¹

However the question of litigation was not the only matter of concern to the British authorities in Bahrain. There was also the problem of attesting instruments and documents. The question was directly and urgently raised by the American Mission which was occasionally faced with such situations as marriages between its members. Members of the American Mission belonged to various foreign nationalities such as American, British and Australian. Marriages and births were required to be attested by an official authority recognised by the countries to which their subjects belonged in order that they would become valid and effective in these countries. For this reason, Captain Prideaux, the Political Agent in Bahrain, wrote to Major Cox, the Political Resident, a letter dated 6th April 1907 describing these conditions and the need for a public and judicial authority:

"I am strongly of the opinion that the Political Agent should now be legally authorised to register births and deaths, to perform marriages, to record affidavits as a Consul does, to note protests, issue bills of health and also do

¹ Major Cox to Government of India, 25 February 1906, I.O.R.R, 15/6, p. 29.

various other acts performed in British territory by harbour-masters and port officers and in foreign countries by consuls."¹

In this letter, Prideaux also pointed out the problem of attesting powers of attorney. The matter had been raised by a German, "Mr. Eishut", concerning his application for legalising a power of attorney. Captain Prideaux described the limitation of the legalisation of power granted to him over the documents made by British and non-British subjects. The non-legalisation of a power of attorney given by the above-mentioned German subject could drive Dr. Listeman to insist that Mr. Eishut should travel to Bushire to get his document attested, with all the practical difficulties involved in making the journey.

In his aforementioned letter Prideaux also raised a practical problem that existed in connection with penal trials. In this regard he said: "*At present, as I am not J. P., a British European subject might commit a murder here and no court whatever exists which could legally deal with his case.*"

Concluding, Prideaux urged the British government to grant to the Political Agent in Bahrain the powers of a District Magistrate and to establish the Session Court and the High Court before which the verdicts passed by the Political Agent could be appealed. He also urged the provision of a prison site to which convicted persons could be sent. For civil cases, he proposed that the Political Agent should refer the parties to litigation to the "*Majlis of Bahrain*" or to any tribunal agreed upon by the parties concerned.

Prideaux suggested in his letter that the procedures he had proposed were in accordance with the provisions of "*The Persian Coasts and Islands Order In Council*" and that the Government should enact these procedures by a New Notification; he did not propose the issue of independent legislation.

¹ Prideaux (P.A.) to Major Cox (P.R.) D.O. No. 163, 6/4/1907.

Prideaux's letter resulted in significant discussions between the Government of India, His Majesty's Secretary of State for India in London, and the Political Resident in the Gulf over the form whereby the setting up and creation of the judicial and legislation authorities should take place, and which powers were to be enjoyed by the Political Agent in Bahrain. From the very beginning, the British Government held the view that these powers should not be based upon "*The Persian Coasts and Islands Order in Council*". It maintained from the beginning that new legislation should be enacted regulating the judicial authority in Bahrain. This view was expressed by His Majesty's Secretary of State for India in a letter to the Government of India dated 14th November 1907 saying: "*We would accordingly request that if His Majesty's Government sees no objection, the necessary Order in Council may be passed providing for the exercise of jurisdiction in Bahrain*".¹

Specific problems relating to the issue of justice and to the question of jurisdiction arose at the time while these general discussions took place. They too were the subject of correspondence and discussions between the Political Agent and the Political Resident in Bushire and Bahrain's Ruler and its judges. The archive correspondence relating to the story of "*Nora*" indicates the sensitivity and the importance of family cases of a religious nature, although it is the only case of its kind that could be found in the records.

"*Nora*", was a Bahraini divorcee who was between 22 to 25 years old. She had lived with another person as a mistress for two years and when she was thrown out of the house by her lover, she sought refuge at the Political Agency on 27th November 1906. The Political Agent persuaded a Mr. Chudrasi, who was one of his employees, to provide her with shelter at his house, pending the settlement of her case.

When her father learnt what happened, he approached the Political Agent protesting against this action and asked to be given his daughter. The Political Agent tried to reconcile Nora with her father, but she refused to go to him out of fear and so she was

¹ Government of India to Secretary of State No. 188, dated 14 November 1907, I.O.R. R 15/2/6, p. 47.

not given to her father. An uproar ensued and the furious father presented a petition to the Ruler which was signed by a number of tribal leaders and prominent figures. This action by the Political Agent also angered the Senior Judge (Qadi) Jasim Al Mihzaa who met Prideaux to voice his protest and asked him to turn the woman over to him, as a Judge, in order to enforce on her the provisions of Sharia. The petition delivered to Shaikh Isa Bin Ali, the Ruler, was discussed with the Political Agent but it seemed that no action was taken. During that time, the woman was taken to the American Mission Hospital from which it seems she later escaped and disappeared.

The important thing in this case was that the Political Agent wrote a report to the Political Resident in Bushire about his handling of this case, with particular emphasis on the position of the Senior Judge Jassim Al Mihzaa. It is to be noted that the Political Resident did not object to the handling of the matter by the Political Agent, although he made some remarks to him and gave him some guidance as to similar cases that could arise in the future by saying the following:

“If a similar case should occur in future, I think the safest and most reasonable course from all points of view, would be for you to get one of the Arab notables who are members of the Joint Majlis to take care of the woman until you can communicate with Shaikh Isa and arrive at an understanding with him as to the best means of dealing with the particular circumstances of the case”¹

Ever since the incident of the attack against the employee of the German Company Wounkhaus, the Political Residence in Bushire, (influenced by the reports of the Political Agent in Bahrain), tended to interfere directly in Bahraini domestic affairs, especially in judicial matters. In his correspondence, the Political Resident, Major Cox, emphatically sought to persuade the British Government to intervene directly for the protection of foreigners. He drew the attention of the Government in a letter dated 4th June 1905 to a speech delivered by the British Prime Minister in which he declared that Bahrain was a British protectorate. He indicated on several occasions the Government’s reaffirmation of this line of policy. In this letter, he said there were many injustices in Bahrain and such injustices might be attributed to the British

¹ P.A. to P.R. No. 542 dated 15/12/1906; No. 547 dated 16/12/1906, F.O. 371/348; No. 262 dated 31/1/1907, pp. 509-512.

Government. He described some forms of practices as requiring reforms. He summed them up in the misconduct of some tribesmen and not dealing firmly with offenders. He also talked about what he described as the unfairness of judges in inheritance cases and the existence of a forced labour system without payment of wages. At the end of his letter, he proposed to the Government the following:

“The Chief should be told that hitherto the Government abstains from interfering in or noticing matters which concern only the chief and his subjects but they cannot permit the protection which they give him to be used as shelter from which he may tyrannise over and ill-treat his subjects as thereby an undesired stigma is liable to become attached to the British Government’s name.”¹

2. The Emergence of the Bahrain Order in Council

These proposals and the supporting suggestions made by the Political Agent in his letter dated 6th April 1906 addressed to the Political Resident constituted the motive for launching an earnest review of the situation in Bahrain by the British authorities in London. The views and proposals won the approval of the Government of India, as the Secretary of State suggested in his letter dated 14th November 1907, the introduction of special legislation for organising the jurisdiction in Bahrain under the title of a Bahrain Order in Council. Such views and proposals were also approved by the Foreign Office, but it held the opinion that such legislation should not be introduced nor should any decision be generally taken concerning jurisdiction in Bahrain until after the formation of a committee for reviewing the British policy in the entire Gulf region. The Indian Office agreed with the view of the Foreign Office with regard to the formation of “*The Committee of Imperial Defence*”. The Committee was formed under the chairmanship of John Morley and with the membership of representatives of the Secretary of State, Admiralty, War Office, Board of Trade and Indian Office. It embarked on its duties in March 1908. Its function were defined as follows:

¹ Cox to Foreign Office No. 204 dated 4/6/1905, I.O.R. R 15/2/93, pp. 5-8.

*“To consider the effect that the completion of the Baghdad Railway may have on the situation - strategic, political and commercial - in Southern Persia and the Persian Gulf, and the measures that it may be necessary to take in advance for the maintenance of British interests in those regions either immediately or after the railway had reached Baghdad”.*¹

The issue of jurisdiction in Bahrain was the topic of many of the discussions by the Committee on the basis of a memorandum presented by the Foreign Office. This document was influenced by the proposals of the Political Agent and the Government of India concerning the need to introduce a “*Bahrain Order in Council*”. However, some Committee members expressed numerous reservations with regard to the enactment of such legislation by the British Government considering the political opposition which such action would cause from the other influential nations, especially Germany, the Ottoman Empire and Persia. The prevailing trend in the discussions favoured an attempt to secure the approval of Shaikh Isa, Ruler of Bahrain, to the relinquishment of his power as to jurisdiction in favour of the Political Agent. This would render legitimate the British intervention in the issue of jurisdiction and would avoid political problems. It would recognise that in spite of the Committee members’ belief that Bahrain was virtually a British protectorate, the circumstances did not allow the formal declaring of it as a protectorate and advising these nations of this kind of action at that time.

Thus, after detailed discussions the Committee reached a consensus that an authority should be obtained from Shaikh Isa giving up his responsibility for exercising jurisdiction over foreigners² in favour of the Political Agent.

On 15th June 1909 the Government of India sent a letter to the Political Resident, Major Cox, referring to the letter that he had earlier sent on 5th January 1908 and to the issue of the granting of jurisdiction over British and foreign subjects in Bahrain to the Political Agent. He was instructed to do the following:

¹ Farah, TT., Ibid p. 177.

² See the Committee’s discussions, Ibid., pp. 178-183; See also L.O.R. R 15/216, Indian Office to Government of India 21 May 1909.

*“I am requested that as directed by the Secretary of State the Political Agent may be instructed to approach the Shaikh with the object to obtain from him the necessary consent to issue the Order in Council and a request that the British Government will relieve him of the responsibility of exercising jurisdiction over foreigners”.*¹

In light of this instruction, Major Cox sent a letter dated 30th June 1909 to the Political Agent in Bahrain to which was attached the above letter from the Government of India asking him to meet Shaikh Isa as soon as possible and to obtain from him a relinquishment of exercising jurisdiction over foreigners. Such relinquishment should be in the form of a letter addressed to the Political Agent in which Shaikh Isa explains to him that the matters of foreigners cause some “worry” to him and he would be grateful to the British Government if they accept to “relieve him from the responsibility of exercising jurisdiction over foreigners in his island.”²

Shaikh Isa had no choice, and so he agreed to the format given to him by the Political Agent renouncing his judicial powers to the foreigners, and so he issued this required renunciation in a letter format dated 16th July 1909, addressed to the Political Agent Captain McKenzie. In this letter, Shaikh Isa complied with the format required by the PA and so he first referred to the difficulties resulting from the backlog of cases in his “kingdom” which it is translated by the Political Agency to “My territory” particularly those in which foreigners were parties. He described these cases as causing him “much confusion”, and for this reason, he did not want to be responsible in these cases.³ Shaikh Isa concluded his letter pleading and entreating the British Government “to relieve him of this responsibility and burden” and to be competent in resolving cases related to foreigners, in other words making the judicial competence in the cases where all parties thereto are foreigners to the British authorities. But if these cases had both foreigners and Bahrainis, as Shaikh Isa said in his letter, “it is necessary to settle them jointly.”⁴

¹ The Deputy Secretary to Government of India to Major Cox, Political Resident in Bushire, Dated 15 June 1909, I.O.R. R 15/216, p. 46.

² Political Resident Bushire to Political Agent in Bahrain dated 30 June 1909, I.O.R. R 15/216, p. 46.

³ I.O.R. R 15/2/6, pp. 63 & 64, Isa Bin Ali Al Khalifa to Captain C.E. McKenzie, Political Agent in Bahrain, 16 July 1909.

⁴ I.O.R. R 15/2/7, pp. 23 & 84.

A special attention must be given to the phrase “*it is necessary to settle them jointly*” which was translated by the British authorities as follows: “*It is necessary that you and I should settle them jointly.*” This translation is an interpretation that gave the British Government unlimited powers in interfering in the court competence for “*non-Bahrainis*”. However, this interpretation was subject to a long standing dispute between Shaikh Isa and the British authorities at a later stage.

Thus judicial jurisdiction over non-Bahrainis was in the hand of the British authorities in a form which is similar to delegation by the ruler of Bahrain and not in the form of obligation by the British authorities in their capacity as a state dominating and imposing it by force on local authorities. This action aimed at helping Britain to avoid being embarrassed towards the then other dominant powers in the regions, particularly the Ottomans and Germans.

At that time, the draft of “*The Bahrain Order in Council*” was still under study in accordance with the draft presented by the Government of India in November 1909. Nevertheless, the agreement of Shaikh Isa to relinquish jurisdiction slowed down the process of enacting the proposed legislation. The matter was a subject of discussion between the British authorities in London, the Government of India and the Political Resident in the Gulf on the one hand, and Shaikh Isa on the other hand. The difference between Shaikh Isa and the British authorities centred mainly on the status of the petty Arab potentates whom Shaikh Isa insisted were not foreigners covered by the relinquishment granted by him to the British government on 16th November 1909. It seems that Shaikh Isa deliberately used the word “*my subjects*” instead of the word “*Bahrainis*” in his sentence “*the cases in which foreigners and my subjects are involved should be subject to consultation between us*”. On the one hand, he did not abandon his jurisdiction over all his subjects nor did he define who his subjects were. It will be noted later that by the term “*subjects*” he did not mean “*Bahrainis only*”. On the other hand, he did not define the nature of jurisdiction in which his subjects and foreigners were involved, but he left the matter to “*consultation*” between him and the British authorities. This unclear expression left the British authorities puzzled as

reflected in the letter of the Political Agent to the Political Resident dated 17th July 1909 when he said: *“I am afraid the last sentence is not quite what I had hoped.”*¹

The British authorities were not on their part sincere in restricting their jurisdiction to foreigners but looked forward to reaching formulae for exercising jurisdiction over Bahraini citizens. This intention was candidly expressed by Captain C.F. Mackenzie in his letter dated 12th February 1910 to Major A. P. Trevor when he expressed his comments on and suggestions about the BOIC: *“In Article 15.2 I am diffident about this suggestion but it appears to me it should enable us to prevent jurisdiction over Bahraini subjects going out of our hands”*.²

For his part, Shaikh Isa insisted that his interpretation of the word *“subjects”* was not limited to Bahraini citizens only but also included subjects of the neighbouring Arab states. He repeated this insistence in 1919 when he insisted that the British authorities’ jurisdiction included only British subjects and other European subjects.³

The British authorities had to think of a way out of this predicament which could cause more disputes by drawing the attention of countries hostile to Britain to the truth of the matter. Therefore, the Political Resident, Lieutenant Colonel Sir P. Cox, proposed to the British Government that the provision of the clause relating to the Political Agent’s jurisdiction over foreigners should be as follows: *“Foreigners with respect to whom the Shaikh of Bahrain has agreed with His Majesty for, or consented to the exercise of jurisdiction by His Majesty”*.⁴

This proposal was found acceptable to the persons in charge of drafting the legislation. The definition of foreigners covered by this jurisdiction was drafted according to this proposal.⁵

¹ I.O.R. R 15/2/6, p. 65, Political Agency D.O.M.C.3.

² I.O.R. R 15/1/296, p. 105, Political Agency to Political Resident dated 12 February 1910.

³ I.O.R. R 15/2/7, p. 23 from Isa Bin Ali to Political Agent dated 10 February 1919 and p. 84, from Isa Bin Ali to Political Agent, 4 March 1919.

⁴ I.O.R. R 15/2/6 p. 118, Cox to foreign simla, No. 192, dated 28 June 1912.

⁵ I.O.R. R 5/1/296, pp. 125-127.

3. Promulgation of the Bahrain Order in Council

On 12th August 1913 the Court of Buckingham Palace issued the Bahrain Order in Council (“BOIC”) and it was published in the London Gazette on 15th August 1913.¹ However, this publication was hardly diplomatic in the prevailing international political condition, especially as regards the talks with Turkey, who had strategic interests in the region. Therefore, such publication was criticised by the regional British authorities which were operating in the Gulf area. They described the publication as a “*misapprehension*” considering that they were better aware of the regional conditions and what such a publication could bring about in terms of international political challenges that might prompt Turkey, in particular, to raise problems connected with Bahrain’s relations with Britain.²

The international political situation was not the sole reason for wanting to delay the enforcement of the Bahrain Order in Council, for there were also internal conditions in Bahrain which prevented its immediate enforcement in practice. The most significant of these conditions was Shaikh Isa’s opposition to grant the Political Agent an absolute authority in exercising jurisdiction over non-Bahrainis. Not being satisfied with mere opposition, Shaikh Isa sought the assistance of the neighbouring Arab rulers to support his position. He succeeded in obtaining an authority from King Abdul Aziz Bin Saud granting Shaikh Isa jurisdiction over subjects of the Najd and Al-Ihsa. The Bahrain ruler delivered this authority to Trevor, the Political Agent, who referred it to Cox, the Political Resident in a letter dated 9th September 1913.³ Shaikh Isa’s insistence on maintaining his jurisdictional powers was not only politically motivated but also had financial motives, particularly as regards the Court fees commonly called “*Khidma*”. The fees were estimated at about 10% of the amount involved in each case. The fees were considered by Shaikh Isa to be one of his rights while the British felt that they belonged to the judicial organisation. Therefore, once the law courts were set up

¹ I.O.R. R 15/2/7, p. 14, See also Penelope Tuson, *The Records of the British Residency and Agencies in the Persian Gulf*, p. 113.

² I.O.R. R 15/2/93, p. 18.

³ I.O.R. R 15/2/6, D.O.N.O.C., dated 18th July 1919 from Political Agent to Political Resident & I.O.R. R 15/2/7 p. 23 from Isa to P.A. dated 10 February 1919.

according to the Bahrain Order in Council, the fees would no longer be payable to the Shaikh.¹

In the course of drafting the new legislation, the British authorities did not fail to take into consideration the religious and tribal judicial institutions that existed at that time and described in the previous chapter. In the legislation it was imperative to accept the position of these institutions but also to restrict them through the control of the Political Agent.

On 27th January 1919 the Foreign and Political Department in the Government of India sent a notification signed by the Secretary of State, Denys Bray, advising that the Governor General in Council had fixed 3rd February 1919 as the effective date of commencement of the BOIC. To reflect the urgency of the matter, this notification was sent by telegram.²

The Political Agent hastened to carry out the order given to him and for this purpose he met with Shaikh Isa on 1st February and wrote a letter to his Government about the meeting. In spite of the Political Agent's explanation about the need for establishing a judicial system on the island, as was the case in other parts of the Gulf, Shaikh Isa abstained from commenting on the Political Agent's statements during the meeting.

He asked the Political Agent to put what he had said during the meeting in writing and that he would reply to these matters after receiving the details.

It was evident from the report that the reservations of Shaikh Isa focused on two matters, the limits of jurisdiction in terms of nationalities which should be subject to the Shaikh's jurisdiction and the question of "*Khidma*", i.e. the court fees. In spite of the Political Agent's attempts to secure the Shaikh's approval on what was said, the

¹ I.O.R. R 15/2/7, pp. 29 and 30, P.A. report dated 1st and 2nd February 1919.
² I.O.R. R 15/2/7, p. 60, Notification No. 241-G, G.O.I. to P.R. dated 27/1/1919.

Shaikh insisted on his refusal to comment and insisted that everything that was said should be noted down in writing.¹

Consequently, the Political Agent agreed to write down the points explained during the meeting on condition that he should receive the reply by the 3rd February, i.e. within two days. Shaikh Isa promised to do so. As the Political Agent presented his written document on the same day, the 1st February, Shaikh Isa replied to it on the 3rd February, acknowledging the receipt of the letter without expressing a positive or a negative opinion about it.²

At the same time, the Political Agent did not neglect the religious judiciary, especially that of the Sunni sect represented by Shaikh Qasim Al Mihzaa. He met him on 2nd February and the purpose of the meeting, as alleged by him, was to be guided by Shaikh Qasim according to certain Quranic rules. The objection voiced by Shaikh Qasim Al Mihzaa, as claimed by the Political Agent, was restricted to the charging of fees as he told him that according to Islamic religion the poor should not pay for justice. Concluding his report about the meeting with Shaikh Qasim, the Political Agent said: "*A two hour talk brought the old man round*".³

When the Political Agent was waiting for Shaikh Isa's reply, there was a rumour that Shaikh Isa had been granted jurisdiction over all nationalities except for British nationals. The Political Agent interpreted this rumour as "*a balloon dosage*" made by the Shaikh's House to force the Political Agent to confirm or deny the report. This rumour and the meaningless reply by Shaikh Isa seemed to have angered the Political Agent, who proceeded to the Court and invited all those at the Political Agency to read out for them, in both Arabic and English, the notification about the operation of the BOIC, without awaiting Shaikh Isa's further comments on his letter. In his report about these events, the Political Agent said he met in the evening with Mr. Yusuf Kanoo, a leading Bahraini businessman, who promised his full support and said he

¹ I.O.R. 15/2/9, p. 60, notification No. 241 – G, G.O.I.TOPR dated 27 January 1919.

² I.O.R. R 15/2/7, p. 31, P.R. Report dated 3 February 1919.

³ I.O.R. R 15/2/7, p. 30, dated 3 February 1919.

“throws his weight on our side and has been of the very greatest assistance”. Thus the BOIC became effective by the Order of the British authorities as from the third day of February 1919.¹

4. The Judicial Bodies under BOIC

In its preamble the BOIC stated that it was promulgated in pursuance of the treaties, concessions, capitulations, usages or sufferance or other legal methods granting to the King (of Great Britain) jurisdiction in Bahrain. In particular, it referred to the powers granted to the King under the Foreign Jurisdiction Act of 1890, which as already mentioned gave the King jurisdiction over British subjects in the countries which granted such authority to the King, as well as the countries where there was no formal government.

In addition, the BOIC in Section Five referred to the 1861 agreement and it authorised reliance upon it with respect to the application of the provisions of the legislation. Thus, the source of such legislation justified its legitimacy whether by considering Bahrain as a country with an organised system of government or without such a system. Presuming it had an organised government, the approval of Shaikh Isa to waive his aforesaid jurisdiction in addition to the provision of the 1861 Agreement constituted for Britain the legal basis for enacting such legislation. This was the British view as understood from the preamble to the BOIC.

1. The BOIC’s Scope of Application

In terms of territorial jurisdiction, the BOIC defined such scope as follows:

“The Islands and islets of Bahrain, including the territorial waters thereof and all other territories, islands and islets which may be included in the principality and be the possession of the ruling Shaikh of Bahrain together with their territorial waters.”

¹ I.O.R. R 15/2/7, pp. 30-33, Political Resident Report.

Article 30 exempted the crime of piracy from the scope of such application and provided that persons subject to the BOIC were to be tried in accordance with its provisions should they commit the crime of piracy wherever the crime was committed.

2. Formation of Courts and their Ranks

The BOIC laid down the rules governing the courts, their jurisdiction and formation. Six courts were to function thereafter.

1. The Chief Court. The formation of this Court was in the competence of the Political Resident in the Gulf. The Court was granted the jurisdiction of the High Court of Judicature in respect of felony penal cases. In other words, this Court was formed as a competent court of first instance to hear penal cases. It was also vested with the competence to hear appeals against judgements passed by the District Court in respect of penal and civil cases. The BOIC granted the Court the authority to refer the cases, where the parties were Muslims, to the Muslim “*Kazi*” i.e. judge on condition that it should have the power to review any verdict passed by this Judge. The Court was also authorised to send a defendant for trial to Bombay, India, if this was deemed appropriate. Article 17 of the BOIC authorised the Political Resident to decide the manner and place required for executing the judgements passed by that Court. It was to have absolute jurisdiction over all foreigners residing in Bahrain or who committed offences on its territories. Finally, the most significant and serious power vested in the Court by the BOIC was the authority giving it the power of a Supreme Court, according to the provision of Sub-Clause 7 of Article II, Part Two.

2. The District Court. This Court was to be formed and presided over by the Political Agent in Bahrain. The Court was to be competent to hear civil cases where all the parties were foreigners, with the Political Agent acting as the District Judge, as if Bahrain were a district of the Presidency of Bombay. The Court’s jurisdiction was to hear all civil cases in the first instance.

As for penal cases, its jurisdiction was to be equal to that of both the District Magistrate as well as the Session Judge. In other words, the Court would have the jurisdiction to hear penal offences and misdemeanours as a court of first instance. The penal jurisdiction of the Court applied to all foreigners. Its judgement in both penal and civil cases could be appealed to the Chief Court. The BOIC empowered the Court to refer any dispute, where it deemed fit, to the “*Majlis Al-Urfi*”, to the “*Salifah Court*” or to the “*Muslim Kazi*” on the understanding that the Political Agent would have the authority to review the verdicts of these tribunals.

The BOIC also dealt with the case where a convicted litigant wanted to appeal a judgement before the Chief Court, which at that time was in Bushire. It provided in Article 33 that an appeal petition had to be lodged and registered before the same Court, the District Court. The latter Court was to refer the documents of the case to the Chief Court as soon as practicable.

3. The Joint Court. This Court consisted of the Political Agent or his judicial assistant and an official appointed by the Shaikh of Bahrain as a Judge. The Court had the jurisdiction to hear all civil and penal cases where one of the parties to a dispute was a Bahraini and the other was a foreign subject. The two parties to the dispute might, by mutual agreement, refer this case to the Majlis Al-Urfi or Salifah Court or even to arbitration. The order does not contain many details about the powers and duties of the Joint Court, but its judgements are subject to appeal before the Chief Court, as though they are passed by the District Court. Article 45(2) of the BOIC provided that “*the judgement of the Joint Court or the Majlis Al-Urfi shall for all purposes be considered the same as if it were that of the District Court.*”

4. The Majlis Al-Urfi. It was defined by the BOIC as a civil court consisting of not less than four members selected by the Political Agent in agreement with the Bahrain Shaikh. Although it was cited as a court in the BOIC, the order did not stipulate any binding powers for it. The order left to the disputing parties the discretion to refer matters to it by making it a standing arbitration board. Its verdicts could also

be appealed before the Chief Court of the Political Resident. The Majlis was given advisory power so that the other courts could refer to it any dispute, whenever they felt this was appropriate. In actual practice, the Majlis played a significant role in the history of the Bahrain judiciary, particularly in commercial cases.

5. The Salifah Court. It was defined by the BOIC as consisting of one judge or several judges who have knowledge of local diving and customary Maritime Law. Such judge or judges were appointed by the Shaikh of Bahrain in concert with the Political Agent. The methods of this Court's operation were not determined nor was there any reference to the law according to which it should operate. It was indeed a Court which ruled cases according to diving and maritime practices. However, it was referred to by the BOIC in Part Four, Article 37 of which authorised the District Court to refer to this Court any dispute relating to accounts between Pearling Masters and divers. The purpose of such reference was for scrutiny and adjustment. Its competence in respect of these referred cases was limited to auditing accounts and making adjustments only, for adjudging these cases was the responsibility of the District Court. The BOIC deals with this Court also in Section 45, Part Five, where it authorises the Joint Court to refer any dispute it feels appropriate to this Court as a substitute tribunal, not as a body only enjoying expertise. The Court's judgement is still subject to appeal before the Political Agent acting in concert with the Shaikh of Bahrain.

6. The Kazi's Court. The Kazi (which is a wrong pronunciation of the Arabic word Qadi) was defined in the BOIC as the officially recognised judge appointed by the Shaikh of Bahrain to this position and approved by the Political Agent. The Agent's approval of such appointment pursuant to this legislation was an essential condition for validity appointing the Kazi. As mentioned in an earlier part of this study, the Kazi has been a known figure in Bahrain since ancient times and he has always enjoyed a prominent position in the country's legal system. In the BOIC the powers of the Kazi were limited to the following:

a) In Penal cases where the parties (defendant and aggrieved party) were Muhamadans, the Political Agent and the Joint Court could refer the dispute to the Kazi. In such a case, the trial had to be attended by a representative of the Political Agency. The judgement passed by the Kazi in this respect was subject to appeal before the Political Agent who had the exclusive right to review the judgement by either amending it or ordering the rehearing of the case before the same Kazi. The decision of the Political Agent amounted to a judgement passed by a District Court. This meant that it could be appealed before the Chief Court.

b) In civil cases Article 37 authorised the District Court to refer any dispute brought before it to the Kazi with a view to the administration of oaths and to give its opinion regarding the cases to which the Islamic Sharia laws could be applicable.

c) In cases heard before the Joint Court, this Court also might refer the dispute to the Kazi for the purpose of the administration of oaths, and to give advice in respect of cases where the elements of Islamic Sharia were involved.

5. Effectiveness of the BOIC as to Persons

As already mentioned the basic concept behind the BOIC was the protection of foreigners residing in Bahrain. This particular legislation was never intended to adjudge cases involving Bahraini litigants, in spite of the claims of Britain's overseas officers about conditions in the Gulf and the state of chaos arising from the lack of justice at that time, especially the repression experienced against certain sects and groups such as the Shia and pearl divers. However, this new legislation left matters as they were for such groups, and it remained to be applied to non-Bahrainis (with the exception of those Bahrainis who were registered in the Political Agency and regularly employed by British or foreign subjects). According to Article 8 of the BOIC, the powers and authorities conferred thereunder were applicable to the persons and cases which any Treaty, Grant or Sufferance or any other legal method vested the King of Britain with judicial powers thereupon, namely the following:

- 1) British subjects: According to the BOIC British subjects were the citizens of Britain and British protected persons.
- 2) The foreigners whom the Shaikh of Bahrain agreed upon with the King of Britain should be subject to the jurisdiction of His Majesty.
- 3) Bahraini subjects who were registered with the Political Agency in the regular service of British or foreign subjects, but the trial of those Bahrainis should be before the Joint Court.
- 4) The expression “*person to whom this Order applies*” should be construed in accordance with the above three sub-Articles.
- 5) The property and all personal or proprietary rights and liabilities within the said limits of British subjects and of foreigners within sub-Article (2) and of Bahraini subjects within sub-Article (3), whether such persons were themselves within or outside the limits of this Order.
- 6) British ships and ships belonging to foreigners within sub-Article (2) with their boats, and the persons and property on board thereof, or belonging thereto, being within the limits of the BOIC; provided that jurisdiction over foreign ships was not exercised otherwise than according to the practice of the High Court in England and the exercise of jurisdiction over foreign ships.

In case of a dispute as to whether a person or a subject of a state or a member of a tribe was subject to the jurisdiction of “*His Majesty*”, (i.e. the King of Great Britain), the settlement of such dispute was subject to the jurisdiction of the Political Resident’s Chief Court. In this case, the Political Resident was to issue a decision under his seal and it was to be enforceable in this respect.

For the applicability of the BOIC to persons, Article 21 contained an unusual provision which dealt with political offences and provided for the following:

“Where is shown evidence on oath to the satisfaction of the District Court that any British subject has committed or is about to commit an offence against this Order or is otherwise conducting himself so as to be dangerous to peace and good order or he is endeavouring to excite enmity between the people of Bahrain and his Majesty (the King of Great Britain) or is intriguing within the limits of this Order against His Majesty’s power and authority, the Court may, if it thinks fit, by or under its seal, prohibit that person from being within the limits of this Order during any time therein specified not exceeding two years.”

The provisions of the sub-Articles of the section grant the Court the right to expel a foreigner residing in Bahrain, and set forth the manner of deporting him from Bahrain or of depriving him of his rights granted according to the BOIC, in the case of committing any acts of a political nature, as indicated in the aforesaid Article 21.

The BOIC further requires persons, subject to its provisions, to register their names in a special register maintained by the Political Agency. It obliges every person who is twenty-one years of age to get himself registered within three months from the promulgation of the legislation where such person was a Bahrain resident at the time of its enactment. Where a person arrived in Bahrain after the effective date he had to get himself registered within one month from the date of his arrival. Within the aforesaid time limit, he was to be liable to pay a fine of Rs. 25 unless the applicant for registration gave an acceptable excuse.

A consequence of non-registration was that a person was deprived of protection or assistance from the offices of the Political Agent.

The BOIC also stipulated that a person’s registration legally comprised the registration of his wife or wives who were living with him. Also the registration of a householder comprised the registration of all women and minor children living with him.

6. Applicable Laws

The BOIC basically outlined the laws applicable to persons and cases subject to the jurisdiction of His Majesty (the King of Great Britain) according to its provisions. The applicable laws were those of India which was at that time under British rule. These included, as was expressed in paragraph One of Article 11:

“The enactment for the time being applicable as hereinafter mentioned of the Governor General of India in Council and of the Governor of Bombay in Council and in accordance with the powers vested and course of procedure and practice observed by and before the Courts in the Presidency of Bombay.”

The third paragraph of this Article also granted the legislative authorities in British India the power to introduce any necessary future legislation they deemed fit, pursuant to the King’s Regulations in accordance with Article 70 of the BOIC. As for the laws applicable in Bahrain at the time of its enactment, the BOIC vested the Court with the authority to interpret and apply it after making the necessary alterations not affecting its essence.

Article 12 dealt with the British laws enacted in the United Kingdom and which had to be applied to the matters covered by them. They were defined as:

“The enactment described in the First Schedule to the Foreign Jurisdiction Act 1890 which shall apply to Bahrain as if it were a British colony or possession.”

On referring to the Foreign Jurisdiction Act 1890, we find that the British laws meant by the above Article 12 are specifically those which are stated in the following table and extracted from the above First Schedule:

Admiralty Offences Colonial Act 1840

Admiralty Offences Colonial Act 1860

Evidence Act 1851

The Merchant Shipping Act 1854

Foreign Tribunals Evidence Act 1856
Evidence Commission Act 1859
British Law Ascertainment Act 1859
Foreign Ascertainment Act 1861
The Merchant Shipping Act 1867
The Conveyancing (Scotland) Act 1874
The Fugitive Offenders Act 1881
The Evidence By Commission Act 1885

However, for practical requirements to the application of the BOIC, Article 12 provided for certain exemptions, adoptions and modifications to the Schedule such as that:

1. The Political Resident in the Persian Gulf was substituted for the Governor of a colony of British Possession, and the Chief Court was thereby substituted for a Superior Court or Supreme Court and the District Court for a Magistrate or Justice of the Peace of a Colony or in British Possession.
2. For the position of Merchant Shipping Act 1854 and 1867 should be substituted with part XIII of the Merchant Shipping Act 1894.
3. In Section 51 of the Conveyancing (Scotland) Act 1874 the Court of the Political Agent was substituted for a Court of Probate in a Colony.
4. Some modifications were applied to certain sections of Fugitive Offenders Act 1881 in connection with the same procedural proceedings and to substitute the Political Resident and Political Agent of the competent courts therein.

In addition to the above-mentioned applicable laws, which are the laws of British India and the laws of the United Kingdom, the BOIC contained certain provisions relevant to certain specific acts relating to this particular area and not included in the said laws.

For example, it included special penalties for the smuggling of goods inside Bahrain with the intent of evading payment of customs duties (Article 26), the offence of smuggling goods and contraband items (Article 27), the offence of violating the rules for registering trade marks, copyright and patents (Article 28), offences against religions and beliefs (Article 29), piracy (Article 30) and breach of treaties with the Shaikh of Bahrain (Article 31).

As for civil disputes, the BOIC allowed the parties to agree to have recourse to another law other than those provided. Article 36 required the Political Agent to ask the litigants whether or not they agree to the application of the laws of India and to get their answer registered. This Article implies that the litigants had the right to select other laws should that be agreeable to them.

This was the BOIC as it was enacted in 1913 which finally came into force in February 1919. Article 79 of the BOIC stated that its provisions must come into effect within six months from the date of its issue, but the prevailing international political conditions had not made this possible. So the British Government had to amend the effective date. The first of these amendments was published in July 1915 under the name of The Bahrain (Amendment) Order in Council. Another Order was introduced under the same title on 24th January 1917 extending the period for the application of the BOIC for four years, commencing from the date of the first Amendment in 1915, so that its application was then postponed until 1919.

After the BOIC came into effect it became subject to successive amendments, the most significant of which were the amendments of 1922, 1924, 1937, 1949, 1952 and finally in 1959. These amendments shall be dealt with when the practical application of the BOIC and the supplementary laws and legislation regulating many of the legal aspects in the form of the King Regulations is discussed. These coincided with the stage of administrative reforms in Bahrain.

Chapter 4

REFORMS UNDER THE BAHRAIN ORDER IN COUNCIL

1. Reforms and Sovereignty

The term “*reforms*” as used by the British in the Gulf, particularly in Bahrain, meant introducing internal rules ensuring the protection of the interests of the British in particular, and foreigners in general. In spite of them having different views as to the Bahrain Shaikhs, ranging from anarchic to unjust, the British did not interfere in their internal affairs, especially in the Sharia judiciary except to the extent necessary for the protection of foreigners: Primarily British but subsidiarily the subjects of other countries (particularly the citizens of the then major powers) in order to maintain relations with those countries.

The protection of British subjects was not a problem after the Friendly Commission of 1861, which deprived the Shaikh of Bahrain of jurisdiction over British subjects and granted it to the Political Resident (PR). However, there remained the issue of judicial protection for non-British citizens, which was undecided until the attack against the German subject, Mr. Bahnson, an employee of Wounkhaus in 1904. The incident prompted Dr. Listeman, the German Ambassador in Persia, to intervene with the British authorities in the Gulf to force them to take measures in retaliation for the attack against the German citizen. This drove Major Cox, Political Resident in the Gulf, to travel from Bushire to Bahrain and to form a law court for prosecuting offenders and passing judgements, which he executed personally in spite of the strong opposition from the Shaikh of Bahrain to such action.¹

The countries which were in rivalry with Britain at that time, especially Turkey and Persia, were keen to find mistakes made by Britain in the Gulf and this was the reason for the anti-British newspapers to closely monitor developments in Bahrain. For

¹ See Chapter 3 of this thesis.

example, the pro-Turkish newspaper “*Al Khalifa*” (published in London) wrote, in its issue dated 1st May 1902, a report about conditions in Bahrain and attacked Britain for its failure to interfere to remedy the situation. This report angered the British and became a subject of correspondence and communications between the British authorities in Bahrain.¹

This was followed in 1904 by a series of articles in the Egyptian daily “*Al Liwa*” which criticised conditions in Bahrain and accused the British of exercising a despotic rule there. These articles linked the proceedings before the Political Resident involving Ali in 1904 to the incident of Dinshawy in Egypt.² There was a further example in “*Al-Majlis*” magazine, published in Tehran in September 1907, which carried a letter from a Persian resident in Bahrain complaining of injustice against the Shia. He accused Britain of involvement and pointed out that it was possible for Britain to intervene if it wanted to. He cited as proof the trial of Ali Bin Ahmad in the incident of the attack against the German citizen.³

From that time on Britain devoted more efforts to gradually establishing its direct authority over the administrative, judicial and internal matters in Bahrain, and correspondence was exchanged between the British authorities in London, India and the Gulf, confirming the need to determine the domestic powers of the Shaikh of Bahrain and seeking to control them. For example:

“The Shaikh should be reminded of his assurance to follow the advice of the Political Agent” (18/2/1905).⁴ (Foreign Office to Cox.)

“The effort of the Political Agent in Bahrain should mainly be directed towards the Shaikh’s acceptance of desirable internal administration” (31/7/1905).⁵ (Prideaux to Cox.)

¹ IOR/R/15/1/317, pp. 49-57.

² IOR/5/318, p. 63.

³ Ibid., p. 109.

⁴ Foreign Office to Cox No. 744 EB dated 18/2/1905; IOR/R/15/2 p. 3.

⁵ Prideaux to Cox dated 31/7/1905; IOR/R/15/2 p. 3.

In fact, the intention to directly intervene in the country's affairs was envisaged by the British as far back as 1900 with their recognition of Shaikh Hamad Bin Shaikh Isa as Heir Apparent. This was the first time in the history of Bahrain that the naming of an Heir Apparent coincided with the appointment of a British Political Agent residing in the country. Previously the post of the Agent was given to any person, not necessarily a British official. When Britain appointed the Agent it built the headquarters of the Political Agency, which was at that time the biggest building in Bahrain. This reflected the significance of the British presence in Bahrain and the link between the system of government and British influence. Also it demonstrated the political nature of the Agent's position.¹

From the beginning of the century British interest in Bahrain's internal affairs centred on the judicial and customs systems which had a special importance in commerce. The customs' reforms were subjects of discussion between the Shaikh of Bahrain and Lord Curzon, the Viceroy of India, when the latter visited Bahrain in the year 1903. When Shaikh Isa protested about British intervention in customs' affairs on the ground that this was one of his concerns, Lord Curzon firmly replied that this matter "*could not and would not be dropped*".²

This trend by the British authorities to intervene in the internal affairs of the Shaikh of Bahrain was not welcomed by Shaikh Isa from the beginning. The Shaikh expressed his dissatisfaction with such intervention, the foremost of which was the appointment of an English Agent instead of a "*Mussalman*" as had been the common practice before the year 1900. When he could not stand the situation any longer, he wrote to the British authorities a letter dated 23rd October 1905, in which he complained of the Political Agent's interference in the internal affairs of government:

"Later the Mussalman representative here was replaced by an English one, who meddled with home matters and arrogated to himself home matters, and

¹ Bidwell, R., *The Affairs of Arabia*, Vo. 1, p. XV; Vol. 2, Par. V, No. 23, p. 27.

² Al Rumaihi, M., *Bahrain Social and Political Change*, p. 225.

arrogated himself competency in what was no business of his, though he was ignorant of religious law and customs of the Mussalman”.¹

Of course, this attitude did not meet with the Political Agent's approval. So Captain Prideaux wrote to the Political Resident on 13th January 1906 expressing his objection to restoring things to what they had been before when a local merchant used to undertake the activities of the Political Agent. When the Political Resident referred the matter to the Indian Government, its reply was clearly opposed to Shaikh Isa's raising of any discussion in this matter. This reply was a confirmation of the policies of the British Political Agent. One of the reasons given by the Indian Government was the presence of many British subjects in Bahrain who must be protected.²

The accomplished fact was imposed upon Shaikh Isa in spite of his opposition until he was forced in one way or another to relinquish his jurisdiction over foreigners, according to his famous letter dated 16th July 1909. However, he continued to resent their intervention in internal affairs by all means at his disposal, including efforts designed to gain support of the neighbouring countries, until in 1913 he obtained the consent of King Abdul Aziz Bin Saud that the Najdi's and Hassa's subjects become subject to his jurisdiction.³ Subsequently the British authorities contemplated assigning jurisdiction over the subjects of neighbouring countries to Shaikh Isa and restricting the intervention of the Political Agent to cases of extreme injustice.⁴

In 1919 the British issued an order enforcing and applying the provisions of the Bahrain Order in Council without the approval of Shaikh Isa. Once again they imposed the accomplished fact but he did not finally yield power and continued to impose his authority even after his removal from governing in 1923.

¹ Bidwell, *Ibid.*, Vol. VII, No. 8, p. 7.

² *Ibid.*, p. 19.

³ IOR/R/15/2/93, p. 25, Dickson to DPR dated 16/2/1919.

⁴ *Ibid.*, p. 22, D.O. Lock to Trevor dated 16/3/1917.

In August and September 1919, which was the same year the British Government of India issued its order for the application of The Bahrain Order in Council, Shaikh Abdulla, the son of Shaikh Isa, and the most powerful man at that time, paid a visit to London to congratulate the Queen and Government of Britain on the British victory in World War I, as a representative of his father, the Ruler. Shaikh Abdulla seized the opportunity to submit demands to the British Government on behalf of his father by submitting a petition to Sir Hertzell, the Secretary of State for India. These demands were that the Ruler of Bahrain shall:

1. *Be put on an equality with neighbouring Arab rulers in the exercise of authority over all persons other than subjects of Great Britain and the Great European Powers, and so over other Arabs other than subjects of Bahrain.*
2. *Be empowered to select the bench of Magistrates in Majlis Al Urfi.*
3. *Be permitted and assisted to develop the Port of Zubara (which he claimed had once belonged to Bahrain).*
4. *Be given permission to correspond with London should necessity arise.¹*

The British Government's reply to these demands was quite clear and definite. In a letter dated 5th June 1920 sent by the Secretary to the Government of India to Shaikh Abdulla, the Government outlined its position as follows:

“On the question of jurisdiction the British Government agreed that the Shaikh of Bahrain shall exercise jurisdiction over the subjects of other Arab rulers with the proviso that there should be a formal agreement between him and those rulers. For the second point the method of appointing the members of Al Urfi Council was defined in the Order in Council and it was not in the power of the Government to alter it. However, it was the practice for Shaikh Isa to appoint the Arab members of the Council although such appointment was ratified by the Political Agent since he acted as a representative of the protecting power, but he did not interfere or reject such appointment without just cause. For the

¹ L/P & S/20/C247A, p. 63; IOR/R/15/2/93, p. 24.

*third point which related to Al Zubara, this was an old claim which was given sufficient attention and the Government of India remained unable to adopt a position in respect of it due to the difficulties in dealing with it. As for the demand for communicating with the British Government directly, the political relation with Bahrain was maintained with the Government of India and it was only appropriate for the Shaikh of Bahrain to address that government not the government of Her Majesty directly. They, the Government of India, would in turn convey any communication of the Government of Her Majesty when that was necessary”.*¹

In other words, the British Government rejected all the demands made by Shaikh Abdulla on behalf of his father to the British Government. The British Government insisted upon imposing its full authority and running the affairs of administration and the judiciary as it wished. What this thesis is concerned with in connection with these demands are the first two demands pertinent to the issue of jurisdiction of the Bahrain Order in Council.

Regarding the question of jurisdiction, the British Government subsequently issued letters from both King Abdul Aziz Bin Saud of Saudi Arabia and the Shaikh of Qatar Abdulla Bin Jasim Al Thani, authorising the Political Agent in Bahrain to exercise jurisdiction over their subjects residing in Bahrain. They were the two Arab rulers who had a considerable number of their subjects in Bahrain and they were the rulers with whom the Shaikh could agree on the question of jurisdiction. Shaikh Abdulla bin Jasim Al Thani sent a letter dated 22nd July 1920 to the Political Agent in which he said the following:

*“The affairs of my subjects and their cases whatever they are in Bahrain or under the protection of Great Britain should always be attended and settled by the Political Agent in Bahrain”.*²

Abdul Aziz Bin Saud wrote a similar letter dated 29th July 1920 to the Political Agent in which he said the following:

¹ L/P & S/20/C247A, p. 63; IOR/R/15/2/93, pp. 14, 15, 26 & 27.
² IOR/R/15/2/93, p. 26.

“I welcome the decision of the High British Government to look after my subjects in Bahrain”.¹

In this manner, Britain pulled the carpet from under Shaikh Isa’s feet and took from him by the right hand what it had been given him by the left hand according to its letter dated 5th May 1920. As for the subjects of the remaining neighbouring countries such as Kuwait and Oman, no particular attention was paid by Britain towards them since they were governed by their own Orders in Council.

As usual Shaikh Isa did not submit to the accomplished fact but acted in a manner that gave the British authorities the impression that he was determined to maintain jurisdiction over whoever lived in Bahrain, including foreigners, except for the British subjects of European countries. So he advised foreign non-Europeans that he enjoyed jurisdiction over them and they had to refer their cases to him or to his son for resolution. The Political Agent’s report dated 27th November 1920 described the behaviour of Shaikh Isa as *“not be too open in his method”*. The report accused him of using *“Fidawis”* (bodyguards)² to force people to have recourse to his Court. In this report, the Political Agent claimed that many Arab subjects who had recourse to the Court of Shaikh Isa were not treated fairly in the judgements, which prompted them to refer their cases to the Political Agency and to seek his protection. The report described Shaikh Isa as having ignored the third paragraph of the letter sent to him by the British Government on 5th June 1920 with respect to jurisdiction. Concluding, the Political Agent said that in order to eliminate the misunderstanding from the minds of Shaikh Isa and the people, he had written two letters, one of which was addressed to Shaikh Isa, and the other of which was in the form of a proclamation to the people of Manama, a copy of which was sent to Shaikh Isa.³

¹ Ibid., p. 26.

² *“Fidawis”* is an Arabic word which originally meant a group of armed men who were employed to protect the tribal leader and his interests.

³ IOR/R/15/2/73, No. 462, p. 4.

In a subsequent report by the Political Agent to the British Government he also referred to conditions in 1920, and said that in spite of the reasonable development in Shaikh Isa's attitude he was still extremely difficult. This report also contained a very strong criticism of Shaikh Abdulla Bin Isa, who was described following his return from London as having "*made himself virtual ruler of Bahrain*". The report also included a very strong criticism of Shaikh Isa's wife and accused her of "*oppression*" against Bahrainis. He said oppression reached a maximum during the era of Shaikh Abdulla. The report warned that there was an imminent indignation which could render necessary the removal of Shaikh Abdulla from running the affairs of government, rather than "*allowing disturbances which would inevitably lead to his downfall*". The report praised the attitude of Shaikh Hamad, the Heir Apparent, and described him as interested in introducing some reforms which were essential and in establishing elementary justice, but he met opposition from his father who cultivated by Shaikh Abdulla resented the reforms.¹

Shaikh Isa tried to impose his influence through the formation of Al Majlis Al Urfi ("The Council"). In a report prepared by Mr. Mirza Abdul Hussain, Officer of the Political Agency, who attended the Council meetings as, probably, an administration officer, it was stated that on 2nd April 1919 a Council meeting had been convened at the summons of Shaikh Isa, without the attendance of Hajj Ahmed Yateem, a member appointed by the Political Agent. Mr. Hajj Ahmed Yateem was replaced by Abd Ali Bin Rajab who was appointed by Shaikh Isa without consultation with the Political Agent, contrary to the provisions of the Bahrain Order in Council.² The report also pointed out the absence of a number of members. On the same day (2nd April) the Political Agent wrote a letter to Shaikh Isa referring to the attendance of Abd Ali Bin Rajab, saying that he was not a member who had the right to attend as he was not appointed in accordance with the BOIC or by consultation with the Political Agent. He expressed surprise at the absence of Hajj Ahmed Yateem and indicated that in the case

¹ IOR/R/15/2/296, pp. 3 & 4.

² IOR/R/15/2/12, pp. 1 & 11.

of appointing Bin Rajab there would be an extra member appointed by himself (i.e. Shaikh Isa). He asked Shaikh Isa to maintain the established rules and duties.¹

In response Shaikh Isa wrote a letter dated 12th April 1915 to the Agent in which he ignored the Agent's protest and said he would send his son Abdulla to discuss the matter with him. This reply did not meet with the Political Agent's approval. He wrote to Shaikh Isa on 6th June 1919 urging him to comply with the previous practice and to ensure consulting with him or with whomever replaced him in the future should he wish to make any changes in the Council. The Political Agent requested Shaikh Isa to keep whatever agreement was reached between the two sides in writing and warned him that the Council would not be able to realise its duties in cases where there was a dispute between them and such situations would create difficulties to "*your subjects and to the subjects of His Majesty*".²

However, Shaikh Isa did not yield but refuted the reply in the Agent's letter by a letter which he sent to him on 14th June 1919, indicating that the absence of the member, Ahmed Yateem, from the meeting was due to the member's apology and that there was no increase in the number of members appointed by himself, as one of the members present, Saqer Bin Muhammed Al Zayani, was there to "*hear a case and to refer to us a report about it*". This meant that his presence was for an administrative purpose. Shaikh Isa assured him that the members should remain as they were. So he fully ignored the protest of the Political Agent to the appointment of Abd Ali Bin Rajab and deliberately sought to exploit the situation to underline his determination to maintain jurisdiction over non-Bahraini Arabs. He said:

*"If necessary we will write to the members every week to urge them to attend the meeting in the same way as we write to the Arab rulers about what we need in respect of the matters".*³

¹ Ibid., p. 2.

² Ibid., No. 126, p. 3.

³ Ibid., p. 8.

It seems that this latter phrase was deliberately inserted with the aim of reminding the Agent of the insistence of the Shaikh to maintain his judicial authority over Arab subjects and to reaffirm his control of the Council. In his letter, the Shaikh decided to change the venue for holding the Council meeting from the Political Agency to the Customs Building which belonged to him.

This letter was followed by the Political Agent's letter to Ahmed Yateem seeking clarification about the reason for his absence from the Council meeting and whether he had actually apologised. Yateem replied by saying that he had not apologised and that he was not invited to attend. He insisted upon maintaining his Council membership which gave rise to the Political Agent's suspicions and asked several times to meet the Shaikh to discuss the Council's issue, as indicated in the comments on Ahmed Yateem's letter. The Shaikh, however, always repeated his statement that the matter was under study and the Agent concluded his comments by the words "*I should have a reply*".¹

In 1921 Bahrain witnessed a growing resentment from the Shia citizens who were described by the reports of the Political Agency at that time as being oppressed. Their protests culminated in the presentation of a petition to the British Political Resident, Major Trevor, when he visited Bahrain, demanding that justice be done to them. Major Clive Daly, the new British Political Agent, paid special attention to the plight of the Shia and probably did that for purely political motives.²

The relationship between the Political Agency and Shaikh Abdulla Bin Isa and his supporters, or "*His party*" as described by Daly, deteriorated to such a degree that the Political Agent accused Shaikh Isa of conspiring and of launching an "*insidious campaign*" against the authority of the Heir Apparent, Shaikh Hamad, and the Political Agent. On his part, Shaikh Abdulla stepped up his campaign against Daly, and he and his supporters wrote to the British Government protesting against the behaviour of the

¹ Ibid., pp. 11-12.

² IOR/R/15/2/296, Administration Report of the Bahrain Political Agency for the year 1922; Also see IOR/R/15/2/83 Political situation in Bahrain dated November 1921. p. 2.

Political Agent and his intervention in internal matters and his offensive acts against the provisions of Islamic Sharia. They demanded that the Political Agent refrain from interfering in the country's internal affairs.¹

Another issue which the Political Agent gave special attention to in his reports in 1921 and 1922 was the Salifah Court which was concerned with examining matters pertinent to the pearl diving industry. This Court was described by the reports of the Political Agency as not being in its proper position according to the provisions of the Bahrain Order in Council. This Court consisted of one judge nominated by Shaikh Isa. The reports described this judge as a venal judge as he received bribes from the dhow captains (Nukhadas) so that the divers boycotted this Court.²

The question of the Shias was of particular significance due to the effects of its development on the history of the Bahrain judicial system at that time. Following the petition presented to Major Trevor, the Political Resident, during his first visit in 1921, he referred the proposals to the British Government for improving their conditions. He suggested that the British Government directly intervene to respond to their demands, but the Government of India was not too enthusiastic for these proposals. In January 1922 the Government of India explained its view that it did not support any radical action for the internal administration of Bahrain. When it had intervened in the past its aim was to protect the foreigners on the island with a view to safeguarding His Majesty's interests. It said it did not find itself obliged to interfere between the Shaikh and his subjects. It also refused the proposal of the Political Agent to keep the Shias under British protection. Nevertheless, the government pledged to support and encourage Shaikh Isa to launch internal reforms.³

¹ IOR/R/15/2/83, p. 5.

² IOR/R/15/2/88, P.A. Report 1921, p. 8.

³ Al Rumaihi M., *Ibid.*, p. 236.

2. The Beginning of the Local Judiciary

The Shias were not confident in the British Government. Therefore, they sought to improve their conditions with the Shaikh by presenting a petition dated 16th February 1922 containing their demands. Shaikh Isa surprised the British when he promptly issued a reply to the Shias' petition in the form of the famous Declaration of 22nd February 1922. This was described by the Political Agent in Bahrain as "*The Magna Carta*". The Declaration was an important turning point which laid the early basis for the Bahrain judiciary independently from the provisions of the Bahrain Order in Council. The text of the Declaration reads as follows:

"In the name of Allah, the Merciful, the Compassionate. From Isa Bin Ali Al Khalifa to the Petitioners for Demands from Our subjects;

- *Reply to the First Demand: Complaints must be presented to our Heir Apparent Hamad and significant matters will be handled with my approval and endorsement.*
- *Reply to the Second Demand: If a complaint is referred to the law courts, the verdict of the court shall be final, otherwise the Ruler shall refer it to the Sharia Court if it is a Sharia matter, to the Majlis Al Urfi if it is a local matter and to the Salifah Court if it is a matter relevant to the diving business. The order will be enforced by the Ruler.*
- *Reply to the Third Demand: The Shia will have to elect three persons to become members of Al Majlis Al Urfi. The right of election shall be granted to the majority. In this regard, they have to consult with the Ruler.*
- *Reply to the Fourth Demand: For the Lease Agreements for palm groves and farms, two copies will be executed so that one shall be retained by the landlord and the other shall be retained by the Lessee. Two witnesses will have to sign the two copies.*
- *Reply to the Fifth Demand: If a complaint is filed with the Ruler against someone, the Ruler will instruct the mayor of the town where the person complained against lives, to order him to appear on a fixed date at a specific place. If the person complained against fails to appear on time, he will be deemed liable.*

- *Reply to the Sixth Demand: Place of imprisonment is to be decided by the mercy of the Ruler.*

- *Reply to the Seventh Demand: Fees to which our Government has been entitled since “ancient times” should remain unchanged. As for forced labour involving donkey-owners and porters, it is cancelled and should only be allowed against payment of a charge. No one who seeks the services of any of the above should stand in the way of a rider or a pedestrian.*

- *Reply to the Eighth Demand: No damage shall be done by way of assaulting camels and sheep and the inhabitants of villages and palm groves should not hinder the passage of a shepherd who owns a herd of camels or sheep. Any damage done should be reported to the Ruler to investigate the matter and interrogate the offender in order that the facts should be revealed”¹.*

In this thesis, the political implications of this Declaration are not of great concern. Apparently Shaikh Isa sought to appease the angry citizens on the one hand and to gain the support and backing of the British Government on the other hand. The latter promised to lend him support should he introduce internal reforms.

What is important is that the Declarations laid a new basis for a radical change of the Bahraini judicial system independently from the provisions of the Bahrain Order in Council. It created the nucleus of what was known as the Shaikh’s Court which later became the Bahrain Law Court.

The principal features of this Declaration may be summed up in the following manner:

(1) From the point of view of the judicial organisation, it dealt with the following matters:

a) The Declaration defined the authority to which cases should be filed, which was the Heir Apparent, who was entrusted with the task of referring the cases to the competent Courts, whether the Sharia Kazi (Judge), Salifah Court or Majlis Al Urfi.

¹ IOR/R/15/2/83, p. 68.

- b) It classified cases into significant matters and insignificant matters. Although no rules were laid down for deciding what was significant and what was not significant, it made the system of litigation follow two degrees. The insignificant matters were subject to the jurisdiction of the Heir Apparent while the significant matters were looked into by the Ruler himself. Verdicts were not passed without the Ruler's approval and endorsement.
- c) For the cases concerning leases of palm groves and farms, the Declaration set forth the procedures for proving claims and required that lease agreements be evidenced in writing and be made in two counterparts, one of which should be retained by the Lessee. For an agreement to be legally valid, it should be signed by two witnesses at the time of its execution.
- d) The Declaration laid down for the first time the rules for the service of summonses upon the defendant in cases. Reference of matters was specified to be made to the "*most senior dignitary*" in the town. Although this latter expression was obscure, the intended person was either the local Amir or the person considered by the local inhabitants as their most senior compatriot, mayor or assistant to the Amir in the local area. The latter used to be called the "*Wazir*", an Arabic word which means "Minister".

The important point in this Declaration was that the service of a summons upon the defendant concerning the filing of the case in a certain specific manner was essential for hearing the case. If the defendant was properly and validly served with the summons, the Court could pass a judgement against him in absentia. In such a case, the judgement was deemed to have been validly adopted against him as though he were present.

- e) The Declaration introduced the principle of the election of members of a judiciary authority, namely Majlis Al Urfi, unlike the provisions of the Bahrain Order in Council. So it authorised the members of the Shias sect to elect three

members of this Majlis from amongst them by a majority of their votes.

- f) It established that the legal fees belonged to the Government or the State and were not the property of the Shaikh as was the common understanding in the past. The Declaration confirmed the fact that the fees were levied from very early times.
 - g) In criminal cases, it vested the power of deciding where a person should be imprisoned in the Ruler and did not grant this power to any person he named, such as the local Amirs or Fadawis. Deciding the place of imprisonment was conditional upon the Ruler's "*mercy*" which reflected a change in Shaikh Isa's attitude towards imprisonment from cruelty to giving due regard to mercy.
- (2) As for the general legislative aspects, the most significant points of this Declaration were the following:
- a) Eradicating of the forced labour system of which many Bahrainis suffered and were exploited by some members of the influential families or tribes in getting their work done without payment. The Declaration prohibited any person from forcing anyone or his animals doing a job without being paid. The eradication of forced labour was a significant development as far as popular feeling was concerned and also from the viewpoint of the British authorities towards the administration of Shaikh Isa.
 - b) Prohibiting the animals owned by members of the Ruling Family and senior tribesmen from trespassing on the farms of local farmers and villagers. Such animals were left loose on the farms owned by local farmers and villagers to graze as they wished without having to pay any costs. Any party suffering damages from these animals could refer the matter to the Courts.

In fact, this Declaration could have been a turning point in the relations between the British authorities and Shaikh Isa Bin Ali. Undoubtedly Shaikh Isa expected to gain the satisfaction of the British authorities and hoped the British Government of India would fulfil its earlier promises should he introduce reforms in domestic government and administration. However, the British authorities represented in Bahrain by the Political Agent disappointed him. Contrary to his expectations, the reports prepared afterwards were against Shaikh Isa. Major Daly, Political Agent, wrote the following in his report to the British Government for 1922 concerning the above Declaration of Shaikh Isa:

“It is a matter of regret that up to the date of this report, the Ruler has not deemed fit to carry out any of his written undertakings”.¹

Before preparing this report and on the basis of earlier reports against Shaikh Isa, Shaikh Abdulla his younger son, and Shaikh Isa’s wife who was Shaikh Abdulla’s mother, the Political Resident visited Bahrain on 7th March 1922 to serve warnings on Shaikh Isa, Shaikh Abdulla and Shaikh Hamad. The most important of these warnings was the one against Shaikh Abdulla that should he persist in his intrigues against the (British) Government, the latter would take firm actions against him. This warning was taken seriously obliging Shaikh Abdulla to act quietly and to temporarily co-operate with the Political Agent and with his brother, Shaikh Hamad, in carrying out what the Political Agent described as reforms.

3. British Direct Intervention in Internal Reforms

The position of the British Government towards interference in internal reforms fluctuated during the period 1922 - 1923. In correspondence dated March 1922 to the British Foreign Office it insisted upon taking immediate measures for introducing reforms in Bahrain’s financial and banking system. Then, on 2nd May 1922 it wrote once again to the Government of India advising that the Government did not wish to directly intervene between the Ruler of Bahrain and his subjects. It reiterated its earlier

¹ L/PLS/20/C47A p. 64; IOR/R/15/2/93 pp. 31, 35 & 38.

position by saying: *“Inform the Shaikh that the Government welcomes his scheme and will lend normal support”*.¹

It renewed its earlier stand that no encouragement should be given to the idea proposing that the Shaikh carried out the reforms on the directions of the British Government. Once more, the Foreign Office changed its opinion by writing to the Government of India on 7th December 1922 expressing earnest hope that the said Government would take steps for the introduction of reforms in Bahrain to ensure a fair and just treatment between citizens. When the Government of India referred this wish to the Political Resident, Trevor wrote to the Foreign Office on 27th January 1923 suggesting that the reforms be carried out even if the matter required the use of force where opposition was shown by Shaikh Isa. Trevor based his proposals upon the letter that was previously sent to him by the Political Agent, Daly, on 8th January 1923, dealing with moves by certain persons in Bahrain, including Ahmed Bin Khamis. He called for speeding up the carrying out of reforms, the most important of which were the following:

1. *Equity of incident.*
2. *Courts in which the Shias may obtain redress.*
3. *Insistence upon proper observance of diving rules and maintenance of accounts and production of accounts in courts”*.²

This attitude of the British Government represented by its highest authorities was in favour of intervention for imposing the proposed reforms. The Viceroy wrote to the Secretary of State for India proposing the following: *“We propose to give the Shaikh a categorical warning and if unsuccessful must be prepared to enforce reforms”*.³

Following the disturbances which erupted between some Persians and Najdis between the 10th and 13th May 1923, in which some casualties from both sides were reported, the British Government found that it was opportune to intervene and enforce the reforms. On 15th May, Captain Knox, who had just succeeded Major Trevor as a

¹ IOR/R/15/2/86, P.R. Report dated 31/5/1923, pp. 28-42.

² Ibid., p.

³ Ibid., p. 101.

Political Resident, left from Bushire for Bahrain, accompanied by two warships, in a show of strength. Upon his arrival Captain Knox started consultations with both Shaikh Isa and Shaikh Abdulla over the prevailing conditions. He asked Shaikh Isa to abdicate voluntarily, but Shaikh Isa rejected the proposal. Instead he suggested consulting with the tribes over the question of his abdication. However, Knox ignored this wish of Shaikh Isa. Then, he called for a major meeting on 26th May 1923 to which the senior Shaikhs from the Al Khalifas, leading tribesmen and prominent Sunni and Shia figures were invited. At this meeting he announced the abdication of Shaikh Isa and the appointment of his son, Shaikh Hamad, as a Deputy and an Agent, having absolute powers of acting on behalf of his father in ruling Bahrain.¹

At this meeting, Knox, the Political Resident, delivered a lengthy speech in which he explained the reasons for the action taken by the British authorities. He outlined the future policy. The general policy lines as expressed in this speech were as follows:

First, The removal of Shaikh Isa as a Ruler was not a result of a dispute between Shaikh Isa and Britain. This measure was due to his old age and his inability to run the affairs of the country. He was seen as unable to keep abreast the needs of progress. Therefore, Britain thought it fit to give its friend Shaikh Isa a rest.

Second, There was no difference between Shaikh Hamad, Shaikh Isa's son and his successor selected by Britain, and his brother, Shaikh Abdulla, as the new system of government was intended to establish the presence of one ruler from the Al Khalifa on the basis of co-operation between the two brothers.

Third, Reaffirming that the authority of the British Political Agent over foreigners was not limited to judicial matters but also to political and administrative matters.

¹ Ibid., p. 71.

Fourth, Placing the official resources, especially of the customs, in the hands of an official “government” administration and considering them as public property not belonging to the Shaikh.

Fifth, The British authority had respect for the independence of the Sharia but the Sharia Qadi (Qazi), whether Sunni or Shia was not empowered to accept any legal action directly from the litigants unless referred via the Political Agent (in case of foreigners) or by Shaikh Hamad (in case of Bahrainis) in order to avoid the power of influential people.

Sixth, Everyone should be obliged to work in order to earn a living. Members of the Ruling Family should work in order to be paid, so that none of them should expect in future to take from people what they wanted without justification nor from the State without doing any work. They also had to become qualified by learning and working.

Seventh, No-one would be allowed to form any “associations” nor to lead them except by a licence from the Political Agent and Shaikh Hamad.

Eighth, All the citizens, including Sunni and Shia individuals and tribes, are equal as regards financial burdens such as the payment of fees. The speech contained a stern warning to the Dawasir tribe which was urged to yield to the public order or to leave Bahrain.

Ninth, Despite laying down the principle of equality in sharing of burdens, equality between Shia and Sunni citizens was unthought of as the rule of Bahrain was a power vested in the Sunnis and the Shias had to accept that fact due to the conditions prevailing around them, especially as regards the wishes of the neighbouring countries. Britain was said to have had an understanding of their grievances with respect to certain violations committed against them, but it would accept their status and would ensure that they would be equal with others as regarded the payment of fees.

It is noted that this discrimination between the Shias and Sunnis was deliberately intended by the Political Residents. The complaints of the Shias were not directed against the Sunnis but were against certain groups of influential people.

Tenth, The speech paid attention to the problems experienced by the pearl divers and the injustices they had to face. It pledged that the local government would be committed to remedying the pearl diving system and to eliminating injustice done to those engaged in this occupation.

In addition, Shaikh Hamad delivered a brief speech in which he expressed willingness to accept the responsibility of ruling Bahrain in response to the orders of Britain. He vowed to work for achieving the advancement of the country, especially in the fields of commerce, agriculture and construction. He acknowledged the support lent to him by his brother, Shaikh Abdulla. He pledged to render justice, to control government imports and to maintain equality in shouldering financial burdens by the citizens.

With this ceremony there was the beginning of a new era in Bahrain's administrative and judicial history, which will be dealt with in the next chapter.

Chapter 5

SHAIKH HAMAD AND THE ADVISOR'S ERA

1. Emergence of Local Judiciary (Shaikh Hamad's Court)

It was difficult for Britain to continue ignoring the new requirements of the Arab peoples, especially the people of the Arabian Gulf countries. Calls were reiterated in British forums and newspapers about the need for understanding the particular nature of these people and their distinctive cultural characteristics, especially the cultural aspects derived from the Arabic language and Islam. So it became clear to the British that dealing with these people should be based upon a *“spirit of imaginative sincerity”* and that *“in such important matters official prescription and susceptibilities should be ruthlessly overridden.”*¹

This trend was reflected in the attitude of the British authorities as Major Daly, the Political Agent appeared to be in earnest about the question of setting up local departments and internal organisations, especially the establishment of a local judiciary. At that time, Shaikh Hamad, officially Deputy Ruler and the actual Ruler took initiative in the funding of the Bahraini national judiciary.

In 1923 Shaikh Hamad started to organise the Court for which his father, Shaikh Isa Bin Ali, issued a declaration for its setting up on 16 February 1922, as discussed earlier. Although Major Daly, the Political Agent, ignored the fact of the establishment of this Court by Shaikh Isa and cited it in his correspondence as the Shaikh Hamad Court (in this way giving credit to Shaikh Hamad for creating this Court), the truth was that the Court had been formed in accordance with the aforementioned Declaration of Shaikh Isa issued in February 1922. Shaikh Hamad informed Major Daly, that he would exercise the judicial powers in this Court on a daily and regular basis.² At the

¹ See Article 134, Sir Henry Dobbs High Commissioner for Iraq, Unifying British Control on Middle East a Vital and urgent problem for the Empire, Daily Telegraph, dated 4 June 1924, IOR R/L/P&S/10/1268.

² IOR R/15/127 No. 99 from PA to PR dated 25/7/23.

same time, contacts with the Government of India were continuing for obtaining help by recruiting judicial assistants to work with the local Government of Bahrain. The Policy of the Government of India was clear in this context so that the assistance should not culminate in the outright intervention in the internal affairs of the Ruler of Bahrain. Therefore, it wrote on 14 June 1923 in support of the reforms and expressed willingness to help but it cautioned as follows:

“But they are of the opinion that H.E. The Political Agent must be on his guard against being tempted to interfere too much and too directly into the Bahrain Shaikh’s affairs and to become the actual administrator”.¹

The Government of India resolved these discussions which centred on imposing some kind of mandate over the internal judicial system (among Bahrainis) in Bahrain. Major Daly went as far as to propose that the Bahrainis should elect the Court judges from amongst them and those elected judges should be placed under British protection in order to ensure their neutrality and independence and that they should not become subject to any pressure from influential people.² He also suggested that the Joint Court should have the jurisdiction to hear all cases including those involving Bahraini litigants.³ The Political Resident tended to favour this latter view and suggested that the matter would require an amendment to the Bahrain Order in Council,⁴ but the Government of India was opposed to this suggestion.⁵

In spite of the position of the Government of India towards the interference by the Political Agent in the affairs of the Ruler of Bahrain, Major Daly still did not comply with the literal directives of the Government to him but continued to follow his own approach of actual participation in imposing reforms. He did not find much difficulty in pursuing this approach for three main reasons:

¹ IOR R/15/2/127 No. 344, from the Secretary to Government of India to the PR dated 14 June 1923.

² IOR R/15/2/133 p. 5, from PA to PR February 1923.

³ IOR R/15/2/133 Telegraph No. 267 dated 8/7/1923.

⁴ IOR R/15/2/133 from PR to PA dated 8/3/1923.

⁵ IOR R/15/2/88, Petition to Viceroy dated 13 August 1923. See also R/15/127, PR to Secretary of State No. 622, dated 10 November 1923, p. 81.

First: Shaikh Isa Bin Ali, who was a strong opponent of the policy of intervention in his affairs for any reason whatsoever, had been removed from the rule of the country and Shaikh Hamad, who was more willing to assist the Political Agent in modernising the State, became the actual Ruler.

Second: A close personal relationship came to be formed between Major Daly and Shaikh Hamad. This relationship reflected more understanding and friendship as well as the acceptance by Shaikh Hamad of his concept for modernising the State and the setting up of institutions.

Third: Increasing calls for reforms from a broader base of citizens. These demands were in the form of petitions that were presented directly to the Political Resident and to the Government of India. Naturally, these petitions strengthened the Political Agent's policy of interference for imposing administrative and judicial reforms.

From the very beginning, Major Daly paid a great deal of attention to the question of organising the judiciary. He proposed the recruitment of a British judicial assistant to help Shaikh Hamad not only in undertaking judicial duties but in acting as an advisor for him in legislative matters. Since the financial issue was of primary concern in the recruitment of the proposed judicial assistant as the Government of Bahrain had to undertake payment of his salary, and as it was imperative to find a source for such payment, one of Major Daly's suggestions was for this judicial assistant to become involved in helping in the enactment of a tax law and giving advice in the organisation of customs duties. The Political Agent endorsed these views and included them in a memorandum which was referred to the Government of India on 9th August 1923.¹

When Colonel Trevor took over the duties of the Political Resident in 1923, it was obvious that he would pay increasing attention to Bahrain's affairs in view of the prevailing discussions and correspondence being exchanged at that time. He paid a

¹ IOR R/15/2/127 p. 72 No. 440, PR to Foreign Secretary to Government of India dated 9 August 1923.

visit to Bahrain on 6th November 1923, and stayed on the island for a few days with a view to having a better understanding of the conditions and to discussing the practical steps taken for the introduction of the reforms. From his report to the Government of India dated 10th November 1923,¹ it may be concluded that the most important topics discussed during that visit were the following:

1. The matter of the petitions submitted by the citizens who were led by Abdul Rahman Al Zayani and Ahmed Bin Lahij. The Political Agent took deterrent measures against them, although such measures were not approved of by Shaikh Hamad. The most important of these actions was sending both Abdul Rahman Al Zayani and Ahmed Bin Lahij into exile outside Bahrain.
2. The prohibition of Shaikh Abdulla, brother of Shaikh Hamad, from engaging in any secret activities. Although the Political Agent did not take any action against Shaikh Abdulla, he did however punish one of Shaikh Abdulla's sons himself and against his wishes.
3. The restructure of the Customs House. The Political Resident confirmed having appointed *Mr. Bower*, who had previously worked in the Imperial India Customs Department, in this House. His function was to organise the customs activities and to prepare an accounting and administrative system there. The next step was appointing a Chief of Customs.
4. The formation of a Force of Levies to be directly subject to the command of the Ruler Shaikh Hamad. It was proposed that it should consist of *Balushis* not Bahrainis to ensure their neutrality and independence from the tribal and factional influences. Further, the men of this force would have to stand firmly in the face of offenders, if necessary, and it was proposed that this force should have an Indian officer as its commander in order to train and organise it.

¹ IOR R/15/2/127 p. 89 No. 622, PR to Secretary of State of Government of India dated 10 November 1923.

5. The organisation of the registration of real estate rights and property income tax. In this regard, the Political Resident felt that he could not remedy the situation arising from the acquisition by some influential tribesmen of lands which belonged to others. Earlier it had been proposed that the possession of property for the previous ten years should be the criterion for title to the property. Also it was decided to leave pending the question of property income tax to a later stage after introducing the remaining reforms.

6. Reforms to the Pearl Diving System. The Political Resident relied in this connection on two significant recommendations. The first was drawing up proper accounts. He proposed that the *Nukhadas* should maintain proper accounts for the pearl divers and should give a copy of these accounts to each pearl diver. He also proposed that there should be appointed in the *Salifah* Court competent persons who were honest and capable of understanding such accounts and evaluating them. The second was ensuring that reforms of the pearl diving system in Bahrain should be as part of an overall programme for reforming this particular system in all the Gulf countries, especially Kuwait and the Trucial Sheikhdoms.

7. The position of the Heir Apparent. The most significant suggestion in this connection was devising a programme for the education and grooming of the three young children of Shaikh Hamad, Mubarak and his two younger brothers, in order to qualify them to gain accession later on. The Political Resident repeated the suggestion of the Political Agent to qualify Mubarak to become the heir apparent instead of the others, as it was easier to qualify and educate Mubarak. He proposed that they should be educated in institutes of learning in India where the emphasis should be laid on developing their character rather than on book learning.

8. Establishment of Bahrain's Judicial System. The existing judicial system was reviewed considering that it was based upon the Bahrain Order in Council in addition to the Shaikh Hamad Court which heard cases involving all Bahraini litigants. The Political Resident explained that as far as the British nationals and foreigners were

concerned the Indian laws were applicable in respect of criminal or civil cases, in accordance with the Bahrain Order in Council.

Also, the Judge who was often the Political Agent or his Assistant had no problem giving judgements and justifying them. However, a problem existed in the case of the Shaikh Hamad Court which heard cases involving Bahraini litigants. At that time, there was no applicable law to be relied upon in the giving of its judgements. Shaikh Hamad himself complained of the lack of such law rendering it difficult for him to deliver rulings. He frequently asked for the advice of the Political Agent with respect to giving judgements. Given these conditions, the Political Resident proposed, in the aforesaid memorandum, the promulgation of a special law for Bahrain. Such law he suggested should either be derived from the Indian laws but in a simplified form or be a mere translation of the laws of Aden or Zanzibar. Another alternative was to apply the laws of Iraq. In all cases, it was intended to modify these laws in order to match the prevailing conditions in Bahrain.

Although there was no reference in the aforesaid memorandum to the employment of a judicial assistant for the Bahrain Government, the Political Resident suggested the following as its end:

“I therefore am of the opinion that if we do not appoint British officials to supervise the reforms, they can never be successfully introduced.”¹

As previously mentioned, Major Daly had a distinctive way of imposing his views in connection with the reforms as gathered from his reports and correspondence. His main preoccupation at that time was the appointment of a British judicial assistant or assistants to direct the work of the judiciary and the law courts. Since the British Government was opposed to direct intervention in internal government affairs, he endorsed a new idea for employment by the Bahrain Government, under his influence and directives, of judicial advisors or assistants who would be subject to the administrative control of the Bahrain Government and not to the British Government

¹ Ibid. Government of India dated 10 November 1923.

or British Political Agency. Against this background, he prepared a detailed memorandum about the tribal conditions that contained his proposals. He addressed the memorandum dated 17th December 1923 to the Political Residency in Bushire.¹

In this memorandum, Major Daly stressed the following points:

1. The existing judicial system was actually based upon the merging of the jurisdiction of the Political Agent and the Ruler of Bahrain. It was only the Political Agent who had the jurisdiction to hear the cases involving foreigners while the local cases were subject to the jurisdiction of the Ruler of Bahrain, Shaikh Hamad, only, and the cases involving Bahrainis and foreigners were subject to the jurisdiction of the Joint Court formed by the Political Agent and the Ruler, yet in practice it was necessary to hear all these cases in one court room where both the Political Agent and the Ruler, Shaikh Hamad, were present. It was the Political Agent who passed verdicts in cases between Britons and foreigners, and Shaikh Hamad who had the responsibility of dealing with cases involving Bahraini parties. Then, both of them were to hear cases relating to the Joint Court. Major Daly said that where the cases involved Bahrainis, Shaikh Hamad often consulted with him before delivering verdicts in the cases that he examined.

He gave numerous justifications for this judicial system which he had devised. Of these the most important were avoiding indulgence in correspondence and communications, avoiding duplication in the execution and speeding up the settlement of cases referred to Al Majlis Al Urfi and the Sharia Qadi in relation to the cases heard before the Joint Court.

It was also obvious that Major Daly exploited this system for exercising control over Shaikh Hamad and ensuring guidance for the judgements that he passed.

¹ IOR/R 15/2/127 p. 106 D.O.N. 29, Agency Report dated 17/2/1923.

In presenting this detailed account about the proposed system, he sought to persuade the Political Resident that Shaikh Hamad needed the advice of a qualified Briton to give judicial advice.

2. There was an increase in the work load on the existing judicial system, which was named “The Court”. Therefore, it was essential to have another court to assist in the hearing of less important cases. He proposed that this court should be formed from a judge from the Ruling Family and a British officer. He suggested that such an officer should also be the Commandant of Levies. The introduction of such a court would make up for the poor performance of Al Majlis Al Urfi which only met once a week for a very short time considering that all its members were merchants who had no time for judicial affairs. As for the Sharia Qadi, he was in favour of reducing the reference of cases to him as much as possible.

3. It was essential to lay down rules for appealing against judgements. In this case, he proposed the new lower court would be competent to hear cases of minor importance except for the cases between owners of palm groves and farmers so as to avoid political and civil sensitivities. Meanwhile, rulings of this Court should be referred to the existing court which he called “*The Large Court*”, for endorsement.

4. The Bahrain Government should pay the salary and expenses of the officer acting as the “judicial assistant”. Such assistant was at the same time to be the Commandant of Levies, and also to be assisted by the Ruler of Bahrain in other important matters. The financing of the salary of this Officer / Advisor would be covered from the fees charged for the cases heard by the lower court and were paid in full to the Treasury of the Bahrain Government. These fees would be used to pay the salary of the British Officer / Advisor even if they would have to be paid by British protected persons.

It is noted that this proposal delegated part of the Joint Court's powers to the proposed lower court, which implied the need for amending the provisions of the Bahrain Order in Council. This was because despite the presence of a British Advisor, he was only an employee of the Bahrain Government but was not officially a member of the Political Agent's Office. This meant granting a Bahraini court jurisdiction over British protected persons. Therefore, the Political Resident did not approve Major Daly's proposal but referred it to the Government of India along with his view opposing it.¹ He went as far as to suggest that the proposed person should be a judicial assistant belonging to the British Agency so as to act as an Assistant Political Agent. The duties of the proposed Court should be the same duties and functions of the existing Court and should follow the same procedures. Afterwards the Judicial Assistant / Officer could be practically seconded to the Bahrain Government to assume the duties of the Commandant of the Levies. The Government of India responded to the proposal for the formation of a small court, and in 1924 it appointed an officer in the position of Assistant Political Agent. Additionally, the Ruler of Bahrain appointed the Amir of Manama Area to sit with him in this Court. However, this situation did not continue for long as the British Judicial Assistant was transferred to another job.²

Meanwhile, the idea of appointing a legal and judicial assistant (Advisor) for the Ruler of Bahrain remained on Major Daly's mind. Following the vacuum that was created with the transfer of the Assistant Political Agent, he seemed to have found the opportunity to resume his attempts with the British Government. This time he approached the British Government in London directly when he was there in the summer of 1925. He published an advertisement in the Times on 10th August 1925 for a person to fill a high-level job in an eastern country. An applicant for this job was Charles Belgrave who was interviewed by Major Daly personally. After the interview, he told him: *"You may or you may not hear from me again. There are many other candidates in the field."*³

¹ Ibid.

² Tuson P. *The Records of British Residency and Agencies in the Persian Gulf*, p. 108.

³ Belgrave C.D. *Personal Column*, p. 9.

Indeed, that seemed to be the situation, but the British Government agreed to Major Daly's recommendation to employ Belgrave. Soon afterwards, Colonel Prideaux, Political Resident in the Gulf at that time, met Charles Belgrave to inform him about employing him as Advisor to the Ruler of Bahrain on the basis of the advertisement and interview with Major Daly.¹ With this appointment, a new era of Bahrain's judicial and legislative history began.

2. The Advisor and the Organization of the Judiciary

The employment contract of Charles Belgrave did not contain any elucidation of the functions assigned to him. The contract did not state the nature of his position although it was signed by Shaikh Hamad in his capacity as the "*Deputy Governor*" as well as by Belgrave. Also Major Daly counter signed the Memorandum of Agreement dated 30th June 1926 as Political Agent.

Belgrave in fact had begun to work as from 31st March of the same year. This meant that the contract was signed four months after its effective commencement. On 12th April Shaikh Hamad wrote to the Political Resident stating:

"I have the honour to inform you that Mr. C D Belgrave has been authorised by me to deal with all routine matters concerning my government and it would therefore be convenient to your friend if Your Excellency would, as far as may be convenient, correspond with him on matters of a purely routine nature."

In this letter, Shaikh Hamad stressed that he would reserve for himself the consideration of important matters.²

The original idea in hiring Belgrave was to employ him in the post of Advisor or Judicial Assistant. Then, he was advised by the Indian Office that the official job title was "*Financial Advisor*". When he assumed the duties of his job, he found himself faced with endless responsibilities as he had to give advice in respect of almost all

¹ Ibid. p. 10.
² IOR R/15/2/111. See also 181D pp. 5, 6, and 13 to 16.

matters. Shaikh Hamad relied on his assistance in managing his private properties and palm groves. He even consulted with him over the disputes involving members of the Ruling Family. He had to give advice to the ladies of prominent families concerning the running of their properties and their marital disputes. He had the task of looking after public utilities and looking after education in addition to his principal responsibility for the judicial system and for maintaining security. Later he simultaneously took over the duties of introducing legislation, law enforcement and the judiciary.¹

However, the main concern in this thesis is the relationship between the Advisor and the judicial system and its evolution, considering that it was his primary concern and was the first official job for which he was officially appointed by Shaikh Hamad. The Advisor faced difficulties in carrying out his duties and in certain cases he was obliged to pass judgements without relying upon specific laws. In his words, he was forced to resort to “*palm tree justice*”.² This concept was derived from the allegedly traditional Arab tribal judicial system as the Shaikh of the tribe used to sit crossed-legged under a palm tree to consider the disputes between members of the tribe. From the very beginning, he had to deal with these conditions as a sole judge given the fact that the second Court judge was, as described by Belgrave: “*deaf and dumb, adverse to the making of decisions. When I asked his opinion he invariably replied: I think the same as Your Excellency. I agree with whatever you say.*”³

Although Belgrave was appointed as a judge, in early 1927 he had an office that was called the Office of the Advisor of the Government of Bahrain. He came to correspond with the British authorities, represented by the Political Resident and Political Agent, on behalf of the Government of Bahrain as revealed in the letter sent by him to the Political Agent under Ref. 25/925, dated 25th Shawwal 1343 Hijri / 27th April 1927, in response to a memorandum sent to the Government of Bahrain by the Political Agent.

¹ Belgrave C.D., *Personal Column*, pp. 64, 67, 77, 128 and 138.

² *Ibid.* p. 29.

³ *Ibid.* p. 28.

The subject of this letter related to the removal of Shaikh Khalaf Al Asfur, the Shia Qadi, from his position and the placement of another judge called Sayed Adnan.¹

It was noticed that the Office of the Advisor had gained an increasing influence at that time. In a letter from the Advisor to the Political Agent, dated 5th Dhu al-Qida 1345 Hijri/ 6th May 1927, he advised him of the desire of Shaikh Hamad, Ruler of Bahrain, to set up a subsidiary court to have the power of examining cases involving amounts of no more than 50 Rupees. Quoting Shaikh Hamad, he suggested that the benefits of this Court would be enormous if it were granted jurisdiction over protected persons in addition to Bahrainis. He said this court would be productive if it included in its formation a protected person acting as a judge. He proposed that this judge could be one of the staff members of the Political Agency. He also suggested that this judge should be Captain Daric in addition to another person to be nominated by Shaikh Hamad from the lower-ranked Shaikhs. Belgrave justified his proposal by the huge work load handled by his court in which Shaikh Salman, son of Shaikh Hamad, acted as a judge. The Political Agent actually approved this proposal and appointed, from his side, Khansahib Mirza, translator of the Political Agency at that time, as a representative of the Agency.²

On 21st Dhu al-Qida 1345 Hijri / 22nd May 1927, Shaikh Hamad issued a letter appointing three judges to the Bahrain Sharia Courts namely: Shaikh Abdul Latif Bin Shaikh Mahmud, Shaikh Abdul Latif Bin Al Shaikh Muhamad bin Saad and Shaikh Abul Latif Bin Jowdar. This letter determined that the Court formed with their membership should sit for two days in Muharraq and two days in Manama. Belgrave sent a copy of this letter to the Political Agent who, in turn, commented on it in a letter addressed to the *Advisor of the Governor of Bahrain* on 14th May 1927, expressing his reservation to this appointment and proposing that all the sittings of the law courts including Salifah Court should be in Manama.³

¹ IOR R/15/2/127, p. 141.

² IOR R/2/15/133, No. 989/9 dated 5 The Al Qida 1345 Hijri and No. 303 from PA to Advisor dated 7 September 1927.

³ IOR R/15/133.

Thus, it is found that the influence of the Advisor over the Bahrain national courts became a fact and the British authorities came to deal with him as the officer in charge of these courts, including the Sharia courts with its two sections, the Sunni and the Shia courts, and the Salifah Court in addition to the modern law courts set up on the same lines as those of the Shaikh Hamad Court.

Analysing the situation of the judicial system in the light of the foregoing, it may be concluded that the main outlines started to take shape in the late 1920s and consisted as follows:

1. The Courts which were competent to hear cases involving foreigners according to the Bahrain Order in Council. These were the Chief Court and the District Court.
2. The Joint Courts which were competent to hear cases involving Bahraini parties and foreign parties according to the provisions of the Bahrain Order in Council.
3. The semi-judicial councils in accordance with the Bahrain Order in Council. These were Majlis Al Urfi and Salifah Court.
4. The national civil courts, the principal court of which was the Shaikh Hamad Court which was earlier referred to, and from it was formed a lower court comprising the Advisor Mr. Belgrave and one of the members of the Ruling Family. It was concerned with hearing cases concerning claims of no more than 50 Rupees.
5. The Sharia Sunni Court which came into being with the official appointment of Shaikh Abdul Latif Mahmud, Shaikh Abdul Latif Bin Mohamed Bin Saad and Shaikh Abdul Latif Bin Jowdar.
6. The Sharia Jaffari (Shia) Court which was set up by the official appointment of Shaikh Khalaf Al Asfur, then his removal from office and the subsequent appointment of Mr. Adnan.

At the same time in 1927 when the above judicial reorganisation took place, the Advisor focused his attention on the organisation of other departments which were connected to justice and the judiciary. The most important of these was the organisation of real estate registration for protection of public interests from fraud, considering that certain influential people used to seize for their benefit some citizens' property without having a rightful claim to it. The purpose was also to prohibit the conclusion of several transactions affecting one and the same property. According to the new system:

“On submission of sale deed for registration the property is measured in the presence of the owner, or in case of sale, before the parties and a plan is prepared. Proclamation giving brief description of property is issued inviting objections within the period of a month. Objections are referred to the Courts. If none is made the new deed is prepared on durable paper with a plan on the back of the deed. Copies are kept, and the original deeds are filed in the Land Registration Department.”

Moreover, the Advisor also established the Waqf Department which was headed by Shaikh Abdulla Bin Isa, the Ruler's brother, and had the membership of judges and prominent figures from the Sunni and Shia communities.¹

A proclamation was issued by the Government of Bahrain under No. 17/69 of the year 1346 (1928) Hijri giving exclusive authority on Waqf affairs to officers appointed by the two Sharia courts of the Shia and Sunni communities. It ordered each of the officers in charge of Waqf properties to appear before either Court to hand over the properties or assets held by them with a view to giving them authority to manage their affairs. In other words, each of the two courts came to have the right to reject issuing a permit to anyone it deemed inappropriate to exercise the power to administer Waqf property.²

¹ Government of Bahrain Report dated 23 February 1927, IOR R/15/2/296.

² IOR R/15/2/130 p. 88.

In pursuance of the reforms and the property registration regulations, the first title deed was issued on 4th Shawwal, 1344 Hijri (around 1927) confirming the ownership by the Government of Bahrain of Government House and the ownership of the Political Agency of its premises.¹

3. Problems which Affected the Organisation of the Judiciary

Things were not as simple as they were envisaged by Mr. Charles Belgrave during the early period of his era as certain problems arose contrary to expectations. On the one hand, he was the Advisor of Shaikh Hamad, the Ruler, so that he was an employee of the local Government of Bahrain, but on the other hand he had to deal with the British authorities, especially the Political Agent as a junior and in a manner which served the British policies. He had the task of trying to harmonise the desires of both parties. Shaikh Hamad, unlike his father, had more understanding and even tolerated the British role. However, Mr. Belgrave found himself faced with forces of confrontation which he had to deal with and could not ignore, as he had to provide solutions for the problems they raised. It could be said that the most important of these forces were the Shia movement, the religious movement, and the national and reformist movements. Focus will be placed on dealing with these movements until the late 1930s, as the nature of these movements underwent major changes after this era as can be seen later.

1. Shia (Baharna) Movement

What is meant by this movement is the attitude followed by the Shia community as a social group, not as viewed from the religious point of view. In their correspondence, the British authorities always referred to them as "*Al Baharna*" to distinguish them from the other Arabs who landed in Bahrain from the Arabian Peninsula and enjoyed stable living conditions under the rule of Al Khalifa and also to distinguish them from the Persian Shias who immigrated into Bahrain from Persia. The word is the original Arabic dictionary word for "Bahrainis". Al Baharna were mostly village people of

¹ Ibid. p. 80.

whom the greater majority were engaged in farming and fishing with a minority of them working as merchants. With the relatively improved living conditions in the mid-twenties and the development of city life in Bahrain, especially in the town of Manama, a leading class of merchants emerged made up of the traders who travelled outside Bahrain or those who mixed with expatriates. So they acquired new ideas, making them tend to be better organised and seeking to deal with the authorities as leaders of a community which had social dimensions and aims.¹ To highlight the social nature of their movement, they deliberately avoided the Persian Shias and the same was true of the Persian Shias who avoided this movement and only interacted with the Al Baharna group in limited and exceptional cases in a personal way and not based on fraternity.²

Since the late 1910's the Al Baharna continued to organise their meetings and to produce their petitions in a written form, addressed to the British authorities. One of their petitions was referred in 1921 to the Ruler Shaikh Isa Bin Ali who met the demands made in it as shown by his historic statement made in February 1922 (see Chapter 4 of this thesis). Al Baharna continued this practice and wrote petitions signed by their leaders on 3rd August 1923, in which they demanded the introduction of reforms to the judicial system. They followed up this petition by a letter dated 3rd Muharam 1342 Hijri, i.e. approximately during the month of July 1924.³

With the beginning of Shaikh Hamad's accession to power, the relationship between the ruling authority and Al Baharna improved dramatically and co-operation became more tangible between Shaikh Hamad and the Advisor on one side and the Shia leaders on the other side. More interesting was the fact that the Shia leaders played an effective role in calming the situation even after attacks suffered by some members of their community, including a murder incident in Sitra.⁴ Al Baharna did not make any opposition to be reckoned with to the reforms. However they protested against the

¹ See report on Activities of Persians in Bahrain, IOR R/15/2/176 p. 145.

² Ibid.

³ IOR R/15/2/88 p. 1/96

⁴ IOR R/15/2/88 Belgrave to Barret dated 10 February 1928 and Barret to Sec. of State to PR dated 4 May 1928.

exile of Shaikh Khalaf Al Asfur, a Bahraini clergyman, in May 1929. Then, this movement calmed down further and was increasingly ignored by the Government.¹

It seemed that Al Baharna became confident of the new administration led by Shaikh Hamad and the Advisor Belgrave, at the end of the 1920s and the early 1930s. They were optimistic about the administrative and legal reforms and showed co-operation with those undertaking them. However, in 1934 they returned to the practice of making protests and filing petitions. They wrote to the Ruler, Shaikh Hamad, a petition dated 23rd Ramadan 1353 Hijri (November 1934) containing the following three demands:

“1. To review the judgements of the Court so as to be just in the proper sense of the word, so that every ruling passed in civil cases must rely upon a definite provision derived from a reliable reference so as to justify the ruling of the Judge, so that he would not be accused of being prejudiced and to convince the party adjudged against of the equitable ruling and the integrity of the court which in turn would serve the best interests of individuals.”

[It is noted here that the demand relates to the need to lay down legislation for the judge to rely upon in justifying judgements and also to have a body for execution.]

“2. Since we are the majority of the native population, it is one of the principles of justice that we should have a proportionate representation in Majlis Al Urfi and the Municipal Council.

3. We plead with your Highness to return to us rights to the education department, which rights we have been deprived of for many years.”

It is noted that Al Baharna drafted this petition using a friendly and loyal language in addressing Shaikh Hamad. They addressed him by saying “*Your Majesty*” and they described themselves as “*your subjects*”. They showered his leadership and policy with praise while the petition was written in the form of a complaint against the administrative authority and was filed with the highest authority in the land and addressed to the legitimate leadership represented by Shaikh Hamad, the Ruler. They

¹ IOR R/15/2/296 Admin. Report of the Political Agency 1929.

reaffirmed their loyalty to his leadership and their confidence in his justice and prudent policy. This trend is somehow different from the trend and language of the earlier petitions, most of which were presented to the Political Agent or the Political Resident.¹

Belgrave sent to the petitioners a reply which was not convincing to them. On 30th January 1935 he met with the writers of the petition, who were Mansur Al Arrayed, Mohsin Al Tajir, Abdul Rasool Bin Rajab and Abdali Al Alaiwat in order to discuss their demands. However, that meeting was not successful as the replies of the Advisor were not convincing to them. Therefore, they insisted upon having an audience with Shaikh Hamad who met them on the following day. The discussions did not seem to have gone smoothly and the meeting ended without any tangible results. Shaikh Hamad was angered by the manner of the discussion and the meeting was brought to an end. Mansur Al Arrayed, who was described by the Advisor as the most capable petitioner to speak, stressed to the Advisor that the petitioners had absolutely no intention to raise any problems but on the contrary wanted to make sure that no disturbances would take place and to ensure behaving in a peaceful manner. In his report, the Advisor pointed out the complete calm and quiet which prevailed among Al Baharna afterwards.²

The manner in which the Shia movement merged with the general national movement in making demands for reforms so that the Al Baharna ceased to appear as an independent social group will be seen later.

2. Religious and Conservative Movement

From the very beginning, the Advisor faced difficulties with all religious scholars, of both Sunni and Shia sects, as they feared the application of laws other than the provisions of Islamic Sharia.

¹ IOR R/15/2/176 p. 12.

² IOR 15/2/176 p. 34. Belgrave to Colonel Loch, dated 4 February 1935.

Although the Advisor became influential in the appointment of judges, as he actually appointed the three Sunni judges as indicated above, those judges did not completely comply with the instructions of the Advisor. In fact, they made explicit objections and declared that they were opposed to the application of any law that was not consistent with Islamic Sharia.¹ So the Advisor had to give consideration to their influence and to ensure for them a minimum level of powers so as to avoid getting into conflict with them.

On the other hand, certain elements of Shia religious scholars were able to cause considerable difficulties to the Advisor. The most important of these was Shaikh Khalaf Al Asfur who was one of the Shia judges from the beginning of the first decade in the twentieth century. Previously he had caused problems for the Political Agent when he initially worked as a judge and was removed from that position, but was reinstated as a judge about 1924 when he acted as a judge of the Shia community. When Belgrave took over as Advisor, he was faced with the independent behaviour of Shaikh Khalaf, prompting the Advisor to seek his removal from office. Then, he was actually removed and exiled to Iraq and Sayed Adnan was appointed as a Shia judge in his place.²

The main reason for these problems was the independent line pursued by Shaikh Khalaf, not only in the exercise of his judicial duties but also in administrative and financial matters, including the collection of alms (*Zakat*) and "*Al Akhmas*" which are religious financial obligations. In this connection, he relied upon the religious duties of judges according to the Shia theory in government (as mentioned earlier in Chapter 1 of this thesis). The Advisor had reasons to describe him as a blackmailer; however, the description was not at all consistent with the high standing of Shaikh Khalaf as a spiritual leader and a religious scholar who had many followers and supporters.³

¹ IOR R/15/1/44 p. 22.

² IOR R/15/2/112.

³ See Adnan S.M. - *Tuhfat Al Nademin*, (transcript, seen in his own library)

The problems made by the Shia religious scholars were not limited to those who were outside the ruling authority, the most prominent of whom was Shaikh Khalaf, but there were those who worked within the judicial corps who caused some problems to the Advisor, as mentioned in his report in 1917 concerning the differences among the Shia judges over the chairmanship of the Waqf Council.

It is noted that the problems raised by the Shia judges and religious scholars were more than those raised by their Sunni counterparts. The reason for this attitude is attributed to the philosophical outlook to the judiciary in both sects as the Shia maintain that the pursuit of justice takes place on behalf of the Imam directly appointed by God, hence they are not subject to the authority of an earthly ruler on earth except to the necessary extent. However, Sunni followers believe that the ruler is the authority in charge of selecting the judge and the latter has to enforce the provisions of Allah, thus he must resolve cases among the people according to the provisions of Sharia independently and with integrity.¹

It was essential to resolve matters in a clear manner with the Shia judges who continued to act independently even in spite of their employment as part of the formal judicial corps. So the Government of Bahrain enacted legislation under No. 26/1357 dated 27th October 1938 addressed to the “*Jaffari Judges*” (i.e. the Shia), containing the following most significant clauses:

1. They must not deliver judgements nor carry out any of their official duties outside the official places of their work.
2. The law courts must hold their sittings a least four days in every week.
3. The judgements passed by the Judges in the court of first instance may be appealed against before the Cassation Judge.

¹ See Chapters 1 and 2 of this thesis.

4. If they make a marriage or divorce contract outside the official court premises, they must procure its registration in the Court Register and all their verdicts and documents must bear the official seal of the Court.

5. They shall not receive any remuneration from the litigants directly nor shall they receive any gifts from the litigants, otherwise such gifts shall be deemed as bribes.

6. The Government will appoint the clerks and judicial assistants of the Sharia Law Courts, and such appointment shall not take place by the judges as they may not employ whom they wish.

The aforesaid legislation stipulates punishments to be inflicted against the judges who breach its provisions. Article 9 thereof provides that any *“of the judges who violates any of these articles shall be liable for the penalties to be determined by the Law Court and Cassation Judge.”*¹

It should be noted that the position of the Cassation Judge is a job which was introduced by the Advisor in 1938 and he recruited a judge from Iraq to take up this job in an attempt to reform the Shia Sharia Judiciary and keep it under the control of the Government. He was responsible for exercising control over the rulings of *the “Jaafari Sharia Judges”* (i.e. Shia Judges).²

In brief, the problems caused by the Sunni and Shia religious scholars were not tolerable to the Advisor. Therefore, he launched an attack against both sects in his report dated 9th December, 1938 presented to the Political Agent. He described the Sunni Judges as follows:

“They are ignorant of the modern methods and have no good training There are complaints about their dilatory methods..... both in matters of law and general matters. They are ignorant, narrow-minded and unprogressive”.

¹ Collection of laws and proclamations, Ministry of State for Legal Affairs of Bahrain, 1977, p. 37.

² IOR/R/15/2/176, No. 1822 Belgrave C.D. to PA 9/12/1938.

It is noted that the Advisor's complaint of the Sunni judges centres on their argument and their lack of experience and backwardness, according to his expression. As for the Shia judges, his attack was much stronger when he said: *"I am sure that as long as there are Shia Sharia Courts there will be factions, disputes and complaints. The record of the Shia Qadis in Bahrain for the last fifty years is notorious"*.¹

3. Nationalist Reformist Movement

In the middle of the 1930s the development of education in Bahrain brought about an increase in the number of students going to universities outside Bahrain. So there was a more developed political awareness among the local citizens. Those educated citizens began to cause a great deal of inconvenience to the Advisor who complained of the students' demonstrations in the early 1930s.²

This educational awareness was followed by a national political awareness and changes in the method of expressing demands and the authorities to be addressed to them. Since the mid-1930s the Shia's petitions almost disappeared and no more petitions were presented by the Sunni advocates of nationalist reforms. The demands became varied in terms of their quality and source. They came to call for general nationalist reforms for both the country and citizens and they were submitted by different people from the Sunni and Shia sects. So new forms and groups of nationalist organisations began to emerge taking special names of such groups and organisations. The demands made always included calling for reforming and developing the judicial system.

In a confidential report which was undated (but seemed from the sequence of events to be related to developments that occurred in 1936), it was indicated that meetings were held and attended by leaders of the two Sunni and Shia sects. The most prominent of these leaders were Yousif Fakhro (Sunni), Mohsin Al Tajir (Shia), Mohammed Bin Yousif Nasser (Sunni), Ahmed Al Alawi (Shia) in addition to others. At least one of

¹ Ibid.

² Belgrave C.D. - *Personal Column*, p. 93.

these meetings was attended by Shaikh Salman, son of the Ruler. These meetings were held at different places which included the Office of Yousif Fakhro and the residence of Ahmed Bin Khamis. Such meetings culminated in making demands, the most important of which were the following:

1. Formation of the Legislative Committee.
2. Reforms in the Police.
3. Reforms in Bahrain Courts.

The leaders of this movement shared a consensus that it was necessary to form a legislative committee consisting of three persons from the Sunni sect and three others from the Shia sect, and the committee would be presided over by Shaikh Salman, son of the Ruler, Shaikh Hamad. The same report said that Yousif Fakhro, Khalid Al Moayyed and Yousif Kanoo subsequently presented demands through the Sunni judges calling for police and court reforms in addition to imposing the continued ban on alcoholic drinks and not allowing women's freedom. Those persons claimed that Al Baharna supported them in these demands.¹

This report was followed by another undated report dealing with the activities of a group of young Bahrainis led by Mohamed Al Arrayed (Shia), Ebrahim Al Arrayed (Shia), Abdulla Al Zayed (Sunni) and Mohamed Saleh Al Shirawi (Sunni). The report accused them of publishing a report in "*Al Rabita Al Arabya Magazine*", a magazine which was published in Egypt.²

Since 1937 the nationalist movement followed another direction as it witnessed the publication of leaflets opposed to the administration led by the Advisor but they showed no opposition to the ruling government represented by the Ruling Family.

¹ R/15/176, p. 142, (Confidential).

² Ibid., p. 176.

During that period, several leaflets were circulated carrying the signatures of “*Representatives of the Nation*” and they were directed against the Advisor and foreign staff who were described by the leaflets as “*occupying the administration of the Government and seizing for themselves the funds of the nation*”. These leaflets described the Advisor of having “*made an amazing dictator of himself*”. They called for his removal from office and entrusting his position to a person from the Ruling Family “*whom we would love and trust*”. A leaflet called for the setting up of a legislative council. The same leaflet underscored the desire to keep the leadership of Shaikh Hamad the Ruler who was loved by the people. He was called upon to approve the demands.

Another leaflet was issued by “*the Free Bahraini Youngsters*” launching a severe attack against the Advisor Belgrave and accusing him of enslaving the people of Bahrain. It called for waging a rebellion against him and the introduction of democracy. The leaflet urged the British Government to back the demands of the people of Bahrain and to give them freedom. It also appealed to the Ruling Family and addressed it as the “*glorious Al Khalifa Family*”. It called upon the Ruling Family not to allow “*an intruder*” to segregate them from the people. It appealed to their sense of patriotism by advising them to “*avoid doing or accepting*”. The leaflet called for national unity and non-segregation between the Sunnis and the Shias. It was clear from the leaflet that it was targeted against the Advisor Belgrave and his administration. It was signed by the “*Arab Youths*”. This leaflet was printed in an elaborate form outside Bahrain and seemed to have been printed in one of the Arab countries as there were then no printing presses producing such high standards in Bahrain. In turn, the Advisor began to become concerned. In November of the same year, a petition was presented to the Political Agent containing a number of demands, the most significant of which was the setting up of a legislative council to enact the country’s laws and to reform the law courts. This petition was also signed by “*Youths of the Nation*”. At the same time, there were posters displayed promising an “*end to injustice*” and calling upon the people to get prepared for change.¹

¹ Ibid., pp. 148, 204, 206, 207-208, 238 and 360.

4. Nationalisation of Laws and Courts

Since the beginning of these developments, the Political Resident had written to the Government of India on the necessity of reforming the judicial system, particularly in Bahrain, and opposed the idea calling for the appointment of a British Assistant for Belgrave “*The addition of an Assistant would cost the state an appreciable sum in salary and would doubtless not be generally popular*”. The Political Resident proposed specific reforms to the judicial system that focused on Belgrave’s involvement in almost all stages of litigation. The Political Resident. proposed that the “*Bahrain Government will be given a reasonably free hand in the administration of justice*”. He also suggested that Bahrain should have its own Judicial Code that would be accessible to everyone.¹

In order to reduce the extent of tension, the Advisor had formed in February 1937 a committee to lay down a judicial system under the chairmanship of Abdul Wahab Al Zayani, a prominent figure in the nationalist reformist movement at that time. It was assigned with task of laying down the laws of the country, not only the judicial system, thus the demand for an elected national legislative council was ignored.² This Committee discussed the drafting of laws dealing with the following issues:

1. Bankruptcy.
2. Diving Laws.
3. Pearl Trading and Brokerage.
4. Mortgage and Sale.
5. Land Division and Partition of Immovable Property.
6. Pre-emption.
7. Court and Case Regulation and Farming Suit.
8. Provisional Remedies.

9. Inter Pleader.

¹ Ibid., p. 140, No. 1605 from PR to Bushire.

² IOR R/15/2/822, Law and Order.

10. Wakils (Attorneys).

In addition to the above subjects, certain other questions were being considered and these were:

1. Sales.
2. Partnership.
3. Evidence.
4. Estate and Wills.
5. Water rights and local usage.
6. Fish trap rights.
7. Limitation Act.
8. Suits by or against government.
9. Arbitration.
10. Appeals.
11. Judgement Courts.

It seemed that in spite of having prepared a large number of laws as gathered from a subsequent report from the Advisor, the Committee did not succeed in completing all the tasks entrusted to it.¹

For this reason, Shaikh Hamad wrote to the Political Agent on 12th November 1938, advising him of the need to investigate the question of the administration of justice in the country. He asked him in the letter to seek the assistance of qualified persons to act as legal experts or judges to train the local judges and to take part in the introduction of laws. He suggested that two such persons could be Arabs from Egypt or Sudan to be recruited by way of secondment.² It is evident from this letter that there was a tangible response from the Ruler of Bahrain to the pan-Arab trend which began to emerge in the movement of meetings against non-Arab foreigners, especially the British,

¹ Ibid., DO 1360/9. To Stewart from Belgrave, February 1937.

² Ibid., p. 212. Hamad Al Khalifa to PA, 12 November 1938.

represented by the Advisor. However, it is noticed that no one from outside Bahrain was employed to work in the judges corps during that period.

Initially Shaikh Hamad seemed to show a reasonable response to the calls for the need to restrict the Advisor's authority, especially in the area of the judiciary, and he sought direct intervention to enforce this trend. At the end of 1935, the Bahrain Law Court consisting of the Advisor Belgrave, Shaikh Salman Bin Hamad and Abdulla Bin Hasan, pronounced a capital punishment against a person who was accused of murdering his sister. Shaikh Hamad was not satisfied with that ruling and ordered a retrial and amending the judgement. When Belgrave rejected Shaikh Hamad's intervention, the latter insisted upon his opinion making Belgrave refer the matter to the Political Agent, who sought to pressure Shaikh Hamad in order not to intervene in the case. However, Shaikh Hamad did not yield to this pressure and insisted upon his intervention. This lead the Political Agent to write to the Advisor Belgrave advising him to gradually withdraw from the Bahrain law courts and proposed that the sentence in this case be reduced to a seven-year prison sentence and to issue a proclamation that the penalty for murder in the future would be capital punishment.

On 7th December 1938 the Advisor Mr. Belgrave issued the famous proclamation under No. 34/1357 with respect to the Re-organisation of the Judiciary under the heading of "*Bahrain Law Courts*". This Proclamation contained the restructuring of the civil law courts as follows:

Court	Judges
Bahrain High Court	Shaikh Rashid Bin Mohamed Al Khalifa Shaikh Abdulla Bin Hamad Al Khalifa Shaikh Ali Bin Ahmed Al Khalifa
Bahrain Lower Court	Shaikh Daij Bin Hamad Al Khalifa Shaikh Mohammed Bin Ali Al Khalifa Shaikh Ali Bin Khalifa Al Khalifa

Bahrain's Representative

in the Joint Court

Shaikh Mubarak Bin Hamad Al Khalifa

Chief Clerk of Bahrain

Law Courts

Abdulla Bin Rashid Al Yousuf

Court of Appeal of the

Bahrain Law Courts

Shaikh Abdulla Bin Isa Al Khalifa

Shaikh Salman Bin Hamad Al Khalifa

Advisor Mr. Charles Belgrave

It is noted that the Advisor selected all the judges from the members of the Ruling Family who were very close to the Ruler Shaikh Hamad, thus he gained his satisfaction. He kept for himself the position of a member of the Court of Appeal, the highest judicial authority at the top of the new legal authority in order to keep himself in full control of the judiciary. Initially due to this restructuring the judicial system faced criticisms and protests from the citizens. It appeared from the Advisor's handling of the protests that they focused on concentrating the judicial authority in the hands of members of the Ruling Family in the civil courts and the lack of legislation that was binding upon the judges and the formation of the Sharia courts.¹

The Advisor defended this structure by justifying the limited choice of the judges to the members of the Ruling Family by saying that "*the purpose of involving members of the Ruling Family in public affairs in spite of the fact that they were uneducated and incapable was because they were less likely to be influenced, hence their neutrality is ensured.*" As for the judges of the Sharia courts, he launched an attack against the judges of the two Sunni and Shia courts by describing them as "*ignorant, backward and lacking in integrity*". He also mounted an attack against those who stirred the protests by making strong accusations against them. He pointed out that the Government had imprisoned some of them for engaging in hostile activities (It is clear

¹ IOR R/15/2/176 No. 1822/9/1351 confidential dated 9 December 1938. See also the Bahrain Court report of 1938.

that those whom he mentioned were political opponents who included the lawyer Saad Al Shamlan, Ahmed Al Shirawi and Ali Bin Khalifa). In his report, he concluded by making proposals for the need to start training the judges from members of the Ruling Family and employing judicial assistants and foreign experts to undertake the task of providing training and to assist in the administration of justice.¹

At the end of 1938 and after repressing the above-mentioned protest movement, it seemed to the Advisor that matters were under control and his authority was further consolidated after establishing the judicial system without any disturbances for a long time. This state of affairs continued until the mid 1950s when protests flared up against the Advisor and took a more advanced form in terms of organisation and methods with the formation of a leadership known as the National Union Organisation with a high council which was named as the High Executive Committee (“HEC”), which had a new impact.

It could be said that the judicial situation in Bahrain during the period from 1938 to the post 1956 period was characterised by certain features, the most significant of which were as follows:

1. Stability of the judicial system according to the structure laid down by the Advisor as already explained with respect to the Bahrain law courts and according to the structure which was introduced by the Bahrain Order in Council with respect to litigation involving foreigners and growth of the Advisor’s influence and his domination over the judiciary.
2. Increase of confidence in the local Bahrain law courts and their ability to settle cases involving foreigners should any of the litigants have recourse to them in the first instance. In this connection, the Government of Bahrain published Proclamation No. 3/58 dated 4th March 1939 which stipulates that if a foreign litigant elects the jurisdiction of the Bahrain courts or if the foreign defendant does not plea with the

¹ Ibid.

non-jurisdiction of the Bahrain courts to hear the case, then the courts shall have jurisdiction and it shall not be possible after commencing with the proceedings to ask for reference to the Political Agency's Court in pursuance of the provisions of the Bahrain Order in Council.¹

3. Increase in the publication of legislation and laws in the form of proclamations signed by the Advisor or the Ruler in co-ordination with the Political Agency's authorities. These proclamations were approximate translations of the King's Regulations which were issued by the Political Agency for implementing the provisions of the Bahrain Order in Council. Many laws were enacted, for example Proclamation No. 35/1357 with respect to Organising the Appeal Procedures of 15th December 1938, Motor Cars Ordinance issued vide Proclamation No. 28/1358 on 5th August 1935, Law Court Fees Law promulgated by Proclamation No. 52/1365 dated 11th November 1945, Estate Law enacted by Proclamation No. 3/1366 dated 26th December 1946 and the Rents Act published by Proclamation N. 42/1365 dated 21st August 1946.²

4. Stability of the role of "*Majlis Al Tijjars*" which was previously called Majlis Al Urfi according to the Bahrain Order in Council consisting of prominent figures from the experienced merchant community. There was an increase in cases referred to it by the law courts as an expert authority, particularly from the Joint Courts and Agency Courts (see reports of the Annual Reports of the Government of Bahrain during this period).³

It could be said that this period witnessed a complete stability of the judicial structure in the form whereby it was set up in 1938 with the development of that system, such as the setting up of departments within each court and creating an administrative staff to organise court procedures and the appointment of a superintendent to supervise the

¹ See collection of laws and proclamations, Ministry of Legal Affairs, Bahrain, p. 1.

² Ibid., See also IOR/15/2/3.

³ See Govt. of Bahrain Annual Report.

work of such staff.¹ There was a continuation of the general stability and acceptance of this system until the launch of the national movement calling for reforms under the leadership of the HEC. Thereafter, it had an influence in the legislative movement and in making some changes relating to the judicial system.

It should be noted that during this period there was a phase of economic boom as the discovery of oil took place in 1932² which in turn gave a boost to the legislative movement to keep pace with economic and business growth. Such recovery contributed to the stability of the judicial system's situation and allowed the Advisor to have more control until the emergence of the national movement calling for independence and democracy and the separation of authorities in the State. This movement was more organised and effective and it clashed directly in a hostile manner with the ruling authority at that time, principally represented by the Advisor. The National Organisation represented in the early 1950s the peak of the organisation of this movement and its most obvious manifestation shall be discussed in the following chapter.

¹ See Government of Bahrain Annual Report for the years 1943 and 1946.

² Journal of the Royal Central Asian Society Vol. LV 1968 p. 28. Article by Sir Charles Belgrave, Journal of the Royal Central Asian Society 1952, p. 68, Article by James H.D. Belgrave.

Chapter 6

THE ORGANISED NATIONAL MOVEMENT, THE ADVISOR AND THE JUDICIARY

1. Foundation of Organised Political Institutions

There is reference in Chapter 5 to the early development of the national reformist movement in Bahrain on both local and national basis and a pan-Arab basis involving the participation of groups from the Shia (Baharna) and Sunni factions. This movement took two directions: the first was the call for the introduction of political, judicial and administrative reforms and the second was the opposition to foreign domination, particularly the British presence, which was viewed by the nationalist movement as a reflection of such domination and as its tool. This chapter will deal with the effect of that nationalist movement on the legislation relating to the organisation of the judiciary during that period until independence, which was promulgated shortly before the enactment of the Constitution in 1973.

Since the late 1940s and with the increased interest in political changes given the impact of the World War in furthering interest in enhancing such interest, the idea of political independence began to develop in the region in general and in Bahrain in particular. This idea was affected by the outcome of the War in terms of independence gained by many Arab countries in spite of differences in formulas. Several factors contributed to the development of the idea such as the emerging concept of popular participation in authority among the intellectuals helped by the changes and developments in methods of transportation, the spread of radio and the possibility of getting newspapers, magazines and books from the Arab countries.¹

¹ Bahrain Civil Aviation Records; See also Charles Belgrave, *Personal Column* p. 109.

In Bahrain, there was an increase in the number of educated people and the travel movement to and from Bahrain grew. The Bahrain Airport was opened in 1932 and the growth in travel and contacts with Arab and non-Arab intellectuals added a new and effective method for dissemination of knowledge, including political knowledge.¹

The new political and social ideas began to find the proper framework for them. Bahrain's intellectuals sought to find organisations that could bring them together and regulate their efforts. The most suitable of these frameworks were the social clubs which came into being in the late 1940s and early 1950s under a specific name and a clear description. Since their early days, these clubs came to be known as the "*national clubs*" to underline the national political thought of the people running them.²

In addition to the national clubs, the early national newspapers were published and their nucleus was "*Sout Al Bahrain*" (which means "the voice of Bahrain") Magazine of which the first issue was published in 1949. This publication was the mouthpiece of the elite of intellectuals and politicians in the country. The editorial board of the magazine not only included the elite of intellectuals from the Sunni and Shia sects, but the founders of the magazine also included on the membership of the board Mr. James Belgrave, son of the British Advisor to ensure for the magazine some form of protection.³

Following the publication of the magazine, other magazines and newspapers were published. *Al Qafila newspaper* was published followed by *Al Watan newspaper* which was published in 1952. All the newspapers advocated calls for independence, political freedom and organisation of national authorities.⁴

¹ See *The Middle East a Political Economic Society - The Gulf Sheikhdoms* edited by Sir R Pollard p. 133; See also Qassim J.Z., *Al Khalij Al Arabi*, p. 24.

² Al Ubaidi I.K. *Al Harkat Al Watani Fi Al Bahrain* p. 162.

³ Al Baker A.R. *Mina Al-Bahrain Ila-Almamfa*, p. 42.

⁴ Al Ubaidi I.K. *Ibid.* p. 164.

At that time, the Bahrain press enjoyed a remarkable freedom of speech and found in the national clubs forums for the spread of political thought which was made possible by the increase in the number of clubs as they became common in many of Bahrain's towns and villages. In 1952 the number of clubs in Bahrain was nine, spread throughout Bahrain's two main towns at that time, Manama and Muharraq, in addition to various villages.¹

One can imagine the impact of the availability of even a small number of newspapers in a community with a scant population such as Bahrain had at that time. The total population in 1952 was 109,650 people², to compare with the number of clubs which used to be meeting places for youngsters who had a great deal of enthusiasm for the views they held. Of course, these newspapers could propagate different ideas and influence the local community in terms of the spread of such ideas, creating reactions and responding to the newly advocated views and thoughts.

In the early 1950s, differences between the Sunnis and Shias sects became deeper, causing disturbances and violent events, some of which resulted in killing people of both sects. Of course, this prompted the young group of intellectuals to take steps to halt these acts and to ensure that such events would not escalate and take the form of a civil war. So moves were made by young Bahrainis of both sects led by those in charge of the local newspapers and management of the national clubs. They called for meetings at the premises of some clubs, and in the houses of some of their members. Their discussions went beyond the issues of the conflict between the two factions to the need to demand political and social rights.³

¹ Daleel Al Andiyah Alwattaniah - The High Council of Youth & Sports, Government of Bahrain. See also Al Muraikhi K. *Safhatan Min Al Mahdi* p. 265.

² Bahrain Census Office Report 1971 Issue, Table 9, p.7.

³ Al Baker Ibid. pp. 61-66.

2. Emergence of Specific Demands

The officials led by the Advisor Mr. Belgrave were not satisfied with such moves, prompting them to attempt to curb the activities of those intellectuals. However, he was faced with a fierce current of opposition. This drove the latter to make those intellectuals call for holding an expanded meeting at a mosque in early October 1954. This was followed by another meeting held in the village of Sanabis on 13 October 1954. The participants in the meeting decided to form an organisation which they designated as the National Movement Organization led by its High Executive Committee (“HEC”), considering their group as a representative of the people of Bahrain. At that meeting, they put forward their demands which were summed up in the following:

1. Setting up a legislative council.
2. Promulgating penal and civil laws for the country.
3. Allowing the formation of trade unions.
4. Introducing a high court of cassation.

It was abundantly clear from all the statements, publications and leaflets of the HEC commencing from the decisions of its above-mentioned first meeting that the reforms of the judiciary were the principal bases and the core of its demands.

In considering the demands made by the HEC as a reflection of the demands of the Bahrain national movement, two main reasons have been relied upon. The first was the absence of any parallel movement at the same time as the HEC movement. The second is the fact that it was officially recognised. It was officially recognised by the Bahrain Government and the officials, led by the Advisor, who acknowledged the strength of its influence.¹ Also Dr. Husain Mohamed Al Baharna, who has been the Minister of State for Legal Affairs in the State of Bahrain from its independence until 1996 refers to the activities of the HEC as an officially recognised body.² It is

¹ Ibid. pp. 73-77; See also Al Ubaidi, Ibid. p. 189. Government of Bahrain Proclamation dated 16 March, 1956.

² Al Baharna H.M., *Duwal Al Khalij Al Arabi* p. 108.

understood from the official report at the time that there was wide scale popular support to the calls made by the HEC.¹

From following up the statements and releases of the HEC, one can gather the special significance given by the nationalist movement to the judiciary. In its first announcement addressed in the form of a letter to the “*Honourable People of Bahrain*”, the HEC advised the citizens that it had held a meeting and elected an executive committee to draft the people’s demand in a bid to submit them to the authorities. It stated in its announcement that the general assembly decided, after consultations with the “*movement*”, the people in the villages and towns throughout the country and with the enlightened educated young people, to submit demands as detailed in that announcement. What this thesis is concerned with in that announcement are the demands related to the setting up of a legislative council by way of holding free direct elections, the promulgating of a penal and civil law, the reforming and organising of the law courts, the appointing of competent judges who held university degrees in law and had previous experience and the setting up of a high court of cassation. The task of the proposed law court

“was to settle the differences arising between the legislative and executive authorities or any dispute that may arise between the Government and any local citizens”.²

What is clear from the wording of the statement is that the intention of mentioning a High Court of Cassation was that it should be a supreme constitutional and administrative court.

After the introduction of certain administrative reforms by the Government which were not convincing to the HEC, the latter reaffirmed in subsequent announcements its insistence upon having its demands met. This move was announced following an expanded meeting of its members and supporters held in the village of Aali. In its announcement, the HEC reiterated that its demands included the call to establish a

¹ See Belgrave C.D., *Personal Column* p. 206.

² Al Ubaidi, *Ibid.* p. 213; Belgrave C.D., *Personal Column* p. 210.

legislative council, the introduction of court reforms and the enactment of laws regulating the civil and penal courts.¹ The announcement strongly opposed the patching up of laws which included the promulgation of a penal law that was considered by the HEC as a non-national law.²

At a meeting held at Riffa Palace between the Ruler at the time, Shaikh Sulman Bin Hamad Al Khalifa, and representatives of the HEC in the presence of the Advisor Mr. Belgrave, agreement was reached between the HEC representatives and the Ruler on the following matters: recruiting an expert for drafting civil and penal laws, forming a committee for assisting him in respect of local traditions and national practices, hiring an experienced judge for each law court to work side by side with the local judges and for ensuring the proper enforcement of laws when they have been enacted. At that meeting, the Ruler pledged to introduce prison reforms.³

It seems that demands for reforms of the judiciary were acceptable to the Government of Bahrain led by the Advisor Mr. Belgrave.⁴ However, the HEC's strong hostility to the Advisor was met by a similar position which was expressed by the Advisor by making a personal criticism of the HEC members.⁵ In addition, one of the HEC's demands was the removal of the Advisor. It often attacked him in its announcements, describing him as a dictator.⁶

The struggle continued between the Advisor Mr. Belgrave and the HEC until the latter part of 1956 in spite of the official recognition of the HEC in the month of March of that year. The text of the HEC's Declaration Charter stated that "*in case of conflict between any proposals put forward to the Government by the existing organisations, the proposals made by the organisation representing the majority shall be endorsed*".⁷ In addition, the HEC continued to insist upon its demands expressed in its first

¹ Al Baker, Ibid. The Committee's Announcement No. 1 dated 13.10.1954, p. 142.

² Ibid., p. 161 The Committee's Announcement No. 19 dated 21.5.1955.

³ Ibid., p. 170 The Committee's Announcement No. 25 dated 25.8.1955; See also Belgrave C.D. *Personal Column*, p. 174.

⁴ Al Baker, Ibid. p. 100; See also Belgrave, Ibid. p. 205; See also *The Persian Gulf Shaikhdoms, the Middle East, a Political and Economic Survey*, Third Edition, p. 134.

⁵ Belgrave C.D. Ibid., p.203.

⁶ Ibid. p.211.

⁷ Al Baker Ibid. p., 206.

announcement. On 15th April 1956, it issued an announcement under No. 23 in which it emphasised its continued insistence upon the demands expressed in its very first announcement for the “*introduction of reforms to the law courts and establishing a just judicial system*”.¹

The last few months of 1956 witnessed a fierce battle between the Advisor Mr. Belgrave and the HEC that was directly caused by the increase in demonstrations and meetings against Britain following the tripartite aggression by France, Britain and Israel against Egypt and the increased hatred of the Advisor for being British. So he tendered his resignation in August 1956 on the basis that he would retain his post until the summer of 1957.²

At the same time, the wide spread violence and increase in demonstrations and riots made the Government angrier against the HEC, causing it to decide to dissolve it. Its leaders were arrested and a speedy trial was arranged for them and long prison sentences were passed against them. The three key leaders, namely Abdul Rahman Al Baker, Abdul Aziz Al Shamlan and Abdali Al Alaiwat were imprisoned on the island of St. Helena (one of the British colonies) outside Bahrain to get rid of them once and for all.³ However, at the same time the era of the Advisor came to an end with all the domination and opposition that it entailed.

3. Reforms After Dissolution of the HEC

Although the Government dissolved the HEC, it sought to carry out the reforms called for by the latter. 1956 was the year which witnessed the start of administrative reforms which subsequently led to constitutional reforms and the creation of the State of Bahrain on modern constitutional bases. In this connection, Dr. Husain Mohamed Al Baharna stated that:

¹ Ibid., p193; Al Ubaidi, Ibid. p. 213.

² Al Baker Ibid., p 176.

³ Al Ubaidi, Ibid. p. 207; Belgrave C.D., Ibid p. 236.

*“There was between 1954 and 1956 a popular movement calling for the introduction of internal reforms in the administrative system and the criticism of the movement was primarily directed against the Administration of the Advisor, who was an English man at that time. The demands of the movement were included to the setting up of elected councils for education, health and municipalities and introducing radical reforms in the judicial system, enactment of the necessary civil and penal laws for the country and the appointment of court judges holding legal qualifications. The Government gave many of these demands the due consideration they deserved. It proceeded with the setting up of the Administrative Council, held elections of the Municipal Councils and set up an education and health council. It was possible for these councils to continue on the basis of electing one half of their members and the appointment of the other half of the members, if it was not for the differences which arose between the Government and the popular movement which brought the latter to an end in late 1956. However, the Government pursued its gradual reformist policy since that time and sought - within its limited resources - to develop the administrative system but it seemed that such development was at a slow rate at the beginning”.*¹

It seemed that the Government was serious in responding to the HEC’s demands relating to reforms of the judiciary. The insistence of people to reject the Penal Law referred to in the above compelled the Government to delay its enforcement. In the first instance, the delay was only temporary by the Proclamation issued by the Ruler of Bahrain on 13th August 1955, as the Proclamation provided for extending the date of its enforcement to the month of November of the same year. Then, another proclamation was issued after the increased opposition to this law for delaying its enforcement to an indefinite date. Further, the Government decided as a result to invite Dr. Abdul Razaq Al Sanhuri to revise the Penal Law and to draft a civil law. This legal expert was the one who was requested by the HEC by name.² Contacts were actually made by the Government with Dr. Al Sanhuri, who was asked to come to Bahrain to revise the Penal Law and to prepare a new draft of the Penal Law. It seemed Dr. Sanhuri’s refusal to come to Bahrain was due to the influence of HEC elements who were in contact with him in Egypt. Following the dissolution of the HEC, the Government changed its mind about what it had asked Al Sanhuri to do and neglected the whole

¹ Al Baharna H. M. *Duwal Al Khalij Al Arabi Al Hadithah*, p. 97.

² Al Baker, *Ibid.*, p. 2228; See also Belgrave C.D., *Ibid.*, p. 239.

matter. Then, it promulgated the Penal Law which was earlier rejected by the HEC after a few amendments.¹

On this background, the reforms began to take their course on the lines originally envisaged by the Government and in the manner it had decided. In 1956 the Administrative Council was formed by the Ruler's nomination of the Directors of Government departments, and this body was assigned with tasks of administering public affairs in the country. A chairman of this Council was appointed. Affiliated to this Council was a department which was called the "*Government Secretariat*" which was chaired by the Secretary of the Bahrain Government. This department replaced what was called the "*Advisorate Office*" which was chaired by the Advisor. This Council was gradually expanded and the number of its departments increased.²

The legislative movement actively started in late 1956 and early 1957. For example, in late 1956 the Penal Code, Penal Trials Law, Property Disposal Law and the Commercial Alcohol Law were promulgated. During 1957 the Process Service Act, Amended Commercial Alcohol Law, Immigration Act, Women's Driving Law, Third Party Insurance Law, Law Governing Licences for Opening Commercial Stores, Law Governing Disposal of Unknown Properties, Customs Law and such other laws covering different fields were introduced. The following years witnessed the enactment of a wide range of laws and legislation as well as amendments to existing laws. It is noted that since late 1956 all this legislation came to be issued by the Ruler of Bahrain, unlike the earlier practice, whereby some laws and legislation used to bear the signature of the Advisor of the Government of Bahrain.³ The situation remained stable and the administrative situation began to develop gradually under the supervision and control of the Administrative Council until the change that occurred in early 1970 which led in turn to the birth of the State of Bahrain as a full sovereign state. Then its Constitution was launched, but before it the Judiciary Law had been promulgated as will be explained later.

¹ Bahrain Government Annual Report for 1955.

² Al Bahama H.M. Ibid., p. 97; Government of Bahrain Report from 1956 through 1970; See also Sadik M.T. & Snovely W.P., *Bahrain, Qatar and the United Arab Emirates*.

³ See Collection of Laws and Proclamations, Ministry of State for Legal Affairs of the State of Bahrain (index).

4. Independence, Constitution and the Judiciary Law

Following the announcement by Britain of its new east of Suez strategy for total and final withdrawal from the region east of Suez, it was clear that there was a vacuum which had to be filled. The status of the “emirates”, small principalities which were subject to the British in one form or another was of great interest to Britain and the West. In addition, the people of these emirates led by their rulers were also concerned with rearranging their conditions. There was no better option than declaring the independence of these emirates. The trend was for declaring their independence as independent states but linked to Britain by treaties.

Given the special status of Bahrain, considering that Persia used to claim that Bahrain was part of its territory, it was imperative for Britain and the rulers of Bahrain to solve this problem first of all. What helped solve this problem were the good relations between the regime of the Shah of Persia and the western nations. The Shah was more tolerant in dealing with this issue. In early 1969 the Shah of Persia said at a press conference held in New Delhi that if the people of Bahrain did not wish to become part of his country he would not resort to the use of force to annex it because this was against the principles of his policy.¹ This statement was followed by contacts and meetings between representatives of Persia, Britain and the Government of Bahrain resulting in the reference of the issue to the United Nations. The UN Secretary General sent a personal envoy to Bahrain on a fact finding mission to get acquainted with the desire of the people of Bahrain. The result of the mission according to the report of its leader Mr. Guicciardi was the unanimous desire of the people of Bahrain to gain independence and the desire of the absolute majority that Bahrain become an Arab State in addition to being independent.²

While seeking to gain independence, Bahrain looked at neighbouring Gulf states from a perspective of achieving unity. It effectively participated in the negotiations and

¹ Qassim J.Z. Al Khalij Al Arabi, p. 147 & 159; Ibid., Sadik M.T. & Snovely W.P., *Bahrain, Qatar and the United Arab Emirates*, p. 11.

² Qassim J.Z. Ibid., p. 148.

meetings held between the other Gulf emirates for the formation of the United Arab Emirates in the Gulf, as it was originally envisaged that Bahrain and Qatar would become part of the proposed federation. However, for many reasons it seemed that the other emirates were not interested in involving Bahrain in their newly formed federation.

Some analysis attributed this position to the fears felt by the emirates from Bahrain's domination owing to being larger in population and due to the large number of educated people in the country which could have given them the upper hand in administering the federal state. Some others believed that the fears were backed by the radical ideas put forward by Bahrain with respect to the constitutional structure of the federal state, as Bahrain initially insisted that the system of government must be on modern democratic lines. Others also felt that the reasons could be attributed to the fears of the remaining emirates from Iran as the problem of Iran's claim concerning Bahrain had not been settled yet. In these circumstances, Bahrain had no other option except to declare its independence as an independent sovereign state. This was exactly what happened and Bahrain's independence was declared in December 1971.¹

While Bahrain was seeking in earnest to become part of the newly emerging federation of the emirates in the Gulf, it was preparing itself for the only other alternative, declaring its independence. For this purpose, the Bahraini leadership was taking steps for the setting up of the departments and institutions for administering the proposed state. The ground was being paved from early 1971 by taking the initiative of setting up the State Council, which was considered as a major turning point towards the launch of the modern administrative structure of the State. The formation of this Council was decided by three decrees which were namely Decree No. 1, Decree No. 2 and Decree No. 3 of 1970 with respect to the formation of The State Council, Determining its Powers and Appointing its Members. Decree No. 2 divided the administrative responsibilities in the State to 11 departments, which were the departments of defence, foreign affairs, information, public security, health,

¹ Ibid. p. 155; Sadik M.T. & Snovely W.P., Ibid. p. 132.

municipalities and agriculture, education, development and engineering services, labour and social affairs, finance and justice. The Council appointed a legal advisor who was given its membership and a chairman who was effectively the Prime Minister.¹

On 15th August 1971 the independence of the State of Bahrain was declared. At the same time, Amiri Decrees were issued which totally changed the organisational structure of the State and changed the overall administrative and political structure of the country. Amiri Decrees No. 1 and No. 2 were issued with respect to the Political and Administrative Re-organisation of the State. These Decrees changed the position of the Ruler of Bahrain to become the Amir of the State of Bahrain. The title of the State Council was changed into the Council of Ministers and the Chairman of the State Council was replaced by the Prime Minister.²

On 16th December 1971, at a ceremony marking the country's National Day, the Amir issued a statement expressing his determination to introduce the Constitution of the State ensuring the enforcement of the proper democratic principles.³

In accordance with this announcement, the Amir formed a preparatory committee consisting of four ministers who were instructed to prepare a draft of the new constitution. In carrying out this task, the committee sought the assistance of a constitutional expert from Egypt. This group prepared a draft of the Constitution and recommended to the Cabinet the drawing up of a timetable to review it.⁴

In the meantime, the Amir issued Legislative Decree No. 12 of the year 1972 whereby the Amir ordered the formation of a constituent assembly to prepare the final draft of the Constitution. Then, Legislative Decree No. 13 of the year 1972 was issued with respect to regulating the election of members of the Constituent Assembly consisting of

¹ Qassim J.Z. *Ibid.*, p. 378, 390 to 392.

² Official Gazette of the Government of Bahrain No. 850 of 22 January 1970.

³ Official Gazette of the Government of Bahrain No. 930 of 19 August 1971.

⁴ Al Baharna H.M. *Ibid.*, p.98.

22 members elected by direct free voting and no more than 10 members appointed by a decree in addition to the ministers in their ex officio capacity.¹

The members of the Constituent Assembly were elected according to the above two announcements. This was followed on 16th December 1972 by the discussion of the provisions of the Constitution. Its review and final ratification were completed on 26th May 1973 and it was referred to the Amir who issued it on 6th December 1973.²

The interest of the Government of Bahrain in the organisation of the judiciary during the pre-independence era was parallel to the reorganisation of the State. Therefore, the Judiciary Law was given intensive review. Its preliminary drafting took place in early 1970 when the State Council instructed its legal committee, which was then chaired by the State Council Advisor, to prepare a draft law governing the judiciary. So the legal committee undertook to carry out the task and finalised the draft which was referred to the Chairman of the State Council by virtue of its letter Ref. 50/1971 dated 22nd July 1971. Later, the Council referred it to the Amir (who was then the Ruler) who promulgated it by Legislative Decree No. 13 of the year 1971.³ This Law regulated the judicial system in the country on sound and modern bases as will be discussed in detail in the following chapters.

¹ Al Baharna H.M. Ibid., p.100.

² Al Baharna H.M. Ibid., p.101; See the Constitution of the State of Bahrain.

³ Official Gazette of the State of Bahrain No. 974 of 22 June 1972 and 978 of 20 July 1972.

Part II

The Modern Judicial System

Chapter 7

ORIGIN OF THE MODERN SYSTEM & GENERAL FEATURES

1. Introduction

From the historical presentation in the first part of this study and considering the current judicial and legal system, we may conclude that the Bahrain modern judicial system has proceeded through the following stages:

1. The period of Islamic Law.
2. The period of mixed Common and Islamic Law.
3. The period of mixed Romano-Germanic and Islamic Law.

In the light of the theory that the classification of a legal system depends upon resources of legislation and judiciary in each system I may explain the above mentioned classification as follows:

1. The Islamic Law Period

The main element of the Islamic Law which is known by Muslims as “Sharia”, is belief that “*the unique ground of validity of law is that it is the manifest will of ALLAH ‘the Almighty’*”; it does not depend on the authority of an earthly Law-giver.¹

The main sources of those principles of God’s Law are mainly: the Quran, the sacred book of Islam, and the Sunna which are the says, the traditional or model modes of behaviour of the Prophet Muhammed, who is God’s Messenger. In addition to these two main sources different scholars of Sharia add other sources such as “Ijma” which is the unanimous agreement of scholars of the Muslim community and “Qiyas” which

¹ David R. And Brierly J.C. *Major Legal Systems in the World Today* - Page 457. See also Mahmasani S. *Al Mujtahedun Fi Al Qada* - Page 7.

means juristic reasoning by analogy.¹ The means of deduction of legal rules and doctrines come through “Ijtihad” which means analysis and the laying down of rules by the Islamic scholar “Mujtahid”.²

The Bahrain legal system including the judiciary had its basis in Islamic Law for the period prior to the enacting and application of the BOIC in 1913 as explained in Chapter 3 of this thesis. The judiciary during this period based themselves on the Islamic Sharia and the main resources were the Quran and Sunna, in addition to the “Ijtihad” which was practised by scholars of both the sections of the Shia and Sunna.³ Arab tribal judicial procedure through the chief of the tribe jurisdiction was admitted in the legal system but the substance of such jurisdiction was laid down on Sharia principles.

Subsequently we conclude that for the period preceding the enactment and application of the BOIC the Bahrain Judicial System belonged to an Islamic Law Period.

2. The period of mixed common law and Islamic Law

In 1913 the British Government (which dominated legislation in Bahrain) proclaimed the BOIC which was put into enforcement in 1917.⁴ By analysing the provisions of the said legislation and its subsequent enforcement and application we may deduce that:

(a) The BOIC maintained the Islamic principles of judiciary by ascertaining the rule and jurisprudence of the Islamic judge (“*Qazi*”) in all matters and conflicts which included Bahrainis and “*Muhammadans*” (sic).

¹ David R. And Brierly J.C. *Major Legal Systems in the World Today* - Page 457. See also Mahmasani S. *Falsafat Al Tashri Fi Al Islam* - Page 420.

² David R. And Brierly J.C. *Major Legal Systems in the World Today* - Page 460.

³ IORR/15/186 - This report was prepared by Lt. Colonel E.C. Ross P.R. in 1882 on personalities among them were Sunna and Shia Judges which explain such Judges’ authorities.

⁴ See Chapter 3 of this thesis.

(b) In matters which included foreigners and Bahraini parties new fora vested with jurisdiction were formed which were “*The Chief Court, the District Court and the Joint Court*”. These Courts in practice applied the general principles of common law by applying the principles of “Case Law” as the judge in such Courts had unlimited authority to decide cases referred to the Court even with those cases which were referred by the Joint Court judges to the “Qazi” or to the semi-judicial consultative bodies such as Majlis Al Urfi or Salifah Court. However the BOIC stipulated as a general rule that:

“The enactment for the time being applicable as hereafter mentioned of the Government General of India in Council and the Governor of Bombay in Council and in accordance with powers vested and course of procedure and practice observed by and before the Courts in the Presidency of Bombay”.¹

Consequently the judicial system of Bahrain during this period showed attributes of both common law and Islamic Law. Such attributions continued with development and the gradual modernising and nationalising of the judicial system until the State of Bahrain obtained independence and after the promulgation of the Constitution of State of Bahrain and the Judiciary Law.²

3. The Period of the mixed Romano-Germanic and Islamic Law (i.e. the current system)

As explained in Chapter 5 of this thesis, Bahrain became an Independent state by the declaration of Independence and the promulgation of its Constitution in 1973.

By virtue of Article 1.A of the Constitution “*The State of Bahrain is an Arab Islamic State with full sovereignty, its people are a part of the Arab people and its land is a part of the great Arab Nation.*”

¹ For details of the judicial system in BOIC see Chapter 4 of this thesis.

² For details of such development see Chapters 4 to 6 of this thesis.

On the grounds of this constitutional provision, the State of Bahrain sought the membership of the Arab League and became a member of the same in 1971.¹

As a result of becoming a member of the Arab League the State of Bahrain adopted the policy of “*Arabizing of Law*”, an expression which means issuing the legislation of the state identical to those of other Arab countries. The Laws of Arab Countries in general are largely influenced by Egyptian legislation and jurisprudence. As a matter of fact almost all the civil codes in the Arab countries are affected by the Egyptian counterparts.² Dr. Sanhuri the late Egyptian jurist who led the team which drafted much of Egyptian law also helped in drafting many of Arab states’ constitutions and laws, especially the civil codes.³

Bahrain started laying down its new legislation towards codifying laws in all aspects, and employed mainly Egyptian legal consultants to assist in drafting such legislation. In 1996 the number of Egyptian consultants in the Directorate of Legal Affairs was five out of total of ten.⁴ This Directorate is the official authority which prepares draft laws on behalf of the Government before submission of such drafts to the Council (the Parliament) which is the legislative authority.⁵ As explained in Chapter 6 of this thesis, the Bahrain Judicial Law was promulgated in 1971 i.e. two years prior to the issuance of the Constitution. The employment of Egyptian judges was contemporary with the enacting of the Judicial Law. In the year 1999 the number of Egyptian judges in Bahrain Courts was 12 out of a total of 14 foreign judges with the majority of the Egyptian judges in the High Court of Appeal and the Court of Cassation. At the end of 1998 the Court of Cassation was formed with a total of 7 judges out of which 5 were Egyptians.⁶

¹ The Minister of Legal Affairs visited the Arab League Secretariat on August 21, 1971 to submit the State of Bahrain application to the League pursuant to the Records of the Bahrain Ministry of Foreign Affairs.

² Sanhuri A.R. *Alwasit fi Al Qanun Al Madani* - Vol. 1 Page 8 and 21.

³ Ibid Page 11.

⁴ Bahrain Ministry of Cabinet Affairs and Information payroll records.

⁵ Amiri Decree No. 11/1972 in connection with Directorate of Legal Affairs.

⁶ The Ministry of Justice & Islamic Affairs Personnel & Payroll records.

The trend of the government in employing Egyptians in legislative and judicial work encouraged Bahrain Law offices to employ Egyptian lawyers in order to cope with the new direction in the judicial trend and precedents. Currently all the major law offices employ a considerable number of Egyptian Lawyers.¹

The Egyptian influence in all legislative and judicial fields has pushed the legal system to adopt Egyptian legislation and Court precedents.

It must be mentioned that the Egyptian Legal System in legislation and the judiciary is largely copied with minor modifications from and is largely influenced by French law. The Egyptian scholar Sanhuri who lay down the basis of the modern legal system in Egypt based it mainly upon French laws and doctrines.²

In consequence of the aforementioned facts, the legal system in Bahrain embraces the Romano-Germanic law family through the influence of Egyptian law which relied mainly on the French Law, and the French legal system is one of the most important members of the Romano-Germanic family.³

2. General Features

The enactment of the Constitution on 6th December 1973 was a significant milestone in Bahrain's political and legal history. With the introduction of this Constitution the country was transformed from a “*sheikhdom*” dominating a semi-civil community comprising a mixture of the ruler's tribal institutional authority (“*Shoyukh*”) and initial civil institutions such as the Administrative Council, municipalities and various service departments, into a modern state with organised political, administrative and legal institutions that have clear features and powers. The most significant provision of this Constitution reflecting the modern state's principles and foundations was the

¹ This information is based on selection of records of major offices as follow:
Issa Bin Mohammed Al Khalifa Law Offices - 1 out of 5; Al Mahmood & Al Z'ubi Law Office - 1 out of 8; Taqi & Mohammed Ahmed Law Office - 1 out of 5; and Hassan Radhi & Associates - 1 out of 6.

² See *Sanhuri al Wasit fi Al Qanun Al Madani* - Vol. 1 page 13, 3rd issue.

³ West Andrew & Others - The French Legal System - Page 1.

distinction between and separation of the three State powers: Legislative, Executive and Judicial. For the Judicial Power, the Constitution has underlined its most basic principle of the Independence of the judiciary. Simultaneously with the introduction of the Constitution was the enactment of laws which reiterated and enforced this vital principle.

Upon reviewing the various laws governing the judicial power and legal proceedings, we can deduce that the most basic features that characterise Bahrain's judicial system are the following:

1. The Independence of the Judicial Authority towards the Legislative and the Executive Authorities.
2. Equality among all people before Courts as part of the right to litigation.
3. The plurality of degrees of litigation.
4. Determining the sources of deducing judgements.
5. The public nature of hearing of litigation.

Details, analysis, exceptions and restrictions on each of the above mentioned features shall be dealt with separately:

3. Independence of the Judiciary Towards the Legislative and Executive Powers

Article 32 of the Constitution provides that:

“The state regime shall be based on the principle of separation of the Legislative, Executive and Judicial Powers functioning in co-operation with each other in accordance with the provisions of this Constitution. None of the three powers may relinquish all or part of its competence prescribed in this Constitution. However, Legislative Delegation, limited for a certain period of time and in respect of a specified matter or matters, may be made and shall be exercised in accordance with the law of delegation and conditions thereof.”

Article 101 (b) of the Constitution further states that:

“In the administration of justice judges shall not be subject to any authority. No interference whatsoever shall be allowed in the conduct of justice. The law shall guarantee the independence of the judiciary and shall state the guarantees and provisions relating to the judges.”

Article 2 of Judiciary Law provides that

“judges shall be independent with no power over them except that of the law in the discharge of their duties.”

From the above provisions, it is evident that the Constitution and the legislators are committed to the principle of the independence of the judiciary without any need for further explanation or analysis.

In spite of the above provisions, there are exemptions and restrictions applied to this principle that should be reviewed. Such exemptions and restrictions are of three types: Constitutional, legislative and practical. These exemptions and restrictions are dealt with in the following:

3.1 Constitutional Exemptions and Restrictions

Article 41 of the Constitution provides that “*the Amir may, by decree, grant a pardon or commute a sentence.*” It is obvious from this provision that the Amir has the power to cancel or amend court judgements in criminal matters although the Amir's right is limited to cancellation or alteration of the penalty without prejudice to the conviction ruling.

It should be noted that the right to grant a pardon given by the Constitution to the Amir relates to a particular case or cases but if the pardon is general (a general amnesty) then a law must be enacted in respect of such pardon. The enactment of a law can only take place following its ratification by the Legislative Authority represented by the National Council according to the provision of Article 32 (b) of the Constitution that provides as follows: “*Legislative power shall be vested in the Amir and the National Council*”. The criterion for distinguishing between a special pardon for a sentence and the general amnesty is that the former is limited to the penalty without affecting the incriminating act while the latter eliminates the very criminal act.¹

It can therefore be concluded that the Constitution has granted the Amir the sole right of reviewing and altering the penalty handed down by the judiciary in case of exercising the right to a special pardon or a pardon in a defence case or cases. Such right to review and amendment has been granted to the Amir and the National Council as combined legislative authority in case of exercising a general amnesty which may include pardon or conviction at any time before filing the criminal action or after instituting it or even after the handing down of a judgement therein.

Such exemption is acceptable and followed in various constitutions of the world. This may sometimes be required (in exceptional cases) for the need to maintain the country's social and political security. This may also, at times, be required for humanitarian considerations that overrule the requirements of justice in its comprehensive sense.

¹ Husni M.N. - *Sharh Qanun Al Uqubat* - Al Qismalam - Page 946 and 982.

3.2. Legislative Exemptions and Restrictions

Such exemptions are either negative exemptions in the sense that they arise from non-issuance of the legislation required under the Constitution or positive by the presence of laws curbing the principle of the independence of the judiciary.

3.3. Exemptions because of Absence of Legislation

The negative exemption is freezing the enactment of a law nominating the judicial authority empowered to resolve disputes relating to the constitutionality of laws and ordinances as required under the provision of Article 103 of the Constitution which states as follows:

“The law shall specify the judicial body competent to decide upon disputes relating to the constitutionality of laws and regulations and shall determine its jurisdiction and procedure. The law shall ensure the right of both the Government and interested parties to challenge the constitutionality of laws and regulations before the said body. If the said body resolves that a law or a regulation is unconstitutional it shall be deemed null and void.”

This provision constitutes a guarantee for compliance of the provisions of legislative laws and executive regulations with the provisions of the Constitution. The Constitution has vested the judiciary with the power to protect this guarantee for both the government and citizens. Since the legislator has not as yet enacted this law which determines the authority that decides upon the constitutionality of laws, he has deprived the judiciary of one of its most significant powers while giving the legislative and executive authorities the right to determine the constitutionality of laws and regulations. This is indeed a drawback that results in the intervention between the operation of various authorities at the expense of the judiciary.

The second negative exemption is suspending the enactment of the law that lays down the provisions relating to the Public Prosecution. Article 101 (c) of the Constitution states: *“The law shall specify the rules for Public Prosecution etc...”*

Currently the Public Prosecution Directorate is a directorate with the authority of the Ministry of Interior. Such Directorate assumes the authority for prosecution in respect of public matters, which authority is in essence of a judicial nature. Such intervention of authority constitutes a breach of the principle of independence of the judiciary in addition to undermining a vital guarantee for any accused person to be interrogated by a neutral judicial authority.¹

3.4. Exemptions by existence of legislations

This means positive exemptions by laws introduced by the legislator which in a way adversely affect the judicial authority's independence. The most vital of these laws are the following:

- First: State Security Law.
- Second: State Security Court Law.
- Third: Military Judiciary Law.
- Fourth: Provision of Article 4 of the Civil Wrongs Ordinance.

First: State Security Law

This Law was promulgated on 22nd October 1974 (unnumbered). The main feature of this Law is that it grants the Minister of Interior a power which is of a judicial nature. The said Law allows the Minister of Interior, in a case of suspicion by the security authorities that a person may have committed acts provided for in Article 1 of the Law, to

“order the arrest of such person and to detain him in jail. Such person may be searched as well as his residence and business premises. The Minister shall also be empowered to take any action he deems necessary for gathering evidence and completing the investigations”.

¹ Amiri Decree No. 29/1996.

The second paragraph provides that

“the detention period may not be more than 3 years. The search or measures provided for in the first paragraph shall not take place except by an order of the law courts.”

The law gives a detainee the right to submit a grievance against an arrest order before the High Court of Appeal after the lapse of three months from the date of its execution. Then, another grievance may be made after six months from the date of the court's decision for dismissal of the last grievance.

The exceptions to the judiciary's independence as set forth in this law may be summed up as follows:

(1.) The exercise by the executive authority, represented by the Minister of the Interior, of a judicial power by giving it the power to pass a judgement for imprisonment for a period of up to 3 years without a valid conviction. It is merely sufficient to suspect that the accused has committed specific acts or deeds for issuance of such judgement as Article 1 provides as follows:

"If serious evidence has been established that a person has committed acts or deeds or engaged in activities or contacts inside or outside the country that may be considered as a breach of internal or external security of the country or the State's religious and national interests or its political, social or economic system or may be considered as a dissent that affects or is likely to affect the existing relations between the people and the Government or between the various institutions in the State or between classes of the people or the workers in firms and companies or if they are likely to assist in committing acts of sabotage or destructive publicity or the spread of atheistic principles, the Minister of Interior may order the arrest thereof."

(2.) Although the Law allows a detainee to contest the order of the Minister of Interior, the periods provided before bringing a grievance are actual detention periods as the detainee has no right to exercise the right of grievance except after three months from the date of his detention. Then, he can have the right to contest the order after six

months from the date of dismissing the earlier one. Such periods are not subject to the scrutiny of the judiciary which has no power over that of the Minister. Even if the court decides to endorse the grievance or if the period of detention expires, another arrest order may be issued and so on and so forth.

(3.) The Law limits the freedom of the court before which a grievance is being heard as regards the assessment of evidence produced by the Public Prosecution and the Petitioner as Article 3 (a) of the said law provides that in adopting its decisions the Court shall rely upon the documents and papers provided by the Prosecution or petitioner, and does not allow for the submission of other means of evidence such as witnesses or experts.

It should be noted in this respect that this legislation was issued in the early days of Independence with the objective to deal strictly with security situations which the government deemed serious. Now with the continuous and confident stability of statehood the circumstances have matured and the existence of such legislation should be reviewed.

Second: State Security Court Law

This is the Law promulgated by Decree No. 7 of 1976 (as amended by Decree No. 14 of 1996) concerning the Formation and Procedures of the Court provided for in Article 185 of the Penal Code. I will discuss the powers of this Court, its formation and procedures as follows:

Powers of State Security Court

Article 185 of the Penal Code promulgated by Legislative Decree No. 15 of 1976 (as amended by Legislative Decree No. 10 of 1996), provides as follows:

“The perpetrators of crimes provided for in the following shall be tried before a court, the formation and procedures of which shall be determined by an Amiri Decree to be issued in this respect: (a) Offences provided for in Articles 112 to 184 and 277 to 281 of the Penal Code. (b) Offences provided for in Articles 220, 221, 333, 336 to 340 of the Penal Code, if an attack has taken place against one of the persons mentioned in Article 107 of the Penal Code or related persons during or because of carrying out his duties. (c) Crimes provided for in Article 18 of Legislative Decree No. 16 of 1976 with respect to Explosives, Arms and Ammunition. (d) Offences related to crimes referred to in the preceding Clauses.”

Decree No. 10 of 1996 amended the original provision which limited the jurisdiction of this extraordinary court to the crimes provided for in Articles 112 to 184 of the Penal Code. The pre-amendment provision read as follows:

“The perpetrators of the crimes provided for in Articles 112 to 184 and related offences which are integral thereof shall be tried before a court the formation and procedures of which shall be determined by an Amiri Decree to be issued. Accomplices in such related offences may be referred to the court provided for in the preceding paragraph provided that such reference shall take place along with the perpetrators of the original crimes and related offences to that court.”

Upon analysing these Articles, the following may be concluded:

(1.) The purpose of setting up this special and extraordinary court is to give it jurisdiction to hear crimes affecting internal and external state security, most of which are of a political nature.

Chapter One of Part One of the relevant section in the Penal Code deals with the crimes affecting external state security in Articles 112 to 164. These provisions deal with acts the most important of which are the acts that threaten the country's independence, territorial integrity, taking up arms against it, acts in favour of an enemy, inciting troops to serve a foreign state, facilitating for the enemy occupation of the country's territory or a part thereof, dealing with hostile forces, serving and providing intelligence to a foreign state to assist it in hostile acts against the State of Bahrain, committing hostile acts against it, divulging a defence secret to a foreign state,

broadcasting malicious news or rumours or exciting publicity in addition to a number of other acts that are detrimental to the external state security.

Chapter Two of the same Part in Articles 147 to 177 deals with the acts that prejudice internal state security. It includes acts, the most important of which are any attempt on the life of the Amir of Bahrain or the Crown Prince, attempts to use force to overthrow the ruling regime, occupation of public buildings, military rebellion, attacking public authorities, seizing public funds by force, establishing running or participating in associations, organisations or societies having the aim of overthrowing or changing the political, social or economic system or favouring such acts or promoting them, calling for the overthrow of the political, social or economic system, inciting hatred for the ruling regime, broadcasting false news and propaganda that are likely to undermine public order, provoking the public to engage in acts of murder, inciting the armed forces and public security forces, cultivating hatred and dissent between different factions, possessing and circulating leaflets and posters that are harmful to the country's reputation in addition to other acts of a similar or related nature.

Chapter Three of the same Part in Articles from 184 to 187 deals with the crimes of demonstrations and rioting that prejudice public security.

It is noted that all these crimes are of a purely political nature whether the incriminating acts are of an internal or external nature in opposition to the political, economic and social system.

(2.) The amendment of the powers of the State Security Court pursuant to Decree No. 10 of 1996 came to broaden the competence of the Court to include crimes that do not basically affect internal or external state security, which namely are:

(i.) Acts of causing fires and explosives provided for in Part Six, Chapter One, Articles 277 to 281 and incriminating acts pursuant to Article 18 of Legislative Decree No. 6 of 1976 with respect to Explosives, Weapons and Ammunition.

- (ii.) Use of violence or threat against a public officer or civil servant undertaking a public service or offending such officer or civil servant, which acts are made criminal according to Articles 220 to 222 of the Penal Code. Crimes of premeditated murder and physical assault against a civil servant or similar person, which acts are made criminal pursuant to Articles 333 and 336 to 340 of Chapter 1 of the Penal Code.

Formation of the State Security Court

Article 1 of Legislative Decree No. 7 of 1976 provides as follows:

"The High Civil Court of Appeal, consisting of three judges, shall be the court competent to examine crimes provided for in Articles 112 to 184".

The amendment pursuant to the aforementioned Legislative Decree No. 14 of 1996 added to this jurisdiction other criminal matters. To the second paragraph of the above Article there is added the following:

"In case the quorum required for the sitting of the Court is less than three, the Minister of Justice and Islamic Affairs shall appoint one of the Senior Civil Court judges to maintain the quorum."

We can conclude from the above Article that the formation of the State Security Court is as follows:

- (1.) It is not an independent court but is in fact a jurisdiction acting with special procedures that are basically attributed to the High Court of Appeal for hearing specific cases under certain articles of the Penal Code to be heard by this Court in the first instance that is contrary to its appeal jurisdiction.

(2.) It is possible to appoint as its members (by an order issued by the Minister of Justice) judges of the Senior Civil Court which is a lower court than the High Court of Appeal. This power that is vested in the Minister of Justice is criticised in two specific aspects:

First: By granting a power to an administrative authority represented by the Minister of Justice to make a judicial appointment, there is an undesirable interference between the judicial and administrative powers.

Second: Allowing judges of a lower rank to hear law-suits that are subject to the competence of higher ranking judges, is unusual in the judicial hierarchy and may adversely affect the efficiency of the Court's performance.

Litigation Proceedings Before the State Security Court

Litigation proceedings before the State Security Court constitute uncommendable exceptions to the independence of the judicial authority. These exceptions are represented by the following:

(1.) Article 2 of Legislative Decree No. 7 of 1976 with respect to The State Security Court limits the right to bring a criminal action before the Court to the members of the Public Prosecution Department and police officers. It states as follows:

"A criminal case shall be filed in court on an indictment statement signed by a member of the Public Prosecution Department or by a police officer but no other authority shall be empowered to file it."

This provision is contradictory to the provision of Article 123 of the Code of Criminal Procedure which gives any citizen the right to file a criminal case once there is an assault committed against a public right by means of an

application to be submitted to the Minister of Justice or to the Minister of the Interior or to any person appointed by the Amir to assume the duty of the Public Prosecution. This Article provides as follows:

“Criminal prosecutions may be conducted:

- (a) by any person who may be appointed by the Ruler¹ for this purpose; or*
- (b) by the Head of Police and Public Security² or any person appointed by him to represent him; or*
- (c) by the complainant or his attorney, if authorised to do so by the President, the Head of Police and Public Security or any person who may be appointed by the Ruler to conduct criminal prosecutions.”*

Restricting the prosecution in crimes affecting state security exclusively to the security authorities means giving an authorisation to the executive authority to assess the breach affecting a specific part of the public right which means limiting the judicial authority for inadmissibility of hearing this kind of public right claim unless they are prosecuted through the security departments. It should be noted that the public prosecution, that is the authority in charge of representing the public interest, is a part of the executive authority as it administratively belongs to the Ministry of Interior as already explained.

- (2.) Sub-Paragraph 5 of Article 5 (1) initially provides for the following: *“A lawyer shall not defend an accused in court if the accused is absent.”* This means that an accused who is absent for any reason whatsoever is deprived of the right to defence. This amounts to undermining of the principle of the independence of the judiciary as it bars the judge from hearing the accused's defence and results in giving the Executive Authority, represented by the public prosecution or the police, the exclusive right to present whatever it feels appropriate to the court

¹ The old title - before independence - of the position of “The Amir” was “The Ruler”.

² The old title - before independence - of the position of “The Minister of Interior” was “The Head of Police and Public Security”.

from a single perspective which would affect the judge's neutrality in hearing the case.

(3.) Article 5 (5) provides as follows:

“The confession of the accused, whether made against himself or against other co-accused, shall be weighed by the court and whether the said confession was made to the investigating judge or in court during trial or was made only in the course of the investigation by the public prosecutor or in the statements to the public prosecutor or the police. The Court may act on this confession for its judgement.”

It is noted that in the admission of reliance upon the accused's confession in the investigations of the public prosecution or in the statements to the public prosecutor or the police there is a contradiction with the general principle constituted by non-reliance upon the confession unless it is made before a judge as provided for in Article 128 of the Code of Criminal Procedure which states as follows:

“(4) No confession made by a person whilst he is in custody of a policeman unless it be made in the immediate presence of a Judge shall be admitted in evidence.”

The provision of Article 5 (5) of the aforesaid State Security Court Law restricts the right of the judiciary in admitting confession in evidence unless it takes place before such authority in respect of state security matters.

This also constitutes a breach of the common rules governing an accused's confession, especially the rules laid down by the aforesaid Code of Criminal Procedure.

It should be noted that the sub paragraph of Article 5 excludes from its provision the case of crimes punishable with the death penalty as it requires for admission thereof that the confession should have taken place before the same court or before an investigating judge.

(4.) Article 6 provides as follows:

“The Court may, for the purposes of its judgement, act on the statements of witnesses even if they were made to the police or to the public prosecutor or in the course of the investigation by the public prosecutor, because of the difficulty of hearing the witness evidence in court due to the impracticality of securing their attendance or when the court wishes to satisfy itself with regard to the statements made during investigation mentioned above or for any other reasons appreciated by the Court.”

As in the earlier provision, this wording involves weakening the authority of the Court to admit testimony in evidence and not only in relying upon such evidence contrary to the common rule with respect to admitting witness statements as laid down in the Code of Criminal Procedure of which Article 130 states as follows:

“Every witness giving evidence in any inquiry or trial under this Code shall take an oath or make a solemn affirmation that he will speak the truth, the whole truth and nothing but the truth.”

(5.) In spite of the provisions quoted in the above Paragraphs 3 and 4, the provisions of the articles that are referred to leave the question of confession and witness statements made before the aforesaid administrative authorities to the discretion of the Court, which may admit or dismiss them. However, this puts the judge in an embarrassing situation as regards his total independence in admitting such evidence. It is obvious that denying the truth of the public prosecution or police statements is naturally embarrassing given that consideration should be made to the fact that each of such authorities is an honest opponent who aims to protect the community.

- (6.) The most serious criticism against this extraordinary Court is that it is a one degree Court as its judgements are final and not challengeable by any procedure pursuant to Article 7 which states that

“Judgements issued by the Court are final and subject to no appeal by any procedure except if the judgement is issued in absentia, in which case the procedure set forth in the preceding Article shall apply.”

This certainly leads to deprive the convicted person of his right in appealing the judgement before two higher degrees of litigation which are the Court of Appeal and the Court of Cassation.

Third: Military Judiciary Law

The Military Judiciary Law promulgated by an Amiri Decree issued on 10th September 1970 (unnumbered) regulates the trials of the Bahrain Defence Force (BDF) personnel. This Law governs the Military Public Prosecution, formation of military courts and rules and procedures of investigating offences in the cases involving BDF personnel. It regulates procedures of arrest and appearance before the courts and such procedures are totally different from procedures followed before the ordinary courts in terms of jurisdiction and formalities.

Military Public Prosecution

The BDF Legal Advisor and his assistants shall assume the responsibility for the Military Public Prosecution and the Military Public Prosecutor will be responsible for supervising the Military Judiciary Department. He shall also act as a public prosecution before the military courts and shall prosecute and defend cases against the accused persons.

The Military Judiciary Department, which is also described by the Law as the Military Public Prosecution, reports directly to the Commander-in-Chief. The Military Public Prosecutor reports to the Commander-in-Chief for ensuring the proper running of the military judiciary. The Commander-in-Chief is also in charge of appointments and transfers within the Military Judiciary as indicated in the provision of Article 5 of the said Law.

Court Formation

The Second Chapter of the aforesaid Law regulates the formation of the military courts. Article 7 thereof provides as follows:

“The Commander-in-Chief shall form a military court comprising a president and two members the seat of which shall be specified in the order for its formation to undertake the hearing of crimes for which a penalty exceeds two years of imprisonment and a fine of no less than BD 300.”

In addition to the competence of the court provided for in this Article, it is also empowered to hear cases where an accused is an officer irrespective of the charge brought against him. In all cases Article 9 of this Law requires that the rank of this court's President should be higher than that of the accused.

Judges who are members of the Court provided for in Article 7 are also judges of the courts that are competent to hear offences the penalty for which is less than the level provided for in that article but they have to hear them as individual judges. In this case, the Court will be formed with a single judge provided that he is a member of the military court so long as the penalty in question is less than two years imprisonment or a fine of BD 300.

Judgements and Their Execution

Judgements of Military Courts shall not be enforceable except after their ratification by the Commander-in-Chief. The latter is empowered to ratify a judgement or verdict or to cancel it. He is also be empowered to order a retrial or to amend the penalty by way of commuting it or to order a stay of execution. In brief, the Commander-in-Chief shall have the absolute power to enforce the judgement of the court or not to enforce it without limitation as provided for in Article 14 (a) of the said Law.

There should be excluded from the requirement of ratification of judgements by the Commander-in-Chief judgements handed down in cases of offences. Such judgements shall be final and should not be referred to the Commander-in-Chief for review but shall be executed upon delivering them. Nevertheless, Article 14 (a) of the said Law gives the right to file a grievance with the Commander-in-Chief by anyone against whom a judgement has been passed by any military court. This should take place by a letter to be referred to the Commander-in-Chief through the Legal Advisor. Consequently, even in the judgements concerning offences the final resolution for the execution thereof should be subject to the decision of the Commander-in-Chief if they are contested by the convicted person.

Article 15 of the Law provides:

“Following ratification of a judgement by the Commander-in-Chief, the Legal Advisor and the concerned branches at the General Command, each in its respective capacity, shall execute the judgement as ratified by the Commander-in-Chief.”

It is deduced from this provision that the judgement or decision shall be executed as handed down by the court or the judgement or decision as amended by the Commander-in-Chief.

The following may be concluded from the above:

(1.) The Military Judiciary Law establishes an extraordinary court system that goes beyond the common rules applicable before the ordinary law courts in their nature and procedures. There is a restriction on the supremacy of the ordinary judicial authority provided for in the Constitution as we have already explained. However, there is nothing unusual in promulgating a special law for the trials of the military forces as this is common in most countries of the world. The jurisprudence is of the view that such a legislative system has its justifications and this is taken for granted as the existence of special military courts allows the

“reconciliation between the necessary requirements of national defence and the maintenance of individual liberties.” However, such jurisprudence maintains that *“under such conditions there must be a military penal code that should be regulated by the authority in charge of enforcing it, defining offences and determining penalties”*.¹

(2.) It is noted from a review of the provisions of the aforesaid Law that the Commander-in-Chief has an absolute authority in forming the courts and appointment of its judges. More important still is the fact that the rulings of these courts are subject to the discretionary power of the Commander-in-Chief in an absolute manner. He is empowered to revoke, rescind, cancel or amend them without any limitation hence the operation of such courts becomes no more than being of an advisory nature to the Commander-in-Chief who may recognise or ignore them. Then, he may give his own judgement in respect of the issue of the accusation.

Imposing another power over the authority of the judiciary is something that prejudices the latter's independence. Therefore, the appropriate step is to amend the provisions of the Military Judiciary Law so that the Courts, though they are special courts, should be given their natural and complete judicial role.

¹ Kamil M.U. *Istiqlal-AlQada* - Page 595 - Majallat Al-Haq No. 3/1987 - Page 160.

While agreeing that there should be special military courts, this should not be in isolation from the requirement to guarantee the independence of the judiciary and its neutrality. Therefore, we have to take in all earnest the warnings made by some of the liberal jurists in the Arab world, especially with regard to the fact that there should be a guarantee ensuring that such courts would exercise proper justice.¹

In view of the above, the existence of an independent Military judicial system is both acceptable and justified. However the Bahraini Military Judiciary Law needs to be amended in terms of two aspects; First: the judicial authority must be given its natural role in carrying out its duties and not to have to subject its judgements to ratification, revocation and amendment by the Commander-in-Chief. In such a case, the role of the Commander-in-Chief should be limited to proposing a pardon if he deems such amnesty necessary or justified and should seek to issue the pardon from the Amir in pursuance of the provision of Article 41 of the Constitution; Second: A detailed legislation that specifies military crimes in detail and prescribes the appropriate penalties should be introduced.

It is also essential that an amendment to this Law should give the right to contest rulings of the Military courts before the Court of Cassation, in order to preserve rights and to ensure the proper application of the law including maintaining the balance between the State's requirement to have a military judicial system on the one hand and preservation of an individuals' rights on the other hand.

Fourth: Civil Wrongs Ordinance

Article 4 of the Civil Wrongs Ordinance of 1970 provides as follows:

*“(1) Save where otherwise expressly provided, no action in respect of any civil wrong shall be brought against His Highness² or the Government of Bahrain.
(2) A servant of His Highness and a public officer shall be responsible for any civil wrong committed by him, and, if sued therefore, he shall be sued in his*

¹ Hawmad A.W. *Majaat Al Huquq Wal-Sharīaa* No. 1. third year - page 114.

² His Highness means the Amir of the State of Bahrain.

personal capacity. Provided that, without prejudice to the operation of the provisions of subsection (4) and of Section 59, it shall be a defence to any action brought against any such servant or public officer other than an action for negligence that the act complained of was within the scope of his lawful authority or that it was done in good faith in purported exercise of his lawful authority. (3) No servant of His Highness or public officer shall be responsible for any civil wrong committed by any agent appointed by him or by any other servant of His Highness or public officer unless he has expressly authorised or ratified such civil wrong. (4) No action shall be brought against any Judge of the Bahrain Courts, or against any member of any Court or Tribunal of which any such Judge is a member, or against any person lawfully performing the duties of any such Judge or member, or any Court or Tribunal, or against any person lawfully performing the duties of any such person, or against any other person performing judicial functions, including an arbitrator, in respect of any civil wrong committed by him in his judicial capacity.”

The following may be concluded about this Article:

(1) The Amir and Government enjoy absolute immunity against claims for compensation arising from a civil wrong or an instance of fault (a “*tort*”) resulting in damage. This rule is acceptable for the person of the Amir because this is consistent with the provision of Article 33 (a) of the Constitution, which provides as follows: “*The Amir is the head of the State, his person shall be immune and inviolable....*” However exempting the Government from claims of civil liability involves unjustified damages to individuals' rights that is obviously restrictive to the law courts. Such legislative exemptions put undesired restrictions and limitations on the judiciary and give rise to the executive authority's domination over the judicial authority which prejudices the principle of judicial independence in addition to prejudicing the principle of justice and ending the right to litigation provided for in Article 20 of the Constitution. It should be noted that the Government is seeking to add a similar Article to the Civil Code currently being discussed by the Consultative Council. This attempt by the Government is opposed by many members of the Consultative Council and is rejected by the citizens, especially those involved in the legal practice, making the Part relating to civil liability in the draft Civil Code blank until the time of writing this thesis.¹

¹ See the pending draft Civil Law.

(2) The second paragraph of the aforesaid Article 4 holds a Public servant personally liable for payment of compensation by reason of an act or error done by the said servant on account of the discharge of his official duties resulting in damage to third parties. This means that a claim of action for liability is limited to the Public servant personally, not to the government. In fact, the normal financial conditions of Public servants do not enable them, in most cases, to pay compensation amounts that are normally high that cannot be provided from their income. If we assume that a driver of a Government-owned car kills a man in a road accident or causes a permanent disability to him, the person entitled to compensation does not have the right to make a claim against the Government but instead can only claim against the Government-employed driver. In such case, one can imagine the enormous amounts of compensation that can be awarded in such case compared with the driver's poor creditworthiness. This unfair legislation can undoubtedly prompt the law courts to pass impossible judgements that cannot be executed and may undermine the operation of the judicial system.

The provision of Paragraph (3) of the said Article makes the situation worse in depriving the victim of a civil servant of his right to compensation as it is clear from its provision that when a civil wrong is committed by any agent or servant of the public officer, such public officer shall not be held liable unless he has approved or permitted such act. This inevitably results in the fact that where a public officer denies that he approved or permitted the wrongdoing of his agent, he is actually denying his liability for damages. This is a strange provision that prejudices the rights of victims at the hands of public officers.

(3) Paragraph (4) of the said Article deals with the case of the Judge's error in the exercise of his judicial duties and the subsequent damage that can arise from an error in his judgement or procedures. Although the legislator's intent from this provision is establish the judge's immunity, which is an acceptable principle, the drafting of this Article is faulty especially in its Arabic text which is probably produced from a wrong translation of the English text which was the original version.

Chapter Three of the Judiciary Law deals with the basic principles and procedures to be followed in holding a judge accountable and suing him whether by way of disciplinary action or criminal trial confirming the liability of the judge for acts that are contrary to the law. The accountability of judges for acts that constitute civil wrongs especially in the case of a gross error, is both essential and justified.

Article 4 (4) of the Civil Wrongs Law stipulates that:

“No action shall be brought against any Judge of the Bahrain Courts, or against any member of any Court or tribunal of which any such Judge is a member; or against any person lawfully performing the duties of any such Judge or member; or against any person constituting, or being a member, of any Court or tribunal, or against any person lawfully performing the duties of any such person, or against any other person performing judicial functions, including an arbitrator; in respect of any civil wrong committed by him in his judicial capacity.”

As it may be observed from the above mentioned paragraph it is impossible to hold a judge or even an arbitrator responsible for civil wrongs committed by him. Although the objective of this provision is to provide immunity to judges, it may lead to an illogical conclusion.

If we assume that a victim of a judge's error is barred from claiming compensation against the Judge and deprived according to the provision of Paragraph 1 of the same Article from claiming against the Government for that error, the victim himself who is expected to be protected by law will become the victim of the Law which deprives him from any means of getting compensated.

It should be noted that the provisions of paragraph (4) include an arbitrator. This provision is extremely strange as an arbitrator is a party to a contract who should not enjoy the immunity acquired by judges.

In brief, the exceptions to the principle of the independence of the judiciary while being intended to be used to the necessary extent for the management of day to day business and for ensuring the proper running of the public facilities in the State, in an expansion thereof exposes the independence of the judiciary to the risks that should be avoided in both legislation and practice.

4. Equality Between People Before Law Courts and Securing Right to Litigation

Article 18 of the Constitution states:

“People are equal in human dignity and citizens shall be equal in public rights and duties before the law, without discrimination as to race, origin, language, religion or belief.”

Article 20 (f) provides that the

“right to trial shall be guaranteed pursuant to the law”.

Meanwhile, Article 32 (a) of the Contract Law provides as follows:

“Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.”

From the above provisions, the following principles may be concluded:

(1.) People enjoy equality in status before the law courts considering that litigation is one of the public rights that the Constitution provides for in its provision on equality among people in its proceedings. The Constitution reiterates in Article 101 (a) that *“the honour of the judiciary and the integrity and impartiality of judges are the basis of rule and a guarantee of rights and liberties.”* Of course, justice requires complete equality between litigants in the true sense as regards the application of the law that

governs the facts of the case and as regards the opportunities of reference to the law courts following procedures that are readily available to all individuals regardless of their status, affiliation or classification whatsoever.

In this regard, the law is enforced and litigation is based upon the principle of equality of all individuals before the law courts including the State, individuals (whether citizens or residents) and even individuals and symbols of the ruling regime, including the Amir. Although no litigation can be brought against the Amir personally, it is possible to commence litigation against the Amiri Court before a court of law in the same way as litigation is sought against a natural person or corporate entity.¹ However, it is necessary to note the exceptions to this principle:

- (a) the legislator's failure to enact a law creating a judicial authority concerned with resolving disputes relating to the constitutionality of laws and regulations as provided for in Article 103 of the Constitution as a legal guarantee for both the Government and individuals. The lack of such legislation results in giving the Government and the Legislative Authority concerned with ordinary legislation a free hand without allowing the citizen any opportunity to observe the constitutionality of such legislation. This prejudices the principle of equality before the law courts. This is a shortcoming that should be overcome by the enactment of a law creating a judicial authority concerned with hearing disputes over the constitutionality of laws and regulations.
- (b) litigation procedures before the State Security Court, as previously discussed in detail, concerning the exceptions to the principle of the judiciary's independence.
- (c) the settlement of the Ruling Family members' disputes. These are not dealt with before the ordinary law courts but are dealt with by the Ruling Family Council set up pursuant to the provisions of Part IV, Articles 18 to 22 of Legislative Decree No. 12 of 1973 with respect to the Emirate's Inheritance

¹ Court Case No. 3209/1976.

Schemes. Thus, the members of the Ruling Family enjoy a distinguished position over all other individuals, including citizens and residents.

Nevertheless, it could be said that the jurisdiction of the Ruling Family Council is based upon an optional arbitral basis that implicitly recognises the existence of an assumed agreement between members of the Ruling Family on the election of this Council as the competent authority to deal with disputes between the family members through institutional arbitration procedure.

In this respect it should be noted that the jurisdiction of the Ruling Family Council only applies where all parties to the disputes are from the Ruling Family members. If one of the parties to the dispute is a non-member, the jurisdiction to hear such a dispute is vested in the ordinary law courts. In addition, there is nothing in the said Law or in any other Law that bars the jurisdiction of the ordinary law courts to hear disputes that may arise between members of the Ruling Family. This does not mean that there is any restriction on the competence of the ordinary law courts should any party to the dispute, who is a Ruling Family member, wish to refer the matter to the ordinary law courts.

(2.) The right to litigation between people, the right of individuals to revert to court to recover their rights, whether private or general, and whether based upon rights arising from contracts or pursuant to a proclaimed law (statutes) are maintained. The guarantee of the right to litigation and to revert to court is an irrevocable constitutional right that cannot be changed even by any law nor can it be prejudiced even by the Legislative Authority.

(3.) The right of persons and individuals to resort to the court is part of the public order, hence no agreement can be concluded for waiving it nor restricting it even with the acceptance of the concerned parties. If an agreement is entered into whereby one of its parties gives up his right to go to court or fixes a period of time or provides for restricting this right under any contract, this condition or part of the agreement for

waiver or restricting the right shall be null and void by virtue of law and shall be deemed of no effect.

It should be mentioned that this provision does not conflict with the principle of the reference to arbitration which is a voluntary form of litigation allowed by law. It shall be emphasised too that time limits and prescription periods to file law- suits or appeals is an accepted and adopted principle of law and jurisprudence in various jurisdictions.¹

5. Plurality of Degrees of Litigation

The main features of modern legal systems include the presence of several degrees of litigation. Such systems guarantee that there are higher courts that can hear challenges and appeals by those who are not satisfied with the judgements of the courts of first instance. Thus, law-suits are heard by two degrees of law courts while there is a higher court in the hierarchy of the law courts to examine challenges relating to the application of the law.

In a plurality of the degrees of litigation, there is a firm guarantee for a more just application of the law and to verify rights, because control by a higher ranking court comprising more experienced judges who are also bigger in number, strengthens the guarantee for soundness of a judgement by upholding, amending or rescinding it.

Bahrain's modern judicial system has endorsed this principle in keeping with the developed legal systems and has made litigation in two degrees: first instance and appeal. Awards of the Court of Appeal are subject to the strict control of a superior court, which is the Court of Cassation. The latter Court is responsible for review of challenges relating to the proper application and interpretation of law applied to the dispute although it does not exercise any control with respect to the facts.

¹ Cassation No. 139/94.

6. The Sources of Law to which a Judge May Have Recourse

The Bahrain judicial system has developed from an Islamic Law Period to a mixed period involving Common Law. Then, it settled within the framework of the Romano-Germanic family. However, this development and transformation has not cut links between the original affiliations of this system and its affiliated systems, hence remaining linked to the latter while closely rooted in the former.

There is no doubt that the key characteristics of the above three systems or families are the sources of law that judges rely upon for producing their judgements. A judge deduces his rulings in the Islamic Judicial System from the provisions of Islamic Sharia. In the Common Law System, a judge deduces his verdicts from legal precedents in the law courts. Meanwhile, in the Romano Germanic system, a judge refers first to the written laws.¹

Article 3 of the Judicial Law embodies the mixture in the affiliation of the Bahraini judicial system as it provides as follows:

“Where the judge does not find a statutory provision that is applicable, he shall derive the basis of his judgement from the principles and provisions of Islamic Sharia laws. In the absence of Sharia provisions, rules of custom shall be applied. Special custom shall prevail over general custom. Where there is no custom, principles of natural law, justice and good conscience shall be applicable.”

To study the provision of this Article, it may be divided into two major sections: first sources of laws that a judge refers to upon handing down his judgements and the second, the gradual approach to such sources.

¹ Zweisert Y and Kotz H. - *An Introduction to Comparative Law* - Page 70, 267-329.

Section One: Sources of Law in the Bahrain Legal System

(1) Codified Legislation

Man-made written laws cover the wide range of codified laws and these relate to almost all kinds of civil and business dealings in various fields especially commercial and business dealings. The principal codified laws can be classified in detail as follows:

(i.) Legislation Relating to Public Law

Such laws are defined as the collection of statutes governing the relationship between the state and other states and between the state as representative of the community and its individual. The first group of statutes relate to the organisation of the diplomatic corps in addition to a number of decrees relating to the ratification of international and regional agreements the most important of which are Legislative Decree No. 24 of 1981 with respect to Approving the Charter of the Arabian Gulf Co-operation Council; Legislative Decree No. 26 of 1981 with respect to Approving the GCC Unified Economic Agreement; Decree No. 1 of 1998 with respect to Accession to the Warsaw Convention for Standardising Some of the Rules of International Air Transport of 1929 and its Supplementary Protocols; Legislative Decree No. 31 of 1996 with respect to Approving the Bern Convention for Protection of Intellectual Property and Legislative Decree No. 31 of 1996 with respect to Approving Accession to the Paris Convention for Protection of Industrial Property.

The other group of statutes relates to regulating the relationship between the Government, society and individuals. The most important of these is the Constitution of the State of Bahrain issued on 6th December 1973 which determines the form of the State and basic features of the society (social, ethical and economic features) and distribution of power. It also outlines the rights of individuals in the State and provides for their protection. There is also the Penal Code promulgated by Legislative Decree

No. 15 of 1976, the Traffic Law enacted by Legislative Decree No. 9 of 1979; the State Security Law published on 22nd October 1974; the Arms and Explosives Law enacted by Legislative Decree No. 16 of 1976; the Citizenship Law enacted by Decree No. 8 of 1963, the Bahrain Monetary Agency Law promulgated by Legislative Decree No. 23 of 1973; the Customs Law of 1950; the Judiciary Law No. 13 of 1971; the Societies and Clubs Law promulgated by Legislative Decree No. 21 of 1989 and the Juveniles Law promulgated by Legislative Decree No. 17 of 1976.

(ii.) Statutes Relating to Private Law

These are the laws that govern the relations between individuals where the role of the state is no more than the exercise of control over what is mutually agreed upon between them. Some legislation may involve the regulation of such relations between them. These statutes may be divided into civil statutes in general and the statutes regulating business activities.

Civil Statutes in general include the following: the Contract Law of 1969; the Civil Wrongs Ordinance of 1970; the Land Registration Law promulgated by Decree No. 15 of 1979; the Copyright Protection Law promulgated by Decree No. 10 of 1993; the Civil and Commercial Procedures Law promulgated by Decree No. 12 of 1971 (as amended); the Law of Evidence promulgated by Decree No. 14 of 1996 and Law of Procedures before Sharia Courts promulgated by Decree No. 26 of 1986.

Business Laws: The most important of these are the Law of Commerce promulgated by Legislative Decree No. 7 of 1987; the Bankruptcy Law promulgated by Decree No. 11 of 1987; the Commercial Companies Law promulgated by Legislative Decree No. 28 of 1975; the Maritime Code promulgated by Decree No. 23 of 1982 and the Commercial Agencies Law promulgated by Decree No. 23 of 1975.

(iii.) Mixed Statutes

These are such statutes that are intended to regulate contractual relations between private individuals or between corporate entities and although the State is not a party to such relations they have mandatory rules that no agreement can be made for the breach thereof. Such laws give the State the right to intervene directly for imposing such rules. The most important of these are the Labour Law for the Private Sector promulgated by Legislative Decree No. 23 of 1976; the Social Insurance Law promulgated by Decree No. 24 of 1976; the Law of Trusteeship on Minors' Funds promulgated by Legislative Decree No. 7 of 1986; the Motor Insurance Law promulgated by Legislative Decree No. 3 of 1987 and Legislative Decree No. 17 of 1987 with respect to Insurance Companies and Organisations.

It should be noted that many scholars classify such laws under the head of legislation relating to private law.

(iv.) Procedural Statutes

This means such statutes that do not directly regulate rights and obligations arising between the State and individuals or among individuals themselves but which regulate the pursuit of justice through the administration of judiciary with a view to enforcing and achieving such rights.

The most important of these statutes are the Civil and Commercial Procedures Law promulgated by Decree No. 12 of 1971 (as amended); the Law of Evidence promulgated by Decree No. 14 of 1996; the Code of Criminal Procedures of 1966 (as amended); the State Security Court Law promulgated by Legislative Decree No. 7 of 1976; the Law of Procedures before Sharia Courts promulgated by Decree No. 26 of 1986 and the Court of Cassation Law issued pursuant to Decree No. 8 of 1989.

In addition, there are procedural provisions provided for by the legislator in certain substantive laws as in the case of grievance procedures provided for in Article 11 of the Societies Law and arbitration and complaints provided for in Articles 9 and 20 of the Commercial Agencies Law.

However, legal scholars classify such procedural laws as falling under the umbrella of public law.¹

(2.) The Islamic Sharia

Article 2 of the Bahrain Constitution provides for the following:

“Islam shall be the religion of the State; Islamic Sharia a main source of legislation; and Arabic the official language.”

This provision should not lead to the understanding that the applicable laws are based upon the provisions of Islamic Sharia. In fact, all the aforesaid laws are man-made laws that are mostly based upon the private law school of the Romano Germanic Family to which the Bahrain legal system has become attributed as explained earlier in this Chapter.

Pursuant to the provision of Article 3 of the Judiciary Law, the law courts, in making their judgements, rely upon the man-made laws, hence the provisions of Islamic Sharia take a secondary position in cases that are not regulated by the Law of Commerce. Nevertheless, in the case of matters governed by the Law of Commerce, the legislator places the provisions of Islamic Sharia in the fourth position after the man-made laws, custom and practice and principles of the Civil Law.²

¹ Faraj T. H. - *Al Madkhal Lil Ulum Al Qanuniah*.

² The expression “Civil Law” principles means the provisions of different laws which govern the relations between individuals or individuals and the State other than public order matters. Such principles are all expected to be covered by the proposed Civil Code.

It can be said that the provisions of Islamic Sharia are a second source for deciding judgements in the case of non-commercial law-suits and are placed in the fourth position as a source of deducing judgements in the case of commercial law-suits.

(3.) Custom and Practice

This is the third source of deciding judgements, except in the cases regulated by the Law of Commerce where they rank in the second position. Specific customs in certain businesses or professions take precedence over general customs.

(4.) Rules of Natural Law, Rules of Equity and Good Conscience

The Bahraini legislator makes the rules of natural law, rules of equity and good conscience as secondary sources that rank after custom and practice. Because of the ambiguity of the wording of this part of the relative article and in order to get to know what it drives at, it resorts to the Explanatory Memorandum to the Egyptian Civil Code - a main influence for the Bahraini legislator in most of his statutes - with respect to the words

“natural law, rules of equity and good conscience”.

It states that

“this does not refer the judge to a definite stipulation but obliges him to exercise his utmost discretion beyond any possible doubt in developing his ruling. In such exercise, he is required to rely upon general objective considerations rather than subjective thinking by referring him to total principles or rules that are sometimes attributed to natural law and at times to the rules of equity etc.”¹

¹ Ibid Page 272.

The Bahrain law courts have already applied the concept of the rules of equity in some of their judgements. The High Court of Appeal ruled in Case No. 344/C/1982 at the hearing of 12th April 1983 prior to the enactment of the Copyright Protection Law that:

“Although Bahrain does not have a legislation protecting copyright for the author in respect of his literary, scientific or artistic works, including the architectural designs produced by an engineer, it is possible to determine such protection in pursuance of the rules of equity. These have the effect that an author should have the exclusive right to financially exploit his own work so that such right may not be exercised by another person except with a permission from him.”

This same concept was applied in Case No.1448/1977 at the hearing of 14th October 1980 where the ruling said:

“Although the Bahrain legislation does not contain general provisions regulating the extent of the applicability of the civil procedures laws to the past, the basic principles in all legislation in conformity with the rules of justice stipulate that laws in general come into effect from the date of publishing them.”

Section Two: Gradual Approach to the Sources from Which the Courts Derive Their Judgements

Upon reviewing Article 3 of the Judicial Law and Article 2 of the Law of Commerce, it is essential to divide this Section into two parts. The first relates to the gradual approach to the sources that the law courts depend upon in developing their judgements in the cases governed by the Law of Commerce. The second relates to cases that are not governed by the Law of Commerce.

(1) Cases Governed by the Law of Commerce

Article 2 of the Law of Commerce states as follows:

“Commercial matters shall be subject to what has been mutually agreed upon by the contracting parties unless their agreement conflicts with mandatory legal provisions. Unless there is a special agreement, the rules of commercial practice shall be applicable to the matters which are not specifically dealt with in this Law or in the other laws pertaining to commercial matters. Special or local practices shall supersede general custom and usage. Unless there is a commercial practice, the laws containing civil provisions shall be applicable unless a judge deduces the grounds for his judgement from the principles of Islamic Sharia, then principles of natural law and rules of equity”.

A close examination of this Article concludes that a judge must follow as a basis for his judgement the following gradual approach:

(i.) Agreement or agreements concluded between the two parties to the litigation, which are of course business matters that are governed by the provisions of the Law of Commerce or laws regulating the dealings between parties to the agreement or those which do not violate such laws.

(ii.) Rules of commercial practice applicable in Bahrain or accepted therein among traders. Where a general practice conflicts with a special practice in Bahrain in respect of a certain matter, the special practice shall prevail in such transactions over the general practice or that practice that is applicable outside Bahrain. Here it should be noted that a practice is a material issue that must be proved by whoever invokes it whether such practice is local or foreign. In this connection, the Court of Cassation confirms the following:

“Thus, the party who invokes such practice has the onus of proving its material existence as a continuous custom prevailing in business and the contracting parties are intent upon complying with its provisions.”¹

¹ Cassation No. 13/1994.

With regard to the prevalence of customs in commercial matters over the provisions of Islamic Sharia and keeping the latter in second order after the commercial laws, the Court of Cassation states:

“Although the application of commercial custom in such cases takes place as a legal rule applicable to commercial matters according to the provision of Article 2 of the Law of Commerce since there is no specific provision governing it in this law or in other laws relating to commercial matters considering it as one of the sources of legislation, the point raised by the Petitioner that the provisions of Islamic Sharia is applicable in accordance with the provision of Article 3 of the Law Governing the Judiciary, is irrelevant.”¹

(iii.) General Rules in Civil Laws: These are the rules governing the contracts or transactions that may not be covered by the Law of Commerce in detail such as the provisions relating to employment contracts, lease agreements, benefit contracts, assignment deeds or guarantees that are regulated by applicable civil laws.

(iv.) Principles of Islamic Sharia.

5. Principles of natural law and rules of equity.

Commercial activities are those carried out by any person, even though he is not a trader, with the intent to speculate. Pursuant to Articles 3, 4 and 5 of Chapter 1 of the Law of Commerce, commercial matters are those which cover commercial activities and such activities may be categorised and listed as follows:

- Purchase of movables of whatever kind with the intent to sell or hire them out in their original form or after procession or conversion thereof in any other manner with the intent to make profit.
- Sale or hire of the movables already purchased in the manner set forth in the preceding Paragraph.

¹ Cassation No. 50/1991.

- Taking movables on lease with the intent to hire them out or subleasing them to third parties.
- All transactions relating to bills of exchange, promissory notes and cheques regardless of the capacity of the persons concerned and whatever may be the nature of the transactions for which they are executed.
- Setting up of commercial companies.
- All activities relating to maritime navigation, including sea or air transport, shall be deemed to be commercial activities, especially:
 - Construction, repair or maintenance of ships or aircraft.
 - Purchase, sale charter or taking on charter of ships and aircraft with the intent of exploiting them.
 - Purchase of materials or equipment for providing ships or aircraft with the necessary supplies.
 - Sea or maritime transport.
 - Loading and unloading operations.
 - Contracts relating to the employment of ship masters, pilots, engineers, navigators and such other employees.
 - Lending and borrowing.

- The following activities are considered commercial if they are professionally practiced:
 - Supply, export and distribution of goods.
 - Industry.
 - Land transport.
 - Commercial agencies, business of commission agents and commercial representation.
 - Brokerage of whatever kind.
 - Insurance business of various kinds.
 - Operations of banks, exchange houses and stock exchanges.
 - Warehousing of goods, corps and such other items.
 - Printing, publishing, photography, broadcasting by radio or television, press, transmission of news or photographs and advertising business.
 - Extraction of natural resource materials from mines, quarries and oil sources, cutting stones and such other activities.
 - Contracts relating to public works, contracts for construction of properties, altering, renovating or demolishing them, cleaning and maintenance contracts where the contractors undertake to provide the necessary materials or workforce.
 - Purchase of properties and real estate rights with the intent to sell them and the sale of the above after having purchased them with the aforesaid intent.

- Customs clearing, service agencies and business for the sale by public auction.
- Business of tourist agencies, hotel industry, business of hotels, restaurants, cinema houses, playgrounds and recreational activities.
- Leasing or letting of houses, apartments and rooms whether furnished or unfurnished with the intent to sub-let them.
- Distribution of water, gas or electricity and communication services.

(2.) Cases that Are not Governed by the Law of Commerce

They include all the cases that are not included in the above Paragraph. In such cases, a judge must deduce his judgement by following a gradual approach in replying upon the following:

- (i.) Applicable codified man-made laws.
- (ii.) Provisions of Islamic Sharia.
- (iii.) Private Practice.
- (iv.) General Practice.
- (v.) Rules of natural law, rules of equity and good conscience.

7. Public Nature of Hearing of Litigation

Article 102 (c) of the Bahrain Constitution provides that “*sittings of the law courts shall be held in public save in exceptional cases prescribed by the law*”. Indeed, this is a basic principle from which there is no exception in procedural laws governing disputes in general. However, the legislator gives the court a discretionary power when necessary to allow for an exception by holding a certain hearing in camera. Article 4 of the Judiciary Law states:

“Court sittings shall be held in public unless the court decides otherwise in observance of public order or public morals.”

Further Article 121 of the Code of Criminal Procedure provides as follows:

“The place in which any Court is held for the purpose of investigating into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them: provided that the Court may if it thinks fit order at any stage any investigation into or trial of any particular case that the public generally or any particular person shall not have access to or be or remain in such place.”

Consequently, the basic principle is that court sittings must be held in public. Meanwhile, the law gives the judge a discretionary power to decide holding the hearing in camera. However such power is restricted by considerations of public order or public morals. However, it should be noted that there is an unusual exception to this principle laid down in Article 2 of the State Security Law which states:

“Court sittings shall always be held in camera and shall only be attended by the public prosecutor, defendant and his representative.”

Chapter 8

THE HIERARCHY OF THE COURTS

1. Introduction

As previously discussed in Chapter 5 of this thesis, the national courts of Bahrain were, for the first time, organized by virtue of the promulgation issued by the Advisor in 1938. However, although such promulgation classified the courts into degrees of the first instance and of appeal, there was no clear definition to their competence. Moreover, no procedure was drawn up for filing of cases, appeals of judgments or execution of judgments.

In 1966 the Government of Bahrain issued the Code of Criminal Procedure (CCP) which set forth the procedures of criminal tribunals and trials, and the classification of the courts in connection with criminal cases.

In 1971, concurrently with the run-up to independence, efforts to organize the judicial authority gathered a distinguished pace. Hence, the Judiciary Law was promulgated dividing and classifying the jurisdiction of courts. This law divides the courts into two main categories: Sharia Courts, which are competent to hear disputes in connection with personal status matters¹ and Courts of Civil Jurisdiction, which are competent to hear disputes in connection with civil, commercial, and criminal cases, in addition to cases relating to non-Muslim personal status matters. The Judiciary Law outlined the levels of litigation, the jurisdiction of each level and set forth the procedure of appealing against judgments issued by courts of first instance before courts of appeal.

In the same year (i.e. 1971) the Civil Commercial Procedures Law (“CCPL”) (which is also referred to in this thesis as the Procedural Law) was promulgated specifying in a definite manner the procedures of litigation before Courts of Civil and Commercial jurisdiction (including cases relating to personal status matters of non-Muslims). The

¹ Personal status is a literal translation of the Arabic expression “Al ahwal al shakhsiah”, which includes matters of matrimony, divorce, maintenance, nursing, kinship, inheritance, wills and waqf (religious trust).

procedural matters dealt with by this legislation included: lodging of cases, submission of appeals, precautionary and conservatory actions, execution of judgments and other procedural matters. The CCPL also deals with arbitration procedures.

The progress of work in the courts and the increasing complexity of the nature of disputes brought before them has required frequent amendments to the abovementioned laws. The Judiciary Law was amended by Decree No. 17 of 1977 in connection with the amendment of the requirements and qualifications of judges. Decree No. 4 of 1999 was issued in connection with the reorganization of the Sharia courts. Finally the Judiciary Law has been amended by virtue of Decree No. 19/2000 in connection with the Formation and Organization of the Supreme Judicial Council. At the same time many amendments were made to the CCPL by virtue of Decree No. 8 of 1978 amending some provisions and adding others to the law; by Decree No. 19 of 1983 laying down new rules on Summary Proceedings and Decree No. 15 of 1985 amending Junior Courts' jurisdiction. It should be noted that frequent amendments to the Junior Courts' jurisdiction have been carried out mainly to increase the amount of claims in cases which come under the jurisdiction of these courts.

With more stability of the judiciary, and on a par with judicial systems in developed countries, the need arose for a court on the top of the hierarchical judiciary that would be competent to give an ultimate interpretation of the law. Hence the Court of Cassation Law was issued by virtue of Decree No. 8 of 1989. With promulgation of this Law the hierarchical organisation of the judicial system was completed.

In the year 1986 the law organising pleading before the Sharia Court was promulgated by Decree No. 26 of 1986 completing the organisation of the procedures before all courts.

The courts organised by the abovementioned laws are the courts of ordinary general jurisdiction. However, there are other courts which exist outside the general organised structure of the judiciary with extraordinary competence vested in them by their specific laws. These courts are: the Military Courts, formed by virtue of the Military

Judiciary Law of 1988 (not numbered) and the Ruling Family Council, which is a council competent to hear disputes between parties who are members of the Ruling Family, pursuant to Articles 8 to 22 of Decree No. 2 of 1973 in connection with the Events of the Emirate.

Although the State Security Court is a part of the organisational structure of the High Court of Appeal which falls under the ordinary judicial structure, the fact that it is a single grade court governed by its special extraordinary procedure makes it also a court of an exceptional nature. Therefore it should be dealt with independently.

2. Ordinary Courts of Law

Article 8 of the Judiciary Law provides that the judicial system shall consist of the following: the Sharia Judiciary and the Civil Judiciary.

The Sharia Judiciary is of two types: Sunni and Jaafari.¹

Article 9 of the said legislation states that the Courts of Civil Judiciary shall have the competence to resolve all civil and commercial cases and personal status matters among non-Muslims and to examine all offences except these excluded by a particular provision. Article 10 of the same Law provides that the Courts of Sharia Judiciary shall have the competence to resolve all personal disputes relating to personal status for Muslims, excluding those relating to inheritance which shall be subject to the jurisdiction of the concerned civil court. However, the Sharia Courts retain the competency to decide the specific shares the heirs are entitled to.

¹ Jaafari means the Shia sect which follows the scholar Jaffar Al Sadiq's teachings to which all the Shia in Bahrain belong.

From the above, the law courts may be classified as follows:

- Sharia Courts.
- Civil Courts with civil, commercial and criminal jurisdiction (that is courts of general jurisdiction).

2.1. Sharia Courts

These are the Courts that have the jurisdiction to hear personal status law-suits for Muslims. It is generally acknowledged in jurisprudence that personal status matters include matters relevant to the family structure arising from marriage, such as guardianship, competence, dower, maintenance, divorce, idda (i.e. separation period after divorce), family relationship, breast-feeding, wills and inheritance.¹

These Courts are divided into two branches based upon a purely Islamic sectarian division between the Sunni and Shia communities. Each branch is represented by a department within the structure of these Courts. The Sunni Department has the jurisdiction to hear family disputes of members of the Sunni sect and the Jaafari Department has the exclusive jurisdiction to hear the family disputes of the Shia members of the community.

The presence of this type of court in Bahrain raises severe criticism and arguments amongst intellectuals, including sectarian or religious members of both groups. The aspects of such criticism of the law courts may be summed up as follows:

First: It is argued that having a type of law court concerned with “*family*” personal status matters that are separate from the civil judiciary implies a breach of the unity of the judicial structure and its hierarchy, leading to an improper separation that affects the harmony of the judicial system.

¹ For matters included in *Al Ahwal Al-Shakhsiah* see Al Baleri, M.A. - *Mawsawat Al Fiqh Wal-quda F: Al-Ahwal Al-Shakhsiah*, page 1.

Second: This takes place while personal status matters for non-Muslims are within the competence of the civil courts (i.e. the general law courts) creating an unjustified discrimination between litigants according to their religion, which is something that is not commendable.

Third: This unusual judicial structure exists in the absence of a personal status law, leaving personal status matters to the discretion of individual judges depending upon the rules of the sect to which the litigants belong or according to the sect of their marriage contract. This in turn results in contradiction in the judgements handed down by such courts, especially between the Sunni and Shia sects in which case litigants are not subject to one and the same law. Thus, in addition to the fact that there are several judicial authorities, there are also several laws applicable to the litigants. This is a drawback that prejudices the principle of equality of law and its enforcement.

Fourth: The division of the Sharia courts into one branch for members of the Sunni community and another for members of the Shia community is something that prejudices national unity and brings about continuous discrimination among the country's citizens. This is something that divides the people on a religious and sectarian basis that is not compatible with the spirit of the modern age, and the scientific educational development of the people of Bahrain. There also arises the threat against social cohesion given that intermarriage between members of the two sects has been quite common. For those couples from different sects who want to marry, the existence of two authorities forces them to decide from the beginning whether they wish to form a Sunni or a Shia family. This enforced decision continues to affect the structure of this family forever as a result of the marriage. All family matters thereafter shall be decided on a sectarian basis through the competent court. Such matters include wills, inheritance and family relationship, which leads to all sectarian division continuing in succeeding generations, due only to the sectarian classification of courts. This is regardless of the fact that the differences between the Islamic sects in issues of family matters are very limited.¹

¹ For differences see Mughniah M.J. *Alfiqh Ala-Mathaheb Al Khahmsah*.

The proper, ideal solution lies therefore in rescinding this type of court and merging it within the overall judicial structure in order to preserve the unity of the judiciary and to achieve uniformity in dealing with all litigants before such authority. Having created this new structure, departments concerned with personal status under the competence of the common judiciary would need to be established.

These courts and the absence of a unified personal status legislation have been subject to a great deal of criticism from all organisations concerned with family issues, especially social and women's associations. Most of these groups' conferences recommend the unification of family legislation and the judiciary.¹

2.2. Order of Jurisdiction of Sharia Courts

According to the provision of Article 17 of Legislative Decree No. 4 of 1999 with respect to Amending Certain Provisions of the Judiciary, the Sharia Courts consist of three degrees as follows:

1. Junior Sharia Court.
2. Senior Sharia Court.
3. High Sharia Court of Appeal.

The said Article of the aforesaid Law states that both the Sunni and Jaafari Sharia Divisions shall have competence to hear personal status cases for Muslims on the basis of the plaintiff's sect at the time of filing the case. However, the provision of this Article excludes the cases arising from marriage contracts on the basis that jurisdiction is according to the Court of the particular sect in which the marriage contract was solemnised. The sect of the contract is established by the Court which solemnised it or the Sharia marriage officer who concluded such contract. The marriage officer is a person licensed by the Sharia Court for solemnising such contracts on behalf of the

¹ See papers on the Seminar held on 17 -18 December 1978 in the Bahrain Young Ladies Association (Jamaeyat Nahdat Fatat Al Bahrain).

Court and with its permission.¹

If there is no attested marriage contract or if there is a marriage contract legalised outside the State of Bahrain which has not been authenticated by either department, jurisdiction shall be determined on the basis of the husband's sect at the time of solemnising the marriage contract. In addition to the aforesaid competence of the Sharia Courts, they are also empowered to deal with matters related to inheritance, gift, wills and waqfs (endowments) in accordance with the sect of the testator, or the person making a gift or endowment.

According to the provisions of Article 18 of the aforesaid Legislative Decree, the Junior Sharia Court is competent to pass judgement in the first instance in respect of the following matters and cases:

1. Wife's maintenance and child support, maintenance of all types, maintenance payable between relatives and claims for increase, reduction or forfeiture thereof.
2. Right to child custody, safekeeping and travel with the child to another country.
3. Authentication of inheritance, gifts and wills and drawing up inheritance deeds.
4. Drawing up Sharia deeds, testimonies of all kinds, notarising instruments and deeds relating to personal status and waqf (endowment) deeds with all the amendments made thereto without prejudice to the provisions of the Notarisation Law.²

The Senior Sharia Court is competent to pass judgements in the first instance in respect of the following matters and law-suits:

¹ See Government of Bahrain Proclamation No. 42/1357/1939 and Minister of Justice Resolution No. 2/1999 for the definition of marriage officer.

² The Notarization Law is promulgated by Decree No. 14/1971 governing the procedures of notarization of various civil and commercial contracts.

1. Matrimonial law-suits such as proving the marriage, review, divorce, nullity, acquittal and separation between two spouses on Sharia grounds.
2. Cases relating to proof of parenthood or denial thereof.
3. Cases relating to appointment of custodianship on grounds of mental disability, mental disqualification, forgetfulness or loss of legal qualification arising from a mental disability or the lifting thereof.
4. Cases relating to proof of absence, being missing and the return of an absent person or proving the death of such persons.
5. Cases relating to waqf (endowment).
6. All personal status matters that are not subject to the jurisdiction of the Junior Sharia Court.

It shall also have jurisdiction to deliver a final judgement in respect of appeal cases delivered by a Junior Sharia Court's Judgments.

The High Sharia Court of Appeal, shall have jurisdiction to rule in respect of appeals of cases referred thereto in respect of judgements handed down by the Senior Sharia Court acting in the capacity of first instance court.

According to Article 20 of the aforesaid Legislative Decree, judgements handed down by the Sunni Sharia Division shall be appealed against before the Sunni Sharia Division in the competent court and judgements handed down by the Jaafari Sharia Division shall be appealed against before the Jaafari Sharia Division in the competent court regardless of the appellant or respondent. This means that the sect is not relevant in respect of appeal or if one of the spouses belongs to a sect other than that of the

other spouse, he/she may appeal against a judgement in a case which he/she has lost but such appeal shall only take place within the appeal department of the sect of the court that handed down the judgement in the first instance.

It should be noted in this regard that judgements of the Senior Sharia Court delivered in an appellate capacity and judgements passed by the High Sharia Courts of Appeal are final rulings that may not be appealed against. These fall outside the scope of the Court of Cassation. As the objective of the Court of Cassation is to supervise courts to ensure the right application of provisions of law, according to a correct and unified interpretation, the leaving out of the Sharia Courts from such court jurisdiction excludes its judgments from any such objective. Such exclusion may lead to deviation of such courts from the structure and unity of the hierarchy of the judiciary and cause their judgements to be in contradiction due to the absence of a true central supreme court vested with interpreting the law and applying it to all disputes.

It is deduced from the order of the Sharia Courts that there is no monetary limit for these courts, because the personal status law-suits are not matters with fixed monetary values, even though they relate to claims of dower or maintenance; the jurisdiction to deal with such matters is mainly dependent upon their subject matter.

It may be noted that the law gives jurisdiction to hear all personal status cases of non-Muslims to the Senior Civil Court, as a first level court (as will be discussed later), but makes the jurisdiction to hear the same kinds of cases for Muslims - as a first instance - to a Junior court. This discrimination has also been strongly criticised.

2.3. The Composition of the Sharia Courts

According to the provisions of Paragraphs 1 and 2 of Article 21 of the Judiciary Law, each of the departments of the Senior Sharia Court and the High Sharia Court of Appeal shall consist of a President and a number of judges, as required. A sitting of the Court's Department shall be considered valid if two judges are present, including

the President of the Department or one of his deputies.

Where the sittings of the Senior Sharia Court or the High Sharia Court of Appeal are held by two judges and they disagree over the ruling, the Minister of Justice shall ask a third judge to take part in the ruling. Then, the Department shall pass its verdict by a majority vote.

According to the last paragraph of the aforesaid Article (added pursuant to Legislative Decree No. 4 of the Year 1999) with respect to Amending Certain Provisions of the Judiciary Law, the Junior Sharia Court shall consist of a single judge.

2.4. Civil Courts

These are the courts of general jurisdiction that can be said to represent in their entirety the modern general judicial structure as they are concerned with all disputes except for those concerning personal status matters for Muslims. They are competent to hear all civil, commercial and criminal matters as well as disputes concerning personal status matters for non-Muslims.

The jurisdiction of such courts is divided into two sections:

- 1) Civil and commercial jurisdiction.
- 2) Criminal jurisdiction.

As to the definition of a civil and commercial jurisdiction, Article 1 of the CCPL states as follows:

“The function of the Civil Courts is to render judgement in all disputes concerning civil and commercial matters and the personal status matters of non-Muslims.”

Such matters are defined specifically or in order of importance in Article 7 of the CCPL (as amended by Legislative Decree No. 1 of 1990) as will be discussed in detail later.

Courts with criminal jurisdiction consist of the civil courts of various levels that hear criminal law-suits according to Article 7 of Chapter Two of Part II of the Code of Criminal Procedure (CCP) 1966 (as amended by Legislative Decree No. 8 of 1996).

It should be noted that these civil courts are also competent to hear administrative law-suits concerned with general jurisdiction.¹

2.5. Jurisdiction of Civil Courts

Civil courts represent the backbone of the judicial authority as they are competent to hear all law-suits and disputes amongst individuals or between individuals and government agencies and departments. They are run according to laws regulating their jurisdiction and degrees and they must apply the relevant laws governing different legal relations whether in the area of public law or private law. They derive their authority and powers from the provisions of Article 9 of the Judiciary Law.

According to the provisions of the Judiciary Law, the expression '*civil law courts*' includes the courts with civil and commercial jurisdiction as well as the criminal courts, which is the definition contained in Article 13 of this Law. However the CCPL and the CCP draw a distinction between these two branches of the civil law courts. So the CCPL regulates the courts having jurisdiction to hear civil and commercial law-suits while the CCP regulates the courts concerned with examining different types of crimes. Each division is divided into Junior Courts, Senior Courts and High Courts of Appeal.

¹ Cassation No. 18/1993 - May 2 1993. In this case the Court of Cassation decided that "*as pursuant to the judicial system in Bahrain the ordinary civil courts have a comprehensive jurisdiction over all kinds of disputes except those relating to Sharia disputes. Such jurisdiction therefore includes the disputes relating to administrative matters...*"

The CCPL, the CCP, and the Judiciary Law regulate the civil law courts in terms of ranking, jurisdiction and formation, except for the Court of Cassation, which is governed by its own Law (Legislative Decree No. 8 of 1989). Therefore, each of these courts will be discussed in terms of rank, jurisdiction and formation. The Court of Cassation whose jurisdiction includes all civil and commercial as well as criminal cases will be discussed in a separate Section.

2.6. Composition and Jurisdiction of the Civil Court

Junior Courts' Composition

Pursuant to the provision of Article 16 of the Judiciary Law every junior court shall consist of a single judge. However, it empowers the Minister of Justice to form lower courts consisting of two judges and assign them to examine a certain kind of case. In practice every junior court consists solely of one judge and court is held in his presence.

Jurisdiction of the Junior Courts in Respect of Civil Cases

Pursuant to the provision of Article 8 of the CCPL, the Junior Courts are competent to hear the following cases:

- (1) Civil and commercial cases where the amount of the claim does not exceed BD5,000 (Five Thousand Bahraini Dinars).
- (2) Cases arising from the employment relationship in accordance with the Labour Law regardless of the amount thereof whether filed by the worker or the employer.
- (3) Cases concerning irrigation rights, rights of way, watering rights where persons are prevented from exercising them, and cases of overlooking and breach of privacy.

(4) Cases concerning repossession of property expropriated from its possessor in any way or non-interruption of possession, whatever the value of that property may be. It should be noted that both cases of repossession and non-interruption of possession do not deal with the fundamental rights relating to the property's title, but simply mean keeping things as they are in respect of the property pending the resolution of the substantial action relating to title.¹

(5) Cases concerning the division of jointly owned property.

(6) Cases relating to suspending the removal of damage between property owners and their occupants or between neighbours.

(7) Cases claiming the establishment of damage or loss of title deeds for property and delivering replacements thereof.

(8) Cases of vacating leased property, except where such cases involve claims in excess of BD5,000.

(9) Cases relating to claims for altering or correcting a name in official records and documents.

(10) Supplementary cases arising from original claims for interest, loss, damage and court fees.

It is noted that the junior courts have jurisdiction in respect of the cases indicated in the sub-paragraphs from (2) to (7) and the first part of sub-paragraph (8) above regardless of the value of the original right involved in the issue of the dispute. No significance

¹ Cassation No. 43/1994 in which the Court of Cassation decided that "whereas a claim of ownership differs from a claim of possession in that the purpose of the former is to protect the right of property and relative rights thereto..... while the purpose of the latter is only to protect the validity of retention regardless of the legality thereof and whereas the appellant claims in his submission the right of property on grounds of continuous possession of the land for a period which entitles him to acquire the right of property. This establishes a claim of property, not a claim of possession which comes under the jurisdiction of a junior court, regardless of the substantial volume of the land. The dispute, therefore, is of a senior court's competence to hear."

is attached to the value of property in a case of claiming repossession, a case of non-interruption of possession, a case of right of passage or a case of claiming a copy of a lost title deed. Further, no consideration is given to the value of a property claimed to be vacated unless it is accompanied by a claim for amounts in excess of the court's prescribed competence. As for the cases mentioned in the above sub-paragraphs (9) and (10), it is not possible to evaluate them monetarily. Consequently, the Court has competence to examine the aforesaid cases except for claims for sums of money that require a certain degree of competence.¹

It should be noted that cases arising from employment relationship contracts are under the jurisdiction of the Junior Courts regardless of the amount of claims involved in such cases, while in other civil cases the jurisdiction of such courts is limited to cases which involve a maximum amount of five thousand Bahraini Dinars pursuant to Article 8 (1) of the CCPL. This provision of the law is criticised because it creates unjustified deviation from the value element of jurisdiction of courts. Labour disputes are not in evaluation less important than other kinds of disputes and therefore the classification of jurisdiction of courts on such cases shall be determined, as other cases, on the basis of their financial value, which is the amount of claim involved in the case.

The Execution Courts are an integral part of the Junior Courts. Article 16 (3) of the Judiciary Law states that a judge of the Junior Court may be instructed to examine special kinds of cases in one or more of the following: "*Criminal, civil, commercial and execution matters*". The Execution Court is empowered to hear claims for execution of judgements regardless of the judgement amount or claim amount subject to the ruling. Thus, the Execution Court cannot be classified on the basis of subject matter jurisdiction.

Pursuant to the law, the Execution Courts are empowered to execute judgements and verdicts handed down by the civil law courts of varying types and degrees. They are also competent to execute pursuant to the duly notarised official instruments and case

¹ See examples under Senior Court's jurisdiction under various laws in this Chapter.

decrees endorsed by the law courts and such other documents that the law considers as enforceable instruments such as foreign judgements or arbitration awards ordered to be executed by the competent court or arbitration tribunal. All of these powers are vested in this Court according to the provision of Article 244 of the CCPL.

In addition to the power to execute the aforesaid judgements and documents, the Execution Court Judge is empowered to take provisional and temporary measures in his capacity as a summary proceedings judge in the following events:

(i) Events indicated according to the provisions of Articles 304, 305 and 306 of the CCPL as follows:

(a) Attaching a debtor's movable property if the creditor is a holder of a bill of exchange or promissory note and if the debtor is a trader whose signature of the bill of exchange or promissory note obliges him to make payment in accordance with the Law of Commerce.

(b) Attaching a debtor's entire properties where the creditor fears the loss of guarantee of his rights.

This provision, stipulated in Article 304 (2), is subject to criticism for the general form used: "*where the creditor fears the loss of guarantee of his right.*" All other instances dealt with in Articles 304, 305 and 306 are events in which the creditor fears the loss of guarantee of his right and therefore there is no need to specify such instances. In my view the authority of the jurisdiction of the Execution Judge on summary actions is an extraordinary one and therefore should be limited by certain defined instances, otherwise the specification of other instances of his jurisdiction, as detailed above, become meaningless.

(c) Attaching by the lessor of a property and any movables, fruits and crops kept inside the leased property as security for payment of the accrued rent in respect of such property.

(d) Attaching, under caretaking of the possessor of a movable property where it appears that such movable is held by a person other than the owner thereof. The purpose of such attachment is to safeguard the owner's interests.

The rulings of the Execution Court Judge in the abovementioned matters are of a temporary precautionary nature. However, the Execution Judge is not empowered to pass a ruling in respect of subjective rights in the above matters.

(ii.) Arresting a ship by a petition for an order of arrest in case of claiming a maritime debt according to the provision of Article 43 of the Maritime Code which states: "*A ship may be arrested upon legal grounds by virtue of an order from the Execution Court judge and such arrest may only take place for satisfaction of a maritime debt.*"

Apart from the above powers, the Minister of Justice may, according to the provision of Article 16 of the aforesaid Judiciary Law, instruct the Junior Court judge or nominate him for hearing certain kinds of cases.

Summary Proceedings Judge (Court of Urgent Matters)

Article 8 (1) (bis.) of the CCPL regulates the competence of the summary proceedings judge. According to the provisions of this Article, the powers of the summary proceedings judge include hearing all urgent cases even though the case in question is subject to the jurisdiction of another court in terms of substance, although such jurisdiction does not bar the jurisdiction of the concerned Court to hear summary claims submitted thereto in connection with the original claim. The competence of the summary proceedings judge shall apply to claims involving threatened action where it

is feared they will be affected by the lapse of time without prejudice to the original right claimed. To explain the above, the summary proceedings judge shall be empowered to hear a case if it fulfills two conditions -

First: The threat endangering the right shall be tangible so that any delay in protection of such right shall endanger its existence or guarantee of its existence.

Second: When a judge resolves a case, he only passes a provisional and precautionary verdict ensuring temporary protection for the right in question, hence such action does not alter the position of litigants in any substantive dispute nor does it affect the principal rights and reasons of acquiring or losing them.¹

The aforesaid provision of Article 8 (1) (bis.) excludes everything falling under the competence of the Sharia Courts. It states “*and his terms of reference shall include examining all claims involving threatened action except those falling within the jurisdiction of Sharia Courts.*” This exclusion is a deviation from the general rules and prejudices the unity of the judiciary, hence prejudicing the overall domination of the judicial authority. This provision is worthy of being amended so as to make the competence of the Summary Proceedings Judge general, inclusive of all law-suits of an urgent nature where the aforesaid two conditions are fulfilled: urgency and non-prejudice of the substantial right. The Summary Proceedings Judge is nominated by the Minister of Justice from the Junior Court judges.²

¹ Cassation No. 14/1994 - 27/3/1994 in which the Court of Cassation decides that “*The evidence presented to the judge of urgent matters is not adequate for him to decide the validity of the claim for either party in a litigation before him in order to hear the case. This leads to the conclusion of his non-jurisdiction to hear the case in order to avoid affecting the substantial rights of the parties.*”

² Ministerial Order No. 7/1995 issued by the Minister of Justice appointing a Summary Proceedings Court Judge.

The Junior Courts also have minor criminal jurisdiction in that pursuant to Article 8 (4) of the CCP (amended by Legislative Decree No. 8 of 1996), the Junior Courts shall hear any offences and misdemeanours.¹

Senior Civil Court

Article 14 of the Judiciary Law states that

“the seat of the Senior Civil court shall be situated in Manama. However, the Court may hold its sittings outside Manama under an order to be issued by the Minister of Justice upon the request of the Court President. The Senior Court shall consist of a president and a number of judges as the situation warrants. Its sittings shall be deemed valid if two judges are present, including the President of the Senior Civil Court or one of his Deputies.”

Senior Court’s Composition

It is clear from the provision of Article 14 of the Judiciary Law that this Court consists of an unlimited number of judges who shall not be less than two, and provided that if it is held by two judges one of them shall be the Court President or one of his deputies. It is understood from the provision that where the Court is held by two judges without either of them being the Court President or one of his deputies, it shall be deemed to have been invalidly held because the principal condition required by the Law for holding its sittings has not been met. If one of the conditions is not fulfilled, the Court’s formation is invalid. It is generally acknowledged that if the law determines a certain form or formula for legal proceedings, any breach of such form or formula shall render invalid the said proceedings.² In practice, the Senior Court sittings are not held

¹ Article 13 of the Penal Code stipulates “crimes and other felonies or misdemeanours. The nature of the crime shall be determined by the type of punishment provided for in the law.” Article 49 of the Penal Code stipulates that “the penalty for a felony shall be capital punishment or imprisonment for at least 3 years, and deprivation of civil rights for a period exceeding 3 years but not more than 15 years.” Article 50 of the same code stipulates that “the penalty for a misdemeanour shall be imprisonment, fine of an amount in excess of 5 Dinars and deprivation of civil rights for a period not exceeding 3 years and not less than one year.” From the above articles we deduce the following definitions: Felony means any crime for which punishment includes imprisonment or deprivation of civil rights for a period exceeding 3 years. Misdemeanour means any crime for which punishment includes imprisonment, and/or fine for an amount exceeding 5 Dinars and/or deprivation of civil rights for a period exceeding one year but not exceeding 3 years. Offence means any prohibited act which is punishable by laws other than the Penal Code.

² Cassation No. 11/1994 - 17/4/94. This cassation judgment deals with the invalidity of a judgment issued by a junior Court consisting of two judges in contrast to the legal composition of a junior Court, which consists of only one judge. By analogy it is applicable as a violation of the Senior Court’s composition as the Court of Cassation stipulates in a judgment that “A judgment handed down by a court which is composed in a form contradictory to the legally set forth system is void.”

by more than 3 judges in spite of the explicit provision calling for: “*a president and a number of judges*”. It has been customary that the sittings of this Court are held by two or three judges. It is also quite common that the Court President or one of his deputies presides over the sitting even if the number of judges is three. This practice has become established although there is no judicial precedent from the Court of Cassation in this respect.

It is noteworthy that Article 8 of the CCP (amended by Legislative Decree No. 8 of 1996 provides in the second paragraph thereof as follows:

“The Senior Civil Court shall consist of three judges but its sitting shall be validly held in the presence of two judges of whom one shall be the Court President or one of his deputies.”

The only exception to what has been discussed above concerning the Senior Courts’ composition is that three judges must be present at sittings for hearings of crimes punishable by death.

Jurisdiction of the Senior Court in Civil Cases

Article 10 of the CCPL gives competence to the Senior Court to hear in the first instance the “*civil cases not falling within the competence of the Junior Courts.*” This Article specifically gives this Court the jurisdiction to “*hear in the first instance all disputes concerning the personal status of non-Muslims.*” This Court is also competent according to the provision of the aforesaid Article, to hear every case that any other law provides shall be heard by the Senior Court.

In addition, the Senior Civil Court shall hear appeals of awards and judgements handed down by the Junior Courts and verdicts handed down by the Courts of Execution according to Article 11 of the CCPL.

Accordingly, study of the Senior Civil Court Jurisdiction may be divided as follows:

1. Civil jurisdiction under CCPL
2. Criminal jurisdiction under CCP.
3. Jurisdiction under various laws.

Senior Court's Civil Jurisdiction under CCPL

As previously mentioned, the Senior Court has jurisdiction as the first instance court, as provided for in the Law, in respect of all matters that do not fall within the jurisdiction of the Junior Courts, as indicated in Article 8 of the CCPL.

As the aforesaid Article 8 (1) provides that the Junior Court has jurisdiction to hear civil and commercial cases in which the value of said case is not more than five thousand Bahraini Dinars (BD), then any case involving an amount of more than five thousand BD shall be subject to the jurisdiction of the Senior Civil Court.

Finally, all judgements and decisions handed down by the Junior Courts are appealable before the Senior Court acting as an appeal court. Decisions of the Execution Court are only part of the judicial competence of the Junior Court and therefore also appealable before the Senior Court.

Senior Court's Criminal Jurisdiction under CCP

Pursuant to the provision of Article 8 (3) of the CCP (amended by Legislative Decree No. 8 of 1996), the Senior Civil Court has the jurisdiction as the first instance court to hear felonies and appeals of judgements handed down by the Junior Court in respect of cases of misdemeanours and offences. Accordingly, the competence of this court is of two stages: a first stage court in connection with felonies and a court of appeal in connection with misdemeanours and offences.

Senior Court's Jurisdiction under Various Laws

This includes the jurisdiction given by the law to the Senior Civil Court in laws other than the CCPL as stipulated in the following miscellaneous laws:

(a) Article 8 of Law No. 17 of 1987 with respect to Insurance Companies and Organisations which gives jurisdiction to the Senior Court to challenge the decision of the Minister of Commerce to refuse a licence for the practice of any branch of insurance.

(b) Article 7 of Bankruptcy Law No. 11 of 1987 which provides for the competence of the Senior Court to hear every law-suit arising from bankruptcy.

(c) The Law of Social and Cultural Societies and Clubs and Associations Carrying on Activities in the Field of Youth and Sports and Special Organisations promulgated by Legislative Decree No. 21 of 1989 according to Article 28 of which concerned persons may contest before the Senior Civil Court the Minister's decision for stay of execution of a decision adopted by the organs in charge of running the society's affairs where it contravenes the law, the society's constitution or public morals or ethics.

(d) Law No. 14 of 1979 according to Article 48 of which the Senior Court has jurisdiction to hear publication offences through newspapers or other publications.

(e) Commercial Agency Law No. 10 of 1992 (amended by Legislative Decree No. 8 of 1998) according to Article 20 thereof which gives to every interested person the right to appeal before the Senior Civil Court any decision issued by the Minister of Commerce pursuant to the provisions of the Commercial Agency Law, its Implementing Regulations or orders issued for its implementation.

As for the provision that the Court may hold its sitting outside its premises, it has never been registered that any Court sitting has been held outside its premises from the time of promulgation of the Judiciary Law until the present time.

It should be noted that Article 14 of the Judiciary Law provides that the seat of the Senior Civil Court shall be situated in Manama (Bahrain's capital). The Court is allowed to hold its sittings outside Manama by an order of the Minister of Justice at the request of the Court President. This provision does not apply to any of the other courts, i.e. the Junior Courts or the High Court of Appeal. This is a drawback in legislation that should be bridged by a similar provision to apply to the other types of law courts.

2.7. High Civil Court of Appeal

Save for the provision of Article 14 of the Judiciary Law concerning the determination of the seat of the Senior Court in Manama, there is no similar provision determining the seat of the High Court of Appeal, although in reality the seat of this Court is located at the Ministry of Justice's complex in Manama. The only exception to this occurs when state security cases are heard in the department of the High Court of Appeal, held as a State Security Court. This will be discussed in detail later.

Article 13 of the Judiciary Law states:

“The High Court of Appeal shall consist of a president and a number of judges as the situation warrants. Its sittings will be considered valid if two judges are present, including the President of the High Civil Court of Appeal or his deputy.”

Article 9 of the CCP states that the *“High Civil Court of Appeal shall be formed by three of its judges”*. This is a recently introduced provision pursuant to Legislative Decree No. 8 of 1996 from which it is understood to apply only to holding sittings of the High Court of Appeal in respect of criminal matters, unlike the case of civil

matters.

Article 15 of the Judiciary Law states that

“if the Court holds its sittings in the presence of two judges, in case of disagreement on the passing of a judgement, the Minister of Justice shall appoint a third judge to participate in the trial, after which the Court will pass the judgement by a majority vote.”

Article 12 of the CCPL provides for the jurisdiction of the High Court of Appeal by stating that the

“High Court of Appeal shall be competent to examine awards, issued in the first instance by a high court, against which an appeal is made.”

Further, Article 8 (2) of the CCP provides that the

“The High Civil Court of Appeal shall hear any appeal made to it against a judgement delivered in the first instance by the Senior Civil Court in respect of criminal matters”.

This Court may be closely examined in five sections:

- (i.) Court’s composition.
- (ii.) Jurisdiction under Provisions of the Law and Establishment of the State Security Court.
- (iii.) Jurisdiction under the State Security Law.
- (iv.) Jurisdiction under Provisions of the CCPL.
- (v.) Jurisdiction under Provisions of the CCP.

(i.) High Civil Court of Appeal’s Composition

For the Court’s sittings to be validly held, they must be attended by at least two of its judges, one of whom shall be the Court President or his deputy as indicated in Article

13 of the Judiciary Law. However, if the Court's sitting is held by two judges and where they disagree in passing a judgement, the Minister of Justice shall appoint a third judge to enable a majority vote to be taken. All this applies to the High Civil Court of Appeal in its session as a Civil Court but do not apply to the Court in its session as High Criminal Court of Appeal, in which the law provides in the most recent amendment thereof that it shall consist of three judges. The provisions of the Law in this respect may be criticised in two aspects:

First: Having two judges, only one of whom is the President, has the danger of reducing the necessary level of deliberations in respect of controversial matters in a case, taking into consideration the possible influence of the Court's President on the other judge.

Second: The provision of Article 13 of the aforesaid Judiciary Law limits the Minister of Justice to calling a third judge into a case where there is disagreement between the two judges constituting the Court only at the time of handing down the judgement. This is certainly a faulty provision because the stage of delivering the judgement may not be sufficient for the newly appointed judge to formulate his conviction. It would have been more appropriate for the third judge to have been appointed from the initial stage of disagreement in reviewing the Case. This wording should have been:

“If the two judges disagree in their views in the course of hearing the case, the Minister of Justice shall call a third judge to take part in the trial.”

(ii.) Jurisdiction of the High Court of Appeal according to the Law Concerning Formation and Procedure of the State Security Court

Article 185 of Legislative Decree No. 15 of 1976 with respect to promulgating the Penal Code (as amended by Legislative Decree No. 10 of 1996) provides as follows:

“The perpetrators of the crimes set forth in the following shall be tried before a court the formation and procedures of which shall be determined by an Amiri Decree to be issued in this respect:

- (a) Crimes provided for in Articles 112 to 184 and 277 to 281 of the Penal Code.*
- (b) Crimes provided for in Articles 220, 221, 333, 336 to 340 of the Penal Code if an assault takes place against one of the persons mentioned in Article 107 of the Penal Code or similar persons during or by reason of carrying out the duties of their position.*
- (c) Offences provided for in Article 18 of Legislative Decree No. 16 of 1976 with respect to Explosives, Weapons and Ammunition.*
- (d) Crimes related to the crimes indicated in the preceding paragraphs”.*

Article 1 of the State Security Court Law amended by Legislative Decree No. 14 of 1996 provides that

“the High Civil Court of Appeal consisting of three judges shall be the court competent to hear the crimes provided for in Article 185 of the Penal Code.”

(See details on the State Security Court in Chapter 7 of this thesis.)

(iii.) Jurisdiction of the High Court of Appeal according to the State Security Law

The State Security Law is a procedural law that gives the Minister of the Interior exceptional authority to arrest suspects accused of committing crimes affecting state security and to keep them in custody by an administrative order (see the section relating to this Law in Chapter 7 of this thesis).

Article 1 (2) of the Law states:

“Everyone who is arrested pursuant to the first paragraph may submit grievance against the arrest order after the lapse of 3 months from the date of its execution before the High Court of Appeal and such appeal shall be renewed every six months from the date of the award dismissing the appeal.”

It is quite clear from this provision that the Court has exceptional jurisdiction to hear challenges by way of grievance against decisions of the Minister of Interior for arrest and detention of suspects involved in state security cases. Such grievance shall be

made after the first three months of the date of issuing the arrest decision, after which the right to appeal shall be renewed after the lapse of every six months from the Court's decision to continue the detention in custody.

The following should be noted in respect of this Law and its relationship with the High Court of Appeal:

First: Contrary to general principles the Court sittings intended for hearing the appeals are by law held behind closed doors, as Article 2 (1) states:

“Court sittings shall be held in camera and shall only be attended by the representative of the Public Prosecution, appellant and his attorney.”

Second: This Law gives the Court when hearing appeals absolute freedom to decide whether to have its seat in Manama, the capital, or outside it. Article 2 (2) provides:

“Sittings shall be held at the premises of the High Court of Appeal and may be held in any other place in Manama or outside it if the Court deems this necessary for maintaining the country's security or to safeguard public interest.”

(iv.) Jurisdiction of the High Court of Appeal according to the CCPL

According to the provision of Article 12 of the CCPL, the High Civil Court of Appeal shall be competent to examine awards handed down in the first instance by a senior court against which an appeal is made.

It is noteworthy that its jurisdiction also includes hearing arbitration awards that may be appealed against where they fall within its value jurisdiction or more accurately if the amount of the arbitration award is subject to the jurisdiction of the Senior Court as a court of first instance.¹

¹ Cassation No. 45/92 - 4/10/1992. In this judgment the Court of Cassation stipulates: *“The arbitration award is considered as an ordinary Court judgment to which procedure of appeal apply unless such arbitration is exempted from this rule by a special legislation.*

It should also be noted that the judgements delivered by the Senior Courts in an appellate capacity are beyond the jurisdiction of the High Court of Appeal and may not be appealed against except by way of cassation before the Court of Cassation where such challenge is permitted.

(v.) Jurisdiction of the High Court of Appeal according to the CCP

As previously mentioned, the High Court of Appeal shall have competence, according to Article 8 of the CCP, to hear any appeal made to it against judgements delivered in the first instance by the Senior Civil Court in criminal matters.

It should be noted that if the High Civil Court of Appeal is held as a State Security Court, it must consist of three judges. Article 1 of the State Security Court Law states clearly that the

“High Civil Court of Appeal consisting of three judges shall be the Court having jurisdiction.... If the Court consists of fewer than 3 judges, the Minister of Justice shall appoint one of the Senior Civil Court judges to have the required number.”

2.8. Court of Cassation

Court of Cassation’s Composition

Pursuant to article No. 1 of the Cassation Law, the Court of Cassation shall consist of the Court President, a Justice (Deputy) and three judges. It shall consist of one department or more as required and shall pass its verdicts by a majority of the votes of at least three judges. If such majority is not available and if there are opposing views held by more than two groups, the group consisting of a smaller number or the group including the most recently appointed judge shall hold one of the two views endorsed by the group consisting of a larger number after seeking the votes for the second time.

Support Bureau (Al maktab al fani)¹ is an office affiliated to the Court of Cassation to be headed by one of its judges. The Law does not fix the number of judges comprised in this Bureau but states that it shall consist of a sufficient number of judges with the rank of at least a high court of appeal judge to be designated for this purpose by the Minister of Justice. This Bureau shall have the power to deal with the following matters:

- (1) To render its opinion with respect to the cases which the Court has the jurisdiction to hear.
- (2) To conduct professional research required as directed by the Court of Cassation President.
- (3) To conclude the legal principles endorsed by the Court in its judgements, compiling such judgements and classifying them.

It should be noted that the role of the Support Bureau has thus far been limited to the first and third functions as to date no legal research prepared by the Bureau has been published.

Jurisdiction of the Court of Cassation

The Court of Cassation shall have jurisdiction to hear challenges of final judgements handed down by the competent courts of appeal in respect of civil, commercial and penal cases, and personal status matters for non-Muslims. Personal status matters for Muslims may not be contested by cassation. Further, an interim judgement is not appealable by cassation except in case such a judgement results in ending the proceeding, in the relative issue.

¹ The literal translation of Al maktab al fani is “the technical bureau”, whose function is of a supportive nature to the court.

The powers of the Court of Cassation can be summarized as follows:

(1) Hearing challenges of final judgements with respect to civil, commercial, criminal, penal and non-Muslim personal status matters handed down by the competent courts of appeal in the following events:

First: If the contested judgement is based upon a breach of the law or an error in its application or the interpretation thereof.

Second: If there is any invalidity in the judgement or if the invalidity of procedures has a bearing on the judgement.

(2) Determining the judgement to be valid or invalid in a case where it is contrary to a previous judgement, irrespective of the law court which has passed it, which had been delivered involving the same litigants in respect of the same dispute and that had become a final and enforceable judgement.

(3) Determining the Court which has jurisdiction to hear a dispute in respect of cases filed in respect of a single issue before a Sharia court and a civil court or before two different divisions of the Sharia courts but neither has abandoned its examination or both have abandoned the hearing thereof.

(4) Settling a dispute arising in respect of the execution of two contradictory judgements one of which was passed by a civil court and the other which was passed by a Sharia Court or if they were passed by two different departments of the Sharia Courts.

From the above Paragraphs (3) and (4), although it is an indirect role, the role of the Court of Cassation is noted in respect of personal status cases of Muslims, through the disputes arising in respect of the execution of Sharia Court judgements. This occurs in the event of a contradiction between such judgements and judgements handed down by

another Sharia Court department or by any civil judicial authority. It should be noted however, that the Court of Cassation has no competence to examine the Sharia Court judgments and that its roll is limited to determining jurisdiction of courts in case of differences between courts in this respect.

(5) Re-examining final judgements handed down in respect of matters of felonies and misdemeanours in the following events:

- (i.) If the accused is sentenced for a murder, and then the victim is found alive.
- (ii.) If a judgement is passed against a person for an occurrence, then a judgement is passed against another person for the same occurrence and there is a contradiction between the two judgements so as to produce the acquittal of either of the two convicted litigants.
- (iii.) If a witness or an expert is sentenced by a penalty for making a false testimony or if a judgement has been passed establishing the forgery of a document produced in the course of hearing the case and should the testimony, expert's report or document have a bearing on the judgement.

It is noted that the provision of this Article is limited to the event of the document's invalidity in case of forgery only to the exclusion of other reasons of invalidity such as the illegality of investigation procedures or invalidity of the accused's confessions on the basis of which a judgement is based. This is a serious drawback in this provision although the provision of Paragraph (v) hereunder may be relied upon in such cases. A provision should have been included giving the Court competence to hear the cassation in the event of a ruling rendering invalid the investigation procedures and accused's confessions given their special significance in evidence. Therefore, a stipulation to this effect should have been present.

(iv.) If the judgement is based upon a verdict delivered by a civil court or a personal status court and should such verdict be revoked.

(v.) If after passing the judgement it appears that there are facts or documents produced which had not been known or produced at the time of the trial and should such facts or documents prove the acquittal of the convicted litigant.

It is noted that the law has limited the right to seek a retrial before the Court of Cassation in penal cases but not civil, commercial or personal status cases, due to the availability of methods of seeking a re-examination of cases in civil, commercial and personal status matters for non-Muslims according to Articles 229 to 232 of Part VI of the CCPL. Such methods of re-examination include final judgement issued by a Court of first instance or a Court of appeal.

Also noted is the exclusion of the Sharia Courts' judgements from the jurisdiction of the Court of Cassation, which means exclusion of the judgements passed in respect of personal status matters of Muslims from the competence of this Court. This is a drawback in this legislation as it deprives the litigants involved in such cases from enjoying the right to refer to a higher degree of litigation. It also breaches the unity of the judicial hierarchy and is in disharmony with its top level. This is in addition to the criticism that has already been made with regard to the concept of dividing the law courts into Sharia Courts and Civil Courts and sub-dividing such Courts into Sunni and Jaafari divisions.

It should be mentioned that the jurisdiction of the Court of Cassation is basically limited to examining the application of the law to facts of the case. Therefore it is a court which deals with the application of law and does not deal with substance. It does not review the facts of the dispute as regards the occurrence of the events confirming the facts subject to the Case, but it assumes in this respect the validity of the findings of both the Court of First Instance and Court of Appeal. Indeed, it only ascertains the proper application of the law to these facts. If it finds anything to the contrary, the

judgement will be rescinded and the case returned to the Court of Appeal or the judgement will be modified, as the case may be. However, this principle is subject to the following exceptions:

(a.) For an application for a re-examining of criminal matters as previously stated, the Court of Cassation shall examine the facts, documents and evidence produced in the Case, and shall ascertain whether the fact or facts have actually occurred or not (such as the existence of a person who is claimed to have been murdered) or confirm whether the documents contested are valid (for example, for being a forgery), or whether such verdict has not actually been delivered or where certain facts arise after the verdict which were not known at the time of the trial and where such documents or facts prove the defendant's innocence.

(b.) Article 14 of the Cassation Law allows the Petitioner to attach to the cassation petition at the time of lodging, documents supporting the grounds of his cassation other than those lodged in respect of the case for which the contested judgement was passed. This has the effect that where documents affecting the facts of the case were not submitted to the Court of First Instance nor to the Court of Appeal, the Petitioner may submit them to the Court of Cassation for the first time where the admission of such documents will be subject to the discretion of the Court. Further, according to the above Article the Court shall be empowered to

“take the action it deems fit to have access to these documents kept in the file of another case other than the subject of the proceedings.”

In a judgement handed down by the Court of Cassation, it states in this respect: *“A petitioner is required to submit the documents supporting his challenge even if its grounds relate to public order.....”*¹ However, the documents that the Court is competent to examine are those that assist the Court in realising its competence as a court of law, i.e. what helps it to apply the law to the facts. As regards the documents designed to investigate the facts, the Court of Cassation determines that *“no challenge*

¹ See Judgement in Cassation No. 25/1991.

*shall be brought before the Court of Cassation by documents that were not previously submitted to the court of substance”.*¹

(c.) Ascertaining the use of documents and ensuring that there is no violation of the facts that they prove so that if there is a conflict with the conclusions of the challenged judgement in terms of the results shown by the documents of the case, the Court of Cassation may cancel such wrong conclusions and establish the right conclusions from the documents. Of course, this results in an examination of the document and its valid use to prove the occurrence of the fact or otherwise.²

Procedures Before the Court of Cassation In Civil, Commercial and Non-Muslim Personal Status Matters.

(i.) Pursuant to Article 12, challenging a judgement by cassation shall take place by a petition filed with the Case Registration Department at the Court. A cassation petition in civil, commercial and non-Muslim personal status matters must include the following:

(a) Particulars related to the names of litigants, their capacities and domicile of each.

(b) A sufficient statement of the challenged judgement, date thereof, grounds on which the challenge is based and the contesting party's claims. If a challenge does not take place in this manner, it shall be null and void and the Court shall of its own initiative rule for the invalidity thereof.

(c) Following the submission of the cassation petition, no other grounds shall be expressed apart from these in the petition unless they relate to public order. The Court shall be empowered to invoke the grounds relating to public order of its own initiative

¹ See Judgement in Cassation No. 83/1994.

² See Judgement in Cassation No. 80/1994.

without the need for raising them by the litigants. For example, in a judgement the Court of Cassation rescinded a verdict on the basis that:

*“participation of the judge in handing down the challenged judgement while he had previously heard the same case in the Court of first instance and had expressed an opinion therein for possible reference of the case to an investigation, has the effect of invalidating the judgement since this relates to public order and the Court of Cassation is empowered to rule to this effect of its own initiative.”*¹

(d) Article 14 of the Cassation Law provides that a petitioner must attach to the cassation petition at the time of lodging it copies of the petition equal to the number of parties challenged against, a power of attorney for the lawyer instructed in respect of the cassation, an explanatory memorandum of the grounds for the cassation and the supporting documents unless they are kept in the file of the case with respect to the challenged judgement. In this connection, the following three points are noted:

First: It has been the customary practice that the Court of Cassation accepts the grounds in the cassation petition without the explanatory memorandum in spite of the explicit provision requiring the attachment of the explanatory memorandum.²

Second: It is customary in the Court to admit the reply of the petitioner to the defence memorandum submitted by the respondent if the petitioner submits the explanatory memorandum. If he fails to submit this memorandum, he shall be deprived of the right to reply to the respondent. However, this measure is not supported by the provision of the aforesaid Article 14 or any other article of the Law.

Third: Article 21 of the Cassation Law stipulates that

“After the lapse of the dates provided for in the preceding Articles, the Court Clerks’ Department shall deliver the cassation file to the Cassation Court’s Support Bureau. This Bureau shall prepare a memorandum as soon as possible expressing its view on the cassation for reference to the Court

¹ See Judgement in Cassation No. 10/1994.

² Cassation No. 29/91.

President to appoint a Court Judge to act as a cassation registrar. Then, a sitting shall be fixed for the hearing thereof by the Court and the date of this sitting shall be notified by registered mail to the lawyers of litigants who have lodged their memoranda at least 10 days before such date.”

By deduction from the abovementioned article the Court of Cassation applies a penalty on the lawyer who does not lodge his memorandum within the time limits set forth to submit his defence. The Court has applied the same provided for in Article 21 by not giving notice to the opponent’s lawyer of the sitting for hearing the cassation or even towards the petitioner who fails to attach an explanatory memorandum to his cassation petition even if the petition includes his challenge in full detail. This is a misinterpretation of the provision that is not consistent with the purpose of the penalty given that the said Article uses the expression “*the lawyers who have lodged their memoranda*”. A petitioner does not lodge his memorandum in practice but attaches it to the cassation petition, so a distinction must be drawn between lodging and attaching.¹

(ii.) In civil, commercial and non-Muslim personal status matters, the cassation petition, defence memoranda and documents thereof shall be signed by a lawyer who is admitted to appear before the Court of Cassation as explicitly indicated by the provisions of Articles 12 and 19 of the Cassation Law. Therefore these may not be submitted by the petitioner or respondent directly. For penal cases, the respondent may submit his cassation petition as hereinafter detailed.

(iii.) The time limit fixed for cassation in civil, commercial and non-Muslim personal status matters shall be forty five days and such time limit shall commence from the date of handing down of the judgement in presence. If the judgement debtor fails to appear at all the hearings of the case before the court of substance or in case the proceedings in the case hearing were suspended then recommenced but the judgement debtor fails to appear in the hearings of the case subsequent to such recommencing of proceedings, then the forty-five day time limit shall commence from the date of notifying the

¹ Cassation No. 29/91.

judgement debtor of the challenged judgement.

(iv.) The respondent shall deposit with the Court Clerk's Department a defence memorandum and the supporting documents within 10 days from the date of being notified of the cassation petition. If the respondent lodges his memorandum, the other party shall also have the right to reply to the defence memorandum within 10 days from the date of being notified thereof according to the provision of Article 16 of the Cassation Law.

However, it has been customary for the Court of Cassation not to accept the petitioner's memorandum in reply to the respondent's defence unless the petitioner has lodged the explanatory memorandum referred to in Article 14 as already mentioned. This is something contrary to the explicit provision of Article 16 that gives the petitioner the right to comment on the respondent's defence according to the details referred to in the above. The court's conduct may be criticised in this regard.

Further, the Respondent may also, within the aforesaid time limit, involve in the cassation any litigant in the case. Such involvement shall take place by sending to the third party a copy of the cassation petition, and the intervening litigants may respond within the same time limit.

Anyone who has been a party to the case in which the challenged judgement has been passed, but has had no challenge made against him, may intervene in the challenge provided that the purpose of such intervention shall be to plead for a judgement to dismiss the challenge. Consequently, intervention as a co-petitioner shall not be admitted. The defence intervention shall take place by a defence memorandum complying with the above time limits in the presentation of defence memoranda.

(v.) Pursuant to the provision of Article 20 of the Cassation Law, the Court Clerk's Department shall not accept for any reason whatsoever memoranda or documents after the lapse of the time limits fixed for them. However, it shall prepare a statement

establishing the date of submitting any document, the name of the person submitting it, his capacity and the reason for not accepting it.

Although the law is silent with regard to the purpose of this provision which requires drawing up a statement for delivering the unacceptable documents, the idea gathered from it is to enable the Court to exercise control over the Court Clerk's Department with respect to non-acceptance of memoranda and documents because they were delivered after the fixed time limit. It may also be wrong in calculating the time limit, or may act arbitrarily in non-acceptance of the memoranda or documents, in which case the Court shall put things in order.

(vi.) After the completion of the time limits provided for in the above paragraphs, the file shall be referred to the Support Bureau which shall expeditiously prepare a memorandum of its opinion in respect of the challenge which shall be referred to the Court for consideration. The Court shall fix a hearing for examining challenges and at least ten days before the date of holding it, notices of the date of such hearing shall be given by registered letters to the litigants who have filed memoranda.

The Court shall adjudge the cassation after examination of the documents thereof without any verbal pleadings unless the Court deems such pleadings necessary. For litigants who shall be allowed to make their verbal pleadings, they shall have in all cases already lodged memoranda in their names. The Court shall be empowered to authorise them by way of exception to lodge supplementary memoranda where this shall be deemed necessary. Then, it shall fix the dates on which such memoranda shall be lodged.

(vii.) The fees shall have been paid and a deposit of no less than BD50 shall have been provided.

Procedure for a Challenge by Cassation in Criminal Cases

(i.) Challenging a judgement in respect of criminal cases by way of cassation shall take place by a report to be filed with the Court Clerk's Department. This report shall be followed by a memorandum containing the grounds of appeal indicating the justifications for the challenge. The report shall be prepared using the prescribed form and may be signed by the convicted person. The said memorandum shall also be signed by a lawyer admitted to appear before the Court of Cassation.

(ii.) The report must be submitted within thirty (30) days from the time the verdict is handed down, in pursuance of Article 28 of the Court of Cassation Law. In fact the law did not mention, at the time when the law of the Court of Cassation was promulgated in 1989, periods for the commencement of the prescribed period, other than the date of the verdict because, at that time, criminal cases were not being heard in absentia, in accordance with Article 84 and subsequent Articles of the CCP of 1966, which required the accused to be present, otherwise the trial would not take place. In addition, the said law does not at all presume the absence of the Public Prosecutor in the criminal case hearings. Therefore it was not conceivable for judgments to be passed in the absence of the litigants, even in the case provided for in Article 87 of the CCP which allows the Court to dispense without the appearance of the accused in person in offences by fine only if he pleads guilty in writing, or when a lawyer appears on his behalf and in the offences which are punishable with imprisonment for a period not exceeding six (6) months, in case he is represented by his lawyer in the proceedings, because judgments, in these cases, are not passed in absentia, but are presumed to be passed in the presence of the accused. Accordingly, the Cassation Law does not exclude the judgments passed in such offences from the period of appeal against verdicts in criminal cases, and hence the commencement of the prescribed period for appeal is thirty (30) days from the date the judgments are handed down.

The legislator has amended some of the provisions of the CCP by virtue of Legislative Decree No. 8 of 1996, by introducing judgments in absentia by virtue of Article 86 (substituted) of the said law, and opened the door for appeal against such judgments by way of objection, whether such judgments are passed by the First Instance Court or the Court of Appeal, within the next ten (10) days following the serving on the accused of the absentia judgement, or from the date he becomes aware of the service of the absentia judgement if such service is not made on him personally pursuant to Article 158 (a) of the said Legislative Decree.

The legislator, however, should have amended the provision of Article 28 of the Cassation Law by making the limited time period thirty (30) days for the appeal by cassation commence from the date the judgement is passed in the case of the judgement issued in presence and by providing that such thirty (30) days shall commence, in the case of the absentia judgement, from the date of the lapse of the period of objection appeal, or from the date of passing the judgement on such objection.

(iii.) A petitioner must provide a BD50 deposit in order for his challenge to be accepted unless the challenge is made by the Public Prosecution or unless the petitioner is subject to a sentence depriving him of liberty or if he is exempted from providing the deposit by an order of the Minister of Justice.

(iv.) Following the submission of the memorandum outlining the grounds of the challenge or expiry of its time limit, the file shall be referred to the Court's Support Bureau. This Bureau shall prepare a memorandum of its opinion in respect of the cassation as in the case of civil, commercial and non-Muslim personal status law-suits. Then, it shall be referred to the Court President and a hearing shall be fixed for examining the challenge. Notice of such hearing shall be given to the Public Prosecution and litigants' attorneys at least 3 days before the date of holding it (not 10 days as in the civil, commercial and non-Muslim personal status law-suits).

(v.) A death sentence does not require any cassation procedures, because such judgement is deemed challenged by the force of law before the Court of Cassation and the Court that handed it down shall refer the case following the delivering of its ruling to the Court of Cassation's Support Bureau.

However, the judgement of the Court of Cassation in respect of Cassation No. 9 of 1996 has come to exclude the judgements handed down by the State Security Court from application of this provision by determining the inadmissibility of challenging them, which is an exception of law and particularly a violation of Article 40 of the Court of Cassation Law.

Procedures for Re-examining (Reviewing) Criminal Matters

The Cassation Law restricts the admissibility of a rehearing before the Court of Cassation to the judgements handed down in criminal matters for the reasons discussed above. For an application to review, the Law lays down the following procedures:

(i.) A request for a rehearing shall be made by the Minister of Justice at his own initiative or at the request of the convicted litigant or his legal representative. This request may be made by the convicted person's relatives or spouse even after his death.

(ii.) The request shall be submitted to the Court of Cassation President and the Court shall rule upon it after its investigation by the person who is designated for this purpose after receipt of the report of the Court's Support Bureau.

(iii.) The Court shall pass a judgement for acquittal where it is obvious, otherwise the case shall be returned to the court that handed down the judgement in question. If it is not possible to arrange a retrial due to the death of the convicted litigant, the Court of Cassation shall deliver the judgement and shall rescind any error that may appear thereto without any reference to another court.

3. Special Courts of Law

What is to be dealt with in this section are those judicial institutions outside the ordinary structure of the judiciary. Therefore, I will not discuss the extraordinary courts of law nor the courts that have extraordinary jurisdiction but are included in the ordinary structure of the judiciary as in the case of the State Security Court.

Chapter 7 of this thesis deals with these judicial institutions by way of analysis and criticism. Therefore, this section is only devoted to dealing briefly with the structural formation of those courts which exist outside the ordinary structure of the courts, which are: the Military Courts and the Ruling Family Council.

3.1. Military Law Courts

The Military Courts Law promulgated by the Amiri Decree dated 10th September 1970 (unnumbered) regulates the special procedures governing the hearings of the Bahrain Defence Force (BDF)¹ personnel trials. This law governs the military public prosecution, formation of military courts of law and rules and procedures of investigating offences in cases involving BDF personnel. It also regulates procedures of arrest and appearance by special procedures that are different from procedures followed before the ordinary law courts in terms of jurisdiction and methods of deliberations.

Military Public Prosecution

The BDF Legal Advisor and his assistants assume the role of the military public prosecution. The Military Public Prosecutor is responsible for supervising the military judicial system. He also assumes the duties of the public prosecutor towards the law courts and brings legal actions against defendants as well as the pursuit thereof.

¹ "Bahrain Defence Force" is the name given to the Bahrain army.

The military judiciary, which is also defined by the law as the military public prosecution, reports directly to the Commander-in-Chief. The Military Public Prosecutor is directly responsible towards the Commander-in-Chief for the proper pursuit of the military judiciary. The Commander-in-Chief also undertakes appointments and transfers within the military judiciary as indicated in the provision of Article 5 of this Law.

Military Courts' Formation

Chapter Two of the aforesaid Law deals with formation of the Military Courts. Article 7 thereof states:

“The Commander-in-Chief shall form a military court consisting of a President and two members whose seat shall be determined in the resolution for their formation to hear offences the penalty of which are imprisonment for two years and a fine of at least BD300.”

In addition to the jurisdiction of the Court provided for in this Article, it also has jurisdiction to hear cases if the accused is in the rank of officer, regardless of the charge brought against him. In all cases, Article 9 of this Law requires that the rank of the President of this Court be higher than the defendant's rank.

The judges who are members of the Court provided for in the aforesaid Article 7 are the same judges of the Courts which have the competence to hear the offences the penalty of which is less than the level provided for in that Article, but they hear them as individual judges. In other words, the Court is formed in this case in the presence of a single judge provided that he is one of the members of the Military Court where the penalty of the offence subject to the trial is less than 2 years' imprisonment or a fine of not more than BD 300.

Judgments and their Execution

Pursuant to Article 14 of the Military Courts Law, judgements of the Military Courts shall not be effective except upon their ratification by the Commander-in-Chief. The latter has the power to endorse a judgement or verdict or to rescind it. He shall have the power to order a retrial or to amend the penalty by demoting it or ordering a stay of execution. In brief, the Commander-in-Chief has the full authority to enforce the Court's ruling or not to execute it according to the abovementioned provision.

As an exception from the endorsement of judgements by the Commander-in-Chief, the judgements handed down in cases of military offences where the rulings are of a final nature and are not referred to the Commander-in-Chief shall be enforced upon handing down the verdicts. However, Article 14 (a) of the Law gives the right to file appeals by virtue of a letter referred to the Commander-in-Chief through the Legal Advisor to anyone against whom a judgement is handed down by any military court. Consequently, even in the judgements with respect to offences, their final enforcement is held by the Commander-in-Chief where the convicted litigant challenges them. Article 15 of the Law states that

“once the Commander-in-Chief endorses the judgement, the Legal Advisor and the concerned divisions at the General Headquarters, each in its respective capacity, execute the judgement as endorsed by the Commander-in-Chief.”

It is understood from this provision that the judgement or decision to be executed is either the judgement as handed down by the Court or the ruling as modified by the decision of the Commander-in-Chief.

This type of Court has been thoroughly investigated and analysed in Chapter 7, hence there is no need to deal with it any further.

3.2. Ruling Family Council

This is a special independent Court based upon the provision of Article 21 of Amiri Decree No. 12 of the Year 1973 with respect to the Emirate Inheritance Scheme that provides as follows:

“The Ruling Family Council looks after the affairs of the minor children and is competent to decide upon all personal status matters involving a member of the Family and for handling financial affairs for all members of the Family. The Council shall be empowered to entrust all or some of its judicial powers provided for in this Article to a panel of the Ruling Family members. It shall have the power to add to this panel some professionals who are not Family members.”

From the provision of the aforesaid Article, this special judicial institution may be discussed as follows:

(i.) In Terms of Composition

The Law does not provide for a specific number of members for the Court but the Ruling Family Council currently consists of a number of members who are appointed by an order of the Amir without any specific determination of the number.

The above provision gives the Council the authority to form other judicial authorities to which some of its powers are delegated. In all cases, the Council members or authorities formed thereby must include in their membership members of the Ruling Family with the possible inclusion of *“some professionals”*. The latter only can be from non-members of the Ruling Family.

(ii.) In Terms of Jurisdiction

The above provision defines the jurisdiction of the Council by stating that it looks into matters relating to disputes between members of the Ruling Family. The prevailing

practice is that the Ruling Family Council examines all the disputes that arise between members of the Ruling Family whether they relate to personal status disputes or financial disputes.

Owing to the peculiar and private nature of this judicial panel and the nature of its formation and administration, it is difficult to go any further in its deliberations, rulings and procedures.

4. International Jurisdiction of the Bahrain Law Courts in Civil Cases

It may be worth mentioning that local classification of jurisdiction of Bahrain courts does not exist. This is because the State of Bahrain is of a small area and its population is a very small number. All courts of law are located in one complex in the capital, Manama.¹ However the CCPL deals with the international jurisdiction of the courts.

Article 14 and the following articles of the CCPL provide that the Courts of Bahrain shall have competence to hear the following actions:

(i) Actions brought against any non-Bahraini having domicile or residence in Bahrain except for property actions relating to property situated outside Bahrain.

In this context, it should be noted that it is taken for granted that the Bahrain Courts have competence to hear actions filed against a Bahraini citizen, whether he stays in the country or is travelling abroad irrespective of the length of the period of his travel.² It is also noted that a foreigner who has a domicile or residence in Bahrain is excluded where the cases relate to a property situated outside Bahrain. This is a practical provision since it is not possible for the Bahrain laws nor its courts to be applicable to a property located outside Bahrain territory.

¹ According to Markaz Alwathayk Al Tarykyah "Bahrain Centre for Historical Records" (Bahrain) Publication of 30th May 1999. The total inhabitation in Bahrain is 508,037.

² Civil Case No. 1560/97.

(ii.) Actions brought against any non-Bahraini not having domicile or residence in Bahrain in the following cases:

(a) if he has elected domicile in Bahrain; which means that when a non-Bahraini who has no actual domicile or residence in Bahrain enters into agreement with another person and agrees with him that his domicile in respect of all matters relating to implementation of such agreement should be for example at the office of a lawyer or accountant in Bahrain such domicile shall be considered his legal address. So if a dispute arises over the implementation of that agreement, the other contracting party can file a case in Bahrain considering that it is the defendant's elected domicile.

(b) if the action relates to an asset in Bahrain or to any obligation arising or performed or to be performed therein, or to insolvency of which notice is adjudicated therein.

(c) if the action is raised by way of opposition to any marriage contract and if such contract requires ratification with the notarial authorities in Bahrain.

(d) if the case relates to any petition for nullity of marriage or divorce or separation, and is brought by a wife having had domicile in Bahrain against her husband having had a domicile there when the husband has abandoned his wife and acquired a foreign domicile after the occurrence of the cause of the nullity, divorce or separation, or has been deported from the country.

(e) if the action relates to a claim for maintenance for a mother or a wife when either has domicile in Bahrain or for any child resident therein.

(f) if the action relates to any matter of personal status and the plaintiff is a national or an alien having domicile in Bahrain, where the defendant has no known foreign domicile, or if the Bahrain law is applicable to the action.

(g) if the action is in respect of the kinship of any child resident in Bahrain or the usurpation of legal capacity or the fettering, suspending or revocation thereof.

(h) if the action relates to any matter affecting the control of any asset where any minor or any person against whom any restraint or for whom any judicial assistance is sought has domicile or residence in Bahrain, or if in such matter the absent party has had his most recent domicile or residence in Bahrain.

(i) if one of the defendants has domicile or residence in Bahrain. This obviously requires that there be more than one defendant in a single action.

(iii.) Actions relating to estates when the administration of such estates has commenced in Bahrain or the deceased was a Bahraini or the assets constituting the estate were wholly or partly in Bahrain.

(iv.) Actions, even though they do not fall within the competence of The Courts of Bahrain, where the parties in question expressly or implicitly accept their jurisdiction by the plaintiff filing his action with such courts and the relevant defendant submitting his defence without pleading for non-jurisdiction.

(v.) Actions which cause the Courts to make provisional or conservative orders to have effect in Bahrain, even where there is no competence to hear the original action.¹

It is assumed - based on Egyptian Jurisprudence - that if a plaintiff files a law-suit but the Bahrain law courts do not have the jurisdiction to hear the case in question and if the defendant does not appear in court, the latter shall rule of its own initiative that it is not competent to hear the law-suit. In this respect, it assumes that the Defendant does not admit the court's jurisdiction.²

¹ Civil Case No. 5732/96.

² See Millrgi Ahmad - Ikhtisas Al Mahakim Al-Dauli Wal Walie, p. 34.

5. International Jurisdiction of the Bahrain Courts in Criminal Cases

This topic is dealt with by the Second Chapter of Part I of the Penal Code, the general provisions of which may be summed up in that the Bahrain law courts have jurisdiction to hear law-suits in the following cases:

(i.) In respect of crimes committed in the State of Bahrain. A crime shall be deemed to have been committed in its territory if one of the acts constituting it occurs therein or if the result thereof is realised in its territory or is intended to be realised therein.

(ii.) In respect of crimes affecting internal and external state security even in the event they are committed outside the State of Bahrain. This shall also be applicable to the crime of forging public seals and signs and forgeries involving currencies and banknotes.

(iii.) In respect of crimes committed by public servants or persons entrusted with a public service in the course of carrying out their duties.

(iv.) In respect of crimes committed by a foreigner who resides in the State of Bahrain where he has committed abroad a crime other than these provided for in Articles (ii.) and (iii.) above and has not been requested to be extradited by another state.

Chapter 9

THE JUDICIARY

From the various laws governing the judiciary or related to it, we can identify the members involved in the judiciary or related to its activities as follows:

1. Court judges.
2. The Minister of Justice.
3. Lawyers.
4. Experts.
5. The Public Prosecutor.
6. The Supreme Judiciary Council.
7. The Courts' Administrative and Clerical Staff.

There is no doubt that the key members of the judiciary are the Court judges who represent the will of the judicial system, its mind and conscience. A judge is the one who hears law-suits, examines litigations, hands down judgements, enforces the law and restores rights by way of justice and according to the law.

Accordingly, it is initially appropriate to have a close look at the judges as the principal members of the judiciary as indicated in the above ranking.

1. Judges

This subject will be discussed in the following sections: (1.) Conditions to be fulfilled by a judge, (2.) Judges' Rights and Obligations, and (3.) Judges' Disciplinary Rules.

1.1. Conditions to be Fulfilled by a Judge

(i) Academic Qualifications Condition:

Article 26 (2) of the Judiciary Law requires that upon initially employing a civil judge he must have a university law degree. In the case of a Sharia judge, he must have a university degree or equivalent thereto with specialization in Sharia.

An academically qualified judge is appointed without his having to obtain further professional training before employment in such a position. There is no particular scheme for qualifying a judge before his appointment as in the case of certain judicial systems where it is imperative for candidates to attend a professional academic course in an institute of judicial sciences or at least to pass certain examinations as a pre-condition for joining the judicial corps.¹

Judicial training is limited to the newly appointed judge spending a limited period of time with another experienced colleague in order to accompany him to Court hearings, often held in a Senior Court consisting of three judges. In such a court, when a trainee judge is appointed to sit he will always sit to the left of the President (he is known as the “*left judge*”) and his opinion may be ignored if the President and the “*right judge*” agree.

The drawback of this system is the fact that it is not an effective training scheme as the Court judges become too busy with the law-suits that they are hearing and consequently do not have enough time to train a new colleague or even devote sufficient time to his training. A trainee judge can only have the advantage of watching the court proceedings and examining case files, thus getting first hand information. Even if his colleagues are able to explain certain technicalities relating to judicial proceedings, their time will naturally be limited.²

¹ Al Sawi A. *Alwasit Fy Qanun Al Murafat. Almadaniah-wal-Tijaryah*, page 86. He refers to the existence of a Judges Training System and suggests the same be adopted in Egypt.

² Personal assessment through daily attendance of courts.

The concept of establishing a specialised institute for training and qualifying judges has been an issue under consideration by the legal profession given that the law-suits being heard before the Bahrain law courts involve certain specialised aspects and elements that are not normally covered by university students who read law. These aspects stem from the very nature of Bahrain's commercial market in the first place and legislation and practices arising from trading in this particular market. This is of special significance as Bahrain has become a key regional financial market where financial institutions, banks, investment managers, insurance and reinsurance organisations operate.

Perhaps the most important justifications for setting up a specialised judicial institute that may offer special programmes to train and qualify judges are as follows:

(a.) Bahrain has become a vital regional and international financial centre which has resulted in the availability and use of contracts covering topics that are not studied by law students in their academic degree programmes. Such contracts include for example syndication contracts, Quota Share Insurance Contracts and investment portfolio management contracts. Such contracts may also include reference to the provisions of laws of other countries that a judge may be required to consider in disputes concerning them. In such a case, the judge must have a sufficient background about such contracts and he must be well-informed as to their elements so as to be able to deal with them, fully understand and properly handle any litigation concerning them or any dispute concerning such issues.

(b.) Holders of university law degrees in Bahrain are to date graduates of universities in foreign countries, particularly the Arab states, hence they have not studied the laws of Bahrain. (The University of Bahrain only started offering a law degree course in the academic year 1999/2000).¹ Although they have studied similar laws, this is far from being adequate given that Bahrain has made vast strides in business and financial legislation and issues relating to globalisation. This has placed

¹ Catalogue of the Programmes of Academic Year 1999/2000. University of Bahrain College of Business Administration - Page 21.

Bahrain far ahead of all other Arab states.¹ Hence there is a need for a specialised educational programme focusing on Bahrain laws.

(c.) All business dealings in the Bahrain market take place basically in English, (particularly in the banking and finance sector) and hence most contracts and agreements are drafted in that foreign language. It is noted that English language syllabuses in Arab universities do not qualify a graduate to understand such contracts. This fact makes it necessary for a judge who is involved in such cases relating to such contracts to have a good command of English. It is true that the CCPL requires all documents and papers submitted to the Court to be translated into Arabic². This does not dispense however with the need for the judge's knowledge of the contractual language given that there are often mistakes in translation or deliberate mistranslations in order to alter the provisions of certain contracts. A judge's knowledge of a foreign language does not mean hearing litigation in such a language but such knowledge will undoubtedly help him in carrying out his duty when the original contracts and documents are drafted in such a language. On the other hand, Bahrain has a peculiar situation where business dealings are carried out in a language other than the native language and contracts are drawn up in such a language. In fact, it is often the case that litigants, experts and witnesses are fluent in English but they do not speak any Arabic.

(d.) Bahrain has recently proceeded towards globalisation and is pursuing an open door economic policy. The country is a member of the World Trade Organisation (WTO)³ and is very keen on implementing its programmes and complying with its rules and legislation. In addition, Bahrain is a party to many international agreements of a legal and judicial nature such as the New York Convention of 1958 for recognition and enforcement of the foreign Arbitral Award.⁴ Knowledge of such international agreements and their provisions is extremely vital for a judge before becoming a member of the judiciary.

¹ Bahrain submitted an application to join the GATT negotiation by a letter dated 12/12/1993 and was accepted immediately by a letter dated 13/12/1993 due to its globalization (See Ministry of Commerce records).

² Article 5 of the Judicial Law - See also the Court of Cassation judgment on Cassation No. 129/1994.

³ Legislative Decree No. 7/1994 Ratifying the signing on to the WTO Convention published in the Official Gazette No. 2120 dated 13th July 1994.

⁴ Legislative Decree No. 4/1988 in connection with joining the New York Convention of 1958.

Indeed, the professional qualification of a judge in order to keep pace with scientific, technical and technological developments is a vital necessity advocated by legal jurisprudence. Judges are urged now more than ever to learn foreign languages and to use computers. Arab jurists call for

“specialisation in all areas of knowledge and business and a judge’s specialisation in a certain type of dispute has become an indispensable need to enhance performance levels and to achieve sound opinion and fairness of judgements.”¹

In light of the above, the setting up of a specialised institute for the training of civil judges after theoretical studies at a post graduate level has become vital to turn out qualified judges who would enjoy the confidence of litigants and keep pace with legislative developments and the latest changes in business transactions and contracts.

(ii.) Experience:

This means the required period of practical experience after obtaining a theoretical academic qualification. Article 27 of the Judicial Law previously required that

“a Junior Court Judge or anyone who is employed in judicial positions is to have spent four years of work in the legal profession”.

In a subsequent amendment to this Article (pursuant to Legislative Decree No.17 of 1977), the period was reduced from four years to two years only. The amended Article 27 of the Judicial Law states as follows:

“It shall be a condition for any person to be appointed as a judge of a Junior Court that two years shall have elapsed from the date of obtaining a law degree during which period he shall have engaged in a legal practice.”

The same amended Article requires anyone to be appointed as a judge of the Senior Court to have had six years and for anyone to be appointed as a judge in the High

¹ Ubaid Mohd. Kamel - Isteqlal Al Qada - Page 403 and 404.

Court of Appeal to have ten years of experience after obtaining a law degree or a high degree in Sharia or the equivalent thereof, during which he shall have engaged in a legal practice. The judges of the Junior Court may be appointed to the Senior Court after the lapse of three years from the date of their appointment as judges to the Junior Court. The same period of three years qualifies the Senior Court Judge to be appointed as a Judge of the High Court of Appeal.

For Court of Cassation judges, the Court of Cassation Law requires in Article 2 that anyone who is appointed as a judge of the Court of Cassation shall have fifteen years experience after obtaining his university degree during which he is engaged in the legal profession. If the judge previously served as a High Court of Appeal judge, it shall be sufficient for him to have served for four years in such position in order to be qualified as a judge of the Court of Cassation.

In order to discuss the condition of experience, the initial condition for the appointment of judges to the first step of the profession, (i.e. in a Junior Court) shall be discussed. The required period for appointment of a judge had been four years after obtaining a Bachelor of Arts or Science degree until the Law was amended in 1977. The Explanatory memorandum to Legislative Decree No.7 of 1977 states as follows:

“Since the publication of Legislative Decree No.7 of 1971 Governing the Judiciary no Bahraini citizen came forward to be appointed as a judge. It was found that young qualified Bahrainis were reluctant to seek jobs in the judiciary because it was more preferable for them to work as lawyers which is a higher paid job. In addition, some of them tend to work in the private sector companies or in trading activities, hence they abstained from working as judges with the enormous responsibility involved in judging cases involving people and rendering justice to them. One of the handicaps of working as a judge is being under the strain of severe restrictions in relations with people and watching out for his behaviour, even in personal affairs, all of which are in consideration of an income that falls far short of what others gain in most other jobs.”

The memorandum goes on in justifying the reduction of the period to say:

*“This amendment will help attract legally qualified young men to the judiciary before settling down in other business after four years when it would be difficult for them to give up.”*¹

The main comments concerning the above in relation to the period required for taking up judicial post are as follows:

(a.) The first comment is that reducing the period of appointment in the initial stage of the judiciary from four years to two years has been motivated by financial considerations relating to judges’ salaries. In the Explanatory Memorandum there is a clear admission concerning the modest level of judges’ salaries and the statement that such incomes fall far short of what others gain in taking up other jobs. This is a faulty trend in the legislation. It would have been more appropriate to give consideration to improving judges’ salaries and compensation rather than to reduce the required experience period.

(b.) The second comment is the vagueness of the concept of the *“legal practice”* required under the aforesaid Article 27 to be taken up by a person seeking employment in a judicial position depending on the level of the judicial post in question. *“Legal practice”* in its general sense may not be sufficient to develop the required experience for a person to be able to take up a job in the judiciary, especially when it comes to senior judicial positions such as a Court of Cassation judge, High Court of Appeal judge or a judge of the Senior Court. What happens if the job taken up by an applicant during the experience period is of a type that involves working as a legal advisor at the Ministry of Foreign Affairs in the field of international law or if he has worked as a lecturer in a law school? Will that be sufficient to qualify him to take up a position in the Court of Cassation? Indeed, explaining the type of legal experience to be acquired by a judge in addition to the period of service is essential given that the post taken up

¹ Memoranda No. 1/1977 dated 27/3/77 issued by the Minister of Justice in connection with the proposed amendments to the Judiciary Act - Registry No. 52/2/77 Legal Affairs Directorate.

by a judicial applicant must be of a similar nature or at least closely similar to the judicial work, otherwise the experience gained would be of no value.

(iii.) Bahraini Nationality:

This is a basic condition required by the nature of the judiciary. The judicial authority is one of the three key authorities created by the Constitution as previously explained. It is only natural that the position of a judge can only be taken up by a Bahraini. If there is a need for making exceptions as in the case of the judiciary in Bahrain such exception must be allowed within a limited extent. In pursuance of this principle, Article 26 of the Judicial Law states as follows:

“To be appointed as a judge, the following conditions shall be fulfilled: He shall be a Bahraini, enjoying full civil qualifications. If Bahrainis are not available, non-Bahrainis may be appointed.”

This exception in the legislation was justified at the time of promulgating the Judicial Law by the aforesaid Explanatory Memorandum of the Ministry of Justice which said:

“Until the enactment of this Law on 7th August, 1971 no Bahraini national has applied for taking up a job in the Junior Courts although such jobs are a prerequisite for taking up higher positions in the judiciary and in spite of the fact that the judges have their own salary scale. Thus, the Ministry was obliged to seek the employment of some Arab nationals to work as Court judges.”

It is deduced from this Memorandum that the reason for employing non-Bahraini judges was the lack of qualified Bahrainis who could fill judges' positions. This statement was true at the time of drafting this Memorandum, but the situation has now changed as all Junior Court judges are Bahrainis. Also most Senior Court's judges are Bahrainis. However, there still exists a number of non-Bahrainis employed in jobs as either judges of the High Court of Appeal or the Court of Cassation.

Although the Ministry of Justice, which is the Ministry responsible for appointing judges, is making a clear effort for Bahrainising the judicial system, yet more efforts are needed for Bahrainising the judicial system considering that it is a part of the national authorities in the State. To speed up Bahrainisation, two avenues may be pursued:

First: Appointment of more Bahraini judges and introduction of a scheme for their training through the setting up of an institute for the training of judges.

Second: Granting Bahraini nationality to those expatriate judges who have been serving for a long time as judges, in recognition of their services to the judicial system. All the expatriate judges are from the Arab states especially the Arab Republic of Egypt and thus can be assimilated in the Bahraini community given that their society is not much different in terms of religion, culture, traditions and aspirations from the Bahraini community:

(iv.) Condition of Having no Criminal Record:

Article 26 (3) of the Judicial Law requires a judge to be known for his good conduct and he shall not have been sentenced by a court for any breach of honour. This condition initially must be fulfilled by anyone taking up a judicial appointment. However, the administrative authorities have at times followed a wrong interpretation of this provision by excluding from judicial appointment those who have records with the police authorities for suspected criminal activities (mainly political) without such persons being found guilty in a court trial or condemned in any manner affecting their honour pursuant to the requirements of the aforesaid Article 26 (3). It should be noted that such records are not available in a public written form, hence there is no actual sentence that can be relied upon. This approach is far from being satisfactory because it deprives the judicial system of efficient and competent people on grounds of mere suspicion.

(v.) Undeclared Condition:

The old rule¹ for selection of judges was that they should be from members of the ruling “Al Khalifa” Family. However, since the late 1960s and prior to promulgating the Judicial Law and declaring the country’s independence, it became the practice to appoint judges from non-members of the Ruling Family. For example, appointments included the Judges Mohamed Saleh Al Shaikh Abdulla, Saqer Al Zayani and Ahmed Qassim in the late 1960s.²

Since the introduction of the Judicial Law, the appointment of judges from non-members of the Ruling Family began to increase until the number of Judges for the Ruling Family has been considerably reduced.

However, selection of members of the judiciary is still subject to restrictions on the basis of choosing persons who belong to prominent families that are acceptable to the administrative authority. This condition is neither declared nor documented. Although the objective from this is to secure a certain standard of social and financial satisfaction such an attitude may deprive the judicial system of certain academic and professional skills of persons that could enrich the legal system.

(vi.) Non-Appointment of Women as Judges:

It is noted that all judges are men and no women have been appointed so far as judges despite the fact that distinguished women do exist as lawyers and legal practitioners. This attitude is largely baseless as the Judicial Law does not limit the job of judge to men.

¹ See Chapter 5 of this thesis.

² Ministry of Justice payroll records

1.2. Judges' Rights and Obligations

(i.) Judges' Rights:

(a) Judge's Independence:

Perhaps the most important rights of judges are stipulated in Article 101 (b) of the Constitution that states: "*In the administration of justice judges shall not be subject to any authority.*" Also Article 2 of the Judicial Law states: "*Judges shall be independent, with no power over them in their discharge of their duties except that of the law.*" I have already discussed the issue of the judiciary's independence in Chapter 7 of this book when the independence of the judiciary as an independent authority from the executive and legislative authorities was discussed. However, the word "*independence*" in this Chapter deals with what a judge enjoys as a person carrying out his duties. The Law secures for him pursuant to the provision of this Article his full independence and bars the exercise of any authority from any person not only from the executive or legislative authorities but also from members of the judicial authority itself, even by those who are higher than him in rank. The court of first instance judge carries out his duties independently without interference in his work in the stage of hearing a case from the judge of a higher court. There is nothing in this which prejudices the rights of the parties to the case in appeal, given that no appeal is made except when the judge of the first instance has completed his involvement in the case and handed down his ruling in its respect.

(b) Judge's Immunity:

A judge's immunity arises as a right enjoyed by him distinctly from the rights enjoyed by other citizens. No disciplinary action shall be taken, including a penal action, except through the procedures set forth in Section 5 of the Judicial Law in connection with the Supreme Judicial Council.

(c) Judge's Remuneration:

A judge is only paid his monthly salary by the State and the Judges' Salary Scale is governed by the Edict issued by the Council of Ministers under No.1 of 1993 with respect to Adding New Grades and Steps to the Judges' Salary Scale and the schedule attached to this Edict under No.5 dated 1st January 1993.

Upon reviewing this Salary Scale, we can conclude that the Judges' salaries range between BD518 (\$1958) as a minimum on Grade 1 and BD1835 (\$6936) as a maximum on Grade 10 of the aforesaid Scale per month.

When comparing the judges' salary levels with other legal practitioners outside the judicial system, it can be said that the judges' salaries are modest in proportion to a judge's standing and what should ensure for him a sufficient income that makes him dispense with thinking about any other means of improving his living conditions in Bahrain where the cost of living is high. For instance, the monthly salary of a legal advisor in a private company may reach a sum of BD4,500 (\$17,000) apart from a luxury accommodation and payment of expenses including payment of school fees for the children.¹ If we compare this level of remuneration with the judges' salary scale, this will reflect the very modest level of income gained by judges. Indeed, ensuring a reasonable income for a judge enables him to work without thinking of another source of income. This is an essential guarantee for a judge to perform his duties honestly and with integrity. This drives one to say that it is vital to review the remuneration currently being paid to judges.

¹ See Labour Complaint No. 670/1999 - GIB (This case is lodged by a company's in-house lawyer whose salary and benefits exceeded BD 6000/-)

(d) Right of a Judge to Step Down:

Even though it is a right, it is also a duty required for the judge's integrity and his strict obligation to enforce the law in an absolute manner as where he has a relationship with one of the litigants or if he is aware of the facts of the dispute or if he is influenced in one way or another by the events of the dispute. Article 35 of the Judicial Law states as follows:

“If a judge is not fit to examine a case, he shall notify the Supreme Judicial Council for permission to allow him to step down.”

Although the beginning of the aforesaid Article implies that it is the judge's duty to step down where he is unfit for examining the case, the Article states in its second paragraph as follows:

“A judge may, even though he is eligible to examine a case, without giving reasons, if he feels embarrassed to examine it for any reason, propose to the Supreme Judicial Council that he wishes to relinquish the case and the latter shall consider it.”

It is concluded from the provision of the second paragraph of this Article that it is sufficient for it to apply if a judge feels any embarrassment to hear a case; and the assessment of such embarrassment is attributed to the judge and is expressed to the Supreme Judicial Council.

These are in brief the judges' rights which are apparently lacking given the obligations and duties that they assume as will be seen later.

(ii.) Judges' Duties and Obligations:

Positive Obligations: These are defined as the duties that the judge must assume and can be summed up as follows:

(a.) Obligation to comply with the law and the obligation to render justice in handing down judgements. Of course, this is a principal obligation on the basis of which a judge is selected as it provides the basis for the judge's personal fitness to assume this position. To ascertain compliance with this basic principle, a judge has to make the oath required by the relevant authority indicated in the Law.

Pursuant to Article 30 of the Judicial Law the oath of office by the Presidents of the courts, deputies and judges shall be made before the Amir in the presence of the Minister of Justice. Other judges of Senior Courts and Junior Courts shall take oath before the Minister of Justice with the attendance of the Director of the Court Directorate. Judges of the Court of Cassation shall take the oath before the Amir also according to the provision of Article 2 of the Court of Cassation Law. The second paragraph of this Article also states:

“They shall be subject to the other provisions in respect of the appointment of judges, their duties and disciplinary action against them as provided for in Part II of Legislative Decree No.13 of 1971 with respect to the Judicial Law.”

Although the aforementioned Article 2 of the Court of Cassation Law does not state whether the Court judges shall make an oath before the Amir or before the Minister of Justice, by analogy they shall do so before the Amir as a higher rank of judges, which has been the practice.

(b.) The obligation provided for in Article 35 of the Judicial Law with regard to the aforesaid judges' stepping down from hearing the dispute. As it has already been stated, in case there is a valid reason therefor, it shall be obligatory upon the judge as much as it is a right enjoyed by him.

Negative Obligations: These are the acts that a judge must refrain from when assuming his judicial position. The key prohibitions are the following:

(a.) Combining the judicial position and any other job. Pursuant to the express provision of Article 31 of the Judicial Law, engaging in business or any other occupation which is not compatible with the judiciary's dignity and independence is prohibited.

According to the prevailing practices in Bahrain, a judge may not take up any other job. Being involved in any job will require him to be fully employed in carrying out his duties which would conflict with his post as a judge. Moreover, he should not work in any other kind of employment as this would create a conflict of interest. Should he take up another kind of employment, he would naturally have the ethics of that particular job or business that could affect his required neutrality and commitment to the principles of fairness and integrity. In this context, he could find himself in an embarrassing position according to the provision of the aforesaid Article 31 that warns against the acts "*which are not compatible with the judiciary's dignity and independence.*"

(b.) Although a judge is empowered to examine disputes occurring among members of the public, Article 32 of the Judicial Law prohibits a judge from

"expressing an opinion on disputes referred thereto nor to give advice to litigants or their representatives nor talk with them on such disputes directly or indirectly before a judgement is passed."

The text of this Article is rather loose as a judge, in the course of running the proceedings, may advise the litigants and obviously talks to them about the disputes. The purpose of this provision is to forbid judges from extending opinions on the matter of the dispute prior to handing down judgements. Therefore, it is commendable to redraft this Article. In its last paragraph, Article 32 obliges a judge not to divulge the secrets of deliberations.

(c.) A judge is also prohibited from acting as an arbitrator in any dispute beyond the scope of his position although judges are the best persons to resolve disputes. However, the Law prohibits a judge according to the provision of Article 33 of the Judicial Law from being an arbitrator even on a voluntary basis.

Pursuant to this Article, a judge may by way of exception be an arbitrator in two cases:

First where the dispute examined by a judge involves his relatives and in-laws up to the fourth degree of relationship.¹

Second in the cases prescribed in law where he is permitted to act as an arbitrator. For instance, Article 136 of the Labour Law relating to collective disputes is applicable where it stipulates:

“It is noted that this restriction is exaggerated and results in depriving litigants involved in an arbitration from benefitting from the judges’ expertise, knowledge and qualification to resolve disputes by arbitration. It is preferable to permit judges to be selected as arbitrators if elected by parties to the litigation while laying down certain rules and conditions ensuring that the judge shall not rehear the same dispute in a court of law as in the case of challenging an arbitration award or filing a law-suit for invalidating an arbitration award.”

(d.) A judge is completely prohibited from engaging in politics. Furthermore, he is prohibited from even “*giving an opinion on political matters.*” Judges shall be banned from nominating themselves for general elections so long as they occupy their positions. Article 34 of the Judicial Law states in its last paragraph that “*any judge who nominates himself for elections shall be considered to have resigned his position from the date of his nomination.*”

¹ First Degree are: Father, Mother, Son and Daughter.
Second Degree are: Grand parents, Grand sons and Grand daughters.
Third Degree are: Brother and Uncle/Aunt.
Fourth Degree are: Cousins. See the explanatory memorandum on the Egyptian Civil Law Article 36 & 37.

The provision of the above Article is valid as it conforms to the principle of separation between the legislative and executive powers. There is no doubt that the judges' involvement in legislative duties will inevitably result in intervention between such powers in such a way as to conflict with the principle of separation of powers which is based upon the Constitution and democratic system. Nevertheless, the provision of this Article looks upon a judge in high esteem and regard by not imposing any penalties nor rendering him answerable for entering into elections for legislative body. Indeed, the Law considers that such action results in an implicit resignation from the judiciary and is endorsed by the Law by considering it applicable from the date of nomination owing to the intervention by the authorities. The law's action in this respect is commendable.

1.3. Disciplinary Actions Against Judges

Judges can be subject to disciplinary action by one of the following actions:

(i.) Caution, (ii.) Disciplinary trial.

(i.) Caution:

Caution as defined by the provision of Article 36 of the Judicial Law means drawing attention to the failure or offence committed by a judge which is not so serious as to require imposing a penalty to the extent of a reprimand. Reprimand is the least penalty that can result from a disciplinary trial as will be explained later. A reprimand cannot take place except after hearing the judge's statement concerning the offence attributed to him.

Article 36 of the Judicial Law gives the power to caution to the Supreme Judicial Council. The first paragraph of this Article states:

“The Supreme Judicial Council shall of his own accord or at the request of the Court President have the right to caution judges against all acts which are committed in breach of their duties or job requirements after hearing their views and statements.”

A caution shall be either verbal or written depending on the seriousness of the offence as provided for in the second paragraph of the abovementioned Article 36. In case of objecting to a caution, a judge may request the Supreme Judicial Council to conduct an investigation with respect to the event subject to the caution. If requested, an investigation shall be conducted before the Disciplinary Court.

It is clear from the context of the aforesaid Article 36 that an investigation takes place in cases where the Council insists upon the caution. However, if the Council withdraws such caution, there will be no need for conducting an investigation.

(ii.) Disciplinary Trial:

Article 38 of the Judicial Law states *that*

“a judge may be subject to a disciplinary trial. A disciplinary legal action shall be brought by whoever is designated by the Supreme Judicial Council for this purpose. A disciplinary legal action brought against judges shall be heard by a special court which is formed pursuant to a resolution issued by the Supreme Judicial Council.”

From this Article, we conclude that the Supreme Judicial Council has two powers:

First: It is empowered to appoint the prosecution authority in the disciplinary trial.
Second: It is empowered to form the court that has jurisdiction to hear the disciplinary legal action.

It should be noted that up until the time of writing this Thesis no disciplinary action has been taken against any judge and the Court provided for in said Article 38 has never been formed.

However, the fact that no judge has been referred to a disciplinary trial should not lead us to conclude that no offence has been committed by any judge over this period which is about 28 years since the enforcement of the Judicial Law. It is more likely that the

Minister of Justice, who was entrusted with the supervision over the Judiciary before the establishment of the Supreme Judicial Council, often behaved in a manner that helped to avoid referring a judge to a disciplinary trial either by the judge's acceptance of a caution or convincing him to resign, all of which are unfortunately undocumented matters.

A plea for initiating a disciplinary trial shall take place by a Statement of Claim that contains the charges, name of the defendant and available evidence. When the Statement is lodged with the Court, the Court shall issue a decision for serving the judge with the Statement and notifying him to appear before it as understood from the provision of Article 39 of the Judicial Law. The same Article provides that the Court is empowered not to serve the summons upon the judge nor to file the case where it is convinced that there are no valid grounds justifying the reference of the judge to a trial. At this point, no decision is adopted for serving the summons upon him. Such conclusion is deduced from the second paragraph of this Article which states:

“It shall be filed with the Court referred to in the preceding Article to adopt a decision to serve the summons to the judge with respect to the statement of claim and to instruct him to appear before it.”

Articles 40 and 41 of the Judicial Law grant the power to conduct an investigation to the Court as it shall deem fit without complying with any procedural restrictions except regarding the hearing of witnesses. Article 40 defines the Court's authority in connection with examination of witnesses as the *“authority vested in the Courts.”*

A judge shall present his own defence and may seek the assistance of a defence attorney but contrary to the principle of holding court hearings in public *“the Court sittings shall be held in camera”*. Perhaps such exception may be justified by terms of the peculiar nature of the disciplinary legal action and the required maintenance of the judicial sanctity and preserving its prestige towards the general public.

The disciplinary penalties that may be inflicted against judges are “reprimand or recommendation for removal from office.” It is noted that this Court does not have the right to rule for dismissal from office but is only empowered to recommend such removal to the Minister of Justice.

2. Minister of Justice

Article 52 of the Judicial Law stipulates that:

“The resolutions of the Supreme Judicial Council shall be submitted to the Minister of Justice who shall take the procedures he may deem appropriate for the execution of such resolutions”.

It is obvious from this Article that the Minister of Justice may largely influence Council’s resolutions by deciding the manner of their execution. There are many other articles the Judicial Law which give to the Minister of Justice powers of an influential judicial nature that include, for instance, the event indicated in Article 21 of the aforesaid Law that:

“where the sittings of the High Sharia Court Department or the Departments of the High Sharia Court of Appeal are held by two judges and they disagree over the ruling, the Chief of the Justice Department shall ask a third judge to take part in the ruling. Then, the Department will pass its verdict by a majority vote.”

According to Article 29 of the same Law, nomination of judges and removing them from office shall be pursuant to a legislative decree upon the submission of the Minister of Justice despite the fact that Article 53 requires the proper recommendation of the Supreme Judicial Council for such submission. Pursuant to Article 30 the Judges of the Senior Courts, Justices and Junior Court judges shall take the oath of office before the Minister of Justice. All these provisions give the Minister of Justice direct powers over the judicial system and make him one of its members.

3. Lawyers

It is noted from the history presented in the first part of this thesis that the Bahrain judicial system is well established and has deep roots extending to the sixteenth century. However, there was no legislation organizing the lawyers' professional practice.

Bahrain knew the advocacy profession for the first time in the 1930s when the first Attorneys' Law was enacted in Bahrain by proclamation No.51/1355 in the year 1935.

The advocacy profession came into being in Bahrain through the law courts formed by the British administration at that time. The most important of these were the Joint Court and The District Court when foreign defence lawyers appeared before such courts. Some Bahraini lawyers took up this business due to contacts with foreign lawyers from whom they gained experience.¹

Proclamation No.51/1355 in 1935 gave the conditions for engaging in advocacy and fixed the licensing fees and regulated the relationship between a principal and his client and their mutual obligations. The key provisions of this legislation may be summed up as follows:

(i) It required anyone who wished to be given a licence to practise to be able to read and write. It is noted that this modest condition of literacy was appropriate at the time of introducing that legislation as higher education did not exist on the island and primary education was still in its infancy as no formal school was opened in Bahrain until 1919.²

In keeping with the judicial structure at that time and with the presence of the joint foreign courts³, the legislation did not restrict licensing by requiring Bahraini nationality but required that attorneys for Bahraini citizens should be of Bahraini

¹ Sangur Hamid-Nahwa *Tashri Afdal*. Page 8 and 9.

² Mahadin A. H. - *Al Hidayan Al Khalifa*. Page 20.

³ See Chapter 4 of this thesis.

nationality. Accordingly, a non-Bahraini could obtain a licence to practise but he could only act on behalf of non-Bahraini clients. A Bahraini attorney was not subject to any restriction as he could represent both Bahraini and non-Bahraini clients.

The legislation also required an applicant for a licence *“not to have been sentenced for a criminal offence or a fine in court.”*

(ii) This legislation regulated the attorney’s obligations by requiring him to

“defend the interests of his client and not to withdraw from a legal action before the finalisation thereof except by a lawful excuse and must report to his client about the progress of his case after each hearing.”

The legislation provided protection of the attorney’s rights by fixing his *“fee”* on a separate basis by a detailed scale of fees. It stated that he was entitled to receive his remuneration even in the event of losing the case except where his client reached an out of court settlement with his opponent.

This legislation was the one regulating legal practice until the introduction of the Legal Practice Law in 1980 by Legislative Decree No. 26/1980 when this Law became the basis governing the advocacy profession and lawyers’ activities.

The amendments and schedules of this Law are constituted by Legislative Decree No. 1/1980, Ministerial order No. 5/1981 with respect to Implementing the Legal Practice Law, Ministerial Order No. 4/1981 with respect to Registration Fees and Ministerial Order No. 19/1989 with respect to the Court of Cassation Court Lawyers Roll. Upon reviewing the said law, its amendments and schedules, the organisation of this profession may be discussed in the following issues:

- Conditions governing practice.
- Lawyers’ obligations.
- Lawyers’ rights.

- Lawyers' licences and disciplinary action.

Since the discussion about licensing and disciplinary action will lead to a discussion about the absence of an independent professional organisation to administer the legal practice affairs, it is essential to review the lawyers' attempts to create such an organisation and the results so far reached. A separate section in this Chapter will be devoted to this purpose under the heading of the Bahrain Bar Society.

3.1. Legal Practice Conditions

Chapter One of the Legal Practice Law deals with the conditions of legal practice. Article 1 and the following articles of this Chapter require anyone involved in legal practice to fulfil the following conditions.

(i) He shall be a Bahraini national. However, there is an exception to this rule. The first is that non-Bahraini lawyers who were licensed prior to implementing this law into effect remain permitted to practise but subject to entering into an association with a Bahraini law firm. In spite of this permission of continuing to be in association with a Bahraini lawyer, a licensed foreign lawyer according to this exception is not allowed to appear in court.

(ii) He shall have obtained a degree in law from a law college in one of the universities recognised by the competent authority. It is noted that the competent authority according to the provisions of the law is defined as the authority concerned with higher education in Bahrain. Therefore, academic certificates of applicants for lawyers' licences are referred to the Education Ministry's Academic Certificates and Qualifications Evaluation Committee unless the Committee has a prior evaluation of the universities that have awarded such certificates.¹

¹ See the Register of the Lawyers Roll Committee in the Ministry of Justice.

The third paragraph of Article 2 of the said Law requires that the Islamic Sharia must be one of the subjects included in the curriculum of the university that awards the degree or certificate. If the Islamic Sharia is not included in the subjects taken by the applicant for a licence, he must pass an examination in the Islamic Sharia held by the Ministry of Justice.

Finally, it should be noted that the law gives an exemption at the time of promulgating it to lawyers who were licensed according to the 1935 Law Governing Legal practice by maintaining their licences without requiring them to have a university certificate. Nevertheless, this is now irrelevant as none of these lawyers is alive or practicing today.

(iii) He shall be legally capable and of good conduct. This is a basic condition as provided for in Article 2 (iv) of the Legal Practice Law which states:

“He shall be of good conduct and worthy of enjoying the respect afforded to the legal profession. Also he shall not have been subject to any court sentences or disciplinary actions for any breach of trust, honour or integrity unless he has been reinstated.”

However, although it is possible to ascertain whether judgements have been handed down against an applicant, it is not easy to assess the conduct or reputation of an applicant and to determine whether or not he will be worthy of the respect provided for in the above provision. Determination in such matters is left to the discretion of the licensing committee.

(iv) A lawyer shall not combine legal practice with any of the following occupations:

- Chairmanship of legislative or municipal councils or ministerial positions.
- Employment in the civil service or in any public organisation, business firm, company, bank, association or with an individual employer.

- (v) Lawyers who are members of legislative or municipal councils may not represent such councils in any dispute.

3.2. Lawyers' Obligations

A lawyer's obligations may be classified into two main sections. The first are the lawyer's obligations towards the public authority especially the licensing and supervision authority, and the second are the lawyer's obligations towards his client. In this Chapter, focus will be placed on reviewing the second section of such obligations.

Article 21 of the Legal Practice Law requires a lawyer to appear on behalf of his client at court hearings pursuant to a power of attorney. It provides as follows:

“A lawyer shall appear in court representing a client under a power of attorney which shall be kept by the lawyer in the case file maintained for the relevant court hearing, otherwise the said power of attorney may be presented for recording the number, date and authority before which it was executed in the minutes of the hearing.”

In discussing this obligation, the following main points will be dealt with:

- (i) To enable a lawyer to represent his client, a power of attorney is required. Such power of attorney shall be recorded before the law courts or any other authority before which a lawyer is representing his client. It shall not be accepted to allow a lawyer to appear claiming to be acting on behalf of someone without a written power of attorney as is the case in certain judicial systems.¹ This is a commendable practice in the light of modern day dealings and the spread of forgery and fraud crimes that require extreme caution in proving the attorney's relationship with his client and valid representation before the law courts so as to protect the rights of litigants.

¹ See the Egyptian Court of Cassation Judgment in Cassations Nos. 1875/49Q and 449/39Q (Q stands for Qadi i.e. Judicial year).

(ii) If an attorney accepts the power of attorney given to him by a client, he must refrain from accepting the power of attorney of his client's opponent and should not give any advice to an opponent concerning the case or legal work for which he is instructed. This ban shall be applicable to any person employed in the lawyer's office regardless of their capacity (Article 23 of the aforesaid Law). This is an established legal principle followed by all legal systems as a lawyer is prohibited from representing conflicting interests.

(iii) Article 26 of the Legal Practice Law states that

“a lawyer is liable to his client for the performance of duties entrusted thereto in compliance with the provisions of this Law and in pursuance of the terms and conditions of the power of attorney. A lawyer shall be responsible for refunding to his client the amounts collected on his behalf and for returning the original documents and papers received therefrom.”

The disciplinary authorities concerned with “*disciplinary action against lawyers*” or the Disciplinary Appellate Board attach special significance to a lawyer's breach of his obligation to hand over to his client the amounts received for his account. The penalty for this offence is severe and the punishment of “*striking off from the Rolls*” or final cancellation of a lawyer's licence is the main disciplinary penalty in the case of a lawyer committing such a violation.¹

This attitude of the disciplinary authority is commendable in deterring any lawyer who may think to exploit his client's rights on the one hand and on the other hand this provides a decisive action against those who misbehave in their legal practice.

(iv) Article 29 of the Legal Practice Law requires a lawyer to maintain the secrets and confidential information of his client and prohibits him from disclosing any facts or information that he acquires in the course of his practice even after the expiry of the term of the power of attorney and terminating his relationship with his client. Disclosure is possible if he discloses such information to prevent a felony or

¹ Disciplinary Case No. 1/1995 - Disciplinary Counsel Record - Ministry of Justice.

misdemeanour or reports its occurrence. The provision specifically mentions a felony or misdemeanour which gives the impression that such disclosure is not allowed if the matter relates to an offence. It would have been more appropriate if the provision allowed disclosure in respect of an offence as this too could cause serious damage. It would have been even better if the provision allowed a lawyer to report with the intent of preventing a crime in general.

Finally, it is noted that the provision barring the disclosure of information acquired by a lawyer in the course of his practice is of a general nature. However, the proper interpretation gained from the general text of Article 29 is that the intended threat relates to his client's secrets in the law-suits for which a lawyer is appointed. This does not mean that a lawyer is permitted to divulge other secrets of persons who are not his clients. However, this prohibition remains subject to other laws such as the Penal Code, and Civil Wrongs Ordinance that are beyond the provisions of the Legal Practice Law and the powers of the disciplinary board formed according to the law as well as the disciplinary penalties provided for in this Law.

(v) For avoidance of any dispute between a lawyer and his client that may end in the termination of the relationship between them and for protection of the concerned parties, Article 28 of the Legal Practice Law states:

“A lawyer may not relinquish his capacity as an attorney acting on behalf of a client at a crucial time. In case the lawyer intends to relinquish, he shall notify the client of the decision to relinquish the law-suit by serving a written notice thereto. In the meantime, he shall continue to defend the same law-suit for a period of not more than one month if required in the client's interest.”

Two comments may be made on this provision:

First: The provision of the Article represents a deviation from the general contractual principles. It is an agency contract and like all other kinds of contracts either party thereto may terminate it and an aggrieved party shall have the right to claim compensation if such termination causes damages thereto. But it is the peculiar nature

of an attorney appointment contract that the attorney is obliged to continue working and defending the legal action for a period determined by the law. It also obliges him to notify his client of termination by a specific method, (*i.e. a registered letter*).

Second: The provision has a drawback in stating: “*he shall continue to defend the said law-suit for a period of no more than one month.*” The words “*no more than one month*” lead to the understanding that it is possible to continue working for a period of less than one month, something that is not intended by the law. The proper wording should be “*for at least one month unless the client is proved to have been aware of such relinquishment.*” Priority should be given to protecting the client’s right as he needs some time to rearrange his situation and to select an alternative lawyer.

(vi) Article 31 of the aforesaid Law prohibits a lawyer from acquiring by way of purchase all or some of the disputed rights or entering into agreement for the acquisition of any part thereof in consideration of his remuneration or obtaining a proportionate share of the claims involved in the law-suit or the eventual court verdict.

In general, this provision prohibits a lawyer from gaining any remuneration derived from an interest involved in the case or in the legal work assigned to him.

Although some countries permit agreements whereby an attorney receives a percentage of the claim (a contingency fee), it has been the customary practice in Bahrain to agree on a lump sum amount of the legal fees. The aforementioned Article 31 is in effect a prohibition of an agreement on contingency fees. In my view, this is a defective provision that restricts the freedom of entering into contracts and in addition creates practical difficulties for clients who may not be in a position to pay specific amounts unless they are awarded their claim amounts or at least part of them. There is little or no legal aid to help poor clients in Bahrain. This is particularly true in claims of compensation for damages arising from traffic accidents or similar claims for compensation.

(vii) Finally, there is an issue worthy of being noted in comparing the Attorney Appointment Law 1935 and the Legal Practice Law. The latter Law does not contain any reference about compelling a lawyer to submit to his client reports about the cases or legal work assigned to him although the earlier law provides for this requirement. Such provision should in my view have been included in the present Law.

3.3. Lawyers' Rights

Lawyers' rights may be discussed in two sections. The first one relates to the lawyer's rights towards his client and the second is in connection with his general rights:

(i) Lawyer's Rights Towards his Client:

They are limited by the aforementioned Law to the fees and relevant issues.

Agreement on the fees is left to the mutual agreement between the lawyer and his client taking into account the provision of the aforesaid Article 31. A lawyer may request drawing up an agreement in this respect. Article 30 restricts this right by the requirement that the amount of fees must be proportionate to "*the importance of the law-suit and the work involved in the defence thereof.*"

According to Article 33 of the aforementioned Law, the Senior Civil Court shall have the authority to make an assessment of a lawyer's fees where the said fees are not determined by an agreement in writing, where such agreement is illegal, where the fees are exaggerated, or in case the disputed fees are for an act which was not referred to a law court.¹

¹ Civil Case No. 1606/1981 Senior Civil Court Records.

The aforesaid Article 33 includes one further instance of the Court's powers which is the case "*where the disputed fees involve a matter that has not been referred to the court*". Including this matter in the competence of the Court is illogical where there is a mutual agreement between the lawyer and client on the fees.

At any rate, the fees may not be reduced if the agreement is made following the execution of the attorney's appointment. This means that if the lawyer and client agree on the amount of the fees after delivering the final judgement or after the completion of the legal work agreed upon, neither shall have the right to contest such amount by any action whatsoever.

The provision of Article 32 states:

"Where any action is settled amicably or by arbitration, a lawyer shall be entitled to one half the amount of fees agreed upon unless there is any agreement to the contrary or the duties undertaken entitle the lawyer to more than half the amount of fees mutually agreed upon."

This provision may be criticised in two respects:

First: Drawing an analogy between an amicable settlement and arbitration although the difference between them is huge as an amicable settlement means ending the dispute, hence terminating the legal work in the case, while in the case of reference to arbitration the professional work undertaken by the lawyer is not at all reduced but on the contrary it may even increase the work than that before the law court.

Second: Determining the right of the lawyer to at least one half of the fee amount in case of an amicable settlement may sometimes be unfair to the client especially if the case is still at the initial stage and the mutually agreed fees are generous.

The decision of the Senior Civil Court to assess the fees may be contested by way of a challenge before the High Court of Appeal within 45 days from the date of issuing the assessment order (Article 35 of the said Law).

The lawyer's fees shall rank as privileged debts in the enforcement of a judgement under which his client acquires monies claimed in the case or work involved in the course of the attorney's assignment.

However, a lawyer's right to request an assessment of the fees shall be time barred at any rate after one calendar year from termination of the legal work subject to the attorney's appointment. (Articles 36 and 37 of the said Law).

Finally Article 38 of the said Law provides as follows:

"A client may terminate the appointment of his lawyer of his own free will. In this case, he shall be obliged to pay the fees which are commensurate with the duties performed and the result which has been accomplished by the said lawyer."

(ii) Lawyer's General Rights:

A lawyer's general rights may be summed up in the following way:

(a) Benefit from General Professional protection: According to the provision of Article 19 of the Legal Practice Law, non-lawyers shall be strictly prohibited from

"regularly carrying on the business of giving legal advice or opinion nor shall they undertake any legal action or procedure on behalf of third parties"

Further, lawyers

"shall have the exclusive right to represent the persons concerned in law courts and before arbitration boards, police departments and competent judicial and administrative commissions of judicial competence."

(b) If a lawyer becomes unable to continue his practice and follow up the cases on behalf of his clients, he may benefit from the legal aid scheme provided for in Chapter Five of the Legal Practice Law and the heirs of the lawyer may benefit from this provision in case of his death. Article 39 which deals with eligibility for legal aid in paragraph (c) states that it is avoidable when *“the lawyer dies or is barred from practising law and generally in all the instances when it becomes impracticable for the lawyer to practise law, carry on his activities and manage cases for clients in courts of law.”* It is understood from this provision that the fees received by the lawyer cannot be recovered in the second event nor from his heirs in the first event.

(c) If a lawyer is appointed in a case according to the Legal Aid Scheme, the Court for which the lawyer is appointed shall assess his fees to be paid by the Ministry of Justice by an order that shall be as good as an executive deed according to Article 42 of the said Law. It should be mentioned that in the Courts’ assessment fees are very modest sums that can be nominal in comparison to the efforts made or to the importance of the case contrary to the rules concerning assessment of fees which have already been discussed.¹

(d) The said Law limits the right of appealing against disciplinary decisions adopted in respect of disciplinary cases to being solely enjoyed by the lawyer not by the petitioner. If the disciplinary action is dismissed, his opponent may not challenge the ruling that gives a special legal protection to the lawyer.

3.4. Licensing of Lawyers

It is essential to study the licensing authority and licence class as well as the fees for licences and taking the oath.

¹ a) Criminal Case No. 464/1999 (Murder case) fees decided by the Court - Bahraini Dinars 100/- while the nominal fees of a lawyer in such a case may reach up to Bahraini Dinars 4000/-.
b) State Security Case No. 10/1947 fees BD 100/-

(i.) Licensing Authority: Article 6 of the Legal Practice Law provides that

“applications for enlistment in the Rolls shall be submitted to the Minister of Justice and Islamic Affairs accompanied by such documents as shall be prescribed by an order therefrom. The Minister shall issue an order for enlistment in the Rolls or for rejection of such applications after seeking the opinion of a commission formed for this purpose. The Minister shall determine its terms of reference and it shall be known as the Rolls Committee.”

The said Article provides that the Rolls Committee shall be chaired by the President of the Senior Civil Court and its members shall include one of the judges of the aforesaid Court and a lawyer both to be appointed by the Minister for Justice and Islamic Affairs every two years.

Ministerial Order No.5 of 1981 was issued regulating the deliberations of the Committee stressing that an application for enlistment shall be *“filed in the name of the Minister of Justice”* and the filing of the application shall be with the Public Registrar at the Ministry of Justice.

Article 8 of the said Ministerial Order provides that *“the Committee shall issue its recommendation in respect of the application by a majority of votes”*. Article 9 thereof obliges the Public Registrar immediately upon the issue of the Committee’s recommendation to refer it to the Minister of Justice to adopt a decision in respect thereof.

If the decision of the Justice Minister is adopted for rejecting the application, an applicant whose application has been rejected may file a grievance against such decision with the High Court of Appeal within 45 days from the date of notifying him of the rejection and the ruling of the Court in respect of this grievance shall be final.

The following may be concluded from the above:

(a.) The competent authority to approve the grant of a licence or rejection thereof is the Minister of Justice and the role of the Committee is only an advisory one by being limited to issuing a recommendation to accept or reject the application. This trend of giving a professional licensing power to a member of the Government is contrary to the prevailing trends in most legal systems. It is the customary practice that a lawyers' organisation should enjoy the licensing power through the Bar societies or associations.

(b.) Article 6 of the Legal Practice Law provides for appealing against the decision of the Minister of Justice through the High Court of Appeal. However, Article 11 of Ministerial Order No.5 of 1981 provides that

“in the cases where the decision of the Minister of Justice and Islamic Affairs cannot be appealed against, the Public Registrar shall implement it immediately by making an entry in the Rolls.”

It is understood from the provision of the said Article that what *“cannot be appealed against”* is the decision approving the licensing application. However, the poor drafting of this provision may cause confusion and it would be better to correct the provision by replacing the words *“that cannot be appealed against”* by the word of *“approval”* and further to prevent any confusion arising in the interpretation as the expression *“cannot be appealed against”* may be wrongly interpreted to include the Minister's refusal of licensing which is not the case as such a decision of refusal may be appealed against, while the approval of the Minister cannot be appealed against. This fact shall be therefore reflected by a clear wording of the abovementioned article saying that the Minister's decision approving the licensing shall not be appealed.

(ii.) Licensing Category: Legal practice is divided according to the Rolls into four groups: Lawyers under-training, practising lawyers, Cassation Court lawyers and non-practising lawyers.

The first group, lawyers under-training, is intended for new lawyers who have not practised as lawyers or as legal practitioners before. Article 11 of the said Law states:

“Any person who has not practised law prior to the effective date of this Law and who wishes to be engaged in this practice shall, provided he satisfies the conditions set forth in Article 2 hereof, have his name recorded in the list of lawyers under-training.”

Pursuant to the second paragraph of Article 11 of the said act a lawyer under-training shall be required to spend a two-year training period in an office of a practising lawyer who has been practising for at least five years.

However, Article 12 entitles the lawyer under-training to plead in junior courts under the supervision of his instructing lawyer. A lawyer under-training shall as well have the right to appear before the Public Prosecutor, arbitration boards, police departments and the competent judicial and administrative authorities. The provision of this Article is subject to criticism because appearance before arbitration panels and concerned administrative authorities is not less serious than appearing before the law courts. In fact, some of the legal issues at stake before the arbitration boards are sometimes more significant than these being heard by the law courts. Thus, it is essential to review this exception and the requirement that a lawyer under-training’s appearance before such authorities should be under the supervision of the lawyer in whose office he obtains his training.

Pursuant to Article 13 of the aforesaid Law a lawyer under-training may not open an office in his name during his training period. If this rule is violated Article 13 provides

“the Minister of Justice and Islamic Affairs may seek - having heard the lawyer under-training’s testimony - the issue of an order upon a petition to the High Civil Court for the closure of the office and such order shall be final.”

It is noted that closing the office in this case takes place by a court order and the Minister of Justice shall not have the right to directly close the office. This is a

commendable trend in legislation as it provides legal protection for the lawyer against any unfair action in the exercise of authority. Here a guarantee is provided by the law court.

The second category is Practising Lawyers: In order for a lawyer to be included in the Rolls as a practising lawyer he is required to have spent at least two years as a lawyer under-training. The candidate who has completed this period must file an application with the Minister of Justice requesting the transfer of his name to the Rolls of practising lawyers. He shall enclose with his application a list of the cases that he has defended. Article 14 of the Legal Practice Law requires that the Minister of Justice should refer the transfer application to the Rolls Committee. The said Committee may at its discretion ask the lawyer in whose office the applicant was trained for a confidential report giving his opinion on the applicant's efficiency, conduct, duties undertaken and recommendations thereof. The category of practising lawyers shall include those who have spent two years engaged in legal work as this should replace the training period. Anyone who has spent any part of the two years of working in such work shall be given credit therefor.

The Law in the aforesaid Article makes reference of the transfer application to the Rolls Committee mandatory, not voluntary for the Minister. At the same time, Article 16 of the same Law with respect to the application for registration for the first time in the Rolls does not include such obligation as it provides as follows:

“The Minister shall issue a decision for enlistment in the Rolls or for rejection of such applications after seeking the opinion of a commission to be formed for this purpose.”

It may be understood from the aforementioned provisions that a lawyer who has undergone the required two years training period shall submit to the Rolls Committee's competence while a lawyer who has spent the same period doing any other legal work shall not submit to such Committee's competence. This is a discrepancy arising from

the defective provisions which are required to be modified in order to unify and standardise the Rolls procedures.

It is noticed that the said Law exempts the lawyers who have been licensed before the effective date of this Law from the training or practice period and considers them enlisted legally in the Rolls of practising lawyers according to the provision of an Article 16 thereof.

Third Category: Court of Cassation lawyers. The Court of Cassation lawyers are regulated pursuant to Article 3 of the Court of Cassation Law which provides that a Court of Cassation lawyer must be registered in the Rolls of practising lawyers according to the Legal Practice Law in addition to another special condition of being registered for 8 years in the Rolls of practising lawyers. Alternatively, Article 3 of the said Law requires for registration in the Court of Cassation Rolls that a lawyer shall have spent 10 years in a legal practice of a legal nature.

Fourth Category: The Non-Practising Lawyers. This category includes lawyers who fulfil the licensing conditions but do not practise the profession or who carry on activities that cannot be combined with the legal profession. It is possible for a lawyer registered under this category, pursuant to the provision of Article 17 (2), to apply for transferring his name to the Rolls of practising lawyers or lawyers under-training, as the case may be. This category also covers the lawyers who temporarily cease to practise.

(iii.) Licensing Fees: Ministerial Order No.4 of 1981 regulates the fees for registration and renewal in respect of the Rolls as determined by the Order as follows:

A one hundred Bahraini Dinar (BD) fee is charged for application for enlistment in the Rolls.

For annual renewal of enlistment, a twenty BD fee is charged for lawyers under-training or practising lawyers. A ten BD fees is charged to non-practising lawyers.

It is noted that there is a contradiction between the provision of Article 2 of the aforesaid Ministerial Order and the provision of Article 8 of the Legal Practice Law. The second paragraph of Article 8 of the Law provides as follows:

“Lawyers shall annually renew their registration in the Rolls. Non-practising lawyers are exempted from such renewal.”

This contradiction represents a drawback in the legislation that should be remedied to the effect that all lawyers including the non-practising lawyers shall renew their registration and pay this fee.

(iv.) Taking the Legal Oath: This is a procedural obligation provided for in the Legal Practice Law which states:

“ A lawyer who is enlisted in the Rolls shall not practise except after taking the oath before the High Civil Court of Appeal.”

The oath is in the following terms:

“I hereby take the oath in the name of God, The Almighty, to carry out my duties with honesty and integrity and to maintain the secrets of the legal profession and to respect its laws and traditions.”

3.5. Lawyers’ Disciplinary Action

According to Articles 43 and 44 of the Legal Practice Law, any lawyer who commits a breach of the provisions of the Legal Practice Law or who is in default of the obligations of the legal profession or who commits an act which is detrimental to the integrity or traditions of this profession shall be subject to disciplinary action determined by a council to be formed with the membership of the President of the Senior Civil Court as Chairman and four members to be elected by the Minister of

Justice by a Ministerial Order, provided that two of them shall be from judges of the Senior Court and two practising lawyers.

The prosecution authority in the disciplinary proceedings is the Minister of Justice. Article 45 of the Legal Practice Law states:

“Disciplinary proceedings shall be instituted by a petition to be filed by the Minister of Justice and Islamic Affairs.”

It is the customary practice that a complainant files his complaint by a letter sent to the Minister of Justice. The letter will be a petition and will refer the complaint submitted to the Disciplinary Council.

The disciplinary matter is then heard at a sitting behind closed doors to be held at the Senior Civil Court according to Article 46 of the aforesaid Law. Pursuant to the said Article, the Disciplinary Council shall

“have the powers vested in the law court in respect of deliberations, summoning witnesses, failure and abstention from testifying and such other procedures.”

When the award of the Disciplinary Council is delivered, it shall be supported by the reasons for which it has been issued as in the case of any judgement passed in respect of any court case.

Challenging the Disciplinary Council’s award shall take place before the “*Appellate Disciplinary Council*” that shall be chaired by a judge of the High Court of Appeal together with a further four members of whom two shall be judges of the Senior Civil Court and two shall be lawyers. The four members shall be nominated by a resolution of the Minister of Justice, but the Law requires the two lawyers appointed on the Appellate Council to have spent ten years in the legal practice.

The challenge shall be in the form of a complaint filed by the lawyer against the decision in question. The right to challenge shall be exclusively enjoyed by the lawyer

but not by the complainant against him. If the award of the Disciplinary Council is adopted for dismissing the disciplinary proceedings, such award shall be deemed final and may not be appealed against.

The aforesaid provisions governing the disciplinary awards may be summed up in the following:

(i) Limiting the right to challenge the award of the Disciplinary Council to the lawyer in case a verdict is handed down against him but excluding the petitioner (who might have suffered damages by the lawyer's action) prejudices the principle of equality before the law courts since the disciplinary action before the Disciplinary Council is a semi-judicial law-suit that is subject to the rules on judicial proceedings followed in respect of the law-suits as provided for in the said Article 46 previously referred to.

(ii) Vesting the prosecution power in respect of the disciplinary proceedings in the Minister of Justice involves an unnecessary restriction on the right of the complainant against the action of the lawyer who may benefit from the disciplinary award by claiming compensation or such other benefits. It would be more appropriate to give the complainant the right to file a law-suit with the Disciplinary Council should the Minister abstain from referring such law-suit to the Disciplinary Council and to directly file pleas therewith or directly through a lawyer.

(iii) Giving the Minister of Justice the power to nominate members of the Lawyers' Disciplinary Council is a breach of customary judicial practices as the lawyers' associations should elect members of the professional boards including disciplinary panels or at least should take part in the selection process. This is a legislative drawback which is due to the lack of proper professional representation of the lawyers. This issue has been subject to much discussion and investigation between the Ministry of Justice and the Bahrain Bar Society.

3.6. Bahrain Bar Society

On 11th March 1974 fourteen Bahraini lawyers (a majority of licensed lawyers at that time) held a constituent meeting for the proposed “*Bahrain Bar Association*” and elected six from within the group to draw up the Association’s Constitution.¹ Upon reviewing the file of the establishment of the Bahrain Bar Association, which is kept at the premises of the Bahrain Bar Society, it becomes clear that the Constitution which was prepared by a resolution of the meeting of the founder members (copies thereof are available in the file) was submitted to the concerned authorities in the State of Bahrain. The text of that draft Constitution contained the provisions and clauses that give the proposed structure the quality of a professional trade union. The file also contains a draft legal practice law that seems to have been prepared by the founders of the Bahrain Bar Association and was attached to the draft trade union’s Constitution. It provided for rules confirming that the Bar Association should have the power of overseeing the advocates profession and organisation thereof including the licensing, disciplinary and dismissal powers.²

The aforesaid file contains a letter from the Minister of State for Legal Affairs addressed to the Minister of Labour and Social Affairs in which the Minister of State for Legal Affairs expresses his opinion to the Minister of Labour and Social Affairs with respect to the draft Constitution of the Bahrain Bar Association. After explaining the nature of the proposed powers of the proposed Association, the Minister of State for Legal Affairs concludes as follows:

“It is not permitted to license the establishment of the Bar Association according to the proposed legal structure except by a law, Amiri Decree or at least pursuant to a law regulating the Professional Legal Practice, hence from the provisions of the law we can understand the source of public authority and limits as given by the lawmaker to the association. Therefore, we feel that it would be better to wait in licensing the establishment of the association pending the promulgation of a law governing the practice of advocacy or to request the persons who submitted the proposed Internal Regulations of the Association to

¹ Application for Licences file - Bahrain Bar Society Records. See Minutes of Foundation Meetings of Bahrain Bar Society.
² Ibid.

*make the necessary amendments in compliance with the Bahrain Law of Licensing Societies and Clubs, 1959. They should also be guided by the regulations of each of the Medical, Engineers and Accountants Societies who have been licensed by the Ministry of Labour and Social Affairs”.*¹

What then occurred was that the founders of the Bahrain Bar Association gave their approval to a change of name, upon the recommendation of the Minister of Justice, to become a society instead of a trade union while maintaining the same draft Constitution.²

In spite of the difficulty in following up correspondence in the files of the Bahrain Bar Society because of the numerous letters that are not properly classified, it is understood from them that the founders subsequently agreed to amend the Society’s Constitution to comply with the aforesaid Law of Societies and Clubs. So a licence was issued to the Bahrain Bar Society in accordance with its Constitution approved by the Minister of Labour and Social Affairs’ Resolution No. 16/1977.³ The said Constitution remained until it was amended in the year 1989. It was amended pursuant to Legislative Decree No. 21/1989 with respect to Societies and Clubs that replaced the Law of Societies and Clubs 1959 hereinabove referred to in the opinion of the Minister of State for Legal Affairs.⁴

In spite of the limited powers enjoyed by the Bahrain Bar Society (BBS) according to its licence and the non-obligatory nature of its membership, the BBS has an active professional history of dealing with the government and private authorities and organisations as well as professional institutions as a representative of Bahraini lawyers and sponsor of the legal profession. The BBS is a member of the Arab Lawyers Federation and International Bar Association (IBA).⁵

The BBS has a pioneering role in defending and developing the profession. Its files and records abound in the correspondence and reports reflecting its effective and

¹ Ibid. Letter No. 227/76 dated 8.6.1976.

² Questionnaires with the Founder Members Mr. Ali Al Ayubi, Mr. Khalil Adeeb and Mr. Abdul Ghani Hamza.

³ Official Gazette No. 1242 dated 25/8/77.

⁴ Ministerial Resolution No. 61/91; Official Gazette No. 1984 dated 4/12/91.

⁵ Institution and Internal Regulation File - Bahrain Bar Society Records.

outstanding efforts. An example is the letter addressed from the BBS President to the Minister of Justice in September 1981 with respect to proposals for amending certain litigation procedure. There is also the Memorandum dated 5th August 1982 from the BBS President to the Arab Lawyers Union concerning the needs of the reforms in the Professional Practice Law demanding more independence of the Practice. Also cited is the Memorandum sent by the BBS to the Minister of Justice dated 8th of June 1988 concerning the requirement to organise the practice of foreign lawyers and requesting the restriction of their practice to the foreign laws (offshore practice). Also worthy of note are the letters (in a unified form) dated 5th May 1984 addressed to local professional associations and organisations warning them against dealing with unlicensed lawyers and the risks which may occur from following the advice of such lawyers.¹

At any rate, the BBS legal status is subject to criticism because of being regulated as a professional organisation by the law governing societies that provide social services with specific objects of providing charitable and social services. The Societies and Clubs Law aims at organisation and supervision of social and cultural societies and clubs and public organisations in the field of youth and sports. Therefore, they are under the supervision of the Minister of Labour and Social Affairs in his capacity as the Minister concerned with social welfare. The Law states:

“The Minister of Labour and Social Affairs shall be deemed as the Minister concerned with the affairs of societies in general, hostels, cultural and social clubs of foreign communities or which are established by private organisations.”²

Needless to say this is an intervention from the executive authority in supervising an institution that is part of the judicial authority.

¹ Local and Foreign Correspondence file - Bahrain Bar Society Records.
² Article 5 of Legislative Decree No. 21/89.

This criticism leads to criticising yet another form of the intervention of the executive authority which is the fact that the legal practice affairs, which are of a professional nature that must be subject to the authority of the law courts, remain governed by the executive authority represented by the Minister of Justice in terms of licensing, control and disciplinary matters. In this context, Article 6 of the Legal Practice Law provides as follows:

“Applications for enlistment in the Rolls shall be submitted to the Minister of Justice and Islamic Affairs accompanied by such documents as shall be prescribed by an order therefrom. The Minister shall issue orders for enlistment in the Rolls or for rejection of such applications after seeking the opinion of a commission to be formed for this purpose. The Minister shall determine its terms of reference and it shall be known as the Rolls Committee.”

Further, Article 44 of the Legal Practice Law also provides that

“disciplinary action against lawyers shall be conducted by a commission to be chaired by the President of the Senior Civil Court and shall have the membership of two Senior Court judges and two practising lawyers who shall be appointed by a resolution to be issued by the Minister of Justice and Islamic Affairs.”

Article 45 of the same Law provides that disciplinary proceedings shall be instituted by a petition to be filed by the Minister of Justice and Islamic Affairs.

It is noted from the above provisions that there is a direct intervention by the executive authority, represented by the Minister of Labour and Social Affairs and Minister of Justice and Islamic Affairs, in licensing lawyers, disciplinary matters and supervising their institutions that are deemed part of the judicial system. It would have been more appropriate for this organisation to be independent and under the control of the judiciary through the legislation governing the Bar Society as an independent syndicate overseeing the lawyers' affairs as is the case in all countries that adopt the principle of the separation of powers. Such independence is also required by the Basic Principles of the Rule of Lawyers issued by the United Nations. Article 24 thereof provides as follows:

“Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity.”¹

4. Experts

Article 48 of the Judicial Law provides that

“the Court may appoint experts to seek their advice concerning the cases being heard and the Court shall determine the expert’s remuneration. Both experts and litigants shall have the right to contest such determination before the same court.”

The activities of experts as may be needed by the law courts are regulated by Part IX of the Judicial Law and partially Article 132 and the articles of Legislative Decree No. 14 of 1996 with respect to Promulgating the Law of Evidence in Civil and Commercial Matters (Law of Evidence). Article 132 provides that *“the Court may where necessary order one of three experts to be appointed etc...”* It seems from the provision of Article 133 that the power to appoint an expert vested in the Court is only exercised where the litigants do not agree on a particular expert. However, if the litigants agree on a certain expert or three experts, the Court shall accept their agreement. Apart from the above, the Court shall elect the experts from the list of experts recognised to act before it unless it delivers a ruling providing otherwise for special circumstances in which case such circumstances shall be set out in its verdict.

The words *“from the list of experts recognised to act before it”* indicate that those who are admitted to act before the law courts are those experts who are enlisted in the Experts Roll provided for in Article 136 of the Law of Evidence which provides as follows: *“If the expert’s name is not listed in the Experts Roll, he shall take an oath before the Court that has appointed him.....”* The provisions of Articles 133 and 136 lead to the understanding that the experts admitted to act before the law courts are

¹ Basic Principles of the Role of Lawyers. Eighth United Nations Congress on Prevention of Crime and Treatment of Offenders, 27th August to 7th September 1990, UN Doc. A/COWF 144/28/Rev. 1.

those who are included in the Experts Roll, but if there is not a competent expert to undertake the assignment required by the Court, it may elect from experts who are not listed in the Rolls. In this case, the chosen expert will have to take the oath given that the registered experts have already taken, which is the oath according to the Law Governing the Experts Roll enacted by Legislative Decree No. 30 of 1995.

The provisions concerning experts under the Law of Evidence and the Experts Roll Law include the following:

(i) The Parties may mutually agree on the expert's appointment. However, attention should be drawn here to the fact that in spite of the agreement to choose an expert, this does not mean that the parties shall be bound by the outcome of his investigation or opinion that he reaches. This principle does not mean turning the expert's assignment into an arbitration between the Parties but his opinion shall remain of an advisory nature to the court and the litigants may challenge it before the Court. In addition, the Court is empowered to endorse his opinion or to dismiss it. *"The expert's opinion shall not be binding upon the Court."*¹

(ii) The expert shall assume special responsibility towards the Court if he does not carry out his assignment as Article 137 of the Law of Evidence allows the Court to

"compel him to pay all the expenses which caused the unproductive spending thereof and to pay compensations where this is relevant without prejudice to inflicting disciplinary measures against him."

The Experts Roll Law includes in Article 11 thereof disciplinary penalties against the expert that include a warning and striking off of his name from the Roll.

(iii) Every interested party may challenge the expert if the grounds for challenge are fulfilled. These include acting in a prejudicial manner in the performance of his duties, or if he is related to the litigant up to the fourth degree or if he is an agent of a litigant

¹ Court of Cassation judgments in Cassation No. 2/1991, 28th April 1991 and 51/1995, 4th June 1995.

in his private business, a guardian or custodian working with one of the litigants or if he or his spouse has an existing litigation with one of the parties to the case or his/her spouse unless such litigation has arisen after appointment of the expert. Nevertheless, an expert shall not be challenged if he is appointed upon the mutual agreement of the parties unless the ground for the challenge has arisen after the appointment (Article 138).

(iv) An expert shall proceed with the mandate within no more than 15 days from the date of notifying him of his appointment by calling the parties to a meeting by registered letters to be sent to them at least 7 days before commencement of the mandate advising them of the venue of the first meeting, date and time in the normal cases. In case of urgency, the Court may instruct the expert to proceed with the mandate within 3 days from the date of notifying him of the appointment. In this case, he shall give notice to the litigants concerning the first meeting within 24 hours (Article 34). Failure to give notice to the litigants shall result in invalidating the expert's assignment.

(v) The expert's report must contain minutes showing the litigants' attendance, their statements and comments signed by them. If they contest the above, this shall be recorded in the minutes. In addition, the report shall contain a statement of the expert's activities and statements of the persons whom he has interviewed of his own initiative or at the request of the litigants. The expert shall submit a report containing an analysis of his activities, views and the grounds upon which he has relied (Article 142).

(vi) The expert's report shall be subject to discussion before the Court or by the litigants according to the provision of Article 150 of the Law of Evidence.

(vii) The expert's fees and expenses shall be assessed by an order of the Court and the expert and litigants shall be entitled to complain against such assessment.

5. Public Prosecutor

Article 43 of the Judicial Law states as follows:

“The Public Prosecutor or whoever represents him shall carry out before the law courts all the powers vested in him under the provisions of the applicable laws.”

This includes the Public Prosecutor as one of the members of the judiciary according to the provision of this Article has a very significant implication. The lawmaker has deliberately intended to make the Public Prosecutor one of the judicial organs considering that the Public Prosecutor is a standing judicial authority.

Article 101 (c) of the Constitution states as follows:

“The law shall specify the rules for public prosecution, rendering of legal opinions, drafting of legislation and representation of the State before the courts and before those who are engaged in such matters.”

It is understood from this Constitutional provision that the Constitution has created an obligation to introduce a law governing public prosecution as is the case with legal systems such as Egypt and Kuwait. They are the two legal systems followed by Bahrain in its legislation and legal systems. Although the Constitution was issued more than 27 years ago, the public prosecution law has not yet been enacted.

Contrary to the Constitution and to the lawmaker’s policy in the Judicial Law as explained earlier, the Public Prosecution that represents the public interest in criminal cases is undertaken by the Public Prosecution Directorate at the Ministry of the Interior. The said Directorate is an integral part of the Interior Ministry’s structure.¹

¹ Amiri Decree No. 29/1996 in connection with the reorganisation of the Ministry of the Interior.

This situation is subject to much criticism as it mixes the duties of the Public prosecution with the work of the security investigation authority, hence creating a defective interference between different authorities and causing a conflict with the independence of the judicial authority from the executive authority. Indeed, the duties of the Public Prosecution are of a judicial nature governed by Article 101 of the Constitution since its organisation is regulated by Chapter 4 entitled “*Judicial Power*” while the various bodies of the Ministry of the Interior are an integral part of the executive power.

The question of organising the Public Prosecution has been subject to the concern of all parties involved in the legal practice since independence and creation of the State of Bahrain. The Minister of Justice in the post-independence era, Shaikh Isa Bin Mohammed Al Khalifa, led those who demanded the establishment of the Public Prosecution and introducing for it a separate law to enable it to be independent from the Interior Ministry’s investigation authority.¹ This issue is one of the priorities of those calling for reform and development of Bahrain’s judicial system.

6. The Supreme Judicial Council

Chapter Five, Articles 44 to 53 of the Judiciary Law which is amended by Legislative Decree No. 19 of 2000, organizes the provisions related to the Formation and Organization of the Supreme Judicial Council, referred to in this section as the “Council” and the powers vested thereto in relation to administration and supervision of the judicial authority.

6.1 Constitution of the Council

The President of the Court of Cassation is the Chairman of the Supreme Judicial Council, ex-lege. In the absence of the President of the Council the President of the

¹ Personal interview with Mr. Shaikh Isa Bin Mohammed Al-Khalifa.

High Civil Court of Appeal shall act for him. The Council comprises, in addition to its President, of the following members:

1. The President of the High Court of Appeal;
2. The most senior Puisne-Justices of the High Civil Court of Appeal;
3. The President of the High Shariaa Court of Appeal-Sunni Department;
4. The President of the High Shariaa Court of Appeal-Jaffari Department; and
5. The President of the Senior Civil Court.

6.2 Powers and Authority of the Council

According to Articles 45 and 46 of the Judiciary Law, the powers and functions of the Supreme Judicial Council are as follows:

- (i.) Ensuring the smooth running of business at courts and other related bodies and putting forward suggestions for this purpose.
- (ii.) Supervising judges' affairs.
- (iii.) Vetting nominations submitted by the Minister of judges and judicial appointments.
- (iv.) Giving opinion on judicial draft legislation.
- (v.) Conducting inspection on the judges' affairs at least once a year for the purpose of appraising their performance. The Law classifies judges' appraisal into:
 - (a.) efficient
 - (b.) above average
 - (c.) average
 - (d.) below average.

The Council is also empowered to conduct a spot and expeditious individual inspection on a certain judge and hears and investigates complaints against him, if it decides that such complaints are serious to warrant investigation.

Whether the Council's report issued against the judge is a result of the annual inspection or of an unexpected and expeditious inspection, the judge may obtain a copy thereof and examine it, and he has the right to submit a grievance against the resolution before the Council itself. However, the Council's decision in respect of the grievance is considered conclusive and final.

6.3 Implementation of the Council's Resolution

Article 52 of the Judiciary Law provides that *“the resolutions of the Supreme Judiciary Council shall be submitted to the Minister of Justice and Islamic Affairs to take the necessary measures he deems fit to implement them.”*

However, the provision of this Article raises questions on the effectiveness of validity of the Council's resolutions, because the phrase *“to take the necessary measures he deems fit to implement them”* is open for many interpretations, as it is loose and may cause slow implementation of the resolutions, since this leads to the Minister dominating on the Council's resolutions by having the discretion of taking the necessary measures he deems fit to implement such resolutions.

The Law is still new, and as such has not been put to the practical test, the practical interpretation of the Law will be clear through its practical application. However, I believe that this provision is fraught with defects and gives rise to many interpretations, which may lead to an overlapping between the functions of the judicial and the executive authorities, which may affect their independence of each other.

I believe that an alternative provision for this phrase, which is more accurate and suitable, would be the following:

“The resolutions of the Supreme Judiciary Council shall be referred to the Minister of Justice and Islamic Affairs to enforce them.”

7. Courts Administrative and Clerical Staff¹

7.1. The Directorate of Courts looks after the Courts affairs through its main different section as follows:

(i.) The Case Receiving Section: which daily receives and register cases lodged by plaintiffs, numbering such cases and transferring them to the Court Secretariat Section.

(ii.) The Court Secretariat Section: which includes the Court Secretaries who attend the hearings of the Courts, record their hearings and maintain the running cases files. This section also is competent to submit the cases transferred to it by the Case Receiving Section to the relative president of the competent Court to appoint the department before which the case is to be heard and carry out such appointment.

(iii.) Service of Process Section: which sends summons and notices to the parties of litigation.

(iv.) The Public Registrar: who is appointed by the Minister of Justice pursuant to Article 49 of the Judicial Law. The Public Registrar’s job objective is: *“to collect the legal costs and fines and receive deposits under the supervision of the Court Directorate”*.

(v.) The Execution Section: which is competent to maintain the records of applications of execution of judgments, follow up, carrying out the orders and decrees of the execution judges.

(vi.) The Filing Section: which keeps and maintains the closed files after the final judgment in the case is issued and the execution proceedings have been finalized or exhausted.

¹ No written job description. This was explained to me in an interview with the Director of Courts Administration Directorate.

(vii.) The Computer Section: In addition to the manual filing of records, the Ministry of Justice maintains an advanced computer system. The Courts Directorate, through the Computer Section devoted to it, maintains records of dates of hearing, Court orders, decisions and judgments and other necessary information of each case. Such information may not include the daily exchanged submission of parties.

7.2. There are no specific educational requirement for the Directorate's personnel. However, competence and qualifications are decided according to the requirement of each particular job. Practical professional training is adopted to qualify personnel before they are given any job in the Directorate. Currently the Directorate is studying the establishment of a specific vocational programme which a candidate would have to pass before his appointment in the Directorate.

Chapter 10

ARBITRATION

Arbitration in Bahrain is either local or international. Local arbitration covers all the civil and commercial disputes which take place locally. International arbitration is limited to commercial matters of an international nature. Rules of local arbitration are governed by Articles 233 to 243 of Chapter VII of the Civil and Commercial Procedures Law (“CCPL”). Rules of international arbitration are governed by the International Commercial Arbitration Law enacted by Legislative Decree No. 9 of 1994, mainly based upon the UNCITRAL Rules.

Arbitration is a voluntary method of reaching a settlement between parties to a dispute involving their agreement to use an alternative private procedure instead of the State’s Court system. Their agreement includes agreeing on nominating the persons to undertake settlement of the dispute. However, arbitration in Bahrain involves some forms of obligatory arbitration where the parties are obliged to resort to arbitration.

Arbitration is either ad hoc or institutional. Ad hoc arbitration is when parties to a dispute elect the persons to act as arbitrators when a dispute arises between them. The agreement on election of such arbitrators may be agreed in the form of an arbitration clause in a contract or may be agreed by an arbitration agreement concluded at the time when the dispute arises between them. Institutional arbitration is when the parties agree that a particular arbitration institute rules will govern their dispute. Both kinds of arbitration are recognized by law and practice in Bahrain.

This Chapter will be divided into the following Sections:

- Section One: Local Arbitration.
- Section Two: International Commercial Arbitration.
- Section Three: Compulsory Arbitration.

Section One: Local Arbitration

Local Arbitration may apply to all civil and commercial disputes but does not include criminal or personal status matters. This is because the relevant arbitration provisions are part and parcel of the CCPL which is devoted to civil and commercial disputes.

Part VII of the CCPL, which provides for local arbitration, will be dealt with in the following subsections:

- First: The Arbitration Contract
- Second: Persons Acting As Arbitrators.
- Third: The Arbitration Proceedings.
- Fourth: The Arbitration Award.

First: The Arbitration Contract

I. Conclusion of an Arbitration Contract

An arbitration is a consensual agreement similar to any other contract and must fulfil the usual objective contractual conditions. Mutual consensus must be available along with the legal qualification of the contracting parties. There must be acceptance of the resolving of the issue subject to the contract and the agreement must have a valid cause. In order to be legally valid, an agreement must also fulfil the procedural conditions, where the law requires that such conditions be fulfilled.

Objective Conditions

(i) Legal Capacity

Every person who is legally capable of disposing of his rights may become a party to an arbitration agreement. In this context, the provision of Article 233 of the CCPL states: “*Arbitration is only permissible for those capable of disposing of their rights.*”

Article 13 of the Contract Law of 1969 deals with the legal qualification of contracting parties by providing as follows: *“Every person is capable to contract who is of the age of maturity and who is of sound mind, and is not disqualified from contracting.”* Accordingly, every normal person who is of sound mind and has reached the legal age without being subject to any condition of disqualification shall be competent to enter into an arbitration agreement.

It should be noted that the legal age is 21 calendar years of age, according to the provision of Article 13 of the Law of Trusteeship on Minor’s Funds (Decree No. 7 of 1986).

Corporate entities may enter into arbitration agreements when represented by the natural persons empowered by the law to exercise contractual authority on behalf of a legal or corporate entity. For example, a commercial company with limited liability is represented by the manager who is mentioned in the Memorandum of Association or by the person designed by the General Assembly of the Partners according to the provision of Article 231 of the Commercial Companies Law. A joint stock company is represented by its Chairman of the Board of Directors either personally or jointly with another person if provided for in its Articles of Association or if the Board of Directors authorizes another person to act jointly with the Chairman pursuant to the provision of Article 155 of the Commercial Companies Law. Social societies are represented by their executive committees or by the persons designated for this purpose by the said committee according to Articles 44 and 48 of Legislative Decree No. 22 of 1989 with respect to promulgating the Law of Social and Cultural Societies and Clubs and Organizations in the Field of Youth and Sport or Special Organizations (hereafter referred to as the “Societies Law”). Article 44 generalizes the power of representation by vesting it in all members of the Executive Committee unless the Committee nominates a particular representative. It might have been more appropriate to provide for the vesting of the power of representation in the Executive Committee Chairman unless the Committee nominates another person to represent the society.

Likewise, government agencies and official organizations may enter into arbitration agreements through their representatives who are given such authority by law¹.

A natural or corporate person may delegate the power to enter into an agreement to an attorney legally appointed by him. However a question arises about the validity of an agreement entered into by a minor or a legally disqualified person or persons unable to enter into an arbitration in the case when it is concluded through such person's custodian or legal representative. The proper opinion in this respect is that it is possible to make such agreement through a guardian or custodian by permission from the Council of Trusteeship over Minors' Properties (the "Council")² according to the provisions of the Law of Trusteeship on Minors' Funds as Article 14 provides that a custodian shall assume the care, management and disposal of minors' funds subject to the provisions of the Law. Article 18 provides:

"A trustee shall not perform the following acts without the permission of the Council:

- (1) Disposing of a minor's property, commercial business or securities. The Council shall not refuse granting the permission unless the conveyance in question puts the minor's funds in jeopardy or involves injustice in excess of one fifth of the value thereof.*
- (2) Disposing of the funds devolved upon a minor by way of inheritance should the legator require the legatee not to dispose of such funds.*
- (3) Lending a minor's funds or any borrowing made by him.*
- 4) Leasing a minor's property for a period of more than two years.*
- (5) Accepting or rejecting a donation or will in favour of the minor if it is encumbered by certain obligations.*
- (6) Granting a mortgage over a minor's property or making a donation involving the said property."*

¹ Arbitration Case No. 2 /97.

² The Council for Trusteeship on Minors' Properties is formed under the Chairmanship of the Minister of Justice and eight members appointed by the Prime Minister pursuant to Article 1 of the Law of Trusteeship on Minors' Funds.

Consequently, it is not permitted for the issue of an arbitration to be related to any of the above matters where a custodian may not act without the Council's permission.

Article 30 of the abovementioned law gives details of the disposals that a minor's guardian may not carry out without permission from the Council. Article 30 (3) provides that a minor may not enter into conciliation or arbitration without permission, except for acts relating to management activities.¹

Arbitration contracts shall be subject to the general provisions regulating contracts for legally incapable persons. If the act involving the conclusion of a contract is beneficial to a disqualified person, it shall be valid and effective but if it is detrimental, it shall be invalid. However, if it has both benefit and detriment, it shall be deemed voidable.²

(ii.) Subject Matter

It is generally agreed that in order for a contract to be valid, the subject matter shall be feasible, easily defined and lawful.

According to the Bahrain law, an arbitration contract should have two special requirements: the first is that the subject matter "*can be dealt with*" in the agreement which means that it has to be possible to be agreed upon and the second is that it can be specified:

a) The subject matter of the arbitration contract is possible to be agreed upon:

The Law requires that the subject matter of arbitration shall be subject to conciliation by agreement. If the subject matter of the contract is not capable of a conciliation, this renders an arbitration agreement null and void. Article 233, Paragraph 4, of the CCPL states as follows: "*Arbitration is not permissible in matters in which conciliation is not allowed.*"

¹ See judgment in Cassation No. 275 hearing 16/2/1971. The Collection of judgment of the Technical Bureau page 179 (issue year No. 22 Vol. 1.) In this respect the Egyptian Court of Cassation stated that "*The disposals which a guardian of a minor may not practice except by a competent court's approval include arbitration.*"

² Abdul Baqi A.F. *Nadryat Al Aaqd wal-Iradah Al-Munfaridah* p. 267.

The Bahrain law does not however have any provision that specifies the subject matter in which conciliation cannot be reached. There are however, diverse jurisprudential opinions in this regard. There is a school of thought that favours reference to the Islamic Sharia in pursuance of the provision of Section 3 of the Judicial Law.¹ This school limits the possible subject matter including such things as penalties and public interest.² There is another trend of jurisprudence that wants to include matters that cannot be subject to conciliation by their very nature such as issues of civil status, legal qualification, interdiction, criminal matters and matters relating to public order.³

In my view the latter school is the better approach because matters which can be conciliated on or be agreed upon including such matters relating to labour disputes are subject to conciliation, thus they are subject to arbitration.

b) The subject must be specified:

The provision of Article 233 (3) of the CCPL states that

“the issue of the dispute must be specified in the arbitration agreement or in the course of proceedings, even where the arbitrators are authorised to bring about conciliation, otherwise the arbitration shall be invalid.”

In the first case, this relates to a special arbitration agreement called by the CCPL in Article 233 (1), the *“special arbitration deed”*. The arbitration deed must include all the elements of the subject matter of the issue in dispute.

In the second case an agreement to resort to arbitration prior to the occurrence of the dispute exists. This takes the form of an arbitration clause that is included in an original contract such as a construction contract, insurance agreement, sale agreement or such contract. In this case, the reference to arbitration is well known in advance.

¹ See Chapter 7 of this thesis.

² Al Khuli Aktham, A paper on Arbitration in the State of Qatar and State of Bahrain.

³ Al Ahdab A.H., *Arbitration in the Arab States* p. 222.

Two scenarios are then possible. The parties may agree on an arbitration document determining the names of arbitrators, detailing the issue of the dispute, counter claims and such other elements of the arbitration which is then commenced , or secondly, one of the parties to the agreement refuses to submit to arbitration, forcing the other party to refer to the courts to enforce the arbitration clause pursuant to the provision of Article 235 of the CCPL which states:

“If a dispute arises and the litigants have not agreed on the arbitrators, the Court originally vested with jurisdiction to examine the dispute shall appoint the necessary arbitrators at the request of the party concerned with expediting the matter, in the presence of the other litigant or with him absent, having been summoned to attend. The decision given in this respect may not be challenged nor appealed against.”

In this event, it is possible for the parties to present the details of the issue of the dispute and mutual claims in the course of proceedings according to the aforesaid Article 235.

c) The subject matter of time is a matter of controversy:

There has been a great deal of controversy over the admissibility of agreeing on the time limits for challenging arbitration awards contrary to the provisions of the CCPL. Some people hold the view that such agreement is permitted. This viewpoint maintains that in view of the contractual nature of the arbitration contract that it is subject to the will of the parties seeking arbitration. According to this point of view, the legislator has intended to consider the time limit fixed for contesting arbitration awards as a regulatory rule which the litigants may agree to the contrary. This is also supported by the provision of Article 237 (2) of the CCPL which states as follows:

“The award of the arbitrators shall be based on the principles of law, unless they are authorised to bring about conciliation, in which case they are not bound by these principles.”

The other viewpoint that is opposed to the first opinion maintains that in spite of the contractual nature of arbitration as it is the outcome of the litigants' will, the award of the arbitrators is considered as an ordinary judgement upon which the basic rules applicable to general Court judgements shall apply unless the law requires the application of certain rules that must be complied with. The Court of Cassation has upheld the second opinion by establishing that:

“while Article 242 of the CCPL provides for the admissibility of challenging an arbitration award before the competent Court of Appeal according to the rules prescribed for appealing against court judgements within 30 days from the date of serving notice with respect to the deposit of the arbitration award, such time limit compares with the case of judgements handed down by the law courts which is of a public order nature, hence the litigants may not agree otherwise.”¹

(iii.) Cause

This reflects the legality of the agreement's object which is considered, in Arab jurisprudence, a vital element of the contract that is independent from the legal nature of the obligations. It is defined by such jurisprudence as the intended object sought by the obligor by agreeing to comply with such obligation. In other words, it is the purpose intended to be realised as a result of undertaking to comply with an obligation. When a debtor accepts to assume a certain obligation, he does that for a certain purpose that he seeks to achieve.

“A seller, for example, agrees to assume an obligation to transfer title to the sold item to the buyer and to deliver it thereto in order to receive the price thereof which the latter is obliged to pay thereto. Accordingly, the cause for the seller's obligation is the obligation of the buyer to pay the price.”²

It can be said that the legality of cause in an arbitration clause requires that the obligations or rights that may be determined by the arbitration award must be legitimate.

¹ Cassation No. 45 of the year 1992, Judgements of the Court of Cassation, year 3/92 p. 229.

² Abdul Baqi A.F. Ibid. p. 428; See also Al Sanhoury A.R. *Alwaseet Fi Al Qanun Al Madani* Third Edition Vol. 1 p. 584.

Considering that the ultimate purpose of any arbitration agreement is to resolve an existing dispute, it can be concluded that an arbitration agreement is always based upon a cause that is presumably legitimate or the legitimacy thereof exists on the basis of this assumption without the need for further investigation. The legitimacy of the purpose to resolve a dispute cannot be doubted so long as the legitimacy of the disputed deal already exists.

Procedural Conditions

Article 233 (2) of the CCPL provides that “*agreement on arbitration shall be valid only if it is made in writing.*”

This provision raises a great deal of controversy amongst legal practitioners. One opinion maintains that the written nature of the agreement is a precondition for validity of the arbitration agreement so that nothing can replace a written document, not even an admission or a decisive oath. Another opinion maintains that an arbitration agreement can be evidenced by admission.¹ It should be accepted that the arbitration agreement may be substantiated by any means of evidence just as in the case with other contracts.

II. Arbitration Agreement’s Effects

One of the most significant effects arising from concluding an arbitration agreement, whether in the form of an arbitration clause in a certain contract or an arbitration agreement in the form of a separate document, is the forfeiture of the right of its parties to seek resort to the State Courts. In this manner, the State Courts cease to have jurisdiction to examine the dispute subject to the arbitration agreement. Bahrain law is quite clear in this respect, as Article 236 of the CCPL states:

“The litigants shall, in consequence of the arbitration clause, relinquish their rights of recourse to the Court originally given jurisdiction to examine the dispute.”

¹ Al-Khuli A. Ibid.

The provision of Article 236 (2) indicates that if a dispute arises concerning the execution of a contract containing an arbitration clause and one of the parties thereto commences proceedings in the competent Court, the other party may contest such proceedings by means of a plea for the case not to be heard and for recourse to the arbitration clause to be enforced.

(i.) Jurisdiction on Provisional and Precautionary Matters

The Summary Proceedings Court judge, who is part of the State's legal system, has jurisdiction to rule in respect of provisional and precautionary matters relating to arbitration.

The CCPL provides in Article 9 as follows:

“The Courts of Bahrain shall have competence to make provisional or precautionary orders to have effect in Bahrain, even where there is no competence to hear the original action.”

According to this provision, Bahrain Courts have jurisdiction to hear provisional and precautionary matters where Courts other than the Bahrain Courts have international jurisdiction to examine the dispute. It is more appropriate - by analogy - to say that such Courts should have the jurisdiction on the case of an arbitration agreement. In this connection, the Bahrain Courts have resolved this issue by ruling that

*“the Bahrain Courts have jurisdiction to examine provisional and precautionary matters even though the jurisdiction to hear the issue of the dispute is given to the arbitration board.”*¹

This attitude is accepted where there is no agreement with respect to the exclusive jurisdiction of the arbitrator to hear summary and provisional matters. The arbitration agreement in this case should be limited to resolving “*the subject matter of arbitration*”, hence the matter delegated to the arbitrator shall be solely the resolution

¹ See the judgment in Summary Case No. 115/90. The Court of Urgent Matters in this case assumed jurisdiction in the temporary precautionary proceedings despite the existence of the arbitration clause governing substantial disputes.

of the dispute, unlike the basic rule for the jurisdiction of the State Courts. Accordingly, where there is no agreement on deviating from the basic rule in respect of deciding upon summary and provisional matters, the State Courts continue to enjoy their jurisdiction.

The question remains, however, as to an express agreement in the arbitration contract in respect of the arbitrator's competence to deal with provisional and precautionary matters. Will the State Courts have jurisdiction in view of this provision? Some jurists maintain that the jurisdiction should be shared between the arbitrator and the Summary Proceedings Court judge. But such jurisdiction will not be relevant in respect of provisional matters and payment orders issued by an ex parte petition in the absence of a litigant. In the latter case, the State Courts will continue to be competent because of the fact that one of the parties has not presented its defence to the court.¹

The more appropriate view, whether or not it is agreed in the arbitration agreement to the arbitrator's jurisdiction to deal with urgent and provisional matters, is that the arbitrator has the competence to hear and decide upon such matters making them beyond the normal scope of the Courts once arbitration proceedings have commenced. This is because summary awards and provisional orders are directly linked to the disputed right and affect it. What is the benefit, for example, of an award handed down by an arbitrator compelling a ship owner to pay a certain sum of money when the arbitrator is unable to arrest such a vessel? What is the benefit of an arbitrator ruling to oblige a certain person to pay a sum of money after having left the country while he is unable to ban him from travelling outside the country?

The provision of the first paragraph of Article 236 of the CCPL is very explicit and comprehensive as it states:

“The litigants shall, in consequence of the arbitration clause, relinquish their rights of recourse to the Court originally given jurisdiction to examine the dispute.”

¹ Attiah A.A.F. *Qanun Al Tahkim Al-Kuwaiti*, p. 170.

In addition, Article 240 of the same Law expressly mentions other verdicts apart from the arbitrators' final award. It stipulates:

“All awards made by the arbitrators, even if made by way of investigation, must be lodged together with the original arbitration agreement, at the office of the Clerk of the Court originally given jurisdiction to hear the case”

It is understood from this provision that the arbitrators are empowered to hand down various verdicts without their being specified, including verdicts for carrying out investigation procedures.

In my opinion, an arbitrator's power in respect of summary and provisional matters shall start to be exercised following the commencement of the arbitration proceedings and the filing of the petitions with the arbitrator. Prior to this stage, exclusive jurisdiction shall remain with the State Courts. If the case is filed with the arbitrator, the latter may review the verdict of the summary proceedings Court judge, and may cancel or modify it in the same manner followed by the substantive Court judge. Any other opinion could pave the way for conflicting judgements between the State Court and the arbitrator and would render ineffective the object from appointment of arbitrators for resolving disputes through arbitration. This opinion however is not supported by a judgement of the Court of Cassation.

(ii.) Prescription and Interruption

In court litigation it is acknowledged that the right to commence a legal action ends after the lapse of a certain period of time. If the period expires without the filing of a law-suit, then the right to bring an action in court ends and prescription applies.¹

¹ Article 87 of the Law of Commerce provides that *“In commercial matters obligations of traders concerning their business activities towards each other shall lapse after ten years from the date on which performance of an obligation falls due save where the Law provides for a shorter period.”* Proclamation No. 46/1347 h provides that: *“The period for hearing cases in Bahrain Courts is ten years.”*

In order to determine the time during which a prescription period is possible, it is essential to determine when certain legal acts have commenced. Proceedings are considered to have commenced in respect of a court case upon the lodging of a statement of claim with the Court Clerks Department, even though the Court has no jurisdiction to hear the dispute.¹ This act will end or interrupt the period. Other acts may interrupt the prescription period and the question is whether asking a party to start arbitration proceedings or asking a court to appoint an arbitrator will be an act which will interrupt the prescription period in this way.

There is no disagreement in jurisprudence that the actual commencement of arbitration proceedings is tantamount to filing a Court claim and acts to interrupt prescription. However, disagreement exists in respect of the point at which commencement of arbitration can be said to occur. Some jurists say that proceedings before the arbitrators only commence from the date of referring the dispute to the arbitration forum, hence the prescription period is only then interrupted.² Others maintain that arbitration proceedings start upon the serving of the summons by the arbitrators to the litigants or by one party of the litigants to the other side of the litigants and the arbitrators.³

These views, though logical, fall short of providing adequate protection for an interested party in arbitration when there may be disagreement by the parties over the appointment of arbitrators, as they assume the presence of an arbitrator mutually agreed upon by the parties or at least already nominated by a competent Court. The question remains what happens in a case when a dispute arises over the appointment of an arbitrator or arbitrators when there is recourse by one of the parties to the Court to nominate such arbitrator or arbitrators. If the Court does not hand down a verdict until after the lapse of the prescription period with respect to the claim, will the claimant no longer have any right to bring a claim in court even though the lapse has occurred?

¹ Fathi Wali, *Al Waseet Fi Qanun Al Qada Al Madani* p. 491; See also Al Shawarbi A.H. p. 1210; *Al Dufu Al Madaniah Al Ijraiah Wa Al Shakliyah*

² Al Shawarbi A.H. Ibid. from p. 1211.

³ Fathi Wali, Ibid. p. 937; See also Abul Wafa, *Al-tahkim* p. 207.

The better opinion in my view in this respect is that arbitration proceedings should be considered as commencing as is provided for in the arbitration clause or agreement. If the arbitration clause provides that either party has the right to give notice to the other of his desire to commence the arbitration, then there is an arbitration claim that commences from the date of such notice which should be considered as interrupting the prescription period. This opinion is supported by the fact that the interruption of prescription only materialises when a creditor insists upon recovering his right as expressed by the pursuit of the legal method that is sufficient to oblige a debtor to honour his obligation. Filing a court case and presenting a statement of claim are only manifestations of pursuing such an avenue which is the only way of enabling a creditor to force a debtor to settle his debt. Whereas recourse to legal procedure of action in case of agreement on arbitration is achieved by one litigant giving notice to the other litigant of the desire to commence the arbitration process, then the recourse to the mandatory avenue, as outlined in the arbitration agreement, is considered a means of interrupting prescription.¹

Second: Persons Acting as Arbitrators, Their Powers and Obligations

The CCPL deals with the persons acting as arbitrators and the powers enjoyed by them in the following articles:

Article 234:

“An arbitrator may not be a minor, interdicted, deprived of his civil rights as a result of criminal punishment, or bankrupt, unless he has been rehabilitated. Where there are several arbitrators, their number must be odd, otherwise the arbitration shall be invalid. The arbitrators shall be named in the arbitration agreement or in a separate agreement. The assent of the arbitrator must be given in writing. Once he has agreed to arbitrate he may not withdraw without substantial cause, otherwise he may be found liable for damages. The arbitrators may not be dismissed except by mutual consent of the litigants or by a Court order.”

¹ This is merely a personal opinion that is not yet supported by any Court precedent in Bahrain.

Article 235:

“If a dispute arises and the litigants have not agreed on the arbitrators, or if one or more of the agreed arbitrators has abstained, withdrawn or been dismissed, or an impediment has arisen to prevent him from acting, and there is no agreement between the litigants concerning this matter, the Court originally given jurisdiction to examine the dispute shall appoint the necessary arbitrators at the request of the party concerned with expediting the matter, in the presence of the other litigant or with him absent, having been summoned to attend. The decision given in this respect may not be challenged nor appealed against.”

Article 237:

“If the litigants do not specify in the arbitration agreement a time limit for the award, the arbitrators shall give an award within three months of their agreeing to arbitrate, otherwise either litigant may take the dispute to the competent Court, unless they have jointly agreed to extend the time limit. The award of the arbitrators shall be based on the principles of law, unless they are authorised to bring about conciliation, in which case they are not bound by these principles etc..”

Article 238:

“The arbitrators’ award concerning the dispute shall be made on the basis of the litigants’ submissions. The arbitrators must set a time limit for them to submit their documentary evidence, briefs and points of defence.”

The provisions of these Articles may be discussed in respect of the arbitrators dealing with the following issues:

1. Conditions to be fulfilled by arbitrators.
2. Number of arbitrators.
3. Nature of the relationship between arbitrators and parties to the case.

1. Conditions to be Fulfilled by Arbitrators

a) Legal Qualification

The aforesaid provision of Article 234 does not cause any confusion as to the requirement that an arbitrator must be legally capable to enter into agreements nor must there be any legal restriction or limitation adversely affecting such capability. If a legally capable person does not suffer from the drawbacks prejudicing his legal capacity as set forth in the said Article, he may become an arbitrator.

b) Eligibility

This means an arbitrator must fulfil certain conditions to be able to act as an arbitrator to undertake his duties; just as a judge is required, according to the Judicial Law, to have certain qualifications such as a university degree, being fluent in Arabic and having Bahraini nationality. In fact, such conditions need not necessarily be fulfilled by an arbitrator as in actual practice parties to the dispute seek to fulfil other requirements such as appointing a person who is fluent in English, which may be the language of the contracts the subject of the dispute, or electing a non-Bahraini person to ensure his neutrality in certain circumstances. There is no provision in the Bahrain law with respect to the argument of some scholars as to whether an arbitrator should be a Muslim or non-Muslim or whether he should be a male.¹ Such issues are not raised in Bahraini law and these conditions are not necessarily fulfilled by members of the judiciary, let alone persons who are elected as arbitrators.

As in the case of the religion of the arbitrator or judge, the same should apply to his sex. The law does not require that an arbitrator must be a male or female; just as the law does not have any stipulation requiring a judge to be a male. Accordingly, there is no objection to a woman acting as arbitrator.

¹ Nader M.J. *Al Tawfiq Wal-Tahkim Fi Al Mamlkah Al Arabiah Al Saudiah* p. 15.

An arbitrator must be a natural person as he cannot be a corporate or juristic entity of any kind whatsoever. If an arbitration agreement provides for the election of a corporate person or entity as arbitrator, it should be interpreted as an election of such corporate person or entity to regulate the process of arbitration. Only a natural person can be elected as arbitrator.¹

c) Arbitrator's Assent

An arbitrator's assent to his election as an arbitrator is a mandatory requirement and the law requires such assent to be confirmed in writing whether he is elected by one of the parties to the dispute or is elected by a competent Court. This is pursuant to the provision of Article 234 which says: "*The assent of the arbitrator must be given in writing.*"

2. Number of Arbitrators

An arbitrator may be a single person or several persons. According to the express provision of Article 234, where there are several arbitrators, there must be an odd number. In actual practice, arbitration conditions state that the number of arbitrators shall be odd of whom each side shall elect an equal number thereof except for the umpire who is nominated by the arbitrators elected by the parties. Failing such agreement between the arbitrators concerning the appointment of such umpire, the parties shall refer the matter to the competent Court to appoint him. The Court having jurisdiction to hear the dispute in the first place shall have jurisdiction in all cases to appoint any of the arbitrators whether prior to the commencement of the arbitration proceedings or after such proceedings as in the case of the resignation or death of one of the arbitrators or if there is any occurrence barring an arbitrator from carrying out his duties as arbitrator.

¹ Judgment of the High Court of Appeal in Case No. 1606/81, Volumes of Legal Principles According to Awards of the Court of Appeal, Years 1980-1985 p. 45. In this judgment the court stipulated that "*Judiciary or arbitration authority is only practicable by a natural person...therefore an arbitrator cannot be a juristic person.*"

The Court may appoint the entire arbitration board where the parties fail to agree on anyone or if either side fails to nominate his arbitrator. This principle has been endorsed by the Courts in practice.¹

It should be noted that the verdict with respect to the appointment of the arbitrators by the Court does not result in resolving a litigation but is merely an action taken by the Court in replacing the litigants in the process of electing the arbitrators with a view to speeding up this nomination thereof when there is no difference over reference to arbitration. The latter instance only applies to the appointment by one of the parties of his arbitrator or failure to agree on an arbitrator or umpire.

The provision of Article 235 stating

“the Court originally given jurisdiction to examine the dispute shall appoint the necessary arbitrators at the request of the party concerned with expediting the matter”

assumes that the arbitration process is in motion but is slow because of the delay by one of the parties in appointing or agreeing on an arbitrator. Therefore, the Court having jurisdiction in respect of the dispute undertakes the task of appointing the arbitrator. This viewpoint has been supported by the Bahrain Court of Cassation in its judgements.²

3. Nature of the Relationship between the Arbitrator and Parties

There is no doubt that the relationship of the litigant and the arbitrator is a relation of a private law nature since the obligations arising from such a relationship are created from their mutual agreement. Therefore the viewpoint which states that the arbitrator, once elected by the litigants, is in the position of a state judge is invalid.

¹ Case No. 6015/95 Senior Civil Court.

² Judgment in Cassation No. 139/1994 Fifth Year in which the court stated that *“The court replaces the parties in appointment of arbitrators in order to expedite the arbitration proceedings.”*

However, the question still remains as to whether the arbitration agreement is an agency agreement or a hire agreement of an employee. The claim that it is an agency agreement is contrary to the provisions of the law and the nature of the relationship between the litigant and arbitrator for the following reasons:

- (a) Neither party to a dispute referred to arbitration shall remove the arbitrator whom he has nominated. Once an arbitrator has been appointed, he may not be removed from such capacity except by the mutual agreement of the litigants or by a Court judgement according to the provision of Article 235 of the CCPL.
- (b) An arbitrator may hand down an award against the litigant who has nominated him. His obligation is specific under this provision according to Article 237 of the CCPL that *“the award of the arbitrators shall be based on the principles of law...”* In the case of an agent, he could not act contrary to the best interests of the principal.
- (c) In order to be independent, an arbitrator must not be an affiliate of any of the parties but must act as an independent judge. If an arbitrator is considered as an agent, such neutrality cannot be enjoyed.

The appropriate opinion in this respect is that the relationship between an arbitrator and the litigants is a special kind of contractual relationship that has its distinctive characteristics which are different from contracts as they are defined in law. Such a relationship creates specific mutual obligations indicated in the arbitration contract with special features characterising the nature of the relationship between the arbitrator and the litigants. These may be summed up as follows:

Arbitrator's Obligations:

- (a) An arbitrator has a duty to hand down an award in respect of the dispute of the subject matter of the arbitration agreement. This obligation requires him to be aware of the rules of the law and to comply with them as stipulated in the preceding provisions.
- (b) An award must be handed down during the time limit provided for in the law as has already been explained in detail and as will be discussed in the arbitration proceedings.
- (c) An arbitrator must fulfil any other obligations laid down under the arbitration agreement such as the agreement to nominate an arbitrator on behalf of each party, provided that the nominated arbitrator must appoint an umpire (third person), which obligation shall be undertaken by the arbitrator as well as other such obligations.

Such rights and obligations result in the possibility of being legally compelled to pay damages in the event of his failure to honour his obligations.

Litigants' Obligations:

- (a) An arbitrator is entitled to receive his mutually agreed fee regardless of whether his award will be satisfactory or not to the Litigants. If the fees are not fixed in the arbitration agreement or if the parties reject the arbitrators' ruling with respect to the fees, an arbitrator may refer the matter to the Court claiming his fees.

The question here arises whether an arbitrator is entitled to get his fees according to his assessment or whether the Court takes over the task of determining the fees. In fact, there are no Court precedents in Bahrain in this

respect, but the Arab jurisprudence in Egypt and Kuwait maintains that the Court is empowered to fix the fees of arbitrators where it is felt that their assessment of their fees is exaggerated. This is a sound opinion.¹

- (b) An arbitrator is entitled to recover the expenses incurred for the arbitration proceedings, which right is maintained by the general rules of law.

Third: Arbitration Case Proceedings

It has already been mentioned that an arbitration agreement has the effect of barring the authority of the State Courts. This means that if a certain party refers a dispute subject to arbitration to the courts, the other party is empowered to plead the existence of an arbitration agreement whether in the form of an arbitration clause or in the form of an arbitration deed. However, an arbitration agreement according to Bahrain law is not a matter of public order so that the court to whom the dispute (the subject of arbitration) is submitted does not enforce it of its own initiative; rather an interested party must invoke such clause before such court, if he wishes to have it enforced. This is understood from the provision of the aforesaid Article 236 of the CCPL:

“.... the other party may invoke the rules by means of a plea for the case not to be heard and for recourse to be had to the arbitration clause...”

Further, it is possible to waive the plea of the arbitration agreement either explicitly or implicitly if the matter is raised. Silence about invoking such clause prior to hearing the issue in question is considered as an implicit waiver. This principle has been established by the Bahrain Court of Cassation in many of its Judgements.²

¹ Atteya Azmi Abdul Fatah, *Qawaid Al-Tahkim Al-Kuwaiti*.

² Cassations No.92 of 1993 hearing of 14.2.1993, No.55 of 1993 hearing of 24.10.1993 and No.105 of 1993 hearing of 27.2.1994 (23) . In these judgments the Court of Cassation decided that *“Arbitration agreement is not of a public order nature that the court applies at its own initiative. Its implications must be at the request of the interested party.”*

(1.) Invoking Arbitration as a Plea for non-hearing of the Case According to the Bahrain Law (“Adam Samal Al Daw’a”)

Arab and foreign scholars of jurisprudence and Courts precedents have disagreed over the nature of the plea invoking an arbitration agreement and whether it is a plea for non-jurisdiction (“Adam Al Ikhtisas”) or a plea for non-admission (“Adam Al Qabul”) or a plea for invalidity of the judicial claim (“Butlan Al Mutalabah”)¹

The Bahraini legislator has resolved this disagreement by stating explicitly in the aforesaid Article 236 that invoking arbitration is considered as a plea for non-hearing “Adam Al Samaa”² of the case. The article provides: “..... the other party may invoke the rules by means of a plea for the case not to be heard and for recourse to be had to the arbitration clause in accordance with the agreement.” Non hearing of the case means barring the judge from examining it if there is a certain fact for which such claim may not be examined. Such a fact in this instance is invoking the arbitration clause by the litigant against whom a legal action is brought before the Court in respect of a dispute.³

In this sense, it is considered as some kind of non-admission owing to the lack of one of the necessary conditions for admission of the case. However, calling the plea as non-hearing of the case is a strange description in the CCPL which is familiar with a plea of non-admission but not familiar with the plea for non-hearing the case in any of its other applications.

¹ Article 137 of the Kuwait Civil Procedures Law expressly considers a plea for invoking arbitration as a plea for non-jurisdiction of the Courts to hear disputes agreed to be referred to arbitration, which jurisdiction may be waived implicitly or explicitly. * Adam Al Ikhtisas: عدم الاختصاص; Adam Al Qabul: عدم القبول; Butlan al Mutalabah: بطلان المطالبة.

² Adam Al Samaa: عدم السماع. It is a status of non-admission of the case under which the judge refrains from hearing of the case on inception or before proceeding. Such status shall be defined by a procedural law provision.

³ Hashim M.M. *Al Nadariah Al Aamah Lil -Tahkim* p. 256;

The Bahraini legislator is not correct in considering an invocation of arbitration as a plea for non-admission as the arbitration agreement creates an advantageous effect of referring the dispute to arbitration and granting the arbitrators the power to resolve the dispute by a crucial and effective award. It also creates a prohibitive effect of barring the normal Courts of law from settling such dispute in the sense of preventing the Courts of law from examining such dispute. An arbitration agreement ousts the jurisdiction of the courts to hear the dispute and gives such jurisdiction to the arbitrators. Thus, invoking arbitration is an appropriate plea for non-jurisdiction rather than non-admission. This is further supported by a major difference between the legal rule for non-admission pleas and the prescribed rule for procedural pleas including the plea for non-jurisdiction. The plea for non-admission, according to the provision of Article 31 of the CCPL, may be made at any stage of the court case - even before the Court of Appeal for the first time, unlike the procedural plea that must first be raised before discussing the substance of the case, otherwise the right thereto shall be forfeited. Moreover, a plea for non-admission often relates to public order, hence the court may determine it of its own initiative because it relates to conditions of admitting the case, such as capacity and interest. In addition, it has been established by the Courts that a judgement of non-admission has *res-judicata* effects and entails the case being outside the competence of the Court which renders such judgement.¹

(2.) Arbitration Time Limit

Article 237 (1) of the CCPL states:

“If the litigants do not specify in the arbitration agreement a time limit for the award, the arbitrators must give an award within three months of their agreeing to arbitrate; otherwise either litigant may take the dispute to the competent Court, unless they have jointly agreed to extend the time limit.”

¹ Cassation No. 155/94 - hearing on 18/12/94 - Court of Cassation Collection, 5th Year, p. 707. In this judgment the court stipulates that *“The plea for non-admission is a subjective defence...the appealed judgment -of the Court Appeal- in dealing with it has adhered to the law.”*

It is evident from the above provision that the arbitrator or arbitrators have an obligation to settle the issue of the dispute within the time limit fixed in the law, which is three months, unless the parties fix another time limit.

The litigants can also agree on extending the arbitration time limit pursuant to the condition contained in Article 237 (1) of the CCPL by the agreement of all parties because the extension is a voluntary act whereby the litigants alter one of the conditions in the arbitration agreement concerning the scope of the arbitrators' authority in terms of time.

The agreement of all the litigants to extend the arbitration time limit may be explicit or implicit. An example of the explicit extension is represented by the drawing up by the litigants of minutes of their agreement. An example of the implicit extension is represented by the litigants' appearance before the arbitrator to discuss the issue of the dispute or to submit new documents or to present new defence pleas without reservation, in spite of their knowledge of the lapse of time.

The legislator does not require that the extension should be before the lapse of the arbitration time limit which leads us to say that there is no condition to this effect once the time limit is properly extended either explicitly or implicitly.

Further, the legislator does not provide for the period of extension in the case of the litigants' disagreement over such a period or their failure to fix it. This leads us to say that the period is extended for the same duration provided for in the arbitration agreement considering that it is the original period agreed upon between the parties.

(3.) Suspension of Arbitration's Time Limit

The Bahraini legislator does not deal with suspending the time limit for arbitration in the case of any of the reasons for normal suspension of litigation, such as challenges on the ground of forging a document, taking criminal actions relating to the original

dispute, force majeure, seeking production of a document held by a third party, or summoning a witness to testify pursuant to Article 238 (3) of the CCPL.

However, despite the lack of a provision in this respect, it is my opinion that the arbitration time limit is suspended in such cases until the competent court rules in respect of the matters that are beyond the competence of the arbitration forum or the reasons for suspension are discontinued. Any opinion to the contrary leads to the impossibility of the arbitration forum's discharge of its task within the fixed period for arbitration, especially if the legal period is 3 months (or less by the mutual agreement of the litigants) and there is refusal of one of the parties to extend it. Needless to say in case of suspension the arbitration proceedings should continue after the elimination of the cause of suspension so that the suspension period shall not be calculated as part of the arbitration period.

The legislation does not contain any provision permitting an extension of the arbitration time limit without the will of the litigants. The legislator should have given the arbitrator or the arbitration tribunal the power to extend the arbitration time limit by a period not exceeding 3 months when necessary and justified.

The provision of Article 237 of the CCPL, in this respect, is rather vague in providing that an award must be handed down within three months from the date of agreeing to arbitrate by stipulating that; *“otherwise either litigant may refer the dispute to the competent court, unless they have jointly agreed to extend the time limit.”* It is maintained that the reference of the dispute means the reference of the issue of the dispute as followed by the principle upheld by the Egyptian Court of Cassation.¹ This principle is viewed to be improper, because it punishes a party having an interest in invoking the arbitration and depriving him thereof by ending the agreement to arbitrate for no error or omission on his part.

¹ Abul Wafa A. *Al Tahkim Al Ikhtari Wal Ijbari*, fifth edition, page 199.

This provision needs to be reviewed and redrafted in a manner enabling the interested party in invoking arbitration to obtain a verdict from a competent court for extending the arbitration time limit, when necessary and justified. In all cases, the right to reference to arbitration must be maintained according to the terms of the arbitration agreement.

(4.) Arbitration Venue

Article 237 (3) of the CCPL states:

“If the arbitration agreement was made in Bahrain, the law of Bahrain must be applied in all aspects of the dispute, unless the parties agree otherwise and provided that the arbitration takes place in Bahrain.”

It is clear from this provision that the Bahraini legislator does not consider that the mere agreement on arbitration in Bahrain renders the judgement handed down in the arbitration a Bahraini award, but also requires that the arbitration must take place in Bahrain, otherwise an award handed down in an arbitration dispute shall be deemed to be a foreign award to which shall apply the provisions of Articles 252 and 253 of the CCPL relating to the conditions for implementation of the judgements and orders issued in a foreign country.

Accordingly, the crucial factor in determining whether an award is considered Bahraini or foreign is not the country in which the agreement on arbitration takes place or the nationality of arbitrators or litigants or that the legal relationship subject to arbitration has its source in Bahrain or involves a foreign element, but the crucial element in determining whether the award is Bahraini or foreign is that the venue of arbitration is in Bahrain or outside Bahrain.

If the arbitration takes place in Bahrain, the arbitration award handed down therein makes it a Bahraini award even if the parties thereof or the arbitrators are foreigners or even if a foreign law to the subject matter is applied.

(5.) Law and Procedures Governing the Issue of the Dispute

Article 237 of the CCPL provides in its second paragraph as follows:

“The award of the arbitrators shall be based on the principles of law, unless they are authorised to bring about conciliation, in which case they are not bound by these principles.”

The third paragraph of this Article states as follows:

“If the arbitration agreement was made in Bahrain, the law of Bahrain must be applied in all aspects of the dispute, unless the parties agree otherwise and provided that the arbitration takes place in Bahrain.”

The Bahraini legislator does not explain what is meant by the words *“based on the principles of law”* as provided for in Article 237 (3) of the aforesaid Law since it allows the litigants, according to the above Article, to agree on the application of another law other than the Bahraini law. This statement creates confusion and ambiguity concerning the true intention of the legislator from the words *“based on the principles of law”* and whether the words refer to the rules of Bahraini law or to the rules of the other law agreed upon by the Parties or whether it means the procedural rules or substantive ones, or both.

There is no dispute in the case of the parties’ agreement to the applying of Bahraini law, as this law is applied with its subjective and procedural rules whether as provided for in the CCPL or on the ground of public order. There is also a consensus that when the parties to the dispute do not agree on the applicable law to the elements of the dispute and where arbitration takes place in Bahrain, that the Bahrain law with its procedural and substantive rules shall apply to the elements of the dispute according to the express provision of the aforesaid Article 237 (3).

However, the legislator's deprivation of the arbitrator's power to select the appropriate substantive law for the dispute in case the litigants do not agree on the applicable law or in the event of their agreement on a foreign law whose substantive rules conflict with the public order in Bahrain is criticized, as in such case the Bahrain law must be applied although it might not be relevant to the nature of the dispute or related to it. The legislator should have given the arbitrator the liberty to choose the substantive law that is closely related and suitable to the dispute guided by substantive rules and guidelines such as the venue of concluding the contract, the execution of the obligations of the disputed agreement or the law of the venue of arbitration.

However, the question remains about the definition of the procedures to be applied in case of the parties' agreement to apply a non-Bahraini law.

The Bahrain Court of Cassation has answered this question in its judgement with respect to Cassation No. 24 of the Year 1994, by determining that

*“the meaning of the provision of Article 237/2 of the CCPL with respect to the arbitrators duty to hand down their award based on the principles of law is ensuring that the provisions of the law, in the chapter concerning arbitration, should not be violated.”*¹

In conformity with the Bahraini legislator's attitude of depriving the arbitrator of the authority to apply the appropriate law to the dispute, the Bahrain Court of Cassation has restricted the interpretation of the phrase “*principles of law*” mentioned in the aforesaid Article 237 (2) by limiting such principles to those contained in the Arbitration Chapter. There is no doubt that the arbitrator will be committed to complying with the procedural rules relating to the public order, even though those rules are not mentioned in the Arbitration Chapter, as a principle of maintaining equality between the litigants and enforcing the prescribed procedures upon them and respecting their right of defence.

¹ Cassation No. 124 of the year 1994, hearing of 6th November, 1994.

Although the Courts are exercising their discretionary powers in remedying the legislative shortcomings contained in the Arbitration Chapter of the CCPL in respect of the matters referred to such Courts, the legislator should have been much clearer in spelling out his intentions rather than leaving such matters to individual interpretations.

Accordingly, it is concluded that the legislator has authorised the litigants to agree on the application of a law other than the Bahrain law. The legislator in this respect means the substantive rules of the foreign law rather than the procedural rules with which an arbitrator must comply in the case of arbitration - except when the arbitrator or arbitrators are vested with the authority to conciliate - provided that such rules must not be repugnant to the public order or ethics in the Bahrain legislation.

(6.) Exempting an Arbitrator from Complying with the Rules of Law when the Arbitrator is vested with Conciliation Competence

According to the express provision of Article 237 (2) of the CCPL, an arbitrator is not obliged to hand down his award according to the principles of law if he is authorised to bring about conciliation.

According to the interpretation given by the Court of Cassation, an arbitrator empowered with conciliation shall be exempted from complying with the principles of law laid down in the Arbitration Chapter of the CCPL.¹

In spite of the arbitrator's acting in a conciliatory capacity the appropriate opinion is that he must always comply with the rules relating to public order which are not subject to agreement between the litigants, hence they are not in a position to deviate from them by agreement as they always relate to public order that protects the public interest.

¹ Cassation No. 124 of the year 1994.

(7.) Initiating the Litigation

The Arbitration Chapter of the CCPL does not contain any rules concerning the manner of initiating the litigation, litigants' representation and organisation of hearings. These matters are left to the arbitrators' discretion. The legislator has been satisfied with regulating certain procedures concerning the litigation and evidence before the arbitrators in Article 238 of the same Law as will be explained later.

However, the legislator should have regulated the matter of initiating the litigation and the starting point thereof given that he obliges the arbitrators where the litigants do not set down a time limit, to deliver their award within 3 months from the date of their acceptance to arbitrate. It is possible that this period would expire without any party of the arbitration taking action for initiating the litigation.

In view of the legislator's silence towards regulating this vital procedure, it must be said that the arbitration proceedings may be commenced by an action on the part of the two litigants either by appearing in person before the arbitrators or by either of them giving notice to the other of his desire to refer the dispute to arbitration if none is appointed or by the arbitrator notifying the parties after his acceptance.

(8.) Arbitration Hearings

There are no provisions regulating the arbitration hearings leaving the arbitrators to have discretionary powers to lay down the rules to be followed in running the deliberations at such hearings. Arbitrators shall have the widest powers in this respect as long as the right to defence is ensured. Thus, the arbitrators are not bound to comply with the rules governing court hearings, the most significant of which is the principle of holding court hearings in public. Arbitration hearings should not be held in public and should only be attended by the litigants and their representatives. Also it is not necessary for such hearings to be attended by a clerk to note down the minutes of arbitration hearings although the arbitration forum enjoys such power if this is deemed

necessary. As for the place of holding the arbitration hearings, the basic principle is that it must be mutually agreed upon by the litigants, failing which agreement, the arbitrator or the arbitration tribunal usually decide the place of holding such hearings. Therefore, hearings may be held in one place or at several places. In actual practice, the arbitration forum is responsible for determining the place of holding such hearings. No restriction exists in connection with the time of such hearing as they can be held on a public holiday or after the official business hours unless there is an agreement to the contrary between the litigants.

Regarding the language, arbitration, in practice, is conducted in Arabic unless the Parties mutually agree on the use of another language. In such case, an official translation into Arabic of the arbitration agreement and the award must be submitted to the Clerk's Department at the competent Court.

This provision does not conflict with Article 4 of the Judicial Law which provides that Arabic is the official language of the law courts, considering that arbitration is an extraordinary method of resolving disputes and an arbitration forum is not considered as a Court of law.

(9.) Litigants' Appearance and Representation

Litigants involved in an arbitration action have the right to defend their viewpoints in the manner they deem appropriate. A litigant should not be compelled to appoint anyone to defend his interests if he prefers to defend himself personally. He may also opt to appoint an attorney to act on his behalf provided that such attorney is provided with a power of attorney.

However, according to Article 19 of the Legal Practice Law non-lawyers may not appear on behalf of the concerned parties before arbitration forums, which means that representing parties before an arbitration forum is exclusively limited to lawyers who

are entered in the Rolls according to the terms and conditions set forth in the aforesaid Legal Practice Law.

(10.) Submissions and Exchange of Evidence

Article 238 (1) of the CCPL provides that

“the arbitrators’ award concerning the dispute shall be made on the basis of the litigants’ submissions. The arbitrators must set a time limit for the parties to submit their documentary evidence, briefs and points of defence.”

By this provision, the legislator gives the arbitrators the power to fix dates for submission of documents, memoranda and defences by litigants. This is a necessary process for regulating the proceedings given that it is the arbitrators who fix the dates of closing the door for submitting defence pleas. After such date, it is not possible to submit any claims, documents nor to make any defence.

The principle of open discovery must be taken into account so that each litigant must show the other litigant the submitted documents and pleas to enable him to prepare his defence after reviewing such materials. Upon submitting the claims, exchanging the memoranda and documents and after cross-examining the litigants, ample opportunity must be given for reply to the other litigant.

It should be noted that each litigant has full liberty to use any means upon which his defence is based. Meanwhile, the arbitration panel has the discretionary power to accept or reject claims, taking any action requested by the litigants such as the appointment of an expert or any other action, provided that the arbitration forum must lay down its decision to reject the required action on substantiated reasons.

In addition to the power given by the legislator to the arbitrators in fixing a date for the submission of documents, briefs and statements of defence, the aforesaid Article 238 (2) states that the litigants must submit to the arbitrators all documents, papers,

accounts and written evidence in their possession or charge, and do all that the arbitrators require from them.

If resolving a dispute requires access to a vital document or summoning a witness to testify, Article 238 (3) authorises either of the litigants, or the arbitration panel, to file an application with the Court for any document necessary to the arbitration in the possession of others to be produced or for notice to be sent to any witness to attend in order to give evidence before the arbitration forum. Article 238 (4) gives the arbitrators the power to make witnesses take an oath or charge them to make a formal declaration to tell the truth. Anyone giving false evidence concerning an essential issue before an arbitrator shall be held to have committed perjury, just as if he had been giving evidence before a competent Court. He may be cross-examined and punished with the penalty laid down for perjury.

Needless to say, investigating a witness accused of perjury cannot take place by the arbitration panel; instead the matter must be referred to the competent Criminal Court.

(11.) Pleas That May be Made before the Arbitration Panel

There is no doubt that submissions of substantive pleas may be made before the arbitration panel.

Procedural pleas with the aim of obtaining an award terminating the litigation without examining the substance thereof, such as the pleas for non-jurisdiction of value or subject matter are not validly heard before the arbitration panel because they are not appropriate for arbitration which is a special system of litigation elected by the parties.

The question remains whether it is permitted for any party to plead that the arbitration panel has no jurisdiction to hear a certain point or matter, on the grounds that such point or matter is beyond the issue of the dispute as defined by the parties of the arbitration agreement or the arbitrators' terms of reference or on the ground of non-

competence of the arbitrator or arbitrators due to invalidity of the arbitration agreement itself or invalidity of the contract that contains the arbitration clause. In other words, is an arbitrator competent to make a determination of the validity of the contract that is considered as the source of his power.

The legislator does not deal with this matter, as it relies upon the provision of Article 243 of the CCPL with regard to the admissibility of seeking the invalidation of a final arbitrators' award in certain events among which is the case where such an award is issued according to an invalid arbitration agreement or departs from the scope of a valid agreement.

Since the Bahraini legislator does not deal with such fundamental issues, I am of the opinion that the arbitrator is competent to decide on the pleas relating to his jurisdiction. Indeed, an arbitrator must of his own initiative investigate how valid and legitimate the arbitration agreement is to ascertain the validity of his competence and decide the existence or non existence of his jurisdiction.

Fourth: Arbitration Award

Arbitration proceedings are concluded on the completion of the defence pleadings and after the submitting of their memoranda to the arbitrator or arbitrators. This is followed by the arbitration panel commencing its deliberations in preparation for handing down its arbitration award in respect of the matter of arbitration. At this point, the litigants remain silent and the floor is given to the arbitrator or arbitrators. The core of the arbitration award is the notice given to the litigants in respect of the decision of the arbitrator(s) to enable the party who has won the case to execute the award through the courts should the losing party refuse to voluntarily implement it.

Article 239 of the Bahrain CCPL deals with the procedural and substantive conditions that must be fulfilled by an arbitration award. This can be dealt with as follows:

Procedural Conditions

The competent Court in order to enforce the execution of arbitration awards requires that such awards shall fulfil certain procedural elements.

The elements provided for in the CCPL in addition to those adopted in jurisprudence in other countries and applied by the Bahrain Courts will be discussed in the following:

(1.) Writing

Article 239 of the Bahrain CCPL provides that “*the award of the arbitrators shall be made by a majority of opinions. The award must be made in writing.*” The written nature of such award is a basic prerequisite of the arbitrator’s award to enable lodging it with the competent court to ensure its validity before ordering the execution thereof. It is inconceivable for it to be oral only; unless it is confirmed in writing as in the case of judgements handed down by the State Courts.

(2.) Language

The Bahrain legislation does not require an award to be written in Arabic. This means that the legislator has left the issue of electing the language of arbitration to the mutual agreement of the parties of arbitration, conforming to the very nature of the arbitration process which is totally based upon the wishes of the parties to the arbitration. However, disagreement on the language in which the award shall be rendered may create an obstacle facing the cognizance of the case. In such case, an arbitrator or arbitration panel does not have the right to decide which language should be used. Furthermore, it is not permitted to impose the use of the Arabic language as being the national language of the place of arbitration as is the case of Article 5 of the Judicial Law which states: “*Arabic is the official language of the law Courts*”. This provision relates to the state Courts as it is not applicable to the arbitration forum. Absence of agreement on the language may raise a legal problem in case of remaining silent with

respect to determining the language whereby a judgement is handed down especially where the dispute involves a foreign party.

The remedy to this situation is that the legislator should include in the Arbitration Chapter of the legislation a provision stating that the arbitration award shall be made in Arabic unless the parties agree otherwise. In the absence of a legislative remedy such a principle should be adopted anyway.

In case the award is delivered in a language other than Arabic, by the agreement of the litigants, it is necessary to attach to it, upon lodging it with the competent Court, an official Arabic translation. Although this is not regulated by the legislator in the chapter concerning arbitration, according to the general rule contained in the provision of Article 5 of the Judicial Law the arbitration award must be referred to the law courts for execution, hence it is subject to the Judicial Law governing the work of the courts which are competent to enforce the arbitration award.

(3.) Signature

According to Article 239 of the CCPL, an award shall only be valid if it is signed by a majority of the arbitrators but if one arbitrator or more refuse to sign the award this fact shall be recorded.

It is clear from this provision that an arbitration award must carry the signature of most of the arbitrators in case there are several of them, but there is no requirement that it must be signed by all of them. Therefore, the party who is against the view of the majority is not obliged to sign the award, provided that his objection to the award is mentioned.

The failure of the arbitrators or the majority of them to sign the award until after the expiry of the time limit for handing down the award results in the termination of their mandate in respect of the arbitration proceedings and renders the award null and void.

By a simple reading of the legislation it may be deduced that in the case whenever the majority of arbitrators sign the arbitration award, the failure to mention the arbitrators who do not sign and may write their dissenting opinion entails its invalidity due to the absence of a legal procedural requirement for the award to be valid. However, if then mentioning of such arbitrator is clearly substantiated by a written clarification annexed to the award it suffices to meet such procedural requirement which would render the award valid.

It should be noted that the law providing for the validity of an award signed by the majority of arbitrators does not mean that it is delivered by such majority of arbitrators in the absence of the minority, because this may lead to ignoring the legal rule that requires the number of arbitrators to be odd. This provision assumes that the case must be heard by all the arbitrators and that all of them should participate in the deliberations. However, should any of them disagree with the majority, it is permitted to have the award signed by such majority.

It is noticed that the Bahraini legislator does not deal with the event of the diversity of views and having more than two opinions which makes it impossible to hand down an award owing to the lack of the required majority to pass an award. According to the prevailing arbitration practice in Bahrain, each party to the litigation must elect an arbitrator and the two arbitrators so elected must agree on the election of a third arbitrator to be called an umpire. The role of such umpire is to uphold one of the two views in case of their disagreement. In this manner, the required majority for delivering the award can be available. Although this is the solution where the number of arbitrators is three, the problem exists if the number of arbitrators is more than three and if there is a diversity of views where the umpire's joining of any of the arbitrators does not achieve the required majority. This is indeed a major drawback in the legislation that should be remedied.

(4.) Handing down the Award in the Name of the Amir

One view point maintains that an arbitration award is just an ordinary judgement that is subject to the prescribed procedures and is handed down by a person or persons entrusted with carrying out a judicial duty with respect to the dispute referred to, although such person is not basically a member of the judiciary. This power is given to him in recognition of the will of the litigants. Therefore, and since an arbitration award is considered as a court judgement that has an executive force given by the court originally having jurisdiction to hear the dispute, it shall thus be delivered in the name of the Amir of Bahrain as required according to Article 32 of the Constitution and Article 6 of the Judicial Law. In case an arbitration award does not fulfil such a requirement it will be deficient and shall be considered invalid.

This opinion is to be qualified because the provisions of the said Articles of the Constitution and the Judicial Law relate specifically to judgements passed by the judicial authority. It has already been mentioned that arbitration represents a departure from judicial authority, hence the provisions of these Articles shall not be applicable to arbitration awards. At any rate, in the case of Court judgements the Egyptian Court of Cassation has held that even the judgments' failure to mention that they are handed down in the name of the "*Nation and People*" does not render them null and void.¹ The wording of "*In the Name of the Nation and People*" is established in the Egyptian Constitution and the Egyptian Judicial Authority Law and this corresponds to "In the name of the Amir" in the Bahrain Constitution and law.

¹ Egyptian Court of Cassation - Technical Office Collection, year 23 p. 3, Cassation No. 1015/43/Q, hearing 21/1/74 and Cassation No. 759/42/QS27 p. 533.

Elements of the Arbitration Award

Article 239 of the CCPL states that

“the arbitration award must include in particular a copy of the arbitration agreement, a summary of the litigants’ statements and documents, reasons for the award, the depositive portion and date of issue of the award and the signatures of the arbitrators.”

The elements of the arbitration award may be explained as follows:

(1.) Names of the Litigants and parties to the Arbitration

The names of the parties involved in the litigation subject to arbitration must be mentioned in full. It is also essential to mention the names of the other persons who have taken part in the arbitration proceedings such as lawyers or consultants.

(2.) Arbitrators’ Names

Article 234 (2) of the CCPL states: *“The arbitrators must be named in the arbitration agreement or in a separate agreement.”*

In Bahrain arbitration awards have followed the practice of mentioning the names of arbitrators and their capacities as arbitrators in the arbitration agreement and in the arbitration award. However failure to mention the names of arbitrators in the arbitration award does not affect its validity as the law allows agreeing on persons of arbitrators in a separate agreement pursuant to Article 234 of the CCPL.

(3.) Date of Delivering the Award

The arbitrators must hand down their award within a fixed time limit including writing it down and signing it. This time limit is usually provided for in the arbitration

agreement. If the agreement fails to mention it, such time limit is 3 months by virtue of Article 237 of the CCPL, commencing from the arbitrators' acceptance of the arbitration.

As previously mentioned in dealing with arbitration time limits, if the time limit expires without the arbitration forum delivering an award in respect of the dispute, it shall lose its power and competence to arbitrate, hence it loses its authority to hear the issue thereof and any award handed down thereafter shall be deemed null and void.

If the date of handing down the award is not mentioned, it shall be deemed null and void because of the importance of mentioning the date for proving its delivery within the legally prescribed time limit or extension. Also handing down an award after the expiry of the time limit renders the award invalid. Nevertheless, proof of the date of handing down the judgement may be deduced from the documents and presumptions, such as the date of depositing such award with the competent Court.

(4.) Arbitration Venue

The arbitrators' award must mention the venue in which the arbitration has taken place. The arbitration award shall be deemed a Bahraini award if it is handed down in Bahrain. However, if it is delivered in another country, it shall be deemed a foreign award regardless of the law governing the arbitration proceedings, arbitrators' determination or will of the litigants as previously explained.

Accordingly, the significance of the arbitration venue lies in the fact that it helps determine the nationality of the award which is a vital standard for the necessary procedures for implementation thereof.

(5.) The Arbitration Agreement

Article 239 of the CCPL stipulates that:

“The award must be made in writing and must include in particular a copy of the arbitration agreement, summary of the litigants’ statement etc.”

In interpretation of the above mentioned Article some jurists hold the opinion that the arbitration award must include a full text of the arbitration agreement to fulfil the requirement of having such award include *“a copy of the arbitration agreement”*. Another point of view maintains that the actual meaning of the word *“a copy”* (of which the Arabic word is *“surah”*) refers to sufficient particulars of the arbitration agreement and not the full text.

In my opinion in this respect the second point of view is sound, as it is not practical to have the full text of the arbitration agreement and it is not even adopted by the State Court judgement. Further the law requires the attachment of the said copy of the agreement to the award when filing it with the competent Court (Article 240 of the CCPL) which suffices the objective of the legislator of enabling the Court enforcing the award to comply with the agreement.

(6.) Grounds for the Award

Article 239 of the CCPL requires that the arbitration award states its grounds. The Bahrain law courts have the practice of giving a general account or a summary form of the reasons of the award. This is because the validity of the arbitrators award is not measured by the same standards as the Court judgements. In order for the arbitration award to be valid, it must contain a summary of the facts deduced from the submissions exchanged between to the two sides of the dispute subject to arbitration. The award must be sound in terms of the legal rules applicable to the dispute. It shall

not be rendered invalid by giving the reasons in a general manner or on the whole unless they involve a violation of the law.¹

Failing to give reasonable grounds for the award may render it null and void. This fact may raise a query with regard to the application for execution of an arbitration award delivered in a country whose legislation does not require such grounds. In this case, will such an award be executed or not?

The CCPL does not contain an answer to this question and there are no court precedents in this respect.

One opinion is that the action for invalidity stated in Article 243 of the CCPL is limited to national arbitration awards and does not apply to foreign arbitration awards. The sound view is that Article 243 does not apply to foreign arbitration award so that if such award is challenged on the grounds of this Article, such challenge shall be invalid.

This latter viewpoint is consistent with the common trend of litigation, in most countries which follow the Civil Law system, which consider grounds for the arbitration award as of a public order issue. Such a view distinguishes between the domestic public order and international public order and tends generally to introduce the executive formula to foreign arbitration awards even if they are without sufficient grounds since the law governing such arbitration does not require such grounds for rendering them effective².

¹ Senior Court of Appeal Judgement - Case No. 5/1998. See also Kuwait Court of Cassation no. 19/1994 in which the court stated that *"An arbitration award is not subject to the same measures of courts' judgments and that for such an award to be valid, it is sufficient that it include the summary of the facts deduced from the application of law. Mentioning the reasons in a general or comprehensive manner does not invalidate it."*

² Kuwait Court of Appeal / Cassation Department No. 1. Cassation No. 1-1974 - hearing of 19/3/75. The court stipulates that *"Resorting to Article No. 186/3 of the CCPL in connection with the invalidation of arbitration awards in challenging a foreign arbitration award is not accepted."*

(7.) Delivering an Arbitration Award

It is a basic rule that judgements are handed down where there are several judges after conducting secret deliberations between them. The judges who have taken part in the deliberations must be present at the time of delivering the judgement. In this fashion, the arbitrators' award must be handed down after the arbitrators' secret deliberations, as in the case of handing down a Court judgement. However the law does not require delivering an arbitration award at a hearing held in public or the attendance of the litigants unless this is specifically provided for in the arbitration agreement. Invalidity will not arise if delivering the award does not take place in the presence of the litigants because delivering a ruling at an open session is not considered a requirement of the parties to the arbitration. Therefore the arbitration award is considered as delivered by having it signed by the arbitrators.

Filing the Arbitration Awards and Notifying it to Parties to the Dispute

Article 240 of the CCPL provides that:

“all awards made by the arbitrators, even if it is an interim one, must be filed in original copy, together with the original arbitration agreement, at the office of the Clerk of the Court originally given jurisdiction to hear the case within three days of being rendered. The Clerk of the Court shall record this deposition.”

It is noted that the provision of Article 240 refers to filing the original award and original arbitration agreement with the Clerk of the Court originally having jurisdiction to hear the dispute. However, invalidity shall not arise if the said original is not filed. Where filing the original is substituted by lodging the copy thereof this shall not cause the invalidity of the arbitration award that was properly handed down before the filing. This viewpoint shall not be undermined by the provision of Article 241 of the said Law which states: *“The arbitrators' award shall not be executable without an order issued by the President of the Court with whose Clerk's Office the original award was filed.”* This provision requires that the filing be made before giving an order of execution but

it does not give rise to invalidation for non-filing of the original arbitration agreement, at the time of filing of the award.

In addition to the above, there are instances where it is impossible to file the original agreement. The aforesaid Article requires that the filing shall take place in respect of all the arbitrators decisions/award even if they are handed down for conducting interim or provisional investigation. If it is assumed that an arbitrator hands down an interim decision and files the original arbitration agreement, it is presumed upon handing down the final ruling that a copy of the arbitration agreement should already be lodged since the original has already been presented along with the temporary ruling.

On the other hand, the time limit provided for in the above Article 240 for the filing of the award, being 3 days following the handing down thereof, is considered as only a regulatory time limit, the violation of which would not be grounds for invalidation. However the arbitrators may be made liable for payment of compensation for damages due to failure to make a deposit within the legally prescribed period if any damage occurs therefrom.

Court's Supervision after Handing down of An Arbitration Award

The control exercised by a judge of a State court over an arbitration award is practised by such court having the authority to execute such award which is the most significant procedure required for enforcement of the arbitration award. By such order, an arbitration award becomes effective and enforceable. Article 241 of the CCPL states as follows:

“The arbitrators’ award shall not be executable without an order issued by the President of the Court with whose Clerk’s Office the original award was filed at the request of any of the concerned parties.”

It should be noted that by issuing an order of execution the judge does not observe the arbitrator's justice nor does he have to examine the validity of the ruling given in respect of the issue of the case as such judge is not an appellate authority in this respect. Further, issuing an order of execution is not deemed as evidence of the validity of such legal process and does not make the award become an official paper since such description is gained by the arbitration award upon its issuance.

As understood from the aforesaid Article 241, what is actually intended from this action is to examine the award and the arbitration agreement in order to ascertain that there is no barrier against its execution. The court is to ascertain and verify that there is an arbitration agreement or clause with respect to the relative dispute and that the same dispute was referred to the arbitrator. The judge also ascertains that the dispute in question is not one of the matters where conciliation is not permitted and that the arbitrator has not gone beyond the scope of arbitration nor violated the prescribed time limit.

A more significant aspect of the State courts' supervision of an arbitration panel is represented by the challenge for invalidity. If an award may not be appealed against owing to the lack of agreement between the parties for appealing it, the interested party shall have the right to seek invalidation of a final arbitration award.

Article 243 mentions the cases where a request for invalidation of arbitrators' awards may be made and these include specifically the following:

1. If the award is issued on the basis of an invalid arbitration agreement or departs from the scope of a valid agreement.
2. If it was issued by arbitrators who were not appointed in accordance with the law.

3. If any of the reasons is established for which a rehearing of the trial can be requested.¹
4. If an invalidation cause exists in the award or the proceedings which affects the award.

An action of invalidation referred to in Article 243 of the CCPL is limited to rendering invalid Bahrain arbitration awards but does not include foreign arbitration awards.

In the filing of an action of invalidation, the normal procedures for filing cases with the Court having jurisdiction to hear the dispute shall be followed. Therefore, such action must be brought before the Court of first instance to ensure that the principle of enjoying all degrees of litigation is applied without any prescribed time limit.

Filing an action of invalidation has the immediate effect of stay of execution of the arbitration award according to Article 243 of the CCPL. However, the Court which examines a case of invalidation shall be competent to order execution. This is considered as a drawback in Bahrain's arbitration system as it results in delaying the execution of arbitrators' awards as any party may block the enforcement of the arbitration award by filing a request of invalidation. The valid opinion in this respect is that the purpose of introducing the arbitration rules is to ensure speeding up the hearing of disputes, especially commercial disputes. Therefore the rule should be amended in a manner which does not allow the blocking of the arbitration award by filing an invalidation action. However an exception may be allowed by giving the Court the competence to issue a stay of execution subject to the fulfillment of certain

¹ Reasons for a rehearing of the trial are: According to Article 229 of the Civil and Commercial CCPL are:
The litigants may request a rehearing of the trial with respect to rulings given as final verdicts by courts of appeal or courts of first instance for any of the following reasons:

1. *if the litigants or his representative commits an act of trickery or fraud liable to have a bearing on the verdict.*
2. *if, after the verdict, the documents on which it was based are admitted or ruled to have been forged or if the verdict was based on the testimony of a witness judged after the verdict has been passed to have been false.*
3. *if after the verdict is passed the litigant comes upon documents with a deciding influence on the case which his adversary had prevented from being submitted.*
4. *if the verdict decides something the litigants did not claim or more than they claimed.*
5. *if two contradictory verdicts are issued by the same court and both litigants are similarly described and the case is the preceding one, provided that no stipulation has been enacted that could, according to the law, be a reason for the handing down of a different verdict."*

conditions, the most important of which is filing an application in this regard by the petitioner and that the latter must produce documentary evidence substantiating the fear to suffer serious damage from the execution. If there is concrete documentary evidence to such fear, the judge may be in a position to order a stay of execution.

The Bahrain civil and commercial procedures legislation does not regulate the state of the dispute upon handing down a verdict invalidating the arbitrators' award.

Although the viewpoint of some jurists is that the invalidation of an award entails the jurisdiction of the Court originally given the jurisdiction on the dispute, this is not a generally accepted viewpoint. The appropriate opinion is that the judgment invalidating the arbitration award puts the parties in the position they were before the arbitration proceeding had taken place. Therefore, parties to the arbitration agreement may resume a new arbitration proceeding maintaining the objective of the parties in electing the arbitration as a means to resolve their dispute.

One of the manifestations of judicial control after handing down an award is the Court's intervention to correct material errors or in its interpretation or supplementing what the award has overlooked.

In the Arbitration chapter of the CCPL, the legislator does not name the authority empowered to correct the arbitrators' material errors, interpretation of the award or supplementing it after its handing down. The sound opinion in this respect is that the parties may refer this to the arbitrator.

Section Two: International Commercial Arbitration

Bahrain legislation has the unique characteristic of devoting a special law to govern international commercial arbitration separate from the provisions governing local arbitration. The International Commercial Arbitration Law promulgated by Amiri Decree No. 9 of 1994 is composed of two parts. The main part relates to the

promulgation of law and encompasses mainly the Legislative Decree by virtue of which it was promulgated. The second appended part (“the Procedural Section”) is identical to the UNCITRAL Model Law on International Commercial Arbitration, which contains the provisions relating to the International Commercial Arbitration as defined in Article 1 (3), 1 (4) and 1 (5) of the UNCITRAL Model Law on International Commercial Arbitration. The main part of the International Commercial Arbitration encompasses, in addition to the Legislative Decree by virtue of which it was promulgated, the necessary definitions and amendments to be in line with UNCITRAL Model Law on International Commercial Arbitration.

As the provisions of the procedural part of the Bahraini International Commercial Arbitration Law are identical to the UNCITRAL Model Law on International Commercial Arbitration Law, the same reference article numbers of the former are also used to refer to the latter. Article 2 of the aforesaid Legislative Decree states:

“The provisions of Chapter Seven of the Civil and Commercial Procedures Law promulgated by Legislative Decree No. 12 of 1971 with respect to Arbitration shall not be applicable to any international commercial arbitration subject to the provisions of this Law. Such arbitration shall not be subject to the other provisions of the Civil and Commercial Procedures Law except to the extent where they do not conflict with the provisions of this Law.”

Upon reviewing the provisions of Article 1 (3), 1 (4) and 1 (5) of the Procedural Section of the abovementioned Law, it can be gathered that an arbitration can be an international commercial arbitration if it fulfils the following:

Its subject matter shall relate to commercial relations. The Law cites examples of such commercial relations by providing that commercial relations shall include but are not limited to the following transactions: any trade transaction for the supply or exchange of goods or services, distribution agreements, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation

agreement or concession, joint ventures and other forms of industrial or business co-operation and carriage of goods or passengers provided that

- a. If the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states.

OR

- b. If the place in which the arbitration is agreed to take place or any place in which a major part of the obligations arising from the trade relations is to be performed or the place which is closely linked to the issue of the dispute is situated outside the State in which the two parties to arbitration have their place of business.

OR

- c. If the Parties expressly agree that the issue of the arbitration agreement relates to more than one country.

If such conditions are fulfilled in an arbitration agreement, the arbitration shall be deemed international and shall cease to be subject to the arbitration provisions provided for in Chapter Seven of the CCPL that has already been discussed.

The general rules of international commercial arbitration of Decree No. 9 of 1994 agree with the overall rules of local arbitration such as the need for the parties to agree on arbitration, and the declining of the courts from hearing the dispute in the presence of the said agreement. However there are certain areas of difference between international commercial arbitration and local arbitration. This thesis is restricted to dealing with areas of difference between international commercial arbitration and local arbitration in the State of Bahrain which are the following:

1. International commercial arbitration can only take place in respect of commercial matters. However, local arbitration can be resorted to for resolving commercial and non-commercial disputes whenever conciliation is permissible.

2. Article 2 (d) of the Procedural Section states as follows:

“Where a provision of this Law leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorise a third party including an institution, to make that determination.”

From the above provision it is deduced that it may be possible for the parties to agree to refer the issue of arbitration to a juristic person as an arbitrator. This provision is completely different from the rules of local arbitration that require that an arbitrator shall be a natural person, as has already been explained.

3. Article 3 of the Procedural Section provides that:

“3. Unless otherwise agreed by the parties: any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address, if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last known place of business, habitual residence or mailing address by registered letter or on other means which provides a record of the attempt to deliver it.”

Such procedures are different from the notice and service procedures for local arbitration that are not expressly provided for in the Arbitration chapter of CCPL, hence they shall be subject to the general rules for giving notices. The prevailing practice in Bahrain is that the service of notice with respect to arbitration documents takes place by confirming the direct delivery thereof. Providing a record of the attempt to deliver, accepted elsewhere in international commercial arbitrations, does not suffice.

4. Article 7 of the Procedural Section lays down the condition that an arbitration agreement must be in writing. An agreement is in writing if it is contained in a

document signed by the parties or in an exchange of letters or other means of communication. This is unlike the local arbitration the agreement, which can be proved by other specific methods of proof, as has been previously detailed.

5. Article 8 of the Procedural Section gives the court mentioned in such Rules, before which an action is brought in a matter which is a subject of an arbitration agreement, the power to hear the case if it finds that the agreement is null and void, inoperative or incapable of being performed. The same Article permits that where an action is brought before the arbitrator and the court it shall be simultaneously heard by both. The second paragraph of this Article allows that “*an award may be made while the issue is pending before the Court.*”

This is a defective provision as it leads to duplication in hearing the dispute and handing down contradictory rulings of the two forums in respect of the same matter and does not comply with the principles of arbitration.

6. Article 9 of the Procedural Section expressly provides for the right of the parties to international arbitration to seek reference to the summary proceedings court, while the rules governing local arbitration are silent in this respect, leaving the issue to be determined by general principles of law.
7. Article 12 of the Procedural Section requires an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him. The second paragraph of this Article provides that “*an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.*” Article 13 of the said rules outlines the removal procedures before the arbitrators and Article 14 of the same Rules provides for jurisdiction

of the national courts to decide upon an application for challenging an arbitrator.

It is deemed from the above referred Article that either party may challenge an arbitrator if there is a justifiable reason for such challenge. There is no similar provision in the rules relating to local arbitration but this is left to be determined by general rules.

8. Article 16 of the Procedural Section vests the arbitrator or the arbitration tribunal with the power to rule on its jurisdiction, which is a valid and acceptable provision. However, this provision conflicts with the provision stipulated in Article 8 (referred to in 5 above) which gives the court named in the Procedural Section the competence to rule on the validity of the arbitration agreement. The sound opinion in this respect is that the arbitration forum shall only be given the power to decide on the validity of the agreement and any challenge to such validity shall be left to the proceeding of the invalidation case of the arbitration award and the arbitration agreement shall not be dealt with separately.

9. Article 28 (3) of the Procedural Section states:

“The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorised it to do so.”

This provision agrees in its first part, with the rules of the local arbitration laws. However, for the second part the matter is different as the arbitrator is barred from having recourse to the principles of equity in the absence of any sources of law for adopting his award apart from the rules of equity and sound conscience. This defective restriction prevents the arbitrator from delivering his award on the grounds of principles that are followed by courts in the absence of specific provisions and prevailing practices.

10. The Procedural Section is limited to one method of recourse against awards. The heading of Article 34 thereof reads “*Application for Setting Aside as Exclusive Recourse Against Arbitral Award*” and the aforesaid Application and its procedures involve challenge by invalidation only. This provision is contrary to the rules of local arbitration which basically permit the parties to appeal against the arbitral award unless the parties agree not to appeal. The provision of the aforesaid Article 34 is the appropriate provision, as permitting appeal against arbitration awards is a prelude to the direct and decisive intervention of the State Courts, hence the entire purpose of reference to arbitration will be pointless.

11. Article 34 (2) and 34 (3) of the aforesaid Procedural Section fix as a three-month period after which an arbitral award may not be contested. The implication of this provision is that any action for invalidating an award must be brought within three months from the date of notifying the petitioner of the tribunal award. Article 35 prevents the possible execution of the arbitral award before the lapse of this period, hence an award shall not be referred for execution before the expiry of the said three-month period. Indeed, these provisions are totally different from the local arbitration provisions in which the execution of arbitration award is not limited by a period of time. The execution of the award in local arbitration takes place by an order of the competent court that has jurisdiction to hear the dispute following the filing of the award therewith. The sound opinion is that fixing a time limit for challenging an arbitral award is an appropriate approach in order to maintain the stability of such awards, and to avoid prolonging the dispute. However, limiting the execution to the lapse of the time limit allowed for the challenge is an improper approach. Rather the court before which the challenge is heard should be granted the power to order the stay of execution of the award pending the court judgment in the challenge proceedings.

Execution of Foreign Arbitration Awards and International Arbitration Awards

Pursuant to Legislative Decree No. 4 of 1988, the State of Bahrain acceded to the 1958 New York Convention with respect to Recognition of Foreign Arbitration Awards and Execution Thereof. The provisions of Article 5 of the Convention with respect to execution of foreign arbitral awards are almost identical to the provisions of Article 36 of the Procedural Section relating to execution of awards in respect of international arbitration. In their provisions, both legislative instruments comply with most of the rules laid down in the provisions of Articles 252 and 253 of the CCPL with respect to execution of awards handed down outside the State of Bahrain. The provisions of the first two legislative instruments are more comprehensive and detailed than the provisions set forth in the CCPL. Similarities and differences may be summed up in the following:

(1.) Similarities:

In order for a foreign award (pursuant to the procedural Law), an international arbitration award (pursuant to the International Commercial Arbitration Law) or an award delivered in one of the signatory States of the New York Convention to be enforced, the following common requirements used to be satisfied:

- a) That the Bahrain Courts shall not have jurisdiction to hear the case concerning a dispute in respect of which the award or verdict has been given and that the arbitral tribunal or arbitrator who has handed down the award has proper jurisdiction.
- b) That the litigants in the case in respect of which the award or verdict was delivered have been given proper notice to appear and that they have been properly represented in the proceedings.

- c) That the verdict or arbitral award has become final according to the law agreed upon under the arbitration agreement.
- d) That the verdict or award does not conflict with any judgement or order previously issued by the Bahrain Courts and does not contain anything contrary to the public order or morals.
- e) That the verdict or award shall not have been delivered in respect of a matter that may not be subject to arbitration according to the Bahrain law.

(2.) Differences:

- a) Article 36 (1) of the Procedural Section which is attached to the International Commercial Arbitration Law provides that

“recognition or enforcement of an arbitral award,, may be refused only at the request of the party against whom it is invoked, if that party furnishes to the competent Court where recognition or enforcement is sought, proof that (i) a party to the arbitration agreement referred to in Article 7 was under some incapacity.....”

In a similar provision, Article 5 (1) of the New York Convention provides for the possible refusal of an application for execution if it is proved

“that the parties to the agreement referred to in Article 2 were pursuant to the applicable law in a state of incapacity”.

Although there are minor differences in respect of the two texts in terms of being under “*some incapacity*” in the first instance and “*in a state of incapacity*” in the second one, they are similar in terms of content and purpose to ensure that the parties to arbitration enjoy the required legal capacity. Both Articles 7 and 2 in the above refer to the parties to arbitration and not to the arbitrators.

It should be noted that there is no similar provision in the CCPL concerning the rules with respect to execution of foreign verdicts and awards. In this context, a question may be raised with respect to what would happen in the case of a request for execution of a foreign award delivered in a state that is not a member of the New York Convention where the party against whom the arbitration award was rendered pleads the incapacity of the other party.

Although in such case the general rules of law will be applicable, it would be more appropriate to supplement the provisions of the CCPL by providing a similar provision to the aforesaid Procedural Section and the New York Convention provisions.

- b) Article 36 (2) of the Procedural Section and Article 6 of the New York Convention deal with the case of contesting an arbitration award or verdict before the competent Court. These provisions state that the Court to whom the application for execution is submitted shall suspend proceedings in respect of such application pending the handing down of a verdict from the concerned Court with respect to the challenge. The CCPL does not contain a similar provision. Further the interpretation of the second paragraph of Article 252 of the said Law may conclude the possibility of the rejection of the request for execution, if a challenge against the arbitral award renders it not to be final. The provision of this particular paragraph states: *“No execution order may be passed except after ascertaining the following: 1..... 2..... 3. that the Court judgement or order has become final in accordance with the law of the Court that passed it.”*

A provision needs to be added to the CCPL similar to the provisions of the said two paragraphs in the Procedural Section and New York Convention with a view to standardising the principles regulating the execution of foreign judgements and for avoidance of conflicts in the interpretation of legal provisions.

Section Three: Compulsory Arbitration

Impact of Arbitration's Voluntary Origin

As already mentioned, arbitration is dependent upon the free will of the parties who must willingly agree on such reference. This means that it is possible for the parties either to have reference to the State Courts or to seek reference to arbitration when they have willingly chosen arbitration.

Consequently the so-called compulsory arbitration must be ruled out from the concept of the normal arbitration as the litigants are obliged to refer their dispute to arbitration by force of the law and not upon their will. In fact, doubts are raised about the legitimacy of compulsory arbitration and how constitutional it is. Such doubt is valid as Article 20 of the Constitution provides in its last paragraph as follows: "*The right to litigation shall be guaranteed in accordance with the law.*" This means that for each citizen the Constitution secures having recourse to the State Courts as a fundamental right but the law permits agreement on reference to arbitration as a method whose legality is derived from the agreement of the parties. Compulsion to any course of action other than the ordinary courts results in denying the right to recourse to litigation before State Courts as guaranteed under the Constitution.

However, since the Bahraini legislator includes certain provisions creating such cases of unusual compulsory arbitration it will be appropriate to deal with them in this study.

Compulsory Arbitration's Definition

An arbitration can be compulsory if reference to it is of a mandatory nature that does not require prior agreement between the two sides nor their approval while such arbitration award is legally binding upon them and they have to implement it and abide by its ruling.

Compulsory arbitration in the Bahrain legislation has two manifestations, namely Arbitration in Collective Labour Disputes provided for in the Labour Law and Arbitration in Disputes Relating to Deals that take place in the Bahrain Stock Exchange (“BSE”) pursuant to the Stock Exchange Law.

I. Arbitration in Collective Labour Disputes

The motive for the legislator’s making arbitration compulsory in respect of collective labour disputes is the seriousness of such disputes and their impact on the national economy, if they are not speedily resolved, as they could lead to strikes and closing down the employing establishment. The legislator regulates this type of arbitration pursuant to the Labour Law. The will of the litigants under this scheme does not have any impact on the reference of the dispute to arbitration or the election of arbitrators. In fact, the dispute is referred from the amicable settlement negotiation stage, in case of its failure, to the arbitration Tribunal without any consideration of the agreement of the litigants, as reference to arbitration may be made by the action of one party or at the initiative of the Ministry of Labour.

1. In this respect, Article 133 of the Labour Law states as follows:

“If any dispute arises between an employer and all his workers, or any group thereof, concerning employment or the conditions of employment and the parties thereto fail to settle such dispute, it shall be settled by conciliation or arbitration upon a written application lodged by any of the two parties with the Ministry of Labour and Social Affairs. Whenever such application is lodged by an employer it shall be signed by him personally or by his duly authorised representative. Alternatively, whenever such application is lodged by the workers, the application shall be lodged by the majority of them or by the majority of the workers of the section concerned with the dispute in the establishment. The Ministry of Labour and Social Affairs may endeavour to settle the matters in dispute by conciliation or arbitration without prior application being lodged by either of the parties thereto.”

From the above Article it may be deduced that the conditions for application of the conciliation and arbitration provisions in collective labour disputes are as follows:

- a) One of the parties to the dispute must be an employer. Article 1 of the Labour Law defines an employer as “*any natural or juristic person employing one or more workers for remuneration of any kind.*”
- b) The other party to the dispute is all the employer’s workers or a group of those workers. This is the implication of referring to collective labour disputes rather than individual disputes.

The reason for making a distinction between collective and individual disputes is the insignificance of the latter to public affairs as such dispute may not lead to obstructing production.

However, the Law does not mention the number of workers who can be a party to the collective dispute nor their percentage of the establishment’s workers or section of the establishment. The provision is of a general nature rather than a specific one.

The legislator does not distinguish between large and small establishments in this respects despite the fact that a dispute in a small business establishment may bear no public effect or concern.

- c) The dispute should pertain to a labour relationship or to its conditions. There must be a dispute between the two parties to the employment contract and its subject must be related to the employment or its conditions. In other words, the dispute must be related to the parties’ relationship arising from the labour relationship, whether the dispute is legal, organisational or financial. An example of such dispute is where the workers or a group of workers of an

establishment demand the payment of a transport allowance in accordance with a certain provision in the establishment's regulations.¹

2. If the conditions of Article 133 of the Labour Law are fulfilled, recourse can be made to the conciliation procedures laid down in Article 134 of the Labour Law which states:

“A mediator appointed by the Minister for Labour and Social Affairs shall convene a meeting urgently of the representatives of the two parties and endeavour to settle the dispute amicably in the light of the statements made by them. A mediator may institute any inquiries which he considers necessary to his efforts of conciliation and may seek the assistance of any person he may deem of assistance. He shall record in writing a process-verbal of his proceedings and the result of his mediation.”

Article 135 of the Labour Law states that:

“if the mediator succeeds in settling the dispute, in whole or in part, he shall record in writing three copies of a formal statement of such agreement reached which shall be signed by him and by the representatives of the two parties thereto. One copy thereof shall be handed to each of the two parties concerned and the third copy shall be retained by the Ministry of Labour and Social Affairs. The said process-verbal formal statement shall acquire the executory force of final judgement upon an executory clause being endorsed therein by the Clerk's Section of the Senior Civil Court. In the event that the mediator fails to settle the dispute entirely within a period of fifteen days of receipt of the application for conciliation by the Ministry of Labour and Social Affairs, he shall record in writing a statement of the outcome of the conciliation proceedings and the reasons for the failure thereof. The Ministry of Labour and Social Affairs shall transmit all the documents relating to the dispute to the Ministry of Justice and Islamic Affairs for submission to an arbitration Tribunal.”

The legislator, in this respect, may be criticised for designating a single person to act as a mediator and/or conciliator between the parties to the dispute. It would have been more appropriate if the conciliation procedures had been entrusted to a committee whose members are not less than three due to the importance and complexity of such

¹ Al Bakri M.A., *Mudawanat Al Fiqh Wa Al Qada Fi Qanun Al Amal Al Jadid*, Page 651. It is noted that Article 93 of the Egyptian Labour Law is identical to Article 133 of the Bahrain Labour Law.

disputes. It is also noted that where the legislator provides in Article 134 that the mediator shall invite the representatives of the parties, he has actually barred the actual parties from appearing before the mediator, which is contrary to the basic principles that give the litigant the right to present his viewpoint personally without appointing a representative thereof. Further, attributing the force of final judgement to the procès-verbal prepared by the mediator and having the agreement recorded therein does not conform with the basic rules of conciliation and amicable settlements. It would have been more appropriate for the legislator to make the mediator's duty limited to drawing up a procès-verbal concerning the points of agreement, considering that such procès-verbal is a mutual agreement that has an ordinary contractual binding force.

3. If the mediator fails in the conciliation procedures, it shall be necessary to refer the dispute, according to Article 135, to the Ministry of Justice and Islamic Affairs to the arbitration Tribunal.

According to the provision of Article 136, the arbitration Tribunal shall be appointed as follows:

- a) three judges of the Senior Civil Court nominated by the Minister of Justice at the commencement of each judicial year.
- b) a representative of the Ministry of Labour nominated by the Minister concerned from amongst senior officers of that Ministry.
- c) a representative of the Ministry of Commerce nominated by the Minister concerned from amongst senior officers of that Ministry.
- d) a representative on behalf of the workers nominated by them from amongst workers who are not directly involved in such dispute; if the workers concerned fail to nominate their representative within the time limit fixed by the chairman of the Arbitration Tribunal, the chairman of the Arbitration Tribunal shall nominate such representative on their behalf.

- e) a representative on behalf of the employer concerned, nominated by him, from amongst businessmen who are not directly involved in such dispute.

Members of the Arbitration Tribunal, other than the judges, shall participate in its deliberations without being empowered to offer any opinion upon its final award.

The Arbitration Tribunal shall convene its meetings at the Ministry of Justice. The meetings of the Arbitration Tribunal shall be valid notwithstanding the absence therefrom of both or either representatives of the workers or of the employer concerned.

The parties to the dispute shall bring their representatives on the day fixed for the examination of such dispute.

The formation of the Arbitration Tribunal itself raises questions about its nature and whether it is an ordinary judicial body, considering that the majority of its members are members of the judiciary. There needs to be a determination as to whether it is an administrative Tribunal that has judicial powers or whether it is an Arbitration Panel.

The answer is that the Arbitration Tribunal is not an administrative Tribunal vested with judicial powers owing to the participation of a whole department of the Senior Civil Court in its formation. Moreover, the Senior Court may be formed with the membership of two judges unlike the aforesaid Arbitration Tribunal that must have amongst its members three Senior Civil Court judges. Further, the Arbitration Tribunal is not a judicial authority as the nature of its deliberations and its formation are different from that of judicial bodies and authorities. Also it follows procedures of a special nature, hence it constitutes an undermining of the judicial system and prejudices the principle of litigation in two degrees. In all aspects it is certainly not a real arbitration forum in the legal technical sense as its members are not appointed by the parties of their own will.

Accordingly, it can be said that such arbitration including formation of its Tribunal is a distinctive legal structure for which the legislator uses the term arbitration in an arbitrary manner, although it is neither an arbitration nor a judicial structure.

At any rate, the legislator's endeavours to regulate this legal structure have not achieved success as the provision of the aforementioned Article 136 of the Labour Law is criticised for stipulating that the Arbitration Tribunal shall include in its membership a representative of the Ministry of Commerce. It would have been appropriate if the Law had stipulated for the designation of a representative from the ministry concerned with or having interest in the issue of the dispute and not necessarily the Ministry of Commerce so that if the dispute relates to an economic interest, the representative would be from the Ministry of the National Economy and if the dispute relates to a banking matter, the representative would be from the Bahrain Monetary Agency and so on. This may help to have the required expertise present in the Tribunal which seems to be the objective of the legislator of having a Ministry's representative as one of its members.

4. Article 137 of the Labour Law states:

“The Chairman of the Arbitration Tribunal shall convene a meeting to examine the dispute within a period of not more than fifteen days from the date of receipt of the documents relating thereto. The date of such meeting shall be communicated to the members thereof and to the two parties concerned at least three days prior to the date arranged for the meeting. A meeting of the Arbitration Tribunal shall be attended in person by the two parties concerned or by lawyers duly authorised by them to act on their behalf before the Arbitration Tribunal. An Arbitration Tribunal shall deliver its award upon a dispute within a period not exceeding one month from the commencement of the hearing thereof. An Arbitration Tribunal may decide to hear witnesses, delegate persons having expertise, inspect factories and work places, examine all documents and books of accounts relating to the dispute and take all measures to effect a settlement of the dispute. The said Arbitration Tribunal may impose the penalties prescribed by the existing laws upon any person who fails to lodge the documents and notes required in support of his claim or upon any witness who fails or who refuses to attend before the Tribunal without reasonable cause or who refuses to tender the oath or to answer questions

provided that the provisions of the Civil and Commercial Procedures Law shall be observed in respect of proof by submission of evidence.”

It is noted that this Article does not mention a method of giving notice to the Tribunal’s members or the litigants concerning the date, the place and time of the hearing, hence it is permitted to give notice by any method that can be proved. Although providing for a one-month time limit for resolving the dispute aims at speeding up the settlement of such dispute for avoidance of the consequences arising from its continuation for an extended time, such time limit may not be sufficient for completing the investigation of the issue in question. Thus, this time limit is a fixed period of time, the violation of which does not result in invalidation of the proceedings.¹

5. Article 138 of the Labour Law states:

“An Arbitration Tribunal shall apply the statutory laws in force, and general and regulatory orders, and may take due account of custom and the principles of equity to accord with the economic and social conditions of the State. The award of an Arbitration Tribunal shall be passed by a majority vote of the judges who are members of the Tribunal and shall state the reasons for such award. Whenever an award is made differing from the opinion held by any of the other members of the Tribunal, such dissenting opinion shall be recorded in the award together with the reasons for its exclusion therefrom. An award shall be deemed to be a final judgement made by the Senior Civil Court upon an executory clause being endorsed therein by the Clerks Section of such Court. Either of the parties to the dispute shall be entitled to submit the dispute again to an arbitration Tribunal after the elapse of at least one year from the date of implementation of the award provided that substantial changes justifying such action have occurred to the terms and conditions of work. The Ministry of Justice and Islamic Affairs shall, within three days from the date of making an award, transmit a copy thereof to the parties to the dispute. The said Ministry of Justice and Islamic Affairs shall transmit the file of the dispute concerned, after having notified the two parties thereto, to the Ministry of Labour and Social Affairs which shall record the award in a special register and maintain the file in its archives, and extracts thereof shall be made available to those persons concerned in accordance with the Orders regulating such matters made by the Minister of Labour and Social Affairs.”

¹ Al Bakri M.A., Ibid. Vol. 2, p. 697.

Article 138 outlines the rules to be duly applied by the Arbitration Tribunal according to the applicable laws and regulations. In addition to this basic principle that must be followed, the said Tribunal must act in accordance with the prevailing customs and principles of equity in line with the prevailing economic and social conditions in the country. The Arbitration Tribunal may meet some of the workers' claims that are derived from custom or principles of equity even if such claims have no grounds of established applicable legislations. Custom is defined here as the practice continuously followed in a profession so as to believe in the need to observe it as a legal rule. Taking into consideration that the appropriate objective of the legislator of these procedures is to solve the dispute between the parties in a manner that reconciles the interests of the two parties as far as possible without intransigence or being cumbersome to either of them. In relying upon any of these sources in the order set forth in the above provisions, the Arbitration Tribunal is not obliged to follow that order. It may rely upon the principles of equity even though there is a prevailing custom concerning the issue of the dispute.

However, a question is raised concerning the power of the Arbitration Tribunal to amend the terms of the contract. The sound opinion is that where the dispute being heard by the Arbitration Tribunal shall apply the provisions of the contract concluded between the two Parties according to the principle *pacta dant legem contractui*, the Arbitration Tribunal is basically obliged to apply the provisions of such contract to the dispute. However, the Arbitration Tribunal must amend the provisions of the contract according to the principles of equity if it feels that the economic or social circumstances have changed from what they were at the time of concluding such contract.

It is noticed from the aforesaid Article 138 that it excludes Islamic Sharia as one of the sources mentioned although it is the second source after the law for deducing judgements according to the Judicial Law.

It is also noticed from the abovementioned Article that although the decision adopted by the Arbitration Tribunal is in effect a substantiated judgement adopted by the majority of its members, the legislator does not consider it as a judgement but as an “*award which is tantamount to a final judgement*”. This raises a question about the possibility of challenging this Arbitration Tribunal award either by way of appeal or by cassation since it is regarded as a final judgement handed down by the Senior Civil Court.

Basically, contesting judgments by way of appeal before the High Court of Appeal can only take place in respect of judgements handed down in the first instance by the Senior Civil Courts. In addition to the fact that this award is not a judgement but is “*tantamount to a judgement*”, it has not been passed by a Senior Court in its capacity as a degree of litigation nor has it been passed in the first instance but has been handed down as a final ruling. Furthermore, the Court of Cassation Law No. 8 of 1989 does not permit any cassation in respect of such award since Article 8 thereof states that a cassation is permitted in respect of awards handed down by the High Court of Appeal or by the Senior Civil Court held in an appellate capacity. The Arbitration Tribunal’s award is not delivered by the Senior Civil Court but by an Arbitration Tribunal. In all cases, it is not passed by the Arbitration Tribunal held in an appellate capacity, aside from the fact that it is not a judgement but is tantamount to a judgement, hence it cannot be contested by cassation or by any other method. It would be more appropriate if, following the establishment of the Court of Cassation, the legislator had permitted appeal by cassation of the Tribunal’s awards by amending Articles 137 of the Labour Law authorising challenging such award.

6. Article 139 of the Labour Law states:

“The provisions relating to the rectification or interpretation of court judgements prescribed in statutory laws shall be applicable to the awards made by an Arbitration Tribunal. The provisions of statutory laws relating to the recusation of judges shall be applicable to members of the Arbitration Tribunal other than the judges.”

Since the legislator considers awards delivered by the Arbitration Tribunal tantamount to judgements handed down by the Senior Civil Court, this Article provides for the application of provisions relating to rectification and interpretation of court judgements prescribed in statutory laws. These provisions are contained in the CCPL.

For the rectification of judgements, Article 190 (2) of the CCPL states as follows:

“The Court may at any time at its own motion or by the request of one of the parties correct clerical or arithmetical errors occurring in verdicts and decisions through accidental oversight. The Court Clerk shall make this correction in the judgement’s original copy which shall be signed by him, Court President and judges.” However, the third paragraph of the said Article states: *“A decision adopted for making a correction may be contested if the Court exceeds its right provided for in the preceding paragraph using the methods of challenge permitted in respect of the judgement subject to such correction.”*

Since an Arbitration Tribunal award may not, as has been already explained, be contested by any method, Article 190 (2) cannot be applicable. Consequently, if it is assumed that the Arbitration Tribunal exceeds its right provided for in the second paragraph of Article 190 of the CCPL, no litigant has the right to contest its action in any manner.

Regarding the interpretation of judgements, Article 260 of the CCPL states:

“If there is any obscurity or ambiguity in the judgement writ which is required to be executed, the Execution Court may not offer any explanation or clarification of its own; and it shall be imperative upon the Execution Court judge, prior to enforcement of the judgement, to seek in writing from the Court

which passed the said judgement, an explanation of the obscurity or ambiguity contained in the judgement writ. The Execution Court judge shall advise the interested parties to approach the relevant Court if it appears to him in the course of enforcement that there are certain matters which require the issue of a court judgement in respect thereof. However, such advice shall not cause any delay in the enforcement of other obvious sections of the judgement writ where the aforesaid sections are not dependent upon the matters advised to be looked into by the relevant court”.

In its first paragraph, this Article does not give the concerned parties the right to proceed directly to the Arbitration Tribunal for interpreting any obscurity or ambiguity in its award, but this authority has been given to the Execution Court Judge considering that he is competent to execute the Arbitration Tribunal’s award according to the provision of Article 244 of the CCPL. This Article empowers the Execution Court to execute the judgements and verdicts handed down by the civil law courts of various kinds and degrees, notarised legal documents and settlement deeds endorsed by the law courts as well as other documents given this quality by law. The legislator considers an award delivered by the arbitration Tribunal as a final judgement after giving it an executive nature, hence it can be said that it is one of the other documents given this quality by law.

The Execution Court Judge cannot enforce the provision of the second paragraph of Article 260 of the CCPL by advising the concerned persons to approach the Court that had delivered the judgement if it appears to him that there is an impediment preventing execution. Recourse to the Court in this case can only take place by filing a case for interpretation before the Court which rendered such judgment following the same procedures for ordinary court cases. Filing an application under Article 133 of the Labour Law is not possible as this Article governs the reference of initial disputes and does not deal with judgments interpretation or correction procedure.

The relevant provisions in the Labour Law should be amended to enable any interested party in seeking clarification, interpretation or remedy of an omission to submit applications for interpretation or procure certain appropriate actions be taken before the Arbitration Tribunal. The procedure of removal of a judge is governed by Article

32 of the Judicial Law and Articles 183 and 184 of the CCPL. Such provisions also apply to the judges who are members of the Arbitration Tribunal as well as to non-judge members.

It is noted that the legislator has not regulated several fundamental matters concerning compulsory arbitration in respect of collective labour disputes such as the extent of competence of the Arbitration Tribunal to hear urgent matters, to hand down an award in respect of them and the effect of the suspension of litigation on proceedings before the Arbitration Tribunal. The legislator has also failed to regulate instances of terminating the contract of employment by the employer prior to or after submitting the conciliation application. Such failure includes issues concerning the legal costs and fees of arbitration cases and the remuneration of members of the Arbitration Tribunal, taking into account that the labourer and his heirs are exempted from paying Court fees in case of ordinary Labour Court cases pursuant to the provisions of Article 155 of the Labour Law.

II. Compulsory Arbitration in Disputes Relating to BSE Transactions

The Bahraini legislator regulates arbitration in respect of disputes relating to trading at the BSE by a single article of Legislative Decree No. 4 of 1987 (the “Stock Exchange Law”) with respect to Establishment and Organisation of the BSE, which is Article 13 thereof. It states as follows:

“An arbitration Tribunal shall be formed at the Exchange and the membership thereof shall be determined by an order of the Exchange Council Chairman. The Tribunal shall be chaired by a judge who shall be nominated by the Minister of Justice and Islamic Affairs and includes two members one of whom shall be a non-Council member. The said Tribunal shall be responsible for settling all disputes relating to transactions concluded at the Exchange. Trading at the Exchange shall be regarded as an admission of the acceptance of arbitration and this fact shall be recorded in the documents of the transactions. The awards passed by the Tribunal shall be binding upon the two parties to the dispute. The Exchange’s internal regulations shall set forth the procedures to be followed for reference of the dispute, manner of settling it and remuneration of the arbitration Tribunal members.”

The Bahraini legislator has introduced a special method of arbitration in respect of all disputes relating to trading at the BSE, considering that trading at the BSE results in an automatic acceptance of arbitration. This raises the question as to the nature of such arbitration as to whether it is voluntary or compulsory.

In other words, since reference to arbitration is essentially a mutual agreement between the parties for which initial acceptance is required as a basic prerequisite for such reference, will trading at the BSE be regarded as an implied agreement or acceptance by the parties trading at the BSE with respect to reference to arbitration?

To answer this question, it must be mentioned that the BSE according to the aforesaid Law is the place where listed companies and financial institutions shall offer their shares and securities for trading to prospective traders. Trading in securities that is contrary to the provisions of the Stock Exchange Law shall be deemed null and void pursuant to Article 4 of the said Law.

Accordingly, the entry into this market by such companies and financial institutions is not an option but a vital economic necessity in addition to being a legal obligation for such organisations for trading in their stocks.

It cannot be said that trading at the BSE results in optional acceptance of arbitration or agreement to such arbitration. Arbitration in this instance becomes compulsory to which the parties are subject as a mandatory legal rule that must not be violated. The parties to the dispute do not elect the arbitrators and have no option but to refer the dispute to the Board designated by the Law, hence eliminating the parties' will to have recourse to arbitration or to elect the arbitrators.

It should be noted in this respect that the Egyptian Supreme Constitutional Court ruled on the unconstitutionality of the provision of Article 18 (2) of Law No. 48/1977 with respect to the Establishment of Faysal Islamic Bank and the invalidity of the third,

fourth and fifth paragraphs thereof as well as the provisions of the sixth and seventh paragraphs relating to the Arbitration Tribunal set forth in the second paragraph. In the recitals to its judgement, the aforesaid Court stated that:

“since the second paragraph of Article 18 of the Law with respect to the Bank’s Establishment has made arbitration as the sole avenue for solving any dispute that arises between the Bank and the persons that deal with it while arbitration is basically a mutual agreement between the parties, thus consent must be available as a basic condition. It is inconceivable to have recourse to arbitration in the absence of mutual consent of the parties, whether the arbitration relates to a previous or subsequent dispute in addition to restricting arbitration by a legislative provision as a means of settlement of disputes is considered as depriving the parties of the right to have recourse to the natural judge and an aggression against the jurisdiction of the law Courts”.

The provision of Article 18 (2) of the Egyptian Law No. 48/1977 with respect to the Establishment of Faysal Islamic Bank that has been ruled unconstitutional is similar in its provision to Article 13 of the Stock Exchange Law.¹

Competence of the Arbitration Tribunal

The aforesaid Article 13 provides for the powers of the Arbitration Tribunal for settling all disputes relating to transactions concluded at the BSE. This means that its competence does not cover any disputes not related to trading at the BSE such as the disputes that may occur between the BSE’s Administration and stock traders in respect of matters beyond trading at the BSE.

The powers of the aforesaid Arbitration Tribunal as outlined in the Law is considered as part of the public order that no agreement shall contradict it.

¹ Egyptian Court of Cassation Case No.13/15 Q Constitutional, Hearing of 17.12.1994.

Arbitration Tribunal's composition

According to the provision of the aforementioned Article 13, the Arbitration Tribunal shall be formed by an order of BSE Council Chairman. The Tribunal shall be chaired by a judge who shall be nominated by the Minister of Justice and Islamic Affairs and include two members, one of whom shall be a non-BSE Council member.

The above Article does not require the judge to be nominated by the Minister of Justice to be of any category and therefore he can be a Junior Court judge. It would be, at least, wiser if the legislator had required this judge to be from the judges of the Court of Cassation or at least from the High Court of Appeal in order to have sufficient experience to settle disputes of the special and significant nature relating to trading at the BSE.

For the other two members of the Committee, the legislator states that one of them shall be a non-BSE Council member, without requiring any further conditions. The other member should be from members of the BSE Council. It should be noted that the BSE's Council, according to Article 5 of the Stock Exchange Law consists of the Minister of Commerce as Chairman, a member representing the Ministry of Commerce to act as a Deputy Chairman, a member representing the Ministry of Finance and National Economy, a member representing the Bahrain Monetary Agency, three members to be elected by the Bahrain Chamber of Commerce and Industry from amongst experienced and competent figures and two members representing national banks and audit firms to be selected by the Council Chairman.

Arbitration Procedures

The aforesaid Article 13 makes reference to the BSE's Internal Regulations with respect to procedures for reference of the dispute, to the Arbitration Tribunal, its settlement and members' remuneration.

Chapter seven of the Internal Regulations of the BSE, promulgated by Ministerial Resolution No. 13/1988, is devoted to Disputes and Arbitration Procedures. Article 57 of the above Regulations states that *“an arbitration petition shall be filed by any of the parties to trading with the Control and Investigation Department of the Exchange after payment in full of the prescribed fee”*. Article 59 requires that the arbitration petitions shall include the litigants’ names, occupations, domiciles, residential addresses, names of the parties they represent should they be acting on behalf of others, subject matter of the dispute, claims in respect thereof and supporting evidence and a memorandum explaining the dispute. Article 60 states that the Control and Investigation Department shall refer the arbitration petition filed therewith to the Chairman of the Arbitration Tribunal for fixing a date for the sitting at which the dispute shall be heard. The said Department shall give notice to all the litigants with respect to the date of the sitting fixed for hearing the dispute, accompanied by a copy of the arbitration petition.

For the method of the serving process of papers and notices relating to arbitration, it shall be according to the provision of Article 61 of the Internal Regulations done by means of registered mail.

Article 62 of the Internal Regulations states that the litigants shall appear in person or through their agents at the sitting fixed for hearing the dispute. If a litigant fails to appear, the arbitration Tribunal may resolve the dispute in his absence.

Article 63 of the Internal Regulations requires the arbitration Tribunal to settle the dispute referred thereto within a period not exceeding three months. However, it is a sound opinion that this period of time is a regulatory one, a variation of which does not cause any invalidation of the Board’s proceedings.

Rules Applied by the Arbitration Tribunal and Execution of its Award

Article 65 of the Internal Regulations states:

“The arbitration Tribunal shall rule in respect of the disputes referred thereto on the basis of what is produced thereto by the litigants subject to the rules applicable at the Bahrain Stock Exchange. Its award shall be executed in accordance with the rules set forth in the Civil and Commercial Procedures Law, as amended”.

Although it sets forth the procedure to be followed pursuant to the provisions of the CCPL, this Article does not expressly mention the substantive law to be applied by the litigants but just states that the Tribunal shall rule on the basis of what is produced by the litigants. It is obvious that what is meant by “*what is provided by the litigant*” is their contractual evidences.

However the question still arises to what rules shall the Tribunal apply if the contractual evidences of the parties are not sufficient to make it render its award. The sound answer to this is that the Tribunal is bound to apply the substantive rules set forth in the Bahrain Stock Exchange Law, its Internal Regulations and the relevant Orders. If there are no relevant provisions in the above the Tribunal shall apply the rules provided for in Article 2 of the Law of Commerce.

It is understood from the text of Article 65 above that the competent authority to execute the Tribunal’s award is the Court of Execution as it states that “*its award shall be executed in accordance with the Civil and Commercial Procedures Law*”. However, executing the Tribunal’s award by the Execution Court Judge is faced with a substantive and a procedural obstacle.

As for the substantial obstacle, the legislator in Article 13 of the Stock Exchange Law refers to the Exchange’s Internal Regulations to specific points. These include the procedures to be followed for reference of the dispute, settlement thereof and members’ remuneration, but there is no mention as to execution of the Tribunal’s

award. Therefore, the fact that the Internal Regulations deal with execution of the award is considered as excess in respect of what has been referred to by the legislator. On this basis the provision of Article 65 of the said Regulations concerning execution of the award or the provision of Article 71 concerning the application of the interested party to the President of the competent court to obtain a copy of the Tribunal's award accompanied by the execution form have no basis in law as it is a fundamental rule that only the law has the force of giving an execution form for the Tribunal's award, which is not done by the Law nor has such law made a reference to the Internal Regulations in connection thereto.

The procedural obstacle is represented by the fact that Article 244 of the CCPL states that:

“the Execution Courts shall have competence to execute judgements and decisions made by the Civil Courts of various kinds and degrees. Execution shall take place under the supervision and control of the Execution Court judge unless the law determines otherwise. Execution may be in accordance with authenticated instruments and conciliation records ratified by the Courts and other documents so characterised by law”.

Since the arbitration Tribunal's award is not at all considered as a judgement nor a decision made by a civil court, it undoubtedly goes beyond the competence of the Execution Court judge.

Furthermore, an award delivered by the arbitration Tribunal cannot be considered as one of the authenticated documents nor the conciliation statements that are endorsed by the law courts.

In addition, it cannot be said that such award is one of the other documents given such quality by law. As has already been stated, the Law does not give the Tribunal's award any capacity rendering it to have the force of an executive deed nor does it authorise the Internal Regulations to give such quality to the Tribunal's award.

Consequently, the execution of this Tribunal's awards is subject to be contested since they do not have the characteristics of executive deeds that are enforceable by law.

Investigation Procedures Before the Tribunal

Article 64 of the BSE's Internal Regulations states:

“The arbitration Tribunal shall investigate the disputes referred thereto whenever necessary. It may designate one of its members or a member of the Control and Investigation Department of the Exchange to undertake the investigation.”

It is understood from the provision of this Article that where resolving a dispute referred to the Tribunal requires evidence by investigation, it shall be undertaken by the Tribunal or it shall nominate one of the members of the Control and Investigation Department at the BSE to undertake the investigation.

This authority of the Tribunal is criticised, especially if one of the parties of the dispute is the BSE itself, in which case the partiality of such member is certainly questionable.

Non-Jurisdiction of the Arbitration Tribunal to Deal with Preliminary Matters Beyond its Competence

Article 76 of the BSE's Internal Regulations states:

“If there is referred in the course of hearing a dispute by the arbitration Tribunal a preliminary matter which is beyond its jurisdiction or if a document is contested as a forgery or if there are penal proceedings filed in respect of forging the said document, the Tribunal shall cease its deliberations pending the passing of a final court judgement.”

This point has been discussed in voluntary arbitration. In this case as the case is in voluntary arbitration the Tribunal should apply here the same rules applied by the arbitrators when dealing with a preliminary matter beyond the scope of their competence as has already been mentioned.

Deliberations and Award

Article 68 of the Internal Regulations stipulates that:

“deliberations with respect to arbitration awards shall take place behind closed doors and no one shall be allowed to participate in such deliberations except the arbitration Tribunal members who have attended the hearings. An arbitration Tribunal award shall be passed by the majority of votes and an award shall be valid if it is signed by the majority of members.”

It is noted that this Article does not provide for the need to include in the award the opinion of a dissenting member nor for recording it; which is contrary to the prevailing principles of arbitration with regard to the need to record the refusal of a dissenting arbitrator to sign the award or verdict as provided for in Article 239 of the CCPL.

As for the form of the award, Article 96 of the Exchange’s Internal Regulation states:

“An arbitration Tribunal award shall be made in writing and shall include in particular a brief account of the litigants’ statements, their documents, grounds for the award, a full text thereof and date and place of adopting it. The draft award shall be signed by the arbitrators. However, it shall be valid if it is signed by the majority of arbitrators.”

Failure to substantiate the award will result in rendering the said award null and void, as the Regulations require the Tribunal to mention the reasons of the award. This action therefore shall be deemed as one of the procedural elements that must be fulfilled and grounds of the award will be deemed as an integral part of the text.

Challenging the Arbitration Award

Both the Stock Exchange Law and the BSE's Internal Regulations are unclear with respect to the possibility of challenging the Arbitration Tribunal's award. Article 13 of the Law and Article 65 of the Regulation states only that the Tribunal's awards shall be binding upon the parties to the dispute. In essence every award or ruling is considered to be binding but still it may be challenged through certain legal procedure. In this context, the legislator should have elaborated about the nature of the binding characteristics of the award and whether this means it is final, particularly as there is no provision relating to challenging such award. Despite the fact that he requires the award to be substantiated, he fails to elaborate about the nature of the Tribunal's award. The opinion is that such award may be appealed against as an ordinary arbitration award.

However, it shall be noted that no dispute has yet been referred to the arbitration Tribunal since the date of its formation until the writing of this thesis as advised by the BSE's Legal Advisor.¹

Conclusion on Compulsory Arbitration

As is deduced from the above study of the two forms of compulsory arbitration in Bahrain, such kind of procedure of resolving disputes cannot be, in fact, classified as arbitration as it lacks the fundamental requirements of arbitration, most important of which is the parties' free will in resorting to such procedure and the electing of persons to resolve the dispute. Such forms are a special vehicle of dispute resolution wrongly given the name of "arbitration".

¹ This information is obtained by a letter from the in-house Lawyer of the Bahrain Stock Exchange in response to my letter dated 25.12.1999.

Chapter 11

CONCLUSION

This thesis covers in its chapters two main parts. Although I have tried to make them integrated and comprehensive, distinction can be made between them as a historical part and an analytical part.

In the historical part, I dealt with the stages of the development of the judicial system. In defining the beginning of this system, I focused on the period directly prior to the Al Khalifa reign. This part then dealt with the stage of the advent of the Al Khalifa reign in Bahrain and establishing their rule, by which the new State of Bahrain was created as a geographical, political and demographic entity that is completely different from Bahrain as it was known in previous historical eras. Before this era Bahrain had historically been known to cover the area from South Iraq to the north of Oman and to extend to the depth of the Eastern Province of the Arabian Peninsula including Al Ehsa.¹

This fact is also evidenced by names of the historically famous Bahrain scholars and men of letters such as Ebrahim Al Qateefi Al Bahrani and Marzuq Al Khati Al Bahrani². The name “Al Qateefi” indicates that this person is from Al Qateef. Likewise “Al Khati” names the person as being from Al Khati. Both are towns in Saudi Arabia.

Since the judicial system which prevailed prior to the Al Khalifa reign was mainly dominated by the Jaafari Shia jurists, whose presence still exists in the current judicial system (with competence restricted to personal status matters), the beginning I have chosen is justified by the actual state of affairs and researching requirements.

¹ Nakhlah M.U. – Tarikh – Al Ehsa Al Siyasi p. 17.

² Al-Amin Muhsin – Aayan Al Shiyaa Vol. 2 p. 141; Al Biladi A. Anwar Al Badrain pp. 282 and 331.

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Questionnaires with the Founder Members of Bahrain Bar Society Mr. Ali Al Ayubi, Mr. Khalil Adeeb and Mr. Ali Hamza.

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Taqi & Mohammed Ahmed.

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