JUDICIAL INDEPENDENCE IN THE ARAB WORLD

A STUDY PRESENTED TO THE PROGRAM OF ARAB GOVERNANCE OF THE UNITED NATIONS DEVELOPMENT PROGRAM

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Judicial independence and the rule of law have moved to the center of global attention. While some of the interest in the matter emanates from the Western world, no region or culture has a monopoly on the concept. Indeed, the principle of judicial independence has deep roots in Islamic culture. All Arab states have proclaimed their fealty to the principle of judicial independence in their constitutions or basic laws.

THE NATURE OF JUDICIAL INDEPENDENCE

THE IMPORTANCE OF JUDICIAL INDEPENDENCE

Judicial independence is critical to three areas of governance. In all these areas, however, the application of the principles of judicial independence raises difficult issues.

First, protection of human rights depends partly on a robust, fair, and independent judiciary willing to hold all political and social actors accountable to legal and constitutional protections. This role involves two paradoxes. First, while judicial independence might be considered a human right, the subject of the right (the people) is different from those who exercise the right (the judiciary). In other words, judges are independent not for their own sake but for the sake of the society that they serve. Second, judges are both part of the apparatus of the state and part of a mechanism that holds state actors accountable. This requires them simultaneously to uphold the public order and correct the actions of public authorities. It would impossible to fulfill these simultaneous missions without genuine independence.

Second, judicial independence facilitates political stability and fairness. In the short term, however, (especially in emergency situations), many governments have been fearful that full exercise of judicial independence and legal safeguards can expose a political system to security risks. This feeling has generally been high among Arab governments, but it is hardly a uniquely Arab pattern. In the United States after September 11, prominent leaders debated the degree to which normal judicial procedures could be followed and some (both in the United States and in other countries) charged that the American government was quick to forget some of its commitment to the rule of law under the threat of terrorism. The purpose of this paper is to examine the requirements of judicial independence in the Arab world rather than the United States, but it must be noted that the sort of security issues that have often inhibited Arab governments from full observance of judicial independence can arise in other countries as well, even those that pride themselves on a history of judicial independence.

Finally, judicial independence is critical for the development of healthy and sound economies. In increasingly complex economies and societies, judicial independence can help ensure the rule of law necessary to avoid inefficiency, injustice, and arbitrary rule. For this reason, international development institutions (such as the World Bank) have evinced a growing interest in judicial development. Yet this renewed interest in judicial institutions, while quite welcome, often comes from organizations that have historically devoted more attention to other areas of economic development and sometimes find themselves required to develop expertise in an area that might have been deemed too political in the past.

1 For instance, one very prominent American legal scholar stated that “even if national security requires our government to ignore traditional rights of accused criminals in pursuing and trying suspected terrorists, it must nevertheless recognize that it acts unfairly in doing so, and it must therefore violate those rights only when the violation is demonstrably essential.” He argued that American actions did not meet even this generous standard. See Ronald Dworkin, “The Trouble with the Tribunals,” New York Review of Books, 25 April 2002, p. 10.
INTERNATIONAL STANDARDS

While judicial independence is often proclaimed as a principle, the diversity of legal and political orders in the world has made it difficult to define in practice. Some countries insulate judges from political pressures by having them selected by non-political bodies; other countries (most notably the United States) attempt to guard independence by involving multiple political forces in their selection (federal judges are nominated by the president with the advice and consent of the upper house of Congress). In some systems there is greater stress on the independence of the individual judge; in other countries here is greater stress on the independence of the judiciary as a whole.

Judiciaries in the Arab world have been formed by the interaction of the Islamic and civil law traditions. In some countries (such as Sudan and Jordan), there has been some common-law influence as well. The Arab world also includes both presidential systems and monarchies. To proclaim a uniform definition of judicial independence in such a diverse environment is difficult. And developing a global standard—one appropriate for all political and legal systems in the world—might be seen as far too complex to attempt.

Yet despite this diversity, at the international level there are various international instruments that deal with judicial independence. Domestically, constitutions of many countries insist that judges should handle their cases in an independent manner without any interference exercised in their business, either by the other branches of the government or by the individuals. And on the international level, documents, conventions and treaties focusing on the protection of human rights often provide for judicial independence. International tribunals, such as the European Court of Human Rights and its Commission, as well as the concerned courts in democratic countries join in supporting the independence of the judiciary either explicitly or implicitly.

As to national constitutions, in some of them, as that of the United States of America (1789), we find that the term “judicial independence” is not explicitly embodied in the Constitution. This independence, however, is unarguable as the Constitution itself implicitly provides for such independence throughout its structures that separates the government powers and requires them to act within the rule of law. Other constitutions such as the Constitution of France (1958), explicitly provides for the guarantee of judicial independence. This Constitution states in Article 64 that “[t]he President of the Republic shall be the guarantor of the independence of the judicial authority...”

Judicial independence is not simply a domestic matter; it has increasingly become an international standard. For example, the Universal Declaration of Human Rights (1948) provides in Article 10 that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” And the European Convention on Human rights (1950) provides in its Article 6 that:

In determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

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2 Ratified on September 17, 1787, and became effective for the ratifying states on June 21, 1788, when New Hampshire ratified it.

3 A law was passed on June 3, 1958 to lay down terms of reference within which the drafters of the new Constitution were to work. The fourth principle of these terms indicated that “the judicial power must remain independent in order to insure the respect of basic liberties...”.

4 Adopted and proclaimed by the General Assembly of the United Nations, Resolution No. 217 A (III) of December 10, 1948.

5 Ratified in Rome on November 4, 1950, and entered into force on September 3, 1953.
In addition, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Milan from 26 August to 6 September 1985, adopted a number of rich principles that guarantee judicial independence known as the basic principles on the independence of the judiciary. These principles were then endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. (See Appendix A.) By approving the “General Principles on the Independence of the Judiciary,” the General Assembly did not attempt to devise a single system for all countries. Instead, it proclaimed twenty general principles that should apply regardless of the prevailing legal and political order. The document recognizes that there continues to be a gap between theoretical principles and actual practice and expressed the wish that the twenty principles would serve to “assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general.”

The principles endorsed by the UN General Assembly fall into six categories. The first concerns general issues of judicial independence: independence must be guaranteed, but this is not enough. The judiciary must also be given jurisdiction; it must receive the resources necessary to perform its tasks; its rulings must be implemented; and tribunals eschewing established procedures must not be used as a device to avoid the judiciary. The second category concerns freedom of expression and association. This is a difficult area, because international practice varies greatly. In some countries, in which partisan bodies (such as parliaments) are involved in the selection of judges, it is not unknown for judicial candidates to have known party affiliations. In other countries, it would be considered highly problematic for a judge to be associated with any party. In some countries, judgments are issued in the name of the court with dissenting judges barred from publicly mentioning their dissent, much less justifying it. In other countries, dissenting opinions are not merely published but studied by jurists and have some precedential value. The UN principles therefore cannot demand uniformity, but they do insist that judges have the same rights as other citizens (subject to the professional requirement that they do not diminish their impartiality) and that they also have the right to organize and join professional organizations.

The third group of principles endorsed by the United Nations General Assembly involves the qualifications, selection, and training of judges. Again the principles do not require specific practices, but they bar discrimination and improper criteria in judicial appointments. The fourth group of principles covers the conditions and terms of service for judges. Here the principles require that such matters be governed by law, that judges serve either until retirement or until a legally-fixed term expires, and that assignment of cases be based on internal administrative grounds. The fifth group of principles involved professional secrecy and immunity, barring judges from revealing or being forced to reveal confidential information and requiring that they receive appropriate immunity from civil suits connected with their professional duties. The sixth and final set of principles involved discipline, suspension and removal of judges, requiring appropriate processes and insisting that judges may only be disciplined for cause.

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6 One of the most prominent and respected chief justices of the United States Supreme Court, Earl Warren, had served as an elected governor of the state of California and as a vice-presidential candidate, both times with the nomination of the Republican Party; he was named to the Supreme Court by a Republican president and approved by a Senate with a Republican majority.

7 This is the case in most of the Arab world, though the practice of barring judicial dissent may be questioned. See Adel Omar Sherif, “The Freedom of Judicial Expression, the Right to Concur and Dissent: A Comparative Study,” in Kevin Boyle and Adel Omar Sherif (editors), Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt, (London: Kluwer Law International, 1996).
Thus, judicial independence in today's world is unarguably a foundation for the good administration of justice, and the concept is increasingly endorsed by judiciaries in different (and very diverse) parts of the world. It is, in this sense, a well-established legal doctrine that has been in force for years. It has been authorized all over the world wherever civilized government systems exist. In its essence, judicial independence is considered to be a fundamental human right—indeed, in some ways, it is a human right that helps protect other human rights. It is therefore widely accepted that judicial independence should be constitutionally guaranteed to every person in our contemporary world. When this basic guaranty is enhanced, the need for other safeguards in the judicial process decreases.

A solid link between judicial independence and democratic system of government does, therefore, exist. Undoubtedly, in all judicial systems including the Arab ones, no judge can perform his/her duties properly unless he/she is independent and also immune from being attacked either personally or professionally. This is simply because any attacks on the judiciary, whether it takes place by accident or on systematic basis, definitely harms the overall judicial performance, negatively detract from litigants' fundamental rights and consequently affects judicial independence as a basic foundation for modern, democratic societies. Justice, therefore, cannot exist within any given democratic system of government in the absence of judicial independence. As a result, the prevailing tendency today in the written language of the constitutions and basic laws of modern states is to provide for judicial independence explicitly in their texts.

The importance of judicial independence is not new in either the Arab world or the broader Muslim world. Indeed, the independence of the judiciary is a very well established principle in the Islamic Shari'a. The principle has historically been applied differently, because Islamic systems of government, in their early stages, did not adopt the principle of the separation of powers as it is understood currently. This was because the Prophet Mohammed exercised judicial, legislative and executive powers himself, which gave rise to a tradition of these powers all being exercised by the ruler of Islam (which, after the Prophet's death, was the Caliph). As for judicial power, under Prophet Mohammed—and after his death, under the ruling Caliphs—some of this power was delegated to local governors (known as al-Wali) and specialized judges (al-Qadi), with these authorities being required to administer justice in compliance with Islamic law. As the Islamic State expanded into various countries, the Caliph had to rely on local officials to apply Shari'a throughout the State. This, however, did not affect the Caliph's right to review their actions. Therefore, in Islam, the

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8 The European Court of Human Rights, for instance, views judicial independence as one of the elements that constitute a good administration of justice. See: R. St. Macdonald, F. Matscher and H. Petzold, The European System for the Protection of Human Rights, MNP, 1993, p. 381.

9 In that sense, Judge Henry Friendly noted that "as the independence of the decision maker increases, the need for other procedural safeguards decreases." Martin H. Redish and Lawrence C. Marshall, "Adjudicatory Independence and the Values of Procedural Due Process," Yale Law Journal, January 1986, FN. 91.

10 The judicial function, from the earliest forms of the organized state until the middle ages, was centralized in the hands of the rulers to the extent that there was no clear distinction between judicial function and the other functions of the state. Furthermore, in addition to the rulers' powers, there were times, throughout different ages, in which the religious powers of Judaism, Christianity and Islam had a great impact on governmental systems and the judicial function of each. It used to be a function of the state to defend religious beliefs in ecclesiastical matters, thus serving, for the most part, the interests of the leaders of the clergy. Nevertheless, the exercise of judicial power—whether by the rulers, the religious institutions or the people's representatives—did not reflect the real role played by those who carried out their judicial burdens in the justice administration process, as the achievement of justice was always subject to and governed by various political and ecclesiastical considerations, and consequently there were no clear defining lines to distinguish the judicial function. In actuality, such a role is only clearly defined when the judicial function has its own identity and independence, which did not practically exist until the doctrine of the separation of powers became one of the principal tenets of the present-day democratic systems of governments.

See: Adel Omar Sherif, "An Overview of the Egyptian Judicial System and its History," Yearbook of Islamic and Middle Eastern Law, Volume V.
Caliph—or the supreme ruler of Islam—is to be the center of power, and judges and other officials are to derive their respective powers through delegation from him. This, by any means, did not affect judges’ ability to be fair, impartial and independent, as they were always keen to perform their power independently and within the law.\textsuperscript{11} It must also be noted that although political power was concentrated in the hands of the ruler, the development of an Islamic legal tradition—based on scholarly interpretation of sacred sources—maintained a significant degree of autonomy for the legal field.

**THE GROWING COMMITMENT TO JUDICIAL INDEPENDENCE IN THE ARAB WORLD**

In recent years, Arab states have endorsed the idea of judicial independence in accordance with international standards; they have also proclaimed their acceptance of the principle of separation of powers. Most Arab constitutional texts make this acceptance explicit. For instance, the current constitution of Egypt, ratified on September 11, 1971, assured judicial independence in several provisions. It provides in Article 65 that “... the independence and immunity of the judiciary are two basic guarantees to safeguard rights and liberties”. It also provides in Article 165 that “[t]he judiciary is independent...” Moreover, it provides in Article 166 that “[j]udges are independent. In their performance, they are subject to no authority but that of the law. No authority can interfere in cases or judicial affairs”.

In many ways, the Egyptian constitution (both the 1971 document and its 1923 antecedent) and judicial structure are exemplary, sometimes serving as models for emulation elsewhere in the region.\textsuperscript{12} Whether drawing on the Egyptian experience or not, virtually all Arab constitutions guarantee judicial independence. For instance, Article 97 of Jordan’s constitution proclaims that “Judges are independent, and in the exercise of their judicial functions they are subject to no authority other than that of the law.” Article 163 of Kuwait’s constitution states “In administering justice, judges are not subject to any authority. No interference whatsoever is allowed with the conduct of justice. The law shall guarantee the independence of the judiciary and state the guarantees and provisions relating to judges and the conditions of their irremovability.” Article 82 of the Moroccan constitution is simple and direct: “The judiciary shall be independent from the legislative and executive branches.”

Yet despite nearly universal support for the idea of judicial independence, Arab constitutional systems vary greatly in how much specificity they give to the concept.\textsuperscript{13} Yemen and Palestine, for instance, have some thorough provisions on how to guarantee judicial independence; Sudan and the United Arab Emirates spell out the court structure in some detail. Yemen goes so far as to ban exceptional courts (Article 148), and Saudi Arabia grounds judicial independence in Shari’a principles (Articles 46 to 54).

It should be no surprise that the degree of judicial independence varies from one country to another, and even in the same country from time to time, in light of many political, economic and

\textsuperscript{11} I believe that the separation of powers is not inconsistent with Shari’a, though others may disagree. We can, therefore, assume that the modern understanding of the Islamic system of government would, in fact, appreciate this principle.

\textsuperscript{12} It is worth mentioning here that the comprehensive application of Shari’a in Egypt, its neighbors and other countries who witnessed the Islamic spread of the Seventh Century, occurred during a limited period of time. It was confined to the period between the commencement of this spread until the late Nineteenth Century when new codes, derived mainly from the European codes, began to be introduced in the Ottoman Empire and its affiliated Arab countries. After that, the application of Shari’a dramatically declined. Today, legislation in most Arab countries, including Egypt, is not generally drawn from Shari’a but rather is grounded on those European codes.

social considerations prevailing in the concerned country at a certain period of time. Despite this regional variation, the publicly-proclaimed standards for Arab judicial structures have increasingly grown to resemble the broader international standards.

In 1983, Arab states negotiated the “Arab Convention on Judicial Cooperation” in Riyadh, an important first step in constructing regional standards. But the ratification process proceeded quite slowly, and the focus was in fact less on developing regional standards than on matters of jurisdiction and enforcements of judgments across borders. But in June 1999, a critical second step was taken when the Arab Center for the Independence of the Judiciary and the Legal Profession (ACIJLP), in collaboration with the Geneva-based Center for the Independence of Judges and Lawyers (CIJL) held a conference on judicial matters. The Beirut conference hosted by the Lebanese Bar Association and under the auspices of the Lebanese Minister of Justice gathered 110 Arab jurists from 13 Arab states. The conference produced a declaration (See Appendix B) providing for a comprehensive set of goals and standards for Arab judiciaries.

The Beirut Declaration has seven sections. The first section covers safeguards for the judiciary, urging a series of structural and procedural guarantees of judicial independence. The second section turns the focus to the selection of judges, urging that clear legal guidelines be adopted. Third, the Declaration recommends measures to insure adequate training to ensure that the judiciary is qualified for its tasks. The Declaration’s fourth section urges structures and procedures for judicial review of the constitutionality of legislation. The fifth section contains recommendations for the rights of the accused and for fair trials. Sixth, the Declaration denounces discrimination in judicial positions on the basis of gender. The final section urges support for the International Criminal Court.

The Beirut Declaration represents the logical starting point for future regional efforts to ensure that general commitments to judicial independence are met.

JUDICIAL COMMITMENT TO JUDICIAL INDEPENDENCE

The judiciary in the Arab World, as has been seen, gives a noticeable attention to the principle of judicial independence. The Supreme Constitutional Court of Egypt, for instance, has repeatedly emphasized the importance of judicial independence as a binding constitutional principle in several recent decisions. We will now look into these decisions in order to understand how regional standards have been articulated, particularly with regard to perhaps the most important prerequisite for maintaining judicial independence: separation of power between the executive and the judiciary.

In a landmark decisions concerning the powers of a bankruptcy judge, the Supreme Constitutional Court of Egypt reviewed the principle of judicial independence and explained its importance to a democratic society.14 The Court first made clear the distinction between judicial independence and the impartiality of judges. Judicial independence, the Court stated, refers to freedom from interference in judicial affairs by other powers, whereas judicial impartiality pertains to the judge’s own ability to adjudicate a case without any personal bias against any of the parties. These definitions are somewhat relevant to the notion of judicial impartiality as construed by Professor J.A.G. Griffith, who explained that,

impartiality means not merely an absence of personal bias or prejudice in the judge, but also the exclusion of relevant considerations, such as his political or religious views. Individual

14 Case No. 34 for the 16th Judicial Year, decided on June 15, 1996, published in The Official Gazette No. 25, June 27, 1996.
litigants expect to be heard fairly and fully and to receive justice. Essentially, this view rests on an assumption of judicial neutrality.\textsuperscript{15}

The Court then reconfirmed its view that judicial independence is a fundamental principle embodied in the Constitution of Egypt which requires at least a minimum level of adherence to ensure the existence of a democratic society. In so doing, the Court set forth the following guidelines:

- Judicial independence means that judges are free to evaluate the facts of the dispute before them and to construe the applicable law without any direct or indirect pressure being imposed upon them by others.

- The judiciary must be independent vis-à-vis both the executive and legislative branches of government. The executive has to refrain from any attempt to interfere with the rendering of decisions or the enforcement thereof. Legislation must not contradict or undermine previous judicial rulings.

- Judicial independence means that judges must have the right to defend their independence within the constitutionally protected right of assembly.

- Judicial independence requires that judges must be independent of each other and that seniority and judicial hierarchy must not affect any judge’s performance.

- Judicial independence requires that all issues of a judicial nature be dealt with by the judiciary alone. For example, the assignment of cases to judges must be a purely internal matter, done without intervention from any external source.

- Judicial independence requires that any disciplinary action against judges must be based solely on clear and convincing evidence of an inability to perform. It also requires that judicial tenure be secured, without threat of reduction or restriction while in service; that judges be appointed for long terms; and that judges be selected on objective criteria within the merit system.

- The judiciary must be consistently allocated sufficient financial resources by the State, otherwise there will only be the illusion of judicial independence.

Defining judicial independence in an Arab context is an important achievement, demonstrating the commitment of governments and judiciaries to the concept. But definition is not tantamount to application.

\textbf{OBSTACLES TO JUDICIAL INDEPENDENCE IN THE ARAB WORLD}

\textbf{ACCOMPLISHMENTS AND POSITIVE ASPECTS}

Thus, the independence of the judiciary is not alien to the Arab and Islamic traditions; in fact, there are strong religious, political and cultural norms supporting the concept. The task is not to change existing norms but to live up to them. A sophisticated and professional judiciary now exists in all Arab countries. All Arab states recognize provision of justice in a neutral manner as part of their mission to society.

Some problems that have arisen in other societies have not arisen in the Arab world. For instance, in some societies, judges lack independence because strong social pressures are put on judges. This can happen in Arab countries (for instance, with honor crimes or security offenses), but it is less likely than in other settings (such as Latin America or even North America). There is a strong sense of professional identity among many judiciaries in the Arab world, though this must be further strengthened in order to guard against undue external influence and even corruption.\footnote{For a useful comparative overview of issues of judicial independence, see the report published by the International Foundation for Electoral Systems, “Guidance for Promoting Judicial Independence and Impartiality,” \url{http://www.ifes.org/rule_of_law/judicial_independence.pdf}}

In this respect, it is important to note that the legal systems of most Arab countries were very much influenced by French law for several political and historical reasons. As a result, legal traditions in these systems are quite different from those of the Anglo-American legal system, and consequently, most legal principles are construed in different ways in each of the two systems.

In particular, even though the idea of separation of powers is very strong in such systems, the idea of “checks and balances” is more unique to constitutional systems built on the American model. A “checks and balances approach” allows the branches to oversee each other’s work but prevents them from dominating each other. The focus is far less on building walls of separation among the various branches of government and more on allowing them the tools to hold each other accountable. In such an approach the various branches do oversee the affairs of the others, but each has sufficient authority and resources to avoid subordination. The various authorities overlap in many areas. A “checks and balances” approach would not work in the Arab world because pluralism is so weak in society. The executive is so strong that following a “checks and balances” approach would lead it to domination by the executive.\footnote{This is examined in more detail in “Mechanisms of Accountability in Arab Governance: The Present and Future of Judiciaries and Parliaments in the Arab World,” \url{http://www.pogar.org/publications/governance/nbrown/account.html}.}

Thus, if Arab states wish to live up to their commitments to judicial independence, they must focus more on a firmer implementation of a separation of powers approach, allowing the judiciary sufficient corporate autonomy from the other branches of the state. While the verbal commitment to such a principle is very strong throughout the Arab world, much work must be done to implement it in practice. Even where structures have been created to grant judicial independence, such as judicial councils, the preconditions for judicial independence have not yet been met.\footnote{For a thorough and balanced examination of the contributions and limitations of judicial councils in a different setting, see Linn Hammergren, “Do Judicial Councils Further Judicial Reform? Lessons from Latin America,” \url{http://www.ceip.org/files/pdf/wp28.pdf}}

**MAJOR PROBLEMS IN THE ARAB WORLD**

Judicial independence requires safeguards against both external and internal forces. In other words, it requires vigorous application of the separation of powers principle to guard against attempts to usurp judicial power by external authorities (i.e., the other branches of government); in addition, it seeks to protect judges from undue influences coming from within the judiciary itself (i.e., internal forces such as superiors or the judicial administration bodies).
While both elements of judicial independence warrant attention, in most countries—including Arab countries in particular—the external element—related to separation of powers—has been the primary cause for greater concern. We will now, therefore, be focusing on the external element.

No country in the Arab world lives up to domestic or international standards for independence of the judiciary. If we focus on the international standards, the following principles from the UN’s “General Principles” are the most problematic in the Arab world:

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

Here the problem is that Arab judiciaries are sometimes restricted in their jurisdiction, both by legislative texts and by executive action.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

Most Arab states have some provisions for special courts that do not meet international standards for fair procedures. This is partly an outgrowth of the difficult security situation in many Arab countries.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Most judiciaries in the region complain that they do not receive adequate resources. Just as important from the point of view of judicial independence, they do not have full control over the resources and are dependent on the executive (often the Ministry of Justice) which becomes far too mired in internal judicial matters. Even judiciaries that have attained a significant degree of formal independence often find this achievement undercut by less visible aspects of dependence.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

In some Arab countries, judges have been able to form appropriate organizations and associations, but professional training opportunities are still insufficient.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Assignment of cases is sometimes a politicized matter, especially in politically sensitive cases.

In short, the other branches of the state—the legislature and the executive—have not yet created the conditions in which international standards can be met. We will turn our attention first to

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19 The jurisprudence of the European Court of Human Rights (e.g. Langborger judgment of 29 June 1989) suggests that in considering whether a given organ is an independent judicial body, regard must be given, inter alia, to the manner of appointment of its members, and their terms of office, as guarantees against outside pressure and as manifestations of independence.

legislatures where the problems are simpler to describe. Following that, we will focus on the executive.

JUDICIAL INDEPENDENCE AND THE LEGISLATIVE BRANCH

The Arab world has witnessed frequent attempts by the legislature to limit judicial discretion.

The issue is not unique to the Arab world. Even a country that has prided itself on judicial independence, the United States, has seen the judiciary’s discretion over sentencing greatly reduced by the legislature. Indeed, judges in Egypt, unlike judges in the United States for instance, enjoy more freedom in this regard. The Penal Procedures Code (Article 17), for example, vests in judges a general discretionary power to reduce the level of criminal sanctions fixed by the Legislature so that judges retain discretion in sentencing even where the applicable legislation provides for minimum sanctions.

To be sure, the Egyptian parliament, like the US Congress, has attempted to diminish judicial discretion. It has been resisted by the Supreme Constitutional Court, which has made clear that it considers any legislative restriction on the discretion of judges to be a threat to judicial independence and a violation of the separation of powers principle. The Court addressed over the last few years several attempts by the Legislature to restrict the discretion of judges and found in all instances that the Legislature had acted unconstitutionally. In one case, the Court examined legislation that restricted judicial discretion by preventing judges from issuing injunctions with regard to judicial decisions which levy fines in particular cases. The Court struck down this legislation as violating the principle of independence.

Sometimes the problem is not that legislatures encroach on the judiciary but that they maintain too much distance. In most Arab countries, judiciaries do not communicate their budgetary needs directly to the parliament, instead having it routed through the Ministry of Justice. This can have the effect of rendering the judiciary less an independent power of the state when dealing with the legislature; instead it seems to be an appendage of the executive.

Occasionally, legislatures will overturn bold decisions by courts by rapidly changing legislation. In some sense, this tactic is fully consistent with the separation of powers principle: it is the legislature that is responsible for determining the text of the law. But when such a tool is used excessively, it risks turning the parliament into an informal overseer of the judiciary, willing to overturn politically inconvenient decisions.

20 In the United States, for example, mandatory minimum sentences are an ancient tradition, as old as the concept of criminal punishment. In accordance with this tradition, the discretion of judges in setting criminal sanctions is now restricted by limitations set by Congress.

21 Some of these cases involved statutes which presumed the liability of certain persons in certain circumstances. The synthesis of the Court concludes that, while the Legislature has the power to define crimes and the appropriate punishment for such crimes, a presumption of liability, in any case, unconstitutionally infringes upon the power of the courts to determine whether or not a crime has been committed, and thus violates both the principle of judicial independence as well as that of separation of powers case No. 5 for the 15th Judicial Year, decided on May 20, 1995, published in the Official Gazette, Al-Jarida al-Rasmiyya, No. 23 on June 8, 1995; Case No. 31 for the 16th Judicial Year, decided on May 20, 1995, published in Al-Jarida al-Rasmiya No. 23 on June 8, 1995; and Case No. 59 for the 18th Judicial Year, decided on February 1, 1997, published in Al-Jarida al-Rasmiya No. 7 (Supplement) on February 13, 1997.

The ability of the judiciary to assert its independence with regard to the executive is even more problematic than its relationship with the legislature.

The recognition and effective application of the principle of separation of powers is essential for achieving judicial independence. This principle, however, is not a self-enforcing one. Nor are the categories of public power which are to be separated entirely clear-cut or completely self-contained. There is always the possibility that one branch of government will seek to exercise powers that, in substantive terms, are not within the sphere of its competence. Indeed, in some countries, where a strong executive prevails, interference in judicial affairs has not been limited to subtle attempts to usurp the judiciary, but has also included instances where the executive has actually gained control of the judiciary, or has been successful at using it as an instrument to fulfill its political goals.

The best ways to forestall executive domination differ between authoritarian systems and constitutional democracies. In the Arab world, where authoritarian and constitutionally democratic forms are often blended, the problem of executive domination is especially difficult, and neither the tools used in authoritarian systems nor those used in constitutional democracies have been fully used.

In authoritarian systems dominated by the executive, this application requires the balancing of the position of the judiciary within the whole system of government, especially if the power of judicial review is also recognized, and precludes the officials from the executive from imposing their will on the judiciary. It also allows the judiciary alone to regulate all judicial affairs, from the arrival of judges on the bench until the termination of their service, including judicial training, compensation, duties, privileges, discipline, impeachment, removal, and rules of procedures. Moreover, it allows the judiciary control of its financial and administrative affairs, including administration, staff and budget.

While judicial independence is difficult to achieve in such an authoritarian setting, it is also difficult to achieve in a constitutional democracy. This is because the separation of powers involves inherent ambiguities which flow from the fact that it is never entirely achievable thing. Rather, it can be seen as an ever-evolving process requiring constant test cases. The domination of the executive is simply not so clear-cut—separation of powers in practice cannot be absolute but requires some coordination among state actors. When being applied, the principle requires constant review. Thus executive domination often occurs in subtle ways. Regional judicial arrangements appear to be the best source for identifying potential and actual violations, as in the case of the European Court of Human Rights which has passed on several issues relating to the separation of powers as relates to individual human rights. Transferring this system to other regional contexts (such as the Arab world) would be a worthy but difficult project. That judges and courts must still have a wide space in which to freely exercise the judicial function without threat of external intervention is not in question. The problem is one of application. Who shall have standing and in what forum? To what extent are the violations really visible from the inside and to what extent can they be chalked up to an acceptable intrusion in favor of a balanced democracy?

Most Arab governments, falling between the extremes of absolute autocracy and constitutional democracy, have not pursued either of these paths effectively. A clear separation between the judiciary and the executive, in particular, has not been achieved. Egypt, for instance, falls somewhere between the two extremes where the executive in Egypt, represented in this context by the Minister

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of Justice, continues to exercise considerable authority over the judiciary, especially the civil, criminal and administrative courts. In comparison to the role of the Attorney General in the United States — the post most analogous to Egypt’s Minister of Justice — the Minister of Justice has tremendous involvement in judicial affairs. Other Arab states show a similar inability to separate the Ministry of Justice from judicial affairs.

In fact, what is worrying here is the relationship between the Minister of Justice and the three important judicial components (civil, criminal, and administrative) in most Arab countries, including Egypt in particular. This type relationship means that the Minister of Justice has the ability to influence profoundly a large segment of the judiciary and inhibit the willingness of the judges involved to render judgments freely and without regard to whether their judgment in a particular case may be objectionable to the Minister. Such a relationship, unfortunately, can only detract from judicial independence.

Executive Interference in the Judicial Affairs

In many modern democratic systems of government judges act independently without interference from the legislature or the executive, who are not involved in the process of the administration of justice. Courts control all judicial affairs, including administrative and financial matters.

While the separation of powers between the judicial branch and the other two branches of government, particularly the executive, is the most essential aspect of judicial independence in every democratic system of government, the existence and role of the Ministry of Justice and its relationship to the judiciary, constitute central issues that must be dealt with carefully. However democratic the system or professional the personnel, Ministries of Justice inevitably have strong ties to the judicial branch. The strength or weakness of these ties must be measured in light of the department’s ability to infiltrate the judiciary. This ability may result in interference with, and at times domination of, the judicial function in countries where the executive has de facto control over the other branches of government.

An Extensive Executive Involvement in Judicial Affairs

In the majority of Arab countries following the civil law system, especially in its French version, the executive branch of government is usually very much involved in the judicial affairs through the Minister of Justice, who is the head of the Department of Justice and a cabinet member as well. Unlike other legal traditions and systems, the Minister of Justice in Arab systems, even as head of the Department of Justice and as a member of the executive branch, has strong ties to the judiciary. His involvement in the administration of justice is noticeable to the extent that the minister is often regarded by most citizens as the ultimate power in the judicial branch.

Legislative provisions tend to reinforce this perception by according the Minister of Justice a higher status than any judge. They do not lack any protection for the judiciary, however, leading to a mixed situation. By looking into the Egyptian Constitution, for instance, we find that some judicial independence from the Minister of Justice is provided for. Other various statutes that regulate the

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24 Whether any Minister of Justice has ever abused his authority or acted inappropriately is not the issue here, the fact remains that the level of involvement by the Minister of Justice poses a real threat to the independence of the judiciary.

25 While there does not appear to be any evidence that any Minister of Justice has ever consciously tried to impose his own legal or political agenda on the judiciary through these powers, the threat to judicial independence remains. The potential for abuse — the possibility of retribution for unfavorable judgments — and the proximity of the two branches in this relationship is, alone, sufficient to curb judicial independence.
For example, the constitutional and legislative provisions regulating the Supreme Constitutional Court do not allow for any interference from the Minister of Justice in the affairs of that court or for his involvement in the disciplining of its judges. Similarly, the State Council Statute does not allow the Minister of Justice any power over Council members or over the Council’s operations or disciplinary processes. The laws governing other judicial bodies, however, grant the Minister of Justice much more control over them.

The high level of influence accorded the Minister of Justice over the judiciary can be seen in the following:

- The budgets for all other judicial bodies are determined by the Supreme Council of Judicial Bodies, which is effectively presided over by the Minister of Justice.

- Law No. 46 of 1972, regulating the Ordinary Judicial Body (which is comprised of the civil and criminal courts), vests in the Minister of Justice the power to supervise closely the performance of the judges in that body and accords the Minister of Justice a role in disciplinary actions against these judges, including the right to initiate a disciplinary case and the responsibility for enforcing removal actions.

- Law No. 75 of 1963, concerning the State Cases Agency gives the Minister of Justice the right to call the Supreme Council of this body to a meeting and the right to control the appointments, promotions, delegations and transfers of its members; this law also retains in the Minister of Justice the power to regulate the internal affairs of this body and to establish an inspection department to evaluate the efficiency of its members. Included in this power is the right to initiate a disciplinary action against a member of the State Cases Agency, as with judges of the Ordinary Courts.

- Law No. 117 of 1958, concerning the Administrative Prosecution Body (the body which prosecutes public employees for administrative offenses), grants the Minister of Justice the right to review and supervise its operation; as with the State Cases Agency, the Minister of Justice has the power to call for a meeting of the Supreme Council of the Administrative Prosecution Body, to relocate its members, and to create an office charged with inspecting the performance of those members and initiating disciplinary actions when warranted.

The Minister of Justice is thus heavily involved in the affairs of the Ordinary Courts, the State Cases Agency, and the Administrative Prosecution Body. In contrast to the detached role of the United States Attorney General with regard to judicial affairs, the role of the Egyptian Minister of Justice in the affairs of Egyptian courts is quite considerable, particularly when it comes to the disciplining of judges.

26 See, Articles 165, 166, 168, 174, 177 of the Constitution of Egypt. See also, Articles 1, 11, 24 of Law No. 48 of 1979 (concerning the Supreme Constitutional Court); Articles 52, 67, 72 of Law No. 46 of 1972 (concerning the judicial power); Articles 1, 91, 94 of Law No. 47 of 1972 (concerning the State Council); Article 1 of Law No. 75 of 1963 (concerning the State Cases Agency); and Article 1 of Law No. 117 of 1958 (concerning the Administrative Prosecutor).

27 The State Cases Agency is the agency that represents the government in civil litigation and is made up of the state attorneys.
The Ministerial Role in the Discipline of Judges

A basic principle in measuring judicial performance was set forth in a decision rendered by a Canadian court in 1915 (Davis Acetylene Gas Co. v. Marrison); in which the court declared that “Judges are servants, not the masters of the people”. As pointed out in the introduction to this study, judicial independence as a human right is unusual in that those who enjoy the right (judges) are not those who benefit from it—a judge is granted independence in order to serve society. Judges exercise an enormous amount of authority and with such authority must come responsibility. Thus, their independence notwithstanding, judges must also be accountable in various ways for the authority they wield. This principle is understood in most Arab countries in that most judges, while enjoying judicial immunity which allows them to act independently, are also subject to rules of judicial responsibility. Unfortunately, the disciplinary process established generally holds judges accountable in a way that affords the Minister of Justice yet another opportunity to exert his influence over the judiciary.

The constitutional provisions and the laws regulating the discipline of judges provide for various treatments that vary from one judicial body to another. Most Arab constitutions appear to grant judicial independency by stating that judges cannot be removed but they do not prevent judicial discipline from falling within the executive branch. In Egypt, the general rule is contained in Article 168 of the Constitution is that “judges are not removable [and the] law shall regulate the disciplinary actions with regard to them.” While the laws regulating the Supreme Constitutional Court and the State Council do not permit the Minister of Justice to interfere in the disciplining of their own judges, his control over the disciplinary process in the Ordinary Courts, the Administrative Prosecution Body, and the State Cases Agency is indisputable. A similar situation exists in most Arab countries.

An alternative method is provided for in Egypt’s Supreme Constitutional Court and its State Council. Article 177 of the Constitution provides that “Members of the Supreme Constitutional Court are irremovable [and the] Court shall call to account its members, in the manner prescribed by law.” The entire disciplinary process for the Supreme Constitutional Court is handled by its members through the Court’s General Assembly, which is charged with evaluating the efficiency and ability of its members. The Chief Justice of the Court starts this process by referring the member suspected of misconduct, or of inability to perform their duties, to the Committee of Interim Affairs, which is composed of some of the Court’s members. It is the Committee’s decision, after hearing the accused judge, to decide whether the proceedings are to be continued or not. Once the committee decides to proceed with disciplinary procedures, it delegates one to three of its members to make a formal inquiry. This inquiry, once completed, is referred to the Court’s General Assembly, which then meets as a disciplinary tribunal with all members of the Court attending except those who participated in the inquiry or indictment. After hearing and verifying the defense of the questioned member, the General Assembly must decide whether this member is innocent of the alleged misconduct; if the member is found guilty, he is forced to retire from the bench. The disciplinary process in the State Council is handled within the Council in a similar manner.

In contrast to the disciplinary processes of the Supreme Constitutional Court and the State Council, the disciplinary procedures established for ordinary court judges allow the Minister of Justice to exert his authority over their judges. In accordance with Article 93 of the Judicial Power

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29 For instance, all members of judicial bodies in the Egyptian judicial system enjoy judicial immunity within which they cannot be transferred to other positions, even as a promotion, without their consent. This differs slightly from the French system, wherein judicial immunity is confined to ordinary court judges and administrative court judges affiliated with the State Council. See, Andrew West et al., The French Legal System: An Introduction, Fourmat Publishing, London, 1992, p. 110.
Law, “The Minister of Justice has the right to supervise all [ordinary] courts and judges...” In addition, Article 94, paragraph 4, of this law provides that “The Minister of Justice has the right to warn the chief judges and judges of primary courts after hearing their arguments...” The filing of a disciplinary action against an ordinary court judge is done by the Attorney General upon a request by the Minister of Justice. This request may be made at the initiative of the Minister of Justice himself or upon a suggestion by the Chief Judge of the court concerned. The Minister of Justice undertakes the responsibility of enforcing removal decisions.

In conclusion, we find that Arab countries tend to consider that an independent judiciary, free from undue influence by the executive and legislative branches, is fundamental to a democratic form of government. However, there is credibility to the claim that these countries do not yet have a judiciary that is entirely free from executive branch influence given the role played by the Minister of Justice in the affairs of a large portion of the judiciary. Therefore, if these countries to have a truly independent judiciary, they need to consider their situation and internalize the experiences and experiments of other democratic systems as well as similarly situated countries. A truly independent judiciary in the Arab countries will also require the entire judicial branch to be invested with more independence to solely handle their affairs.

Exceptional Courts In most Arab countries, the problem is not simply that the judiciary lacks independence but also that it is not allowed to have exclusive sway over judicial matters. Special and exceptional courts; security services that bypass the courts; and tampering with the jurisdiction of the courts are a consistent problem in most Arab countries. In some ways, the problem has become less obvious over the past couple decades, but it has definitely not disappeared.

It is true that some of the most severe violations of international judicial standards (such as revolutionary tribunals that were clearly political in nature and observed few procedural guarantees) have lessened in recent years. But in other parts of the world, constitutional documents specifically forbid the use of exceptional courts. In the Arab world, only Yemen has followed that path. (Palestinians have debated inclusion of such a clause in their constitution, and the Egyptian constitution stipulates that each citizen has the right to resort to his “natural judge”—the precise meaning of which is disputed.)

Further, the decline in exceptional courts has masked the development of another problem: the reliance on specialized courts that, while grounded far more firmly in law, still undermine the ability of the judiciary to oversee the application of law. Specialized courts—whether they focus on security issues, taxation, or electoral disputes—can work best if they resemble the regular judiciary as much as is practicable and also a degree of oversight and participation from professional and trained judges. Even in such cases, the move against a unified judicial system has its costs for the rule of law.

REMEDIES: ORGANIZATION OF THE JUDICIARY

Arab states have made a clear commitment to the world, to each other, and to their own citizens to build independent judiciaries. This is not a task or standard imposed by the outside but one which the Arab world, based on its own history and culture, has articulated for itself. Some important steps have been taken to realize that goal, but further efforts are needed. It is time to move beyond development of standards to begin implementing them. Measures can be taken on three levels to this end:

- On a regional level, there is considerable room for cooperation in developing standards of best practice and monitoring progress. The European Union has shown how this can be done. Such ambitious regional structures cannot be
built instantaneously, but the Arab world must move from the stage of declaration to the stage of institutionalization. Regional judiciaries, NGOs, and supportive international actors can help develop ways of circulating best practice, developing appropriate training and continuing education, supporting research, and monitoring country’s compliance with the standards they have set for themselves.

- On a state level, each Arab state must accept that judicial independence is not something that can be achieved only through static institutions; it also needs continuous attention and development. If the pledges of constitutions and international instruments are to be taken seriously, legislative bodies in the Arab world must be willing to deal with the judiciaries directly (and not merely through the executive) and as a co-equal branch of government. Judiciaries should not legislate, but they must be consulted on all matters of legislative drafting and budgeting that affect their work.

Executive authorities throughout the region must make a similar commitment to treating the judiciary as a co-equal branch. Ministries of Justice will always necessarily have some involvement with judicial affairs, but they must refrain from micromanaging all aspects of justice and allow a considerable measure of responsibility for judicial affairs and court administration to pass to the judiciary. To date, there are only isolated examples of this happening. In the 1980s, Egypt took important steps toward increasing judicial independence, though much work still must be done. Yemen took some steps in the 1990s that showed willingness to accord the judiciary greater autonomy. In the past few years, Morocco evinced a real desire to pursue reform, though progress may have stalled. Recent legislation issued by the Palestinian Authority shows a very strong commitment to judicial independence, but it is unclear whether any of this legislation can be implemented.

- Finally, judiciaries themselves must be empowered to develop their own mechanisms to enhance professionalism and independence. Some of this work can be done even absent a strong commitment by the executive to implementing steps toward judicial independence. In other words, it may be more practical to shift attention to developments over which the judiciary has some control. Any increase in judicial independence might be incremental, but it will be important.

In particular, the judiciary needs not only autonomy from the executive but the ability to organize its own affairs on a corporate basis. Judicial councils must be willing to move beyond purely technical matters and articulate their needs to the executive. Judges clubs can be an important avenue for similar work. Judiciaries must become more outward looking, alert to developing regional and international standards. Some of this work can be accomplished through more active conferences, publications, and region-wide judicial organizations.

The renewed global interest in judicial independence has spread to the Arab world: political leaders, judges, and ordinary citizens are showing greater interest in issues connected with the judiciary and the rule of law. Translating this interest into practice will require commitment at all levels but will have tremendous benefit for societies in the region and for the reputation of Arab governance.
Appendix A

BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY


Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct.

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.
INDEPENDENCE OF THE JUDICIARY

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

FREEDOM OF EXPRESSION AND ASSOCIATION

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

QUALIFICATIONS, SELECTION AND TRAINING

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the ground of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

CONDITIONS OF SERVICE AND TENURE

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

PROFESSIONAL SECRECY AND IMMUNITY

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

DISCIPLINE, SUSPENSION AND REMOVAL

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.
APPENDIX B
THE BEIRUT DECLARATION

RECOMMENDATIONS OF THE FIRST ARAB CONFERENCE ON JUSTICE

Beirut, 14-16 June 1999

Convened by the Arab Center for the Independence of the Judiciary and the Legal Profession (ACIJLP), in collaboration with the Geneva-based Center for the Independence of Judges and Lawyers (CIJL), hosted by the Bar Association in Beirut, and under the auspices of the Lebanese Minister of Justice, 110 Arab jurists from 13 Arab states participated in a conference on “The Judiciary in the Arab Region and the Challenges of the 21st Century.” The conference, held on 14-16 June 1999, focused on four main topics:

1. The main challenges faced by judiciary institutions in the Arab region in the 21st century.
2. The main impediments and problems related to the independence of the judiciary in the Arab region.
3. The judiciary in the Arab region and international standards on human rights and the independence of the judiciary.
4. The basic safeguards for the independence of the judiciary in the Arab region.

The participants discussed the ability of the judiciary in the region to confront the various challenges resulting from international political and economic transformations and the new technological challenges. The ability to confront such challenges depends on the existence of real support for the independence of the judiciary in the Arab region.

Moreover, the judiciary’s capacity to be a substantial power in Arab countries and to be an active party in entrenching democratic principles and the rule of law is pending on the progress of democratic development and respect for the law, including the subjection of the main powers to it. The discussions stressed that democracy is progressing with difficulty, which in turn affects the development of the judiciary in many Arab countries.

In the conference, participants discussed several papers and other issues in detail. They stressed the importance of articulating and implementing a set of recommendations which would be put into effect by individuals, jurist institutions and Arab governments. This action would serve as real support for the judiciary in enabling it to confront the challenges of the coming century, and would also contribute towards entrenching the rule of law and democracy in the Arab region.

The participants proposed the following recommendations:

**First: Safeguards for the Judiciary**

1. To include the UN Basic Principles on the Independence of the Judiciary into Arab constitutions and laws, and in particular, to penalize any interference in the work of the judiciary.
2. The state shall guarantee an independent budget for the judiciary, including all its branches and institutions. This budget shall be included as one item into the state budget, and shall be determined upon the advice of the higher judicial councils within the judicial bodies.

3. The executive power shall not intervene in the activities of judicial inspection in any form, nor shall it breach the independence of the judiciary through orders or circulars.

4. The public prosecution shall be considered a branch of the judiciary. The authority undertaking this prosecution shall be separate from those of investigation and referral.

5. Judges shall have immunity associated with their jobs. Except in cases of illegal acts no judicial measures shall be taken unless upon a permission issued by the highest council.

6. Lawsuits shall not be transferred from the judges reviewing them unless for reasons related to incompetence.

7. It is important to reform the administrative structure and other work mechanisms pertaining to the work of judges, and to facilitate the means for an efficient administration of justice.

8. To link the work of the judiciary with a democratic environment on the basis that democracy is the approach for a more effective management of justice.

9. Lawsuits shall be distributed among judges of various courts through their general assemblies or according to their internal regulations in case such assemblies do not exist. Such distribution shall be made in a manner that guarantees the non-intervention of the executive.

10. Judges shall freely practice freedom of assembly in order to represent their different interests. In this regard, they shall have the right to establish an organization to protect their interests and guarantee their constant promotion.

Second: Electing and Appointing Judges

11. The election of judges shall be free of discrimination on basis of race, color, sex, faith, language, national origin, social status, birth, property, political belonging, or any other consideration. Particularly when electing judges, the principle of equal opportunity must be followed to guarantee that all applicants for a judicial position are objectively assessed.

12. Assuming the position of judge shall be possible, without discrimination, for all those who meet its requirements. The appointment of judges shall be made through the higher councils of the concerned judicial bodies.

13. No judges shall be appointed by virtue of temporary contracts. They cannot be disciplined unless by boards made from their bodies, provided that the decisions made by such boards shall not have immunity against being challenged, unless the decision is made by the highest council of the concerned judicial body.

14. The law shall stipulate the rules for appointing, delegating, transferring, promoting, and disciplining judges, as well as for all other matters related to their affairs, particularly those concerning their livelihood while in office and in retirement. The aim of this is to guarantee in all cases their independence from the executive.
15. A percentage of no less than 25 per cent of vacant judicial posts shall be allocated to lawyers and those working in legal issues, provided that the appointment is made by the highest judicial boards in the concerned judicial bodies.

**Third: Qualification and Training of Judges**

16. The state shall endeavor, through specialized centers and institutes, to provide judges with an effective legal training in order to prepare them adequately to assume judicial posts. All aspects of the study and training programs shall be subject to the supervision of the judiciary.

In the professional preparation of judges, the following principles shall be observed:

a. To activate the Arab convention issued in Amman pertaining to the cooperation in the professional qualification of judges, and to reinforce the role of non-governmental organizations to secure their support for qualification programs and to serve as intellectual entities for judges, particularly in the field of human rights.

b. These qualification programs shall focus on legal and professional training, as well as personal growth. The qualification programs shall particularly focus on managing and facilitating the role of the defense.

17. To develop national institutions specializing in qualifying judges, whether by developing courses or financial and information resources supported by modern technological systems, in such a way that would guarantee the modernization of the judiciary, change educational courses in the faculties of law and develop infrastructure for the legal profession.

18. To support continuous judicial education in developing an in-depth understanding of constitutional provisions in a way that would guarantee constitutional legitimacy, the structure of which is connected with the intelligent understanding of human rights.

19. To urge the judicial authorities to constantly refer to international human rights treaties ratified by states, as being part of the states’ legal structure and a framework of the values which societies should adopt and try to implement.

20. To make the exchange of legal expertise between judges and lawyers, supporting human rights and freedoms, a firm methodology of Arab states, and a planned attitude of their legal systems in order to guarantee the objectiveness of their application and their consistence with modern concepts of advanced countries.

21. To develop educational law courses in Arab countries that will give special consideration to human rights and freedoms and constitutional legitimacy, and affirm solidarity with efforts made by the United Nations in this regard.

**Fourth: Judicial Review on Constitutionality of Laws**

21. States with no system for judicial review on the constitutionality of laws shall adopt such a system whether through establishing a supreme constitutional court for this purpose, or establishing constitutional councils to assume this task, provided that they are made of members of judicial bodies, lawyers, and law professors, and in a way that would guarantee the independence of such a court or council and secure the soundness of practicing its
constitutional responsibility. All members of such a court or council shall be appointed without the intervention of the executive. The right of individuals to bring a constitutional lawsuit by means of original claim shall be guaranteed.

Fifth: Safeguards for the Rights of the Defense and a Fair Trial

22. To call on Arab states to ratify the optional protocol to the International Covenant on Civil and Political Rights (ICCPR), which enables individuals to bring their case before the Human Rights Committee after having exhausted national means of challenging through national judiciary without being able to obtain their rights.

23. Every defendant shall be guaranteed an attorney of his/ her choice. In case the defendant is unable to afford lawyer’s fees, the judicial authority shall appoint a lawyer to the defendant.

24. Laws applied in Arab states shall set short periods for suspension whether in the stage of gathering information or during interrogations. During these two stages, the minimum human rights and freedoms must be observed including the right to a defense, as well as the constraints necessary to protect human rights and freedoms and secure everyone’s right to refrain from making statements that would condemn him.

25. No suspension shall be made against misdemeanors of which the sentence is no more than one year in prison. Also, those in preventive detention shall not be denied their right to obtain, from the state, a suitable compensation for his imprisonment in case there is legal ground.

26. Decisions on judicial litigation must be made according to previously set legal rules which respect human rights and freedoms, provided that parties have equal chances to a defense, whether with respect to the actual dispute or its legal factors.

27. Judicial disputes shall only be decided on by judges who are the most objective given the nature of the case and the circumstances surrounding it.

28. Only natural judges shall decide on disputes of a judicial nature.

29. There must be a guarantee that any trial, be it civil or criminal, is heard within a reasonable time that would secure a fair trial. Trials shall be conducted with modern technical means as much as can be provided.

30. Refraining from implementing judicial rulings by law enforcement officials is a crime the penalty of which shall be stiffened. Impeding the implementation of rulings shall be considered as refraining from the implementation.

Sixth: Women and the Position of Judge

31. No discrimination is permitted between men and women with respect to assuming the judicial responsibility. Women shall not be subject to any discrimination for assuming this position.

32. The rights achieved by Arab women in the field of the judiciary shall be supported and extended. Existing laws shall be cleared from impediments which prevent or restrict the practice of these rights.
33. Links shall be made between the issue of women’s rights in the society and cultural and social development in concerned Arab countries. Studies which stress women’s rights in conscious work and in society shall be conducted.

34. To exchange experiences among Arab countries to support equal rights for men and women while practicing judicial work.

**Seventh: The International Criminal Court**

35. To assert the role of the International Criminal Court and call upon Arab states to sign its Statute to support the Court and guarantee the effective practicing of its jurisdiction.

36. To call upon Arab states to increase participation in preparatory meetings assigned to set the procedural rules of the Court in order to form a general trend with respect to the Court’s safeguards, and particularly its independence from the Security Council.