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The Reform of Judiciaries in the Wake of the Arab Spring



2012

Proceedings of the Seminar
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Cover photo by: Hossam Hamalawy

Marching for justice مسيرة تطهير القضاء

Demonstrators march on the High Court, in support of judicial independence, as tens of thousand of protesters take to Tahrir Square on Friday, 9 September 2011, denouncing military tribunals, calling for ousting the ruling Supreme Council of Armed Forces, Mubarak's generals.

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The Reform of Judiciaries in the Wake of the Arab Spring

Proceedings of the Seminar
11-12 February 2012, Rabat

Final Report

Summery, discussions and recommendations

By: Ashraf Hussein
Justice Coordinator, EMHRN

The Euro-Mediterranean Network for Human Rights (EMHRN) with the collaboration of Moroccan Association of Human Rights (AMDH) and Moroccan Organization for Human Rights (OMDH) convened a seminar in Rabat/ Morocco in February 2012 on the theme of “Reform of Judiciaries in the Wake of Arab Spring”.

With the political turmoil affecting the region since 2010, and the rising of the popular demand for political reform, new opportunities and prospects are emerging. The Arab Spring has so far resulted in the removal of the heads of the regimes in Tunisia, Egypt, Yemen and Libya and in persistent on-going popular uprising in Syria, in addition to continued protest in Yemen, Bahrain and Egypt. The effects are by no means confined to the above mentioned countries but have had repercussions in the whole region and beyond. The dominant political powers in Morocco, Algeria and Jordan are trying to respond to the popular demands by proposing political reforms. Many see those changes as too small, too late or even cosmetic. But they need to be analysed closely because it is in such extraordinary times that the small changes might open the door for long term radical changes.

Against this background EMHRN convened the Rabat seminar with two main objectives:

- Mapping of the reform initiatives already underway in the region, identifying commonalities and differences, challenges and opportunities and making recommendations to support these reform initiatives.
- Identifying the main actors in these processes and how civil society can support the reform processes

As preparation for the seminar in February 2012, EMHRN commissioned researchers to prepare background papers on the above mentioned issues in Morocco, Tunisia, Libya, Egypt, Lebanon, Syria, Palestine, and Jordan.

For the two-day seminar, EMHRN invited approximately 60 participants from the Euro-Mediterranean region. The participants were judges, lawyers, human rights activists, and researchers representing 15 countries in the region. In addition, a number of participants were from international organizations working on the issue of the judiciary in the Middle East and North Africa.

Each of the eight country papers followed a similar structure based on the terms of reference prepared prior to commissioning the papers. Firstly, each country paper commences with a brief description of the situation of independence of the judiciary prior to the Arab Spring¹. Secondly, the authors of the papers were to review the main reform initiatives taken in the course of 2010-2011, in the period coinciding with the democratic uprising coined as the 'Arab Spring'. Thirdly, the country papers were to identify the main agenda and the actors of change.

It is worth mentioning here that the legislative reform processes were still on-going while the seminar and the papers were under preparation. Since the writing of the papers and the holding of the seminar, further developments in regard to reform of judiciary have taken place, which will need update in the future.

This seminar came as a continuation of EMHRN's previous efforts to enhance and support independence of judiciaries in the region. In the past, EMHRN has published reports on independence and impartiality of judiciary in several South/East Mediterranean countries: Morocco, Jordan, Tunisia, Lebanon, Egypt, and Algeria. These research reports have been followed by seminars to discuss their findings and in this way establishing spaces for free debate on this important issue.

This previous work had a national focus since each of the above mentioned reports were meant to analyse in depth issues related to independence and impartiality of the judiciary of the concerned country, and come out with feasible recommendations for reform².

In this brief introduction, which serves as an executive report and conclusion of the eight papers and the related debates in the seminar, we will synthesize the above mentioned main sections in a cross country manner.

1. Brief summary on the judiciary in the eight countries prior to the Arab Spring

As it has been pointed out in the Seminar, generalization on the nature of judiciary is risky since there is specificity pertinent to each country. However, the following are some of the most common characteristics of judiciary in the Arab World:

1 Here the authors of the country papers benefited from the previous country reports published by EMHRN in the last 10 years, however, there were two countries were not covered by EMHRN's previous report, Libya and Palestine

2 This work was launched with the publication of a regional report on "Justice in the South and East Mediterranean Region" in 2004 highlighting commonalities and particularities of the countries.

- **The hegemony of the executive authority over judicial authority:** in spite of the fact that the constitutions of all the countries of the region have stipulated an article or more on the independence of judiciary. Most of the countries - apart from Libya under the Jamahirya regime - have kept this formal acceptance of independence of judiciary. The legal mechanisms of this hegemony take place via the prerogatives given to the Ministry of Justice over the role of judicial councils in most of the countries (notably Egypt, Syria, Jordan, Tunisia, and Morocco). In this relationship, we find the executive authorities, mostly through the role of Minister of Justice, controls appointment, disciplinary actions against judges, judicial inspection, salaries, promotion, retirement, transfer or permission to work abroad (especially that the rich Gulf area countries 'borrow' judges from Egypt, Lebanon and Jordan in particular) or permission to be seconded to work as legal advisors with other government bodies; this situation gives the executive authorities a huge leverage on the judges' economic and professional situation.
- **The role given to executive authorities in appointing the High Judicial Councils have also been highlighted,** where the head of the state has an important and often decisive role in the appointment of the members. In Lebanon the High Judicial Council is subject to the societal divisions where the influential sectarian and political actors are part of the judiciary according to the formula of sectarian power sharing. In the Palestinian Occupied Territory the occupying force on the one hand, and the split between the Hamas de-facto government in Gaza and the Palestinian National Authorities, on the other hand, has fragmented the basic identity of the judicial body.
- In connection with the previous point, judges in the region lacked **the right to associate.** Egypt is the only exception where its Judges' Club has played and continues to play a significant role in the defence of independence of judiciary (although it is legally a social club of original mandate is to deliver social services, but it also plays a *de facto* role in promoting independence of judiciary and defending the professional career of the judges). However, still the hegemony of the executive power on the professional and economic situation of the judges could manipulate the results of the Judges' Club elections in Egypt. The Egyptian Judges' Club is to some extent dependent on funds it receives from the Ministry of Justice.
- **Exceptional and military courts** try civilians in Egypt, Syria, Jordan, Palestine and Libya. Civilians are subjected to special courts without the minimum standard guarantees of fair trials. The peak of military trials took place in Egypt after the revolution under the Military Council acting as the transitional power, where the number of civilians brought military courts numbered over ten times more than under the Mubarak regime.
- The **Public Prosecutor** is influenced by the executive power. The Public Prosecutor's complicity with the executive power was prevalent particularly in Egypt, Syria and Tunisia where his role in the blocking or manipulating of certain legal complaints against the violator of human rights under the Revolution was an illustrative example on the lack of neutrality.

- In countries where there is a **constitutional court**, the executive power dominates the appointment of a quota of judges (in Egypt the president appoints the Head of the Constitutional Court, in Jordan it is the king, in Tunisia previous president Ben Ali appointed all of the Constitutional Council members and the Constitutional Council had only an advisory role). In Syria the president appoint all the members of the constitutional court, the constitutional court has very limited prerogatives; it is only the president and the parliament who have the right to refer the laws for the court to rule on the constitutionality of those laws.

2. Initiatives of reform under Arab Spring

In this part of the report a brief overview of the main reforms which took place in the Arab countries as a result of the uprisings will be given. It should be mentioned that this process of reform is an on-going process and new developments were still at play while the proceedings of the seminar were taking place.

As we see from the papers, the depth of reform differs from one country to the other. While in some countries the reform involved constitutional amendments like in Jordan, it also took the form of a whole new constitution as in Morocco. In the countries where a revolution has taken place and head of state has been removed, we have witnessed provisional constitutional declarations to govern the transitional period as is the case in Tunisia, Egypt, and Libya. The constitutions of these countries were still under review at the time of the seminar. Syria is still in an on-going internal conflict, the peaceful popular uprising has been met by the regime with brutal oppression hoping to turn the uprising into a civil war; and in spite the issuance of decrees and the process of introducing a new constitution in response to the uprising, the legitimacy of the ruling regime is becoming under question domestically, regionally and internationally in a way that makes it difficult to take the legislative reforms and the issued decrees as an expression of seriously meant reforms.

In the countries that have witnessed different forms of demands for reform, significant legislative amendments relating to the judiciary have taken place. As has been observed by the participants in the Seminar, the constitutional and legal changes that took place in countries where the reform demands did not fundamentally contest the legitimacy of the head of the state namely Morocco and Jordan, were not less in significance compared to countries that have witnessed a change in the head of the state (Egypt and Tunisia and Libya), which might be due to the context the revolutionary transition has taken place that made the old political elite more cautious.

The political changes that took place in Tunisia and Egypt have not yet resulted in comprehensive legal changes. In Libya, the internal conflict and lawlessness

that followed the revolution made priorities of the ruling authorities to be given to restoring the law and order rather than long-term change related to the legal structure that governs judiciary; but it is expected the new constitution will restructure the judicial system.

In Tunisia, Egypt, Libya, and expectedly Syria in the future, the discussion on judicial reform is expected to take place within the larger context of reform of the justice system as a whole – a discussion is to take place as part of transitional justice efforts which are already underway.

Regional reforms, on the other hand, fall in two categories: firstly, ratification of a number of international treaties on human rights and lifting previous reservations to ones which have previously been ratified as is the case in Morocco, Tunisia and Jordan; and secondly constitutional reforms and decrees regarding independence and role of the judiciary.³

Regarding the latter, as mentioned above the region has witnessed so far, as a result of the uprisings of the Arab Spring, five new constitutions or interim constitutional declarations amendments to existing constitutions; which have either been issued during 2011 or which are in the process of being issued; in Morocco, Egypt, Tunisia, Libya, and Jordan.

In both **Egypt** and **Tunisia** the parliament elected after the revolution is expected to review the law governing judicial authorities, defining the prerogatives and formation of the high council of judiciaries. In both of the countries the judges' associations are preparing principles that should be included in the law. In Tunisia, alongside the constitution writing process, the National Constitutional Assembly has issued an amendment to the Code of Criminal Procedures regarding the definition, punishment and the limitation of public action in the crime of torture. At the time of the seminar Egypt was electing the parliament that should elect the Constitutional Committee that is supposed to write the constitution⁴.

Morocco has witnessed significant reform processes in the period between March and July 2011 following the peaceful demonstrations that began in the country on February 20th of the same year. The peak of those reforms were the issuing of the Constitution of July 2011 based on consultation exercises involving political parties, CSOs including NGOs, trade unions, and other actors. The most significant improvement was article 111 which stipulates the **right of judges to freedom of expression and association**; and the **establishment of a 'Supreme Council of the Judiciary'** to secure the independence of judges in respect to their appointment,

3 See details of treaties ratified and the lifting of reservations in the papers on Tunisia, Jordan and Morocco in this report.

4 The constitutional declaration of the March 30 2011, articulated that parliament should elect a constitutional committee to draft the constitution, however it did not put clear criteria of the way parliament should select this committee, till the writing of this report, the committee has not been formed.

conditions of retirements, and discipline, which puts an end to the Ministry of Justice control upon the judiciary. Also the decisions of the Supreme Council of the Judiciary are subject to appeal on the ground of abuse of authority before the highest administrative court. The Constitution also established a Constitutional Court. In addition, the Constitution in article 127 has prohibited the establishment of exceptional courts. And last but not least is the clarification in the new Constitution of the rights of individuals appearing before the courts and the rules governing the functioning of judiciary. However, The Constitution has not altered the position of the King and the implementation of a number of provisions in the Constitution will obviously depend on the issuing of corresponding laws to be submitted for parliamentary and other regulations and instructions. Therefore, the situation will still need further analysis after the issuing of those laws.

In **Jordan** in early 2011, and after a series of peaceful protests inspired by the Tunisian revolution, a call for reform has resulted in constitutional amendments in early 2011. It also has resulted in amendments to the law of public meetings where the approval of the administrative governors for **holding public meeting** has been lifted and the requirements reduced to informing the Governor. The most prominent development regarding judiciary in the constitutional amendments are: The creation of a **Constitutional Court**, restricting the reasons for the promulgation of **temporary laws** to cases of war, natural disasters, and urgent expenditures that cannot be postponed; constitutionalizing the state of **security courts**; and the prohibition of trying civilian in a criminal case before a court whose judges are not civilians with the exceptions of crimes of high treason, espionage, terrorism, narcotics and currency counterfeiting. Lastly the constitutional amendments have established an **Administrative Court of Appeal**, which will consider appeals against the verdict of the administrative court. However -and similar to the situation in Morocco - new laws and amendments of the existing laws are needed to conform to the new constitutional amendments. An actual assessment of those legal improvements should wait till the new laws are issued.

In **Libya** after the beginning of the revolution of February 17th, a constitutional declaration issued on August 3, 2011, explicitly articulates the independence of judiciary; prohibits the establishment of exceptional courts; and prohibits the issuing of any legal provision granting immunity to administrative decrees against judicial supervision. It also changed the presidency of the Minister of Justice to the Judicial Council, moving it instead to the president of the High Court. The amendments also abolished the immunity of High Judicial Council's decisions and made it subjected to judicial appeal. In addition, the jurisdiction of the Supreme Court has been expanded to allow it to establish mechanisms to handle electoral appeals.

In **Syria**, with the start of the peaceful protests, the regime - in response to democratic calls for reform- has tried to manage the crisis by decrees that handle the economic condition of the people. With the growing depth of the uprising, the regime has abolished the state of emergency and the Supreme State Security Court.

The most significant legal change was the presidential decision to form a national committee tasked with crafting a draft constitution. Also decree No. 100 of 2011 known as 'Law of Political Parties' has been issued, allowing the formation of political parties. However, those changes have been seen by the human rights movement and the public as cosmetic. With the on-going armed crackdown on the opposition movement and targeting civilians in general, there is very little room in Syria for a legal change under the current regime and conditions.

In **Lebanon**, the Arab Spring has not resulted in public protests, in the same way it did in other countries. But still the 'spirit of the Arab Spring' has been felt by the political class. As the paper documents the most significant reforms which took place in 2011 are the increase of the salaries of judges combined with technical reforms funded largely by the EU. The second point of reform is concerned with ensuring the accountability of judges via a vetting system and disqualifications pursuant to article 95 of the Code of Judicial Organization. However this vision of reform –according to the author- does not tackle the deep structural problems of judiciary in Lebanon but rather treated the High Judicial Council as the main actor of reform not the independent judges themselves.

Palestine was the least affected country by the Arab Spring; its struggle with the Israeli occupation and the very weak situation of the Palestinian Authority, the split between the PA in West Bank and the Hamas de-facto government in Gaza, has paralyzed reform attempts in the Palestinian Territories. Yet, Palestinian human rights organizations have kept up their advocacy for rule of law. However, eventually, the campaigns led the PNA to declare the **end of trying civilians before military courts** in mid-January 2011.

3. Opportunities, risks and the emergence of new actors

- The papers in the seminar did not examine in a comprehensive way the role of each of the actors, but rather identified those main actors, whose collaboration is indispensable for the purpose of the judicial reform:
- The **government**, the **parliaments** and connected to these, the **political parties**: There is a need for monitoring of and influencing the positions of the political parties, legislative proposals and the decrees that affect the independence of judiciary.
- The **civil society organizations**: it is important to continue the networking of those organizations whose mandate is to reform judiciary. Building synergies among those organizations and the **judges clubs** and **bar associations** is growing in importance.
- The **international community** particularly the EU, the UN and the **regional actors** notably the Arab League: more efforts are needed in order to identify and exchange knowledge on their activities and programs, and to facilitate more coordination and collaborations.

In general, the political changes evoked by the Arab Spring have shaken the pillars of the despotic state in some countries but there is a long way to go until a thorough legal and cultural structure that sustained despotism have changed. The issue of justice and independence of judiciary has been part of the political debate that should involve the society as a whole and is not confined to the experts and human rights activists. The process of **constitutional amendments** in many more Arab countries and the on-going legal reforms gives a space for the discourse on reform of judiciary to occupy a centre stage.

With the freeing of the political space initiated by the political changes, **judges' organizations** are flourishing in Morocco and Tunisia in addition to the important role of Egypt's judges club. In the rest of the region, bar associations are playing a significant role in advocating for legal reforms.

The reform of the judiciary has been on the agenda of **political parties** in several countries in the region notably in Morocco, Tunisia, Egypt, Lebanon and Jordan. Attempts of common agenda of change have been initiated.

However, the Islamists and their acceptance of the international human rights and judicial standards need to be kept under scrutiny. There is a legitimate fear among participants on the commitments of Islamist forces to international human rights standards; some highlighted the fact that Islamists has been selective in their support of international human rights standards. The growing gap between Islamists on one hand and the secular forces on the other hand sets a challenge for building common agenda on the issue of judiciary and legal reform.

With the ideological divisions associated with the freeing of political space, the **sectarian and ethnic** divisions are also on the rise, the despotic state kept the sectarian tensions under control although it failed to solve them.

4. Debates and discussions

Overall assessment on the reform in the wake of Arab Spring

- There was a general consensus that the Arab Spring has not been reflected in judicial reform; in other words the call for change has not reached the Ministries of Justice, not even in the countries where heads of state have been removed.
- In spite of the above point, the call for change is strong on the Arab streets and there is recognition from the participants that the transformation towards independent judiciary in accordance with international standards is a long process.
- The 'Arab Spring' is not only 'Arab'. Due regard should be given to the role and

contribution of the different ethnic and linguistic minorities in the region, such as Amazigh, Kurds, and many others who equally participated in the democratic uprising.

- Participants from the north of the Mediterranean have pointed out to the global aspect of the Arab Spring and the reform of the justice system in the sense that there is also critical reforms required in the north of the Mediterranean, particularly in connection to the 'war on terror'.
- There is a general agreement on the fact that reform of the judiciary is part of a comprehensive package of democratic change. Legal changes regarding independence of judiciary in the absence of freedom of expression, freedom of association and assembly, and values of pluralistic democracy will not succeed.

Transitional Justice

In countries which witnessed a change of the head of states and attempts to build new regimes, the issue of transitional justice was prevalent in the discussion of the Seminar as well as in the political debate within those countries. The issues of ending **impunity** of the violators of human rights before and during the revolutions were at the heart of the discussion of the papers on Tunisia, Egypt and Syria.

The method of dealing with corrupted judges who facilitated the violations of human rights and collaborated with the old regime was debated. Some of the participants advocated for the need to **vet judges** in order to purify the judicial system from those who breached their professional code of ethics and obligations due to the collaboration with the ex-rulers and executive authorities; others warned against any exceptional measures that could violate the principles of non-removability, taking a more pragmatic approach, recognizing that most judges had no choice - in order to earn a living, they had to "keep their heads down" and avoid becoming a problem for the regimes concerned. Participants shared the idea that the vetting of judges if deemed desirable, has to take place according to a due legal process and be overseen by fellow judges.

Regarding the issue of ending the impunity of the ex-dictators and those who violated human rights, there was frustration about the expected results of the trials of the human rights violators of the 'old regime' as well as the corruption cases. It was pointed out that those trials, are based on laws made by the old regimes themselves, and the violators are tried by judges who themselves might be part of the old regime. There were some calls for **benefiting from the experiences of democratic transitions in other countries** that have been through similar processes as explained in the previous section on recommendations.

Another important aspect regarding transitional justice is guaranteeing the right for **reparation** for the victims of human rights violations under the dictatorships. It has been proposed that the victims of violations of human rights, (e.g. those that

have been arbitrarily imprisoned, disappeared, injured and their families) should be given access to legal remedy which guarantees various forms of reparation such as compensation, rehabilitation, and other employment opportunities for the injured and victims of arbitrary imprisonment.

In addition to impunity and restitution, the option of developing transparent **truth and justice processes** needs to be examined in Egypt, Tunisia and Libya not as a substitute but as a complementary measure to secure safe transition.

The role of international mechanisms of justice

There were calls for pressuring the countries of the region to ratify the Rome Statute of the International Criminal Court, particularly in the light of the inability of national justice systems as they are to end the impunity for violators of human rights. However some were concerned that this would mean surrender of jurisdiction to The Hague, and therefore conceding to the failure of national justice. Others recognized that the complimentary jurisdiction of the International Criminal Court means that most of the time the best place to put a person on trial for “atrocious crimes” (crimes against humanity, war crimes and genocide) is domestic courts.

The importance of training of judges

Some of participants highlighted the fact that constitutional or legislative efforts are not enough to reform judiciary in the region. Many countries in the region have adapted legislations and ratified international treaties but judges are not trained enough on the relevance of these in the proceedings relating to them. Hence the issue of training and continuous education of judges must be on the reform agenda according to the participants. Some have called for regional and national institute-centre for training of judges.

Role of constitutional courts:

With lifting the ban on Islamic forces and the rise of Islamic forces in the free parliamentary elections, there were questions on the legislative agendas and possible radical changes in the legal systems. Many argued the constitutional courts should play an important role in the coming period to guarantee that no laws shall be issued from the parliament that might violate the basic constitutional rights of equality before law for men and women for example.

5. Recommendations

Agendas and priorities for legal changes:

The country papers provide suggestions for a variety of legal reforms pertaining to each country; we list in this brief report the recommendations that are relevant to the region as a whole or common among more than one country. It is also worth mentioning that most of the recommendations are similar to those that have been demanded by CSOs prior to the political change.

5.1 Agenda and priorities for legal changes

1. **The High Judicial Councils** or the equivalent body that represents the judicial authority shall enjoy full independence and oversee upon clear criteria the appointment of judges; disciplinary measures; and the inspection and its budget.
2. The High Council of Judiciary or Judicial Councils should not be appointed by the executives. Election or other objective criteria of selecting its members should be set and the process should be clear and transparent. Judicial Councils should represent all levels and branches of judges.
3. Judicial control must be ensured over the constitutionality of laws by instituting **constitutional courts**, with powers to strike down laws that are inconsistent with their respective constitutions
4. Ensure the **rule of law** and secure guarantees for the implementation of judicial rulings. In Tunisia and Egypt, it has been proposed to create a **judicial police** unit in the Ministry of Justice under the command of the judicial authority to enforce judicial warrants and rulings.
5. Eliminate exceptional courts and guarantee that civilians shall not be tried before military courts.
6. Access and utilize best international practices with regard to the functioning and independence of **prosecutors** and the separation of powers to investigate and indict.

The above-mentioned legislative reforms are the shared ones in all the eight countries according to the country papers. In addition there are other legislative reform suggestions pertinent to the condition of each of the countries, presented in the country papers.

5.2 Areas of actions and interventions by SCOs and international actors

- On the national level, there is first of all a need for research, information gathering, and well organized debates leading to agreed proposals on laws and institutions that implement them.

- On the regional level, there are some particular issues on judiciary that have been highlighted by the participants that could be studied and documented by EMHRN, CSOs, other relevant international organizations and legal experts via regional reports on those issues:
 1. The role of public prosecutor in judicial system in the region and its relation with both the executive and judicial authorities: The legal mechanisms of appointing, its prerogatives and roles in the region
 2. Formation and prerogatives of the Supreme Council of Judiciary in the region.
 3. The formation and prerogatives of Administrative Courts in the region.
 4. Comparative study on constitutional courts in the region: How constitutional courts could play a role in preserving and protecting individual rights under the Islamic rule that might prevail after democratic transition?

- The participants in the Rabat seminar expressed the need for exchange of experiences with the countries in Europe and other countries which have gone through a similar path from totalitarian toward democratic transitions. Specific issues of debate were identified as issues that warrant further discussion and exchange of experiences. For example, the participants were aware of the many initiatives regarding transitional justice in the region but the aspect on how to deal with independence of the judiciary as a whole, and vetting judges who have been part of the old regime is a an issue with a high priority. It has been also highlighted that the legislative changes are not the only responses for transitional justice, committees of reconciliation and truth and measures of restitution for victims of the violations could be used. There is a need for sharing experiences on those issues.
- Expertise and knowledge need to be exchanged among the countries of the region via roundtables, symposiums and discussion panels. The need for data-bases where best practices, studies and relevant judicial rulings from the region could be published was also discussed.
- Improve the law schools and professional training for lawyers and judges. This will need more collaboration between judicial authorities, international agencies and CSOs.
- There is a need in all countries of the region for technical modernization of courts, more computerization of the administration of courts and accessible data bases for the legal provisions and judgments.
- Media support to efforts aimed at reforming and achieving the independence of judiciary was also stressed.
- In countries where judges are forbidden from the right to form associations, advocacy should be undertaken for securing this right. Also, regional collaboration between judges associations in the region needs to be developed.

Chapter 1: The reform of judiciaries in the wake of Arab Spring - Egypt

By: Gamal Eid

Executive Director of the Arab Network for Human Rights

The negligence of reforming the judiciaries in Arab countries has exacerbated their legislative, regulatory and professional problems. These problems have rendered the state of the judiciaries in the Arab region inconsistent with evolution in the economic, social and humanitarian fields even though the independence of the judiciary has become – at least in the media – a common denominator among the constitutions of Arab countries. At the same time, respect for basic principles and minimum standards for the independence of the judiciary has become a major demand of the Arab peoples. Some Arab countries have transformed judges into submissive tools in politics, depriving them of their independence and utilizing them to endorse the orders of the executive and legislative authorities, which is considered a violation of the rule of law. Some of the countries in the Arab world even used their judges as instruments for political persecution under the guise of the law in support of the dictatorial regimes in place which consider judicial independence an ultimate threat. These dictatorial regimes have been reluctant to enforce the independence of the judiciary, claiming that Arab countries are not yet ready for independent judiciaries, which is one of the most important mechanisms for the maintenance of democracy and human rights.

Moreover, in many Arab countries, the judiciary faces numerous challenges that hinder the administration of justice including assaults against judges for the extent of jeopardizing their personal security and safety, the deprivation of jurisdiction from their basic prerogatives and the containment of judges by the executive authority and the referral of judges to retirement when necessary⁵.

1. Judiciaries under Mubarak: superficial judicial independence

In recent years, Arab countries have adopted the concept of judicial independence – albeit superficial – in order to conform to prevalent international standards and have declared their endorsement of the separation of powers. This principle is stated clearly in many Arab constitutions:

⁵ See: "Situation of Judiciary in the Arab Region". Papers of the first Justice Adalah conference-Beirut-1999- Edited by the lawyer: Nasser Amin, forwarded by Judge Awad Al-Murr. Page 11,12. Published in Arabic:

“أوضاع القضاء في بلدان المنطقة العربية” أوراق مؤتمر العدالة الأول - بيروت 1999 - إعداد: المحامي/ناصر أمين، وتقديم: المستشار/عوض المر.

The Egyptian Constitution of 1971 provides for the independence of the judiciary in several articles including Article 65 “the independence and immunity of the judiciary are two basic guarantees to safeguard rights and liberties;” Article 165 “the Judicial Authority shall be independent;” and Article 166 “judges shall be independent and be subject to no other authority but the law [and] no outside authority may intervene in court cases or judicial matters.” The Constitutional Declaration issued in the wake of the revolution stipulates in Article 46 that “judicial authority is independent;” and in Article 47 that “judges are independent and not subjected to removal. The law regulates disciplinary actions against them. There is no authority over them except that of the law, and it is not permissible for any authority to interfere in the court cases or matters of judiciaries.”

Most Arab governments have followed the Egyptian example by guaranteeing the independence of the judiciary in their respective constitutions.

Therefore, with regard to the independence of the judiciary, the majority of Arab constitutions provide safeguards to ensure no interference whatsoever in the judicial functions of judges and the establishment of a high judicial council to ensure judicial independence and the good functioning of judges. These constitutions have generally come close to the basic principle of the independence of the judiciary enshrined in international human rights conventions and recommended by United Nations conferences, particularly the Congress on the Prevention of Crime and the Treatment of Offenders held in Milan. However, these constitutions outline the overall themes and leave the law to ensure the independence of the judiciary and provide sufficient safeguards⁶. Beyond ratifying international conventions, Egypt has not granted the issue of basic rights and freedoms the attention and priority it deserves because most legislative, executive and judicial powers lie with the president, while the system of governance is actually based on the one-party system (officially there were multi-party system under Mubarak but the ruling party was controlling). The de facto one-party system is a form of totalitarian regime that reflects the concentration of powers in the hands of the ruling party and rejection of the rotation of power. In all cases, this renders the judiciary to almost situation of powerlessness before the executives.

Threats to judicial independence under Mubarak Regime

The impediments that have been jeopardizing the independence of the judiciary and administration of justice in Egypt, particularly before the January 25 revolution, are almost identical to those found in other Arab countries. The most notable obstacles and challenges include:

⁶ Ibid. P. 53

- The hegemony of the executive authority over the judicial authority, as the Ministry of Justice controls the fate of judges in terms of their transfer, secondment, endorsement of judges to work abroad, discipline, vacations, promotion, salaries and retirement age (although the retirement age of judges is specified by law, there are exceptions to extend the retirement age given by the executives).
- Extensive powers vested in the hands of president, empowering him to review judicial rulings, appoint the chief justice of the constitutional court and the public prosecutor and endorsing the appointment of prosecutors.
- Excessive powers vested in the public prosecutors, who allow for controlling the inputs of judiciaries, for example; which cases to be transferred to courts for trials (or kept in the hands of the prosecutor office without referral) as well as controlling the output of judiciaries by courts' rulings by selectively putting obstacles in the face the implementation of the court verdict.
- The stipulation in the constitution that the president of the republic is the president of the High Judicial Council, empowering the president to endorse the appointment of judges to the council, manipulate the organization of work within courts and the distribution of cases to judges and, occasionally, assign judges known for their loyalty to the regime to hear certain cases.
- The hegemony of the executive authority over the legislative authority manifested in the rigging of legislative council elections, the appointment of legislative council members, the granting of the head of the state and the government the power of legislation and so on and so forth. Consequently, the judicial authority has simply become an implementer of laws that are largely corrupt, considering that they were originally issued by a legislative authority lacking independence. In fact, these corrupt legislative councils issue the very laws that organize the judicial authority.
- It should be noted that the protracted state of emergency in Egypt is essentially a major cause for the squandering of the guarantees for the independence of the judiciary and the rule of law.

The independence of the judiciary in Egypt is further diminished by the special-exceptional courts which continue to exist even after the revolution. These courts apply the Emergency Law, which a deviation from the administration of justice. Even worse, civilians are tried before military tribunals consisting of officers appointed by the Ministry of Defense. These courts have the exclusive competence to determine whether a given case falls within their jurisdiction, hence evading the supervision of regular courts. In this method, military courts lack the minimum rules of justice and issue extreme sentences that cannot be challenged via the regular channels.

Therefore, the judiciary is practically under siege due to the constitutional, legal and political structures that diminish its role and overstep on its independence. Thus, no matter how much we qualify judges, they will not be independent under such circumstances, indicating that a truly independent judiciary is realizable only in the context of long-term democratic and political transformation.

Ensuring the independence of the judiciary requires the political will to guarantee actual and effective implementation of the principle of the separation of powers in order to thwart executive authority attempts to usurp the judicial authority. The guarantees must also protect judges from unlawful influences they may encounter from senior superiors within the judicial authority itself. The external factor associated with the separation of powers is the main cause of increased anxiety and fear in most Arab countries including Egypt.

2. Judicial reform initiatives after revolution in Egypt

Egypt's judges took the initiative and prepared a draft law to govern judiciaries, aiming to make the judiciary immune from the interference of the executive or any other authority by reassigning the majority of powers granted to the Minister of Justice to the Supreme Judicial Council (SJC).

Those concerned with justice in Egypt hope to put aside the current disagreement between parties to the judicial process; lawyers, judges, prosecutors, etc. regarding the draft law. It is hoped that they will agree on one draft that reflects the views of all stakeholders and achieves the aspirations of the Egyptian people, and that revolutionary forces will support the draft. Coincidentally, the Supreme Judiciary Council is formed by seniority and it was Hossam Ghariani's turn to serve as SJC President at the time of the revolution. The widely known fact that Ghariani is a leading advocate for the independence of the judiciary must be utilized. There are high hopes that he will advocate the Council and raise its attention to the issue of judicial independence.

The Ghariani draft law, crafted by a committee headed by Ahmad Makki who is also a prominent advocate for the independence of the judiciary, reiterates the principle of the independence of judges even though such independence would cost them a financial loss given that they would no longer be seconded to work in the government. The Judges' Club, currently headed by a judge close to the government and former regime, has opposed this approach, this fact prompted judges to issue the ten principles, better known as the Document on Judicial Independence in order to be leading principles governing the law proposed by the judges' club. (Annexed)

3. Recommendations

3.1 Civil society and judicial reform initiatives

Civil society organizations in Egypt can contribute actively by gaining expertise and experiences from countries that under went through democratic transition. Civil society organizations can do so through the following:

- Symposiums, roundtables and discussion panels to put forward draft laws prepared by judicial experts from these countries. Specialist professors, lawyers and those concerned with the independence of the judiciary must be invited to discuss, support and initiate social dialogue around these draft laws. Print and audio-visual media outlets must also be utilized to acquaint the public with the draft laws on judicial independence. Campaigns must be conducted to generate favorable media coverage and a popular environment supportive of the independence of the judiciary.
- Expertise must be exchanged between Egypt and other Arab countries and with countries around the world considered advanced in this regard by dispatching Egyptian researchers to those countries or bringing experts carrying their experiences in judicial reform to Egypt.
- Civil society organizations in Egypt stood against special courts and trials of civilians before military tribunals that undermine the independence of normal courts. They also attempted to amend the Military Justice Law and apply pressure towards reassigning investigating judges to their original role, i.e. reviewing cases, rather than conducting prosecution work. This will contribute to achieving the separation between the function of investigation and the function of indictment.

3.2 Political actors, political forces and independence of judiciaries

In spite of revolutions in some Arab countries and intensified political action in others as well as the importance of an independent judiciary as the body responsible for the administration of justice and protecting individuals' freedoms and property, the political campaigns and electoral platforms of all political entities Egypt have not given this issue the attention it deserves considering the utmost importance of the independence of the judiciary.

Reforming the judiciary has been a major part of various parties' platforms. There is almost a tacit agreement among these parties on one model for judicial reform that involves upgrading law curriculum, emphasizing the independence of the judiciary and the legal profession, amending laws that allow the executive authority to interfere in the judiciary, easing bureaucratic burdens for courts and judges, establishing a modern system to document, store and grant access to court rulings in order to reduce contradictions between rulings, asserting the jurisdiction of regular

courts over all civilian cases, separating the powers of investigation and indictment and reinstating the investigating judge, referring cases to judicial departments in order as opposed to referring a certain case to a certain department, increasing the number of judges to ensure a swift judicial process, respecting court rulings and guaranteeing prompt enforcement.

The Islamist Salafi Al-Nour Party is practically the only exception to this agreement, given that its platform did not include any proposals or drafts to reform the judiciary. It should be noted that the Muslim Brotherhood's Freedom and Justice Party created controversy after calling for instating the right of each citizen to initiate public interest litigation without meeting the conditions of capacity and interest. This means a return to the Hisba system, which encountered opposition from liberal and leftist parties.

Example of an effective actor in Egypt (Judges' Club)

The judges' battle for independence is half-century old. Except on a few occasions, the battle has been waged silently behind the scenes between the regime and judges. In most cases, its repercussions manifest in the elections of the Judges' Club. The Judges' Club in Egypt is only a social club, not a professional association, but it offers judges some services. It does not formally represent judges, a function of the Supreme Judicial Council; nonetheless, its statutes mandate that it contributes to maintaining the independence of judges.

Most importantly, the Club offers the only venue for judges to assemble and express solidarity on issues of concern to them. The Club is effectively independent, as the attempts of the regime and some judges to turn the Club into a civil association reporting to the Ministry of Social Affairs have failed on grounds that it would violate the separation of powers. The struggle for the Club's independence ended with a decision issued by its general assembly in 2004 refusing to subordinate the Club to any entity whatsoever, not even the SJC.

Nonetheless, the Club is partially dependent on funds it receives from the Ministry of Justice, which has never hesitated to use this funding as a weapon to undermine the Club's stability and independence.

Given the importance of the Judges' Club, the results of its elections indicate the degree of judges' acceptance or rejection of subordination to the executive authority, which, according to the Constitution, consists of the president of the republic and the government. For this specific reason, the Club has long been the battleground for the independence of the judiciary. The government attempted more than once to rig the Club's elections and influence its members towards voting for judges loyal to the regime. After the revolution, the Club continues to play a significant role in fighting for the independence of the Egyptian judiciary.¹

3.3 Anticipated role of international community in support of judicial reform efforts in Egypt

The international community has not embarked on a single initiative to reform the judiciaries in the region save in Egypt where it exerted some timid efforts. Although the Egyptian Ministry of Justice conducted several trainings and activities before the revolution in collaboration with the United Nations Development Program (UNDP), these did not achieve real results. International institutions also helped organize only one conference on transitional justice in Egypt, which reveals weakness in the international role in this regard.

Conclusion and Recommendations

Achieving justice is the purpose of judicial reforms. The majority of those concerned with the judiciary have agreed on several measures to reform the judicial system, notably:

1. Improve law schools to produce well-qualified judicial cadres.
2. Streamline judicial procedures, shorten trial periods and promptly issue rulings.
3. Allow appeals of court rulings and always guarantee the right to resort to a higher court.
4. Respect the right to resort to a civil judge.
5. Emphasize the need to enforce judicial rulings as a sign of respect for judicial independence and a guarantee for ensuring the rights of litigants.
6. Promote the freedom of judges to establish clubs and associations that express their views and defend their independence and interests.
7. Ensure the financial independence of the judicial authority.
8. Provide media support to efforts aimed at reforming and achieving the independence of the judiciary.
9. Reconsider the laws in force to bring them into conformity with current times.

These are only examples. The problems in Egypt and most Arab countries have remained the same over the years. The solutions are not new either, but they remain to be implemented.

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Annex

Document on Judicial Independence

We, the undersigned, declare our full support to the judiciary and the judges who have long demanded the independence of the judiciary. Chief among them are Supreme Judicial Council President Hossam Ghariani and the Committee he formed under the chairmanship of Ahmad Makki to prepare a draft judicial authority law aimed at reducing executive authority powers over judges and democratizing the decision-making process within the judicial authority. To this end, the following principles are hereby introduced:

- I. The subordination of Judicial Inspection shall be assigned to the Supreme Judicial Council instead of the Minister of Justice.
- II. The government shall not interfere in the selection of senior positions in the judicial authority. These positions shall be selected by the general assemblies of courts.
- III. The Public Prosecutor shall be selected upon the nomination of the Supreme Judicial Council and the approval of the general assembly of his respective court through secret ballot. The Public Prosecutor's term of office may not exceed four consecutive years.
- IV. Public Prosecutor inspection of prisons and locations where criminal sentences are served shall take place at least once a month and inspection reports shall be presented before competent authorities and human rights organizations.
- V. Applicants for appointment to the Public Prosecutor's Office shall sit for a test to determine their competence and ensure equal opportunity in accordance with general conditions specified by the Supreme Judicial Council and published in the Official Gazette.

- VI. After training, judges shall specialize in one branch of law in order to ensure promptness and competence in adjudication.
- VII. An administration shall be created to assist in the enforcement of sentences and securing of courts per the directives of the competent court president.
- VIII. Judges may not be seconded to serve with the government. Secondment of judges to serve with other organs within the judicial authority may not exceed four years.
- IX. Judges may not be appointed to a political or executive position for a period of three years as of the date of separation from service.
- X. The Judges' Club shall be enshrined in the law and may not be subject to any authority other than its general assembly.
- XI. We call upon the authority in power to promulgate this law before the legislative elections in order to empower judges to perform their roles in supervising the electoral process while they are independent.

Chapter 2: The reform of judiciaries in the wake of Arab Spring -Tunisia

By Al-Ayachi Al-Hammami – Lawyer, Journalist and Human Rights Activist
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1. The State of the Judiciary before the Revolution

Before the revolution, the Tunisian judiciary suffered under the weight of the executive authority, particularly the president of the republic. Although the constitution holds that “the judiciary is independent; the magistrates in the exercise of their functions are not subjected to any authority other than the law;” (article 4 in the old constitution), the executive authority sought to hinder the independence of the judiciary. It enacted an organic law (Law No. 67-69 of July 14, 1969) depriving judges of their independence by placing them under the authority of the Minister of Justice and president of the republic who had control over the details of judges’ careers in terms of assignment, discipline, etc. The president also appointed, directly or indirectly, the majority of members (4 out of 5) in the High Judicial Council, which had no real power.

The judiciary was always an obedient tool in the hands of the political regime with which to attack its rivals. Reports by local and international non-governmental organizations stand witness to hundreds of political trials in which the judges played a dirty role, violated the defence rights and principles of fair trial and issued harsh prison sentences and sometimes the death penalty against political opponents and civil society activists.

Before the revolution in Tunisia, the political regime would create legal structures that would seem at first glance a guarantee for democracy and human rights. Indeed, such structures were only a front before domestic and international public opinion. They were emptied of all values through limiting their powers and appointing their members from among regime loyalists.

In this context, the “Constitutional Council” was founded (Decree No. 1414 of December 6, 1987). Contrary to what the name suggests, the “Constitutional Council” was only an advisory board to which no one had the right to turn to except the president who, of course, had appointed its nine members. Ironically, when former president Zine El Abidine Ben Ali fled the country on January 14, 2011, this Council “observed,” according to the constitution, the vacancy of the presidency in order to enable the prime minister to provisionally assume the presidency.

The political regime also adopted a propaganda policy whereby it had ratified the majority of international human rights conventions and covenants while abstaining

from respecting them at home. Up until Ben Ali's flight on January 14, 2011, Tunisia had had ratified the following:

Convention	Signed	Ratified	Reservations
International Covenant on Civil and Political Rights	April 30, 1968	March 18, 1969	×
First Optional Protocol to the International Covenant on Civil and Political Rights	×	×	
Second Optional Protocol to the International Covenant on Civil and Political Rights	×	×	
Convention on the Rights of the Child	February 26, 1990	January 30, 1992	Chapters 2 and 7
United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	July 24, 1980	September 20, 1985	Chapters 9/16.2 (C), D), E), F)
Optional Protocol to the CEDAW	×	×	
International Convention on the Elimination of All Forms of Racial Discrimination	April 12, 1966	January 13, 1967	×
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	July 28, 1987	September 23, 1988	×
Optional Protocol to the Convention against Torture	×	×	
International Covenant on Economic, Social and Cultural Rights	April 30, 1968	March 18, 1969	×
Arab Charter of Human Rights		×	
African Charter on Human and Peoples' Rights		March 16, 1983	

Judges' Struggle for Independence

Despite the conservative nature of the judicial body, there were some attempts to call for improving the situation of judges and the independence of the judicial authority. However, they were always answered with repression and rejection by the political regime. The last of such attempts was by the Association of Tunisian Judges (Association des Magistrates Tunisiens, AMT) when the Ministry of Justice orchestrated an internal coup to overthrow its independent board of directors and arbitrarily transferred its members to inner cities following the Association's Tenth Conference "Supporting the Independence of the Judiciary Foundation of Justice" held in December 2004⁷.

2. The State of the Judiciary after the Revolution

The legal framework regulating the judiciary in Tunisia has not changed since Ben Ali fled the country. The revolution has not affected the Ministry of Justice. Despite suspending the old constitution and issuing a presidential decree on March 23, 2011 to provisionally regulate public authorities, high judicial bodies have remained unchanged. Article 17 under Chapter IV "The Judicial Power" of the Decree states that "the judicial power shall be organized and run and shall exercise its competences in accordance with the laws and regulations in force." Article 2 of the same Decree dissolved all legislative institutions: the Chamber of Deputies, the Chamber of Advisors, the Economic and Social Council and the Constitutional Council.

The AMT⁸, the Syndicate of Tunisian Judges (SMT) and the Union of Administrative Judges (UAJ)⁹, have called for dissolving the High Judicial Council and electing an interim council of judges to oversee the affairs of judges pending the enactment of new laws to provide the regulatory framework for the judicial authority in accordance with international standards for the independence of the judiciary. However, the government rejected the proposal and the situation was left unchanged. The old High Judicial Council conducted the annual transfers, which engendered outrage among judges who challenged the legitimacy of their transfer.

Maintaining the same legal framework regulating the judicial authority has not prevented the interim president from issuing several decrees ratifying a number of international agreements on human rights and lifting some reservations to other conventions that Tunisia had previously ratified. These are:

⁷ For more on Tunisian judges' struggle for independence, see the report published by EMHRN in 2008 on the Network's website: <http://www.euromedrights.org/en/permalink/3657.html>

⁸ Is an independent association led by judges who suffered the oppression of the former regime over the past years

⁹ Both of which were established after the revolution

- International Convention for the Protection of Persons from Enforced Disappearance (May 14, 2011);
- First Optional Protocol to the International Covenant on Civil and Political Rights (May 14, 2011);
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Statute of the International Criminal Court;
- Agreement on the Privileges and Immunities of the International Criminal Court (May 14, 2011).

A decree was also issued lifting Tunisia's statement on the fourth paragraph of Article 15 and reservations on the second paragraph of Article 9, paragraphs C, D, F, G and H of Article 19 and the first paragraph of Article 29 of the Convention on the Elimination of All Forms of Discrimination against Women.

Furthermore, a decree was issued amending the Code of Criminal Procedure and Penal Code with regards to the definition of the crime of torture, its punishment and the term of limitation of public action based on the crime of torture, which was set at 15 years contrary to previous expectations (Official Gazette No. 22 of October 28, 2011).

After it was elected on October 13, 2011, the National Constituent Assembly (NCA) endorsed a law to provisionally regulate public authorities throughout the current period as the new constitution is being drafted. With regards to the judiciary, the provisional regulation partially responded to the demands of judges and civil society by dissolving the High Judicial Council, but introduced no changes to administrative justice and the Court of Accounts (financial courts). The Law on the Provision Regulation of Public Authorities states the following in Chapter V under the Judicial Authority:

Article 22 "The judiciary shall exercise its prerogatives with full independence.

After consultation with judges, the National Constituent Assembly shall issue an organic law establishing and defining the composition, prerogatives and formation mechanisms of a provisional representative body to oversee the courts of justice and to replace the High Judicial Council.

The National Constituent Assembly shall enact organic laws whereby the Assembly reorganizes the judiciary, restructures high judicial councils pertaining to justice and administrative and financial courts and sets the foundations for reforming the judicial system in accordance with international standards of judicial independence."

Article 23 “The Administrative Court and the Court of Accounts shall exercise their prerogatives in accordance with the laws and arrangements in force relevant to their regulation, jurisdictions and procedures.”

3. The position of the associations of judges and some civil society organizations

Civil society organizations and the associations of judges emphasize the principle of separation of powers, especially the independence of the judiciary in accordance with international standards of judicial independence as vital requirement for building the desired democratic state. In this regard, the associations of judges, now pluralistic after the revolution, offer practical and precise proposals and conceptions. The positions of AMT, SMT and UJA are almost identical with regards to the independence of the judicial authority and the need to have an elected high judicial council with real powers and to amend the organic law on judges in accordance with international standards of judicial independence. AMT calls independently for defining the conditions for election and nomination eligibility, cleansing the judicial body prior to holding the elections and agreeing on an independent commission to oversee all phases of the electoral process. Below are the most important AMT proposals given that AMT is the oldest and most representative organization for judges.

In July 2011, AMT issued a report on the “Requirements of the Tunisian Judiciary During Transition” following a symposium organized by AMT in cooperation with the United Nations Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Development Program (UNDP) held on July 27-28, 2011. Pending a final constitution that guarantees the independence of the judicial authority, the report emphasized the need to abolish the executive authority’s supervision over the judiciary, purge the judiciary of corrupt figures and provide judges with the necessary safeguards. Following the release of the report, AMT held its 10th extraordinary conference on October 30, 2011 and issued two documents; one on the “constitutional status of the judicial authority” and another on the “laws governing the judicial authority and administration of justice.”

Both documents contained AMT’s vision of the principles of the independence of the judiciary, the means to affect such independence during transition and in the new constitution that the Constituent Assembly will produce.

The two documents constitute a serious initiative by immediate stakeholders to reform the judiciary. After the judges framed the independence of the judiciary as a fundamental entitlement of the popular revolution in Tunisia, they emphasized in the document on the constitutional status of the judicial authority the need to adopt international standards of judicial independence in the new constitution and specifically provide for the following principles:

1. The judicial authority shall be independent from the other state authorities;
2. The judicial authority shall consist of:
 - Constitutional, administrative, electoral, financial and justice courts.
 - Elected high judicial councils enjoying a legal personality and financial and administrative independence with headquarters in the capital shall oversee the judiciary.
 - Endorsing the principle of judicial control over the constitutionality of laws, a constitutional court shall be created with functions and composition defined in the constitution.
 - Banning the creation of special courts exercising the powers of the judiciary.
 - The public prosecutor's office shall report to the judicial authority and consist of prosecutors who are independent in the exercise of their functions. The public prosecutor's office shall have judicial police working under its command.
 - The judicial authority shall consist of: Constitutional, administrative, electoral, financial and justice courts.
 - The judicial authority shall be administrated in accordance with the principles of good governance.

In addition to these principles, the judges add in their document concerning the laws governing the judicial authority and the administration of justice the following recommendations to incorporate into the laws relating to the judicial authority:

- The judicial authority comprised of judges and prosecutors shall be structurally and functionally independent from the executive authority.
- All courts and judicial institutions shall report to elected high judicial councils, and judges shall be independent and subject to no authority other than the law.
- Judges shall be immune to criminal and disciplinary prosecution and no action may be brought against them except with a decision from the High Judicial Council.

- The exercise of accountability shall be vested in an elected judicial body which shall guarantee the judges their rights to defence in accordance with the procedures and standards guaranteeing the independence of the judge.
- Judges may not be transferred without their consent or request.
- The judicial body is a constitutional body elected by the judges and has legal personality and structural and financial independence as well as a headquarters with a designated budget deliberated in Parliament under a specific section in the state budget.
- The High Judicial Council shall consist of elected judges representing all ranks.
- The High Judicial Council shall manage the career affairs of judges in terms of assignment, promotion, retirement and accountability.
- Each branch of courts: justice, administrative and financial courts, shall be managed by a specific high judicial council. All judicial councils shall report to one supreme council of justice.
- The High Judicial Council shall have direct oversight over the Centre of Studies and the High Judicial Institute.
- Introducing objective guidelines and criteria on hiring judges to serve in central and regional administrations as well as the administrative committees of the executive authority including the departments of the Ministry of Justice. These include objective guidelines and criteria concerning the implementation of the technical cooperation mechanism and vesting the power to select candidates to work abroad in the High Judicial Council.
- Creating a judicial police unit within the Ministry of Justice under the command of the judicial authority to ensure its integrity, enforce judicial warrants and rulings through the public power and ensure safety of the courts.

Thus, judges seem determined to seize this historic moment to attain genuine judicial independence in the new constitution. They have decided not to delegate this task to the Constituent Assembly or the government but intend to submit a comprehensive draft of the section on the judicial authority in the new constitution, especially since all parties agree that an independent judiciary is a crucial requirement for the desired democratic state.

Chapter 3: The Reform of the Judiciaries in the wake of the Arab Spring - Morocco

By Abdelaziz Nouaydi
Professor of Law and Member of the Bar of Rabat

Context

In Morocco, after several campaigns to raise awareness in civil society, mainly through the memorandum initiated by Adala which was inspired by the EMHRN Report (in late 2007) and jointly adopted in April 2009 by ten Moroccan NGOs working for human rights,¹⁰ King Mohamed VI drew inspiration from this memorandum in a speech on judicial reform that he made on 20 August 2009.

However, the main reform occurred between March¹¹ and July 2011, following the peaceful demonstrations that began in Morocco on **20 February** 2011 (which Morocco's Arab Spring movement then adopted as its name) after the revolutions in Tunisia and Egypt. The **20 February Movement** calls for democratic change and radical reforms to end corruption, the rent-based economy and serious violations of human rights.

The July 2011 Constitution¹², drawn up by royal commission after a large-scale consultation exercise involving political parties, NGOs (including Adala)¹³, trades unions and other actors, introduced significant human rights reforms and an improvement in the relationship between the different powers, redressing the balance in favour of the government and parliament, as compared with the hitherto quasi-absolute powers of the King.

It is in the area of justice that reform has been most advanced: it is improving the status of magistrates, strengthening the independence of the judiciary and maintaining the rights of **individuals appearing before the courts**. A constitutional court is being established with a new competence that constitutes, at the same

10 LMDDH (Moroccan League for the Defence of Human Rights), AMDH (Moroccan Human Rights Association), the Moroccan Bar Association, OMDH (Moroccan Organisation for Human Rights), Amnesty Morocco, Transparency Morocco, *Association Marocaine pour la défense de l'indépendance de la magistrature* (Moroccan Association for the Defence of an Independent Judiciary), Adala, *Forum marocain pour la Vérité et la Justice* (Moroccan Forum for Truth and Justice), *Observatoire marocain des Prisons* (Moroccan Prisons Observatory).

11 Speech by King Mohamed VI on 9 March 2011, in which he announced the main thrust of the forthcoming constitutional reform.

12 Adopted in a referendum on 1 July, and published in the Official Gazette (*Bulletin officiel*) on 31 July 2011.

13 Adala's recommendations, which were presented to the commission orally, in writing and electronically on 12 April 2011, were substantially incorporated into the text of the constitution, including the name "Supreme Council of the Judiciary" and the priority preliminary ruling on the issue of constitutionality (QPC).

time, a new law such individuals: this is the priority preliminary ruling on the issue of constitutionality (*QPC*).

We will use the template proposed by the EMHRN to facilitate comparisons.

1. Brief update on the situation before the reform in 2011

1.1 Ratification of relevant international treaties

the following lists show:

1. The main conventions on human rights adopted when the Morocco report was drafted (December 2007);
2. The conventions, protocols and declarations adopted since then;
3. The main conventions on human rights that have not yet been ratified.

The main conventions on human rights adopted when the Morocco report was drafted (December 2007):

1. The 4 Geneva Conventions (1949)
2. The Convention on the Prevention and Punishment of the Crime of Genocide
3. The Convention on the Elimination of All Forms of Racial Discrimination
4. The International Covenant on Economic, Social and Cultural Rights
5. The International Covenant on Civil and Political Rights (ICCPR)
6. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
7. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
8. The Convention on the Rights of the Child
9. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Ratified by Morocco on 22 May 2002
10. The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Ratified by Morocco on 22 May 2002
11. The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

The conventions, protocols and declarations ratified or adopted since the EMHRN report (between January 2008 and December 2011):

1. The Convention against Torture: Recognition of the Committee's competence to receive and consider individual communications under Article 22 of the Convention
2. The Convention on the Rights of Persons with Disabilities. Ratified by Morocco on 8 April 2009
3. The Optional Protocol to the Convention on the Rights of Persons with Disabilities. Ratified by Morocco on 8 April 2009
4. The lifting of restrictions on the CEDAW Convention¹⁴ on 8 April 2011.

The main conventions on human rights that have not yet been ratified:

1. The Rome Statute of the International Criminal Court
2. The International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20 December 2006 and opened for signature on 6 February 2007¹⁵
3. The 3 Additional Protocols to the Geneva Conventions of 12 August 1949
4. The 2nd Protocol of the ICCPR on the Abolition of the Death Penalty. However, there is a *de facto* moratorium on implementing the death penalty in Morocco.

One should remember those human rights organisations and the Equity and Reconciliation Commission or IER, (since January 2006) have been calling on Morocco to ratify these important conventions to improve the status of the judiciary and the system for protecting human rights. It should also be noted that, on 17 April 2006, on the occasion of Morocco's candidacy to the Human Rights Council¹⁶, the Permanent Representative of the Kingdom of Morocco to the United Nations declared in a letter to the UN Secretariat that Morocco "solemnly undertakes to ratify or adhere to the few human rights instruments to which Morocco is not yet party (...), including the International Convention for the Protection of All Persons from Enforced Disappearance" (which was at the time being finalised at the UN). Since then, Morocco has been elected to the Human Rights Council and has signed the convention, but ratification has not yet become a reality.

¹⁴ On 18 April 2011, the Secretary-General of the United Nations Organisation, acting in his capacity as depositary, stated the following: "The Kingdom of Morocco withdraws its reservations in respect of the second paragraph of article 9 and article 16 of the Convention". The withdrawal took effect on 8 April 2011 in accordance with paragraph 3 of article 28 of the Convention, which stipulates: "Reservations may be withdrawn at any time by means of a notification addressed to the Secretary-General of the United Nations Organisation, which informs all States party to the Convention. Notification shall take effect on the date of reception".

¹⁵ Morocco only signed the Convention on 6 February 2007.

¹⁶ See the link: <http://www.un.org/ga/60/elect/hrc/morocco.pdf>, page 5.

1.2 Legal frame work governing the judiciary before the July 11 constitution

Article 82 of the 1996 constitution only stated that: “The judiciary is independent of the legislative and the executive branches”. It adds: “The Supreme Judicial Council is responsible for implementing guarantees made to magistrates in respect of their promotion and their discipline” Art. 87.

However, these guarantees were nullified by the 11 November 1974 law on the status of the judiciary.

This law, implemented by royal decree (*Dahir*) during the period of the state of emergency¹⁷, makes magistrates subordinate to the executive branch, represented by the Minister for Justice. It is coupled with a law, the so-called “transitional measures”, which dates from 28 September 1974. This law drastically reduced the guarantees sanctioned by the 1959 Code of Criminal Procedure; reinforced the powers of the prosecution and instituted a system of rapid justice by abolishing the preparation for eventual judgment of cases not punishable by death or life imprisonment; instituted the *flagrante delicto* procedure with direct referral to the criminal courts by the King’s public prosecutor; abolished both the court of criminal appeal and the use of juries in criminal cases, knowing that the criminal courts were replaced by the criminal division of the court of appeal whose decisions were not open to appeal (until October 2003) after a reform of the Code of Criminal Procedure (*CPP*).

The law of 15 July 1974 relating to the court system¹⁸ must also be taken into consideration. Assessing this law, it is clear that the law established the presiding judges’ control over the judges working in their courts.

The law of 11 November 1974 should therefore be viewed as part of a global system for controlling magistrates and making them subordinate to a civil service that can be mobilised in the service of those in power, should the need arise. This approach fits into an overall vision that conceives of justice, the police, the army, the administration and the official media not as impartial public services serving the community as a whole, but rather as instruments enabling the political regime to be protected and legitimised and, if need be, as effective tools to repress its political opponents.¹⁹

17 There was a state of emergency in Morocco between 1965 (the year that saw the suppression of popular unrest in Casablanca on 23 March; the King’s proclamation of the state of emergency on 7 June, resulting in the suspension of parliament; and the abduction and disappearance of the leader of the Left, Mehdi Ben Barka, in Paris on 29 October) and 1977. It is a period marked by many political trials against the left-wing opposition.

18 The court system, set up by *Dahir* or Royal Decree relating to the 15 July 1974 Law, is structured as follows: the courts of general jurisdiction; the communal and district courts in the *communes* (in 706 rural *communes*) and districts (*arrondissements*) respectively (with district judge in each of the primary courts); the primary courts; the courts of appeal; the specialised audit court system represented by the national Audit Office; the specialist courts represented by the High Court of Justice, which dates back to 1965, and the permanent court of the Royal Armed Forces; the Supreme Court.

19 For details, see our report at the EMHRN (late 2007).

2. The status of the judiciary in the July 2011 Constitution

Several improvements have been introduced by the new constitution:

2.1 Strengthening the independence of the judiciary

The new constitution stipulates that judges are irremovable. It prohibits any intervention in cases brought to the courts. It further states: "In his judicial office, the judge shall receive neither injunctions nor directives, nor shall he be subjected to any pressure whatsoever. Whenever he considers his independence to be under threat, he shall refer the matter to the High Council of Judiciary. **Any failure by the judge in respect of his duties of independence and impartiality constitutes grave professional misconduct**, without prejudice to potential legal consequences". Art. 109.

Article 110 stipulates: "Judges are bound solely by the application of the law. Court rulings are given based solely on the impartial application of the law. Prosecutors are bound by the application of law and shall comply with written instructions received from higher authorities".

Article 111 unequivocally proclaims **the right of judges to freedom of expression and association**: "Magistrates shall enjoy freedom of expression, compatible with their duty of confidentiality and the judicial code of ethics. They may belong to organisations or establish professional associations, while abiding by their duties of impartiality and independence and in conditions permissible by law". However, this same article adds: "They may not join political parties or trade union organisations".

On 20 August 2011, some hundred judges took advantage of this article to establish **a new organisation, the "Club des Juges du Maroc" (Moroccan Judges' Club)**, no doubt inspired by their Egyptian counterparts. The new organisation was swiftly welcomed and supported by Moroccan human rights NGOs, particularly after the tactics employed by the Interior Ministry, who had sought to prevent the Club's constitutive assembly from being held. The assembly finally took place outside the venue, which had been hired for the occasion but was closed on the Interior Ministry's orders.

This acknowledgement was reinforced, two months later, when the president and vice-president of the Judges' Club were invited by the French ambassador to a lunch-reception during a meeting on the death penalty.

Another organisation was already in existence: the **"Amicale hassanienne des juges"** (Hassan Judges' Association); this was not independent since it had been founded when the status and fate of magistrates were under the control of the

Justice Ministry. Let us hope that this gives rise to healthy competition that will ultimately benefit both judges and litigants alike!

It should be noted, however, that the authorities continue to favour the Hassan Judges' Association. This was also the case with the new law on the "*Fondation mohammadienne des oeuvres sociales des magistrats et fonctionnaires de la justice*" (Mohammad Foundation of Social Activities for Judges and Justice Ministry Officials),²⁰ which restricts judicial representation on the advisory and monitoring Board (Art. 6), on the administrative committee (Art. 11) and on the regional committees (Art. 15) to members of the Hassan Judges' Association alone, as though this were the sole body representing judges!

2.2 Establishment of a "Supreme Council of the Judiciary"

The new constitution has established a Supreme Council of the Judiciary which is responsible for implementing guarantees given to judges, notably in respect of their independence, their appointment, their promotion, their conditions of retirement, and their discipline. This council prepares reports on the status of the judiciary and the judicial system, and makes appropriate recommendations on the issues. The Council delivers detailed opinions on all matters relating to the judiciary, at the request of the King, the Government or Parliament.

This puts an end to the Justice Ministry's control, pending the adoption of detailed provisions by the forthcoming organic law.

For more guarantees for judges, individual decisions of the Supreme Council of the Judiciary are subject to appeal on the grounds of abuse of authority before the highest administrative court in the Kingdom, something that has never been

²⁰ Law 39.09 of 17 August 2011, Official Gazette (Arabic version) no. 5975, 5 September 2011. It is true that this law was first put forward by the Justice Ministry in June 2011, before the appearance of the Judges' Club, which was initially launched on FACEBOOK as the Magistrates' Forum in the aftermath of 20 February (the Moroccan Spring).

possible before now, as evidenced by the sad case of Judge Jaafar Hassoun.²¹

The Supreme Council of the Judiciary is presided over by the King. It is composed of the First President of the Court of Cassation acting as Deputy president; the Attorney General for the Crown at the Court of Cassation; the President of the First Chamber of the Court of Cassation; 4 elected representatives, including magistrates of the courts of appeal; 6 elected representatives including magistrates from courts of first instance. The ten elected members must include women magistrates in numbers proportionate to their presence in the judiciary as a whole.

The council is open to persons outside the ranks of the judiciary, that is to say: the Ombudsman (appointed by the King), the President of the National Council for Human Rights (also appointed by the King), as well as five individuals appointed by the King, one of whom is nominated by the General Secretary of the Higher Ulema Council.

The Supreme Council of the Judiciary has administrative and financial autonomy. In disciplinary matters, the Supreme Council of the Judiciary is assisted by magistrate-inspectors.

21 This case began on 19 August 2010 when the Justice Minister publicly announced his decision to suspend Jaafar Hassoun and Mohamed Amghar, both judges and elected members of the Supreme Judicial Council, from exercising their judicial and representative duties. The minister also decided to suspend their salaries and to initiate disciplinary proceedings against them for breaching the confidentiality of the Council's deliberations through the alleged disclosure of certain conclusions of its proceedings to the newspaper, *Assabah*. In view of this situation, nine signatories to a Memorandum for the Reform of the Judiciary in April 2009 (viz, the Moroccan League for the Defence of Human Rights (LMDDH), the Moroccan Human Rights Association (AMDH), the Moroccan Organisation for Human Rights (OMDH), the Moroccan Forum for Truth and Justice, Amnesty Morocco, the Moroccan Prisons Observatory, Adala (Justice), Transparency Morocco and the Moroccan Association for the Defence of an Independent Judiciary) took a stand in September 2010, issuing a joint communiqué in which they reiterate that the granting of legislative powers to the Justice Minister, enabling him to unilaterally suspend a judge, constitutes a flagrant attack on the principle of the separation of powers and on the universal standards of judicial independence; the NGOs expressed their indignation at the summary manner in which this case was handled.

Subsequently, and with the agreement of one of the two magistrates concerned (Jaafar Hassoun, a brave and respected judge, and President of the administrative court of Marrakech), a lawyers' collective was formed which brought an action before the administrative court of Rabat on 28 September to annul the Justice Minister's decision on the grounds of abuse and misappropriation of power. However, on 15 November 2010, the administrative court of Rabat adopted the minister's view that the action was inadmissible as the minister's decision was not final, since the fate of judges could only be decided following the decision of the Supreme Judicial Council, which would be held as a disciplinary council after 6 December 2010. This council was held in the absence of the lawyers, who refused to plead the case when the council denied them copies of the file. A disciplinary action involving removal from office was subsequently taken, which was validated by the King (President of the Higher Council of the Judiciary); this decision was final and binding, according to the established case law of the Supreme Court of Morocco.

2.3 Clarification of the rights of individuals appearing before the courts and the rules governing the functioning of the judiciary:

The new constitution states that: "The judge is charged with the protection of individuals' and groups' rights and freedoms and their judicial security and with the application of the law".

It further states that access to justice is guaranteed to every individual for the defence of his rights and interests protected by law, and that every legal act taken in administrative matters, whether of a regulatory or individual nature, may be the subject of an appeal before the competent administrative courts.

The presumption of innocence is stated in the following terms: "All accused persons shall be presumed innocent until found guilty by a court decision having acquired the authority of a final judgement". This guarantee by the Code of Criminal Procedure is in sore need of better organisation, as the Code currently gives powers to the prosecution and the detective division of the police force which, in practical terms, nullify this principle, particularly when it comes to matters relating to "terrorism"!

According to the new constitution, "Damages resulting from a miscarriage of justice shall carry an entitlement to compensation".

The constitution **prohibits the creation of special courts**. Art. 127

However, these improvements remain dependent on the adoption of several organic and other laws.

There is concern that these laws will not be implemented for several years to come as the new constitution stipulates in Article 86 that: "The organic laws planned by this Constitution shall be submitted for parliamentary approval within a period not exceeding the duration of the first parliament, following the promulgation of the aforementioned Constitution". This effectively means a period of five years. Let us hope that the new government and parliament ensure that the organic laws will not take more than a year to come into effect, and that the new institutions will be operational as soon as possible for, without such laws, we will continue to function with old institutions and rules, which have placed the judiciary at the mercy of the executive branch.

2.4 Establishment of a Constitutional Court with a new right for litigants and ease of access for the parliamentary minority

The Constitutional Court is composed of twelve members appointed for a non-renewable nine-year term of office. Six members are appointed by the King, one of whom is nominated by the General Secretary of the Higher Ulema Council, and six more members are elected, half by the Chamber of Representatives and the other half by the Chamber of Councillors, from among the candidates proposed by the

Bureau of each Chamber following a vote by secret ballot and a two-thirds majority of the members making up each Chamber. A third of each category of members is renewable every three years.

The president of the Constitutional Court is appointed by the King from among the members of the Court.

Here too we must wait for an organic law to define the rules governing the organisation and operation of the Constitutional Court, as well as the procedure to be followed before it, and the position of its members. This law will also determine what are incompatible duties, notably those relating to the professions, and it will establish the conditions of the first two renewals for a three-year term, and the procedure for replacing members who are inactive either as a result of resignation or death during their term of office.

The Constitutional Court will carry out the responsibilities assigned to it by the Constitutional Council. Moreover, international laws and commitments may be referred to the Constitutional Court, before promulgation or ratification, by the King, the Head of Government, the President of the Chamber of Representatives, the President of the Chamber of Councillors, or by a fifth of the membership of the Chamber of Representatives or forty members of the Chamber of Councillors.

The **major new element** here is introduced in Article 133: “The Constitutional Court is also competent to hear **a plea of unconstitutionality raised before it in proceedings, when it is argued by one of the parties that the law, on which the outcome of the case depends, infringes on rights and freedoms guaranteed by the Constitution.**”

3. The main barriers to justice and the opportunities to facilitate the implementation of the reforms

3.1 Barriers to justice

Article 121 of the new constitution states that: “In cases specified by law, access to justice shall be free of charge to those who lack sufficient resources to take legal action”. There are, however, several factors that impede such access for certain individuals, notably:

- Legal costs²² and lawyers' fees for individuals without the means to pay. The legal aid currently available is unsatisfactory.²³
- The geographical distribution of the courts: some (administrative or commercial) courts of appeal are located at great distances from individuals wanting to go to court (e.g., someone from Agadir in southern Morocco must lodge an appeal in administrative matters with a court in Marrakech, in the centre of the country). There are only two administrative courts of appeal (Rabat and Marrakech) and three commercial courts of appeal (Casablanca).
- Despite some progress and the maintenance of web sites by certain courts, the systematic failure to publish laws and case law online makes access to legal and judicial information difficult. The sites maintained by the Justice Ministry are not updated and important documents and reports are not published.
- Since 2000, programmes for modernising the courts have been introduced with the support of international partners, notably the EU, but there is little evidence of their effectiveness to date.

3.2 The opportunities to facilitate the implementation of the reforms

The Moroccan Civil Society Organisations (CSOs) are very active in supporting and improving the independence of the judiciary in general, as evidenced by their record of sustained advocacy over the past several years.

However, the new constitution poses several challenges to an effective application of the provisions pertaining to justice, rights and freedoms, and to the relations between the different powers.

There is first of all a need for research, information, dissemination and well-organised debates leading to agreed proposals on laws and institutions that will implement the reforms announced, in particular through several organic laws:

the organic law on the status of magistrates; the organic law on the Supreme Council of the Judiciary; the organic law on the Constitutional Court; the organic law on the plea of unconstitutionality; the organic law on the parliamentary opposition, etc.

²² Legal costs (court costs) are determined by legislation, in particular by the code of civil procedure and the 1984 Finance Law. Costs depend on the value of the amount claimed, the level of court involved (charges are higher for the court of cassation).

²³ Legal aid is governed by a 1966 royal decree and by various laws, particularly the code of civil procedure and the law governing the legal profession. It is decided by the prosecutor's office, together with representatives of the Finance Minister and the Bar Association.

The main actors will be the government, the parliament and behind these the political parties who, in coordination with the CSOs, should now translate into concrete actions their proposals for reforming the judiciary, as stated in their electoral programmes, through legislation and the selection of the men and women who will serve in the new institutions.

The role played by the international community, in particular the EU institutions, in the processes of reform and transition that are currently underway, is critical. The EU works with Morocco, a country with “advanced status”, through the medium of EU-funded programmes and a “Human Rights” action plan and subcommittee.

The EU has always ranked a reform of the judiciary as one of its priorities in Morocco. It has always sought to involve the Moroccan CSOs in EU-Moroccan discussions on the subject.

There is an opportunity to be grasped now with the new constitution and the new government produced by the fairest elections ever to take place in Morocco.

The PJD (Justice and Development Party) that leads the government, with almost a third of the seats in the Chamber of Representatives, has an ambitious programme of reforms, particularly in relation to the judiciary.

Let us hope that the combination of goodwill and competence will ensure the success of these long-awaited reforms, and bring about an end to the lobbies that have always worked to protect their own interests at the expense of the public good.

Chapter 4: Reform of judiciaries in the wake of Arab Spring - Jordan

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The Arab region has witnessed several popular revolutions demanding change and reform, best known as the Arab Spring. Jordan is no exception in the region, as its popular movement has been demanding reform rather than regime change in the Kingdom. As a result, numerous sit-ins, amendments and dialogues have taken place and have impacted the judiciary in Jordan. The Judicial Council has thus been engrossed in discussions and dialogue regarding the laws that govern the functioning of the judicial authority, most notably discussions to approve a law on the judicial authority, which, if passed, will be the first of its kind in the Kingdom's history.

This paper offers an overview of the judicial system and judicial independence and reform in Jordan. It also discusses Jordan in terms of international human rights law and presents recommendations.

1. Judiciaries before the Arab Spring

1.1 The Judicial System in Jordan

The Judicial Council in Jordan is the pinnacle of the judicial authority, while the Ministry of Justice is the body responsible for the executive aspect of the judicial system. The Judicial Council (JC) is composed of 11 members, all of whom are civil judges: the president of the Court of Cassation as JC president, the president of the High Court of Justice as JC vice president, the public prosecutor of the Court of Cassation, the two most senior judges of the Court of Cassation, the three chiefs justice of the Court of Appeals (Jordan, Irbid, Maan), the most senior inspector of civil courts, the secretary-general of the Ministry of Justice and the president of Amman's Court of First Instance.

Article 99 of the Constitution divides courts into three categories: civil courts, religious courts and special courts. Civil courts include first level courts (Magistrate Court and Court of First Instance), second level courts (Court of Appeals) and the Cassation Court, which is the highest judicial body in Jordan. The High Court of Justice is the administrative court.

The religious courts include the Sharia Courts, which consider matters of personal status for Muslims and fall under the supervision of the Department of the Chief Justice. Religious courts also include ecclesiastical courts, which consider matters of

personal status for other religious communities in Jordan. Each ecclesiastical court is supervised by the council of the respective religious community.

1.2 Judicial Independence in Jordan

In 2010, the government endorsed a number of temporary laws relating to the independence of the judiciary, notably the Law on the Independence of the Judiciary, the Law on Judicial Inspection, the State Cases Law and the Law on Judicial Service.

These laws contain provisions that violate the independence of the judiciary, particularly with respect to subjecting the Public Prosecutor's Office to the Minister of Justice's orders when initiating public interest litigation and the subordination of the Judicial Inspection Department to the Minister of Justice.

The independence of the judiciary in Jordan is principally violated through the following:

1. **Lack of the unity of the judiciary:** i.e. the multiplicity of authorities overseeing courts and the lack of a mandate for the judicial authority over all matters of a judicial nature. Not all courts fall within the mandate of the judicial authority, as there are civil courts that report to the Judicial Council, special courts (such as the Police Court, Military Courts, and State Security Court) that report to the executive authority, and religious courts that report to the Chief Justice in the case of Muslims and the councils of religious communities in the case of non-Muslims.
2. The Crime Prevention Law grants judicial powers such as the power of arrest to administrative bodies (administrative governors) who report to the Minister of the Interior.
3. **The judiciary's lack of administrative and financial independence:** The Judicial Council is not financially independent, as the Ministry of Justice prepares its budget under the pretext that the Ministry would rather not occupy judges with fiscal matters. Nonetheless, Article 97 of the Constitution guarantees personal independence for judges by stating "judges are independent, and in the exercise of their judicial functions they are subject to no authority other than that of the law."
4. The executive authority's interference in the appointment of judges. The judicial authority can only appoint judges upon recommendation from the Minister of Justice who is also empowered under the law to recommend the secondment of any judge to serve as secretary-general of the Ministry of Justice for a period of three months. Judges may be loaned to foreign governments or regional and international bodies by Cabinet decision based upon Judicial Council recommendation.

5. Judges lack job security, i.e. as long as judges are professional, transparent and impartial in the exercise of their functions, they should remain in office until they decide to retire or reach a certain age.
6. The lack of a club or association that represents judges, their rights and interests.
7. Interference in the work of the Public Prosecutor's Office, as the law limits administrative supervision over public prosecutors to the Minister of Justice and the Attorney General. The Minister of Justice is also entitled to supervise the performance of the civil public defender and his assistants.
8. The fact that the Judicial Inspection Department reports to the Ministry of the Judiciary and submits its reports to the Minister of Justice.
9. The Council of Ministers has the power to issue regulations necessary to implement the Law on the Independence of the Judiciary.

2. Judicial Reform in Jordan

The most important development that has taken place in Jordan since early 2011, the year of the Arab revolutions, has been the constitutional reforms. These were a response to intensive popular protests and sit-ins demanding reforms. The significant reforms included amendments to the Public Meetings Law, which used to give administrative governors the power to approve or reject the holding of rallies and public meetings. After the amendment, the law requires that the administrative governor be informed of the event only, eliminating the approval requirement. A reform movement emerged calling for the return of the 1952 Constitution and focusing its demands on reforming the relationship between the three branches of government and the creation of a constitutional court. The Higher Council for the Interpretation of the Constitution, before the amendments, had the sole power to interpret the provisions of the Constitution, while the courts were empowered to consider challenges to the constitutionality of laws. The courts may refrain from enforcing laws that are unconstitutional but may not repeal them. The judicial ruling regarding the unconstitutionality of a given law may be enforced with respect to the lawsuit considered by the court only and may not extend to similar situations. Below are the most significant constitutional reforms relating to the judiciary:

1. Amendment of Article 27 of the Constitution to state: "the Judicial Power shall be independent and shall be exercised by the courts of law," i.e. the word "independent" was added to modify the "judicial power".
2. Creation of the Constitutional Court. A whole new special section was introduced to the Constitution regarding the Constitutional Court. Article

58 now states, "A constitutional court shall be established by a law in the Hashemite Kingdom of Jordan based in Amman. It shall be an independent and separate judicial body, and shall consist of nine members, including the president, appointed by the King... The term of membership in the Constitutional Court is six years, not subject to renewal."

Article 59 stipulates: "1- The Constitutional Court shall monitor the constitutionality of laws and regulations in force and issue its judgments in the name of the King. Its rulings are final and binding on all authorities. Its rulings shall take effect immediately unless another date is specified by the ruling. The Constitutional Court's rulings shall be published in the Official Gazette within fifteen days from the date of issuance. 2-The Constitutional Court has the right to interpret the provisions of the Constitution if so requested either by virtue of a decision of the Council of Ministers or by a resolution taken by the National Assembly passed by an absolute majority. Such interpretations shall be effective upon publication in the Official Gazette."

Article 60 stipulates:

1- Only the following authorities have the right to challenge the constitutionality of laws and regulations in force before the Constitutional Court:

- A. Senate.
- B. Chamber of Deputies.
- C. Council of Ministers.

2- In a lawsuit pending before the courts, either party of the litigants may raise a plea of unconstitutionality. Should the court deem the plea serious, the court must refer the plea to the court specified by law to decide on its referral to the Constitutional Court.

Article 61: A member of the Constitutional Court must be:

- A. Jordanian not holding any other nationality;
- B. Fifty years of age or older;
- C. From among current or former judges of the Court of Cassation or the High Court of Justice, current or retired law professors at universities, lawyers who have served in the legal profession for a minimum of fifteen years or legal experts and specialists who meet the requirements set for membership in the Senate."

After the constitutional amendments were endorsed, the amendments concerning the Constitutional Court have been criticized by a range of constitutional law experts for the following reasons:

- Limiting the term of service for Constitutional Court judges to six years;
 - Confining the right to access the Constitutional Court to specific bodies.
3. Ceasing the issuance of temporary laws except in the cases of war, natural disasters and urgent expenditures that cannot be postponed. Article 94 of the Constitution of 2011 reads: "In cases where the National Assembly is not

sitting or is dissolved, the Council of Ministers has, with the approval of the King, the power to issue temporary laws to face the following emergencies:

- A. Disasters.
- B. States of war and emergencies.
- C. The need for urgent expenditures that cannot be postponed.

Such temporary laws, which shall not be contrary to the provisions of the Constitution, shall have the force of law, provided that they are placed before the Assembly during its first meeting.

4. Constitutionalizing the State Security Court, i.e. trying civilians before special courts (all of whose judges are not civilians). Article 101/2 states that “a civilian may not be tried in a criminal case before a court whose judges are not all civilians, with the exception of crimes of high treason, espionage, terrorism, narcotics and currency counterfeiting.”
5. Challenging the results of parliamentary elections before civil courts.
6. The establishment of a Judicial Council and granting it the sole power to appoint judges in accordance with Article 98 of the amended Constitution: “A Judicial Council shall be established by a law. It shall be responsible for matters related to civil courts and shall have the sole right to appoint civil judges. 3- Subject to paragraph 1 of this Article, the Judicial Council shall have the sole power to appoint civil judges in accordance with the provisions of the law.”
7. The establishment of an Administrative Court of Appeals pursuant to Article 100 of the Constitution. The High Court of Justice was previously the only administrative court in Jordan and its rulings were final, violating the rules of fair trial and the International Covenant on Civil and Political Rights, which requires that litigation be conducted on two levels.

These constitutional amendments were endorsed and entered into force early in October 2011. Since then, the government has been working on drafting new laws and amending existing ones in order to conform to the constitutional amendments including the Law on the Constitutional Court and the Law on the High Court of Justice. The Judicial Council initiated its activities in a workshop held recently at the Dead Sea. The Council distributed questionnaires to judges in the Kingdom seeking their views on what the new law should contain and their vision for the functioning and independence of the judiciary.

Jordan's Position on International Human Rights Law

Jordan has ratified and published in the Official Gazette the majority of international conventions on human rights such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child,

the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Rome Statute of the International Criminal Court and the Arab Charter on Human Rights. Over the past three years, Jordan submitted reports about the human rights situation in the country and the Kingdom's implementation of international human rights conventions to United Nations committees, including the Universal Periodic Review (UPR) report to the Human Rights Council; the report on the implementation of the ICCPR to the Human Rights Committee; the combined second, third and fourth periodic report on the implementation of the Convention Against Torture and the report on the implementation of CEDAW. Jordan has recently finalized its report on the implementation of the Convention on the Rights of the Child.

Among the most significant commentaries produced by UN committees regarding access to justice in Jordan, the Committee against Torture indicated the following in its concluding observations of May 2010 "the Committee expresses its grave concern at the special court system within the security services, including the State Security Court, the Special Police Court and the Military Tribunal of the General Intelligence Directorate, which have reportedly shielded military and security personnel alleged to be responsible for human rights violations from legal accountability. The Committee is concerned that transparency, independence and impartiality are jeopardized by this system and that the procedures in the special courts are not always consistent with fair trial standards. With reference to its previous recommendation (A/50/44, Para. 175), the Committee calls on the State party to take immediate steps to ensure that the functioning of the State Security Court and other special courts are brought into full conformity with the provisions of the Convention and international standards for courts of law and, in particular, that accused persons are granted the right to appeal against decisions of the Court; alternatively, the State party should abolish such special courts."

3. Recommendations

1. Amend the Crime Prevention Law and abolish the power of arrest vested in administrative governors.
2. Amend legislation to ensure that civilians are tried before courts whose judges are all civilians and ensure that only one authority supervises courts.
3. Amend the Law on the Independence of the Judiciary and entirely eliminate Ministry of Justice interference in the affairs of the judiciary, judges and all of those serving in the judicial system including administrative staff.
4. Reassign the Judicial Independence Department to the Judicial Council instead of the Ministry of Justice and abstain from providing the Ministry with inspectors' reports.
5. Separate the judicial authority's budget from the budgets of ministries.
6. Grant the Judicial Council the power to draft its own legislation.
7. Ensure psychological and functional stability to judges, for example, by

rendering it inadmissible to terminate a judge's service without cause or until he reaches a certain age, and enable judges to challenge the decision to terminate their service before a tribunal formed by the Judicial Council.

8. Access and utilize best international practices with regards to the functioning of prosecutors and the separation of the powers to investigate and indict.
9. Develop scientific and objective bases for the transfer, secondment and promotion of judges.

4. Stakeholders in Judicial Reform in Jordan

1. The Judicial Council.
2. The Ministry of Justice.
3. The National Assembly (the Chamber of Deputies and the Senate).
4. Local civil society organizations such as the National Center for Human Rights and human rights organizations.
5. International actors including donors such as the European Union, which is currently financing a project on the justice sector in Jordan, and UN agencies such as the Office on Drugs and Crime, which has organized several events in cooperation with the Ministry of Justice on criminal justice for juveniles and the right of access to justice.

Chapter 5: Reform of judiciaries in the wake of the Arab Spring -Syria

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Introduction

This study will discuss the justice system, its evolution and historical roots in the collective conscience of most Syrians, as justice has the potential to induce people's constructive ability to comply with the rules of public life and respect group consensus.

The study will shed light on the conceptual and practical environment in which the Syrian judicial establishment operates under the Constitution and laws and the implications thereof for human rights and fundamental freedoms.

The study will provide an overview of the historical evolution of the Syrian Constitution and laws, highlighting the turning point at which the independence of the judiciary was undermined. It will discuss the Constitution as the crucial guarantor of judicial independence and address the separation of powers in the current Constitution, as well as the judiciary's role as an authority rather than a function. The study will tackle the currently touted reform decrees and discuss whether they are meaningful and positive or are simply an attempt to provide cover until the Arab Spring passes without a harvest under blatant regional and international complicity in favor of the Syrian regime.

1. The situation of Syrian judiciaries before Arab Spring

1.1 Main Stages Undergone by the Syrian Legislation since Independence

Public policy in Syria underwent two main stages separated by an interim stage, i.e. the Nasser era.

The first stage: it is the stage followed Independence. During this stage, the Syrian legislature was influenced by the winds of change that liberal individualism brought to Europe in the early 1800s in the fields of politics and law. This school of thought viewed the state as a social and humanitarian entity founded to protect individuals and safeguard their freedoms within the framework of requirements for coexistence. According to this school of thought, the state has a legal personality independent of that of the rulers, whether kings or presidents, as the rulers change with shifts in conditions and circumstances, whereas the state is a constant expression of the entire nation.

During this stage, the legislature's mission was to enact laws that protect the common interests of all citizens rather than defending the interests of the ruling elite, as became the case later after the military coup.

It was necessary to preserve this independent judicial system that feared no one in the administration of justice, did not allow any authorities to infringe on others, enjoyed skill, prestige and respect and was able to establish equality for all under the law. Such necessity was taken into account in all of the Syrian constitutions drafted by elected national commissions, including the Constitution of 1950.

During this stage, the laws that shaped the infrastructure of the state were enacted, including the Personal Status Law, the Land Registry Law, the Urban Development Law, etc. The majority of current laws were also enacted, including the Penal Code promulgated under Legislative Decree No. 148 of June 22, 1949; the Civil Code promulgated under Legislative Decree No. 84 of May 18, 1949; and the Law on Associations and Political Parties promulgated under Decree No. 47 of 1953. In this stage, Syrian society also produced prominent jurists, most of who graduated from the Sorbonne in France. Generations in the 1950s and 1960s were taught and trained by these eminent figures and adopted and later defended their values and principles. Among them were Adnan Al-Ajlani, Marouf Al-Dawalibi, Mustafa Al-Sibai, Fares Khoury, Mustafa Al-Zarqa, Abdul Wahab Homad, Rizkallah Antaki, and many others who were pioneers of the period and played major roles in politics, economics, parliamentary life and general public life in Syria. They were landmarks and beacons paving the way for future generations.

The second stage: it covers the period of unity with Egypt during which socialist concepts permeated the laws as concern for the interests of the working class grew. Legislations were enacted to guarantee more interests for workers and farmers at the expense of certain classes in society, yielding the nationalization of factories, the Social Insurance Law, the Unified Labor Law, the Agricultural Reform Law and other laws that reflected an expanding Soviet Communist wave. Unfortunately, this was also reflected in the situation on the ground as state and security dominance and hegemony started to take over the unified state through correspondence between the national and socialist struggles. Among the results, Legislative Decree No. 50 of January 25, 1961 was issued amending Article 1 of the State Council Law and rendering the council an independent body that reported to the cabinet. This was the first blow to the independence of the judicial system, as the administrative court was subjugated to the very executive authority against which the court was supposed to rule.

The third stage: encompasses the revolutionary era that followed the March 8, 1963 coup. During this stage, the principles of revolutionary legitimacy prevailed, and as a result, strict restraining laws were enacted and the harshest penalties were sanctioned against those who dared to oppose the goals of the March 8 Revolution

or hinder the socialist transformation. This transformation was in fact a movement towards tyranny and the entrenchment autocracy as follows:

On the morning of March 8, 1963, a state of emergency was declared under Military Decree No. 2 and issued by the Revolutionary Command Council at that time. The declaration of a state of emergency under a military decree violated the very law it was based on; the Law on Declaring a State of Emergency No. 51 of 1962.

Waves of new freedom-curtailing laws written in loose language have been issued with the purpose of maintaining order and controlling state powers. The Revolution Protection Law was issued under Decree No. 6 of 1964, criminalizing and punishing those who oppose the goals of the revolution or resist the socialist regime whether in words, writing or action with life in prison and the death penalty in some cases. This law remains in force until this day.

The Supreme State Security Court was established under Decree No. 47 of 1968 with jurisdiction to consider all cases referred to it by the military governor or his deputy. This Court has acquired a dreadful record over the past 50 years.

The General Intelligence Department was established under Decree No. 14 of January 15, 1969, whose Article 16 stipulated that "the General Intelligence Department shall include a disciplinary board to discipline its staff and those assigned to serve in the Department. It is not permissible to pursue any legal action against any State Security Department employee for crimes they commit while implementing their designated tasks or in the process of performing such tasks unless an order is issued by the State Security Department Director to that effect".

Article 4 of Decree No. 5409 of 1969 on regulating the work of the Intelligence Department stipulates that:

"None of the employees, in neither the General Intelligence Department, nor those assigned or loaned to it or directly contracted by it, can be prosecuted for crimes arising from their job or in the course of performing their job, unless they are referred first to a disciplinary board within the Department and a prosecution order is issued by the Director. The prosecution order remains a prerequisite even after the concerned person's service at the Department is terminated."

Undoubtedly, these articles serve to protect the employees of the General Intelligence Department from judicial accountability for crimes they may commit during the performance of their functions. This, in turn, opens the door widely for grave violations of human rights, and provides for impunity under the law.

Field military courts were established under Law No. 109 of 1968. It is designed to prosecute soldiers who desert the battle field, these courts report to the Ministry of

Defense and consist of commanders of military formations. Field military courts are not required to abide by the Code of Criminal Procedure.

The military governor expanded the jurisdiction of these courts to trial civilians and to hear all cases that he himself refers. It should be noted that these courts issued numerous death sentences against defendants accused of belonging to the Muslim Brotherhood during the 1980s in accordance with Law No. 49 of 1981. This law stipulated that political affiliation with the Muslim Brotherhood was punishable with the death sentence even if the defendant did not commit concrete acts against the state. This practice contradicts human rights principles as it penalizes sheer ideological affiliation.

The Economic Penal Law was issued under Decree No. 37 of May 6, 1966 to control, curtail, and direct the economy. It is a special law and was issued subsequent to the Penal Code, and so has precedence.

The Economic Security Court Law was promulgated under Legislative Decree No. 46 of August 8, 1977. The Economic Security Court is a special court, consisting of a judge from among the ranks of the Court of Appeals and members who hold graduate and postgraduate degrees in the field of economics. This court has had a notorious record in the field of justice in Syria, especially in the 1980s and 1990s. Its victims amount to tens of thousands if not more. The court enforced loosely drafted legal provisions such as Article 13 of the Economic Penal Law which imposes a 15-year imprisonment sentence for resisting the socialist regime and Article 23 pertaining to smuggling money. The jurisdiction of this dreadful court was expanded in the early 1980s by Decree No. 11 of 1981 to include, in addition to crimes outlined in the Economic Penal Law No. 37 of 1966, the crimes of smuggling covered under Decree No. 13 of 1974 when the value of smuggled goods exceeds 30,000 Syrian pounds. This court contributed to creating smuggling-proof boundaries at that point in Syria's history when the centers of military and security power monopolized the only available route for smuggling via the military crossing connecting Syria and Lebanon. This crossing offered a passage to the convoys and hordes of vehicles of Lebanon-based Syrian military and security forces, those related and close to the security establishment and those related to the Al-Assad ruling family. These segments formed subordinate armed militias immune from legal liability for all the crimes they would commit, and accumulated incredible wealth as a result.

Law No. 52 of 1979 on the Security of the Baath Arab Socialist Party was issued, imposing a punishment of a minimum of 5 years in prison and the death penalty if the act in question involved violence intended to prevent the Party from exercising its tasks set forth in the Constitution and the law.

Paragraph (A) of Article 12 provided for a minimum of six months in prison for conspiracy to commit such an act. This and other laws have been exploited to impose intelligence and security dominance over the Baath Party, gradually turning

the party into an authoritarian organization founded on the glorification of the one and only leader and commander and feeding instinctive pre-state loyalties based on primal sectarian, tribal and ethnic determinants. The price of this long-nurtured culture is being paid now during the Arab Spring in the blood of Syrians killed at the hands of the *shabiha* [thugs], who unhesitatingly execute those cheering for the downfall of the regime. This culture has replaced the political party as a national institution that works towards nourishing loyalty to the people and their interests and consolidate national unity.

1.2 Impact of the Revolutionary Era on the Judicial Authority Law

Like other laws, the Judicial Authority Law was affected by the stages the country underwent as seen in the changes introduced to this law and particularly to the High Judicial Council (HJC), the agency overseeing judges' affairs.

In democracies, the Minister of Justice's function is limited to coordinating between the ministry of justice as an executive body and the HJC as the highest judicial body concerned with improving the judiciary and overseeing the proper functioning of the justice system. Accordingly, the function of the Minister of Justice is assumed to be limited to making executive decisions to enforce HJC resolutions.

It is necessary to maintain a safe distance between the Minister of Justice as a member of the executive authority and the HJC as a representative of the judicial authority. Without this safe distance the executive authority will control the judicial authority through the Minister of Justice in his capacity as a member of the government.

Throughout Syria's history, the HJC as the highest judicial authority has been an independent body composed of the most senior judges of the Court of Cassation and has been the sole overseer of the judiciary in the country.

The Supreme Court, i.e. the *Supreme Constitutional Court*, plays a crucial role in monitoring the constitutionality of laws and has constitutional control over the legislative authority, preventing the enactment of laws that contradict the Constitution. Supreme Court members were elected in parliament. This court is competent to hold the President accountable, punish and even dismiss him from office if necessary, and thus guarantees the separation of powers and the independence of the judiciary. Thus, the Supreme Court is enshrined in previous Syrian constitutions, particularly those drafted by national commissions elected by the people, including the Constitution of 1950.

The Judicial Authority Law establishes the independence and impartiality of the judiciary according to the constitutions which ensured the separation of powers, the independence of the judiciary and a safe distance between the executive authority, represented by the Minister of Justice, and the HJC overseeing the affairs of the judiciary on the one hand, and the Supreme Constitutional Court that guarantees the separation of powers on the other.

Situation after military coup of 1963

Three years after the military took over power, late Minister of Justice Mohammad Fadel presented to the President's office a recommendation, based on which the Decree No. 23 of January 29, 1966 was issued. The Decree contained:

Article 1: Contrary to the legal provisions in force, especially Paragraphs E, F of Article 70 and Articles 72, 93 and 94 of the Judicial Authority Law, the Minister of Justice shall be empowered for a period of six months only to:

- A. Appoint by direct selection judges and prosecutors of all ranks.
- B. Transfer judges and prosecutors of all ranks.
- C. Appoint by selection technical staff of all ranks in the Government Cases Administration.

Article 2: The appointment and transfer of judges and the appointment of technical staff of the Government Cases Administration shall be carried out in accordance with Article (1) above through a decree issued upon the recommendation of the Minister of Justice. Such appointments and transfers may not be appealed or reviewed.

Decree No. 23 of January 29, 1966 clearly shows the executive authority's intention to fully control the judiciary including the selection, appointment and transfer of judges. However, the powers above were limited to six months, given that such a situation was considered exceptional and serious in the past.

Unfortunately, before the six-month period ended, the Presidential Council issued Legislative Decree No. 24 of February 14, 1966 stipulating the following in Article (3): The High Judicial Council shall consist of the following:

1. The Chairman of the Presidential Council as president with the Minister of Justice acting on his behalf.
2. The President of the Court of Cassation
3. The two senior deputies of the President of the Court of Cassation
4. The Secretary General of the Ministry of Justice as member
5. The Public Prosecutor as member
6. President of the Judicial Inspection Department as member

According to Article 67 of the Decree, the High Judicial Council was empowered to:

- Appoint, promote, discipline and dismiss judges upon the recommendation of the Minister of Justice, HJC President or three of the HJC's members.
- Refer judges to retirement or provisional retirement and accept their resignation.

- Oversee the independence of the judiciary.
- Propose draft laws related to the judiciary, immunity of judges and procedures for their appointment, promotion, transfer, discipline, dismissal and the determination of their seniority as well as other powers related to judges' affairs.

The Legislative Decree No. 24 of 196 was enshrined in Article 132 of the current Constitution of 1973, which stipulates that the President of the Republic shall preside over the High Judicial Council and that the law shall define the method of its formulation, its powers, and its internal operating procedures.

Based on the above, the following facts can be concluded:

Regarding the High Judiciary Council

The HJC is now composed for seven members, three of whom, the Secretary General of the Ministry of Justice, the Public Prosecutor and the President of the Judicial Inspection Department, report to the Minister of Justice by law, i.e. they report to the Minister of Justice administratively under the Judicial Authority Law.

Since the HJC is composed of seven members, including the Minister of Justice and three members who administratively report to him, the Minister of Justice now controls the majority of the Council, i.e. 4 out of 7.

Since HJC decisions pass by majority vote, the Minister of Justice is now the sole decider in the HJC.

Since the Minister of Justice is a member of the government (executive authority), controlled by the Baath Party under Article 5 of the Constitution, and considering that intelligence and security apparatus with unlimited powers have controlled and transformed the Baath Party from a civil body into a machine for the militarization of state and society and divided people into loyalists who exchange their loyalty for safety and opponents who face detention, exile or displacement, the judicial authority has become entirely under the control of the security apparatus, which ultimately runs the system singlehandedly.

Since the HJC, according to Article 67, is competent to oversee the professional life of judges in terms of their appointment, promotion, discipline, dismissal, secondment, retirement, etc. and since the Minister of Justice, an executive authority, is in control of the Council, the Minister of Justice has gained full control over the decisive matters for judges, entirely undermining the principle of judicial independence and enabling the executive authority to consolidate its absolute control over the judiciary. Subsequently, the relationship between the judges and the Minister of Justice became a superior-subordinate relationship with negative effects on the justice system in Syria.

Under Article 11 of the Judicial Authority Law, the Judicial Inspection Department consists of a Chairman of a Chamber of Appeals and six advisors seconded every July by a decision from the Minister of Justice upon HJC recommendation.

The Minister of Justice sets judicial inspection regulations with HJC approval according to Paragraph 3 of Article 11 of the Judicial Authority Law.

Pursuant to Article 12 of the Judicial Authority Law, judges serving at the Judicial Inspection Department report to the Minister of Justice and the HJC President.

Hence, the Judicial Inspection Department is confined to its relationship with the head of the executive authority, i.e. the President of the Republic, and his deputy at the HJC, i.e. the Minister of Justice who is a member of the executive authority.

The Judicial Inspection Department has broad prerogatives in inspecting the functioning of judges, prosecutors and all judicial departments. According to Article 13 of the Judicial Authority Law, these powers include the inspection of all places of detention, preparing statistics in relation to the functioning of judicial departments, and monitoring judges' records, the extent of judicial independence, judges' attendance, efforts in adjudicating lawsuits, management of courts, commitment to impartiality, etc.

When we consider these powers, we realize the dangers of having the Judicial Inspection Department report to the executive authority, represented by the Minister of Justice, as clearly stated in Article 12 of the Judicial Authority Law. The Minister can use this department to destroy any judge seeking to consolidate his independence in a manner inconsistent with the general approach of the security apparatus-controlled Baath Party.

On August 29, 2000, Legislative Decree No. 42 was issued establishing the Judicial Institute in Syria. The goal of the Institute, according to Article 4 of the Decree, is to "qualify and train judges and prosecutors competitively appointed to the lowest judicial ranks in accordance with the Judicial Authority Law."

As per the Decree, the Minister of Justice serves as Chairman of the Institute's board and is empowered to endorse the curricula used and issue directives on the Institute's activities. Under Article 11 of the Decree, the Minister of Justice has the power to nominate lecturers and instructors as well as committee members tasked with discussing research papers. Under Article 13, he is empowered to endorse the nominations he makes according to Article 11.

As a result, the primary incubator in which judges learn and gain qualification is now under the executive authority. The lecturers, instructors and trainers have been named by and often work for the executive authority. The curricula and courses on the basis of which judges are trained have been designed by the executive authority.

Hence, future judges are taught and physiologically and ideologically shaped under executive authority guidelines and supervision. This cultivates an instinct in them to follow executive authority orders and wishes in the future, and renders them too weak to stand one day in the face of executive authority hegemony due to its aforementioned nature which sanctifies and grants absolute immunity to the individual ruler.

Lastly, a new amendment was introduced to the Judicial Authority Law, extending the retirement age for judges to 70 years instead of 65. However, the extension of a judge's retirement age to 70 years is conditioned upon the approval of the Minister of Justice. The approval is renewed annually and the Minister of Justice may decide that a judge's health condition is no longer fit for service and disapprove his annual extension.

Since the majority of HJC judges are elderly, they too are subject to the annual extension controlled by the Minister of Justice. This renders their service at the HJC subject to the Minister's will, a fact that enhanced his control over the Council and its composition.

1.3 Impact of the Revolutionary Era on the Syrian Constitution

It should be noted at first that constitutions drafted by a popularly elected constituent assembly or committee, such as the Constitution of Independence of 1920 and the Constitutions of 1930 and 1950, widely differ from the constitutions drafted by a certain body as is the case with provisional constitutions issued by the national leadership of the Baath Party for the years 1966, 1969, 1971 and the current Constitution of 1973. The current Constitution was drafted under the state of emergency by a people's assembly appointed by a military commander who arrived in power through a coup, as everyone knows.

It is true that the Constitution was approved by the people in a referendum held on March 12, 1973, but all rulers win the approval of their people through referendums. It must be noted that a serious overlap exists between the authoritarian "intelligence-based" security apparatus directly associated with the President of the Republic and the Baath Party, supposedly a civil institution that represents the interests of the people rather than the ruling elite. However, the Baath Party was hijacked and turned into a mission to promote the sanctification and glorification of the individual ruler using an arsenal of freedom-curtailing laws, especially Law No. 52 of 1979 on the Security of the Baath Party, which imposes the death penalty on those who attempt to prevent the party from exercising its constitutional and legal powers.

As for violating the principle of separation of powers and subordinating the judicial authority to the various security agencies, the Syrian Constitution provides for the concentration of powers with one authority. While it is true that Chapter 2 of the

Constitution divides powers into executive, legislative and judicial powers, violations of the principle of separation of powers and, by extension, the subordination of the judicial authority manifest in the following:

- A. Dominance of the executive branch, represented by its president, the “President of the Republic,” over the legislative and judicial authorities through a high political power represented by the Baath Party that leads the state and society (Article 8). The Baath Party is the imposed and eternal leader of all state authorities and institutions, aided by the national front parties that have never functioned as more than a hollow front to the single-party system. Founded on discrimination due to monopoly of power and oppression, the system became an incubator for corruption and bureaucracy and divided the society into two categories. The first includes rulers controlling all powers, the Baathists, led by the President of the Republic, commanders of security agencies and privileged and corrupt business figures. The second category consists of the governed of all types who are obliged to exhibit obedience and loyalty and abide by the rulers’ decisions. This situation undermined the principle of equality set forth in Article 25 of the Constitution. This discrimination also manifests within the judicial establishment in the form of discriminating between judges based on their loyalty, which has undermined the principle of equal opportunity between citizens in general and within the judicial institution in particular. Further, it enhanced and protected the interests of certain groups in society. This situation led to social recession and set the ground for opportunism and careerism. The distribution of wealth within the society became parallel to the distribution of power, which spread a culture of hypocrisy and followership.
- B. More dangerously, the annulment of the principle of separation of powers in the Syrian Constitution and the assignment of the judicial authority to a subordinate position takes place through the extensive powers held by the President of the Republic, rendering him the absolute uncontested individual ruler. This ruler combines and controls the executive, legislative and judicial authorities with almost full immunity and lack of accountability for any crimes he may commit. What makes these very broad prerogatives of the president, even more dangerous is the fact that he could be elected for unlimited number of terms.

According to the Constitution, the powers vested in the President of the Republic fall into five categories:

- The President of the Republic assumes full legislative authority either when the People’s Assembly is in session (Article 111/2) or not in session (Article 111/1), and even in the interim period between two assemblies.
- The President may veto the laws approved by the People’s Assembly (Article 98),
- The president also crafts draft laws and submit them to the People’s Assembly (Article 110),

- The President can also dissolve the People's Assembly (Article 107),
- The president can repeal any amendment to the Constitution approved by a 3/4 majority vote in the People's Assembly (Article 149).

Ironically, the majority of People's Assembly members belong to the Baath Party whose Secretary General position is held by the President of the Republic and which is controlled by the security agencies.

Naturally, these unlimited legislative powers lead to the dominance of the executive authority, represented by the President of the Republic, over the legislative authority.

- C. According to Article 132 of the Constitution, the President of the Republic presides over the High Judicial Council, whose competence covers all matters related to judges in terms of their promotion, transfer, discipline, bonuses, dismissal, etc. The Minister of Justice, a member of the executive authority, acts as a deputy of the President in presiding over the HJC as the sole decision-maker, which brings the judicial authority under the full control of the executive authority. The Judicial Inspection Department administratively reports to the Minister of Justice and has wide ranging powers in the face of the judicial body.

Under Article 91 of the Constitution, the President is not accountable for any of his acts, except in the case of high treason. His trial takes place only before the Supreme Constitutional Court, whose members are appointed by the President of the Republic, i.e. himself. Hence, the President is absolutely immune under the Constitution. Article 132 of the Constitution, articulate the President is the guarantor of judicial independence.

Article 139 of the Constitution establishes the Supreme Constitutional Court to consider challenges to the constitutionality of laws and hear electoral appeals. However, members of this Court are assigned by the President for a four-year term, rendering them indebted to the President for their appointment.

As for the mechanism through which this court conducts its work, Article 145 stipulates that challenging the constitutionality of laws can only be done through the President or by request from one quarter of People's Assembly members. How could one imagine that the entity enacting the law would challenge its constitutionality? Hence, no entity in Syria has the right to challenge the constitutionality of laws except the very entity that enacted them in the first place! This reality blocks the power of the Supreme Constitutional Court to consider challenges to the constitutionality of laws, and disrupts the work of this crucial supervisory organ.

Article 62 of the Constitution defined the mandate of the Supreme Constitutional Court to consider challenges to the legitimacy of elections. After receiving a challenge to the validity of an election, the Court is required to present a report to

the very same People's Assembly whose validity, or the validity of some of whose members, is in question. This People's Assembly has the sole power to decide either to follow or discard the recommendation of the Court to hold new elections. Is it imaginable that members of the People's Assembly, after arriving in parliament at last, would opt to repeat the elections based on a recommendation issued by the Supreme Constitutional Court?

The role of the state has shifted from acting as a guarantor of peoples' lives to an intrusive authoritarian force dominating their affairs. This reality has had negative effects on people's lives and was a reason for the outbreak of the Arab Spring revolution in Syria, even as some regime mouthpieces used to arrogantly boast that it was immune to internal revolutions by virtue of an octopus-like machine of domination and control.

Under Article 113, the President may, in case of a danger threatening national unity, obstruct state institutions from carrying out their constitutional responsibilities. According to Article 91, the President cannot be held responsible for the crimes he commits except in the case of high treason. He can only be tried before the Supreme Constitutional Court, whose members are appointed, according to Article 139, by the President of the Republic, i.e. himself, as indicated earlier. Eventually, this situation annuls the independence of the judicial authority and constitutes an infringement on the rule of law as a fundamental principle in the state and society.

In addition, the President heads the executive authority; devises state and government general policies (Articles 93 and 94); appoints vice presidents, prime ministers, ministers and deputy ministers (Article 95); exercises full executive authority (Article 93/2); appoints civilian and military officials (Article 109); accredits heads of political and diplomatic missions (Article 102); forms ad-hoc organizations, councils and committees (Article 114); functions as the supreme commander of the army and the armed forces (Article 103); declares war and general mobilization and concludes peace (Article 100); declares and terminates a state of emergency (Article 101); promulgates the laws approved by the People's Assembly (Article 99); ratifies and abolishes internal treaties and agreements (Article 104); bestows decorations (Article 106); holds public referenda on important issues (Article 112) and issues amnesty and reinstatement decisions (Article 105).

In short, the President of the Republic has absolute powers save reviving the dead. After all of these powers and authorities are concentrated in one man's hand, what is left for the judicial authority, especially in the absence of a system of accountability? The President has full immunity from prosecution of crimes he may commit except in the case of high treason. In such a case, a request for his indictment requires a proposal of at least one-third of the members of the People's Assembly and an Assembly decision adopted by a two-thirds majority in an open vote at a special secret session (Article 91 of the Constitution). He can only be tried before the Supreme Constitutional Court whose members he appoints for four-year terms while he serves a seven-year term renewable indefinitely.

Even more alarming is Article 153 of the Constitution, which stipulates that legislation in effect and issued before the proclamation of the Constitution shall remain in effect until it is amended so as to be compatible with its provisions. This means maintaining the arsenal of laws curtailing public freedoms and human rights that came into effect in the wake of the revolutionary legitimacy stage with the declaration of the state of emergency on March 8, 1963. This arsenal of laws includes the Revolution Protection Law, laws on establishing various intelligence departments, laws on establishing special laws, Law No. 49 penalizing affiliation with the Muslim Brotherhood with the death penalty, etc.

These disturbing and loosely-drafted laws have led to domination exercised by the intelligence and security establishment over the Baath Party. This authoritarian establishment then switched the roles; instead of the party working in the service of state and society as a civil institution advancing people's interests, this establishment made the state and society serve the party and later serve its secretary general and security branch. Gradually, the boundaries between the notions of state, society and ruling party were blurred. The notion of the state was later reduced to the person of the father leader, then the master of the homeland and so on and so forth.

Eventually, this situation produced pre-state instinctive loyalties, including ethnic and sectarian loyalties, which are often fed and stirred in the context of the Syrian Spring in order to build security and quasi-security apparatus that strictly follow commands and see in the Syrian people an enemy that is easy to defeat.

In this fashion, all guarantees set forth under Chapter 4 of the Constitution in relation to public freedoms and human rights as well as the independence of the judiciary have become obsolete.

Article 39 of the Constitution provides for citizens' right to assemble and demonstrate peacefully, while in practice they are executed, tortured, dismembered and their larynxes and eyes are removed.

The right to hold opinions and express them peacefully through all means of expression is now a reason to be tortured with all sorts of instruments, mechanical and electrical, at the hands of the security or quasi-security apparatus, i.e. the shabiha (Thugs hired by security forces to terrorize the public).

Today, our situation has deteriorated immensely and Syria now stands in the eye of the storm, while decision makers remain trapped in a half-century old mentality of dominion and control.

1.4 Impact of the Revolutionary Era on Safeguards Enshrined in the International Bill of Human Rights in Relation to Judicial Independence

One simply needs to glance through that arsenal of legislative, legal and constitutional freedom-curtailing provisions to recognize that they are worlds away from the provisions of international conventions on human rights, particularly those pertaining to the independence of the judiciary. That repressive arsenal of provisions contradicts with the following:

- Universal Declaration of Human Rights, adopted and proclaimed by the United Nations General Assembly Resolution 217 A (III) of December 10, 1948. Syria contributed to the drafting of the Declaration.
- International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of December 16, 1966. Date of entry into force: March 23, 1976.
- Basic Principles on the Independence of the Judiciary adopted and proclaimed by General Assembly Resolution 40/32 of November 29, 1985 and Resolution 40/146 of December 13, 1985.
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted and proclaimed by General Assembly Resolution 40/34 of November 29, 1985.
- Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Havana between August, 27 and September 7, 1990.
- Arab Charter on Human Rights, adopted by the 16th Arab Summit hosted by Tunisia on May 23, 2004.

2. Reform Efforts Exerted by Syrian Authorities during the Arab Spring and their Relevance to the Judiciary

Below is a list of decrees issued by President Bashar Al-Assad since the beginning of the Syrian Spring. These decrees are evidently insignificant and do not address the structures of corruption and oppression which the Syrian regime is keen on protecting. The regime attempts to manage the crisis through these decrees by small tax exemptions and a trivial increase to already miserable salaries that are incommensurate with living expenses. In an attempt to stop Kurds from joining the revolution, the regime reinstated the nationality of stateless Kurds and implemented some irrigation projects in Kurdish areas. Al-Assad also met with leaders of Kurdish

political parties and promised that they would assume ministerial and parliamentary positions in the future. These meetings succeeded in turning some cadres in those parties into shabiha militias operating in their respective locations and some of the mixed areas in northern Syria. Certainly, this does not reflect popular Kurdish positions, especially abroad.

The decrees include exemptions of unpaid dues resulting from unlawful connections to the electrical grid, granting students an additional academic session while allowing others to sit for the summer session examination and helping students to pass with two marks and some with six marks. The decrees also include some typically meager general amnesties that cover minor infractions and misdemeanors.

The decrees also provide for the transforming temporary daily workers into permanent workers, the establishment of administrative courts in governorates and the defining of corruption crimes and mechanisms to combat them. Of course, no one in Syria dares speak about the corruption of the elite, but that of the small earners from among state employees and occasionally directors general is defined.

Furthermore, the decrees waive fines for investors and consignees in the free zones, establish the Public Authority for *Badia* Development, address the issue of goods and vehicles abandoned in the free zones, exempt Agricultural Bank loans from interests and waive late-payment fines payable by defaulters on installments for the General Housing Establishment.

A quick look reveals how meager these decrees are and how irrelevant they are to the reform of the repressive constitutional and legal structure that constitutes a solid foundation for corruption and tyranny in Syria.

In addition, some decrees pose as gains to public freedoms in Syria, such as the decrees on **abolishing the state of emergency** and the **Supreme State Security Court**. However, the state of emergency was declared by the Revolutionary Command Council on March 8, 1963, whereas the Emergency Law itself provides that a state of emergency can only be declared by the prime minister. This means that the state of emergency was not lawful from the beginning and yet it remained in effect for nearly half a century and required a decree to be abolished. It is worth noting that the decree abolished the state of emergency rather than the Emergency Law, which remains in effect at the date of writing. Under this law, more than 6,000 Syrian citizens have been killed so far.

Moreover, the Emergency Law stipulates that the declaration of the state of emergency shall be endorsed by the People's Assembly, but the state of emergency lasted for fifty years without a vote from the People's Assembly or a presidential decree as stipulated in the current Constitution. The Supreme State Security Court was also established by an order from the military governor. Tens of thousands of Syrians were victimized over half a century by this unconstitutional and illegal court.

This oppressive political structure of a regime which is difficult to change from within, has already consumed many souls in order to yield marginal and sometimes disingenuous reforms. The lives of those people who were killed could have been spared had the regime applied minimal transparency and tolerated the opinions of others.

More than 7,000 Syrians have been killed during the Arab Spring so far (at the time of writing this paper). This number reflects the cases that we have been able to document relying on simple and limited capabilities. All of them were victims of extrajudicial killing with hundreds executed in cold blood or dying of torture. These practices have taken place under the Constitution, the law and regular rather than special courts, i.e. not under the state of emergency. Why hasn't any murderer from among the *shabiha* been brought to justice? Why have none of the victims' families dared to file a single lawsuit to demand punishment for the killers? Why has the Public Prosecutor been silent with regards to the outlaws? Why were the free lawyers in Aleppo who called for initiating legal action against *shabiha* militia members arrested? The answer to these questions explains the truth behind the judicial establishment in Syria. It is the legitimate offspring of the constitutional and legal structure we discussed.

Among other important decrees is one that regulates the **right to demonstrate** in accordance with the Constitution and law. But does the Constitution in its current shape offer the slightest chance for opposition and peaceful expression of opinions? To demonstrate, a committee must submit a request citing the location, time, route, goals, reasons for and slogans of the demonstration and agree to bear all responsibilities. Nonetheless, the ministry of the interior still retains the right to reject, change or set a new location or time for the demonstration. The ministry can also prevent any statements or actions that are inconsistent with the licensing decision. In all cases, a demonstration may be dispersed at any time!

A presidential decision was issued forming a **national committee** tasked with **crafting a draft constitution**. However, the committee members have been raised within authoritarian agencies and most of them have lived by hypocritically, praising and glorifying the regime as the culture of hypocrisy has spread in Syria due to a half-century of tyranny.

Had there been a sincere intention for reform, this committee would have at least been elected and empowered to introduce a new constitution without endorsement from the current People's Assembly, because the present Constitutional structure is beyond repair. It was tailored originally to fit an individual ruler rather than the nation.

Among other reform decrees is one that sets up a commission tasked with initiating a **comprehensive national dialogue**. In this context, Sheikh Majed Salha accepted

the invitation of some members of the People's Assembly to attend a dialogue at Semiramis Hotel in Damascus. When his turn came to speak, he said: "sovereignty lies with the people, and the people want to overthrow the regime." Immediately, the hosts jumped at him, kicking, spitting and cursing him from every direction. This event illustrates the desired national dialogue with people whose instinctive loyalty to the sole individual leader is built on personal interests.

The Legislative Decree No. 100 of 2011 containing the Law on Political Parties opened with a condition obliging political parties to abide by the Constitution and its supplemental repressive laws that remain in effect in accordance with Article 153 of the Constitution as indicated earlier.

According to available information, no political party whatsoever has been licensed thus far save the political parties functioning under the umbrella of the National Progressive Front which were considered, ipso facto, licensed. They are a group of dictatorial political parties that published their charter on March 7, 1972. They have never been more than a façade for a constitutionalized one-party system. These parties acknowledge that Baath resolutions and the Baath Party approach are fundamental guideline to their policies and that the Baath party has the majority rule within the Front and is the sole party working among students and the army ranks. Therefore, this decree only serves to maintain a vicious cycle, while reviving the country's political life remains an elusive goal.

Lastly, according to the Syrian News Agency, Al-Assad issued a decree sanctioning the death penalty for anyone who supplies or helps supply weapons to be used in acts of terrorism. This decree is an addition to the arsenal of dreadful laws in Syria.

The most serious part of this decree is the fact that it will be implemented by a judicial system that does not recognize the current peaceful protests or the legitimate demands of the Syrian people and adopts the viewpoint of the regime, i.e. the armed gangs and the belief in a cosmic conspiracy against the regime. Hence, this decree can be used to justify all acts of extrajudicial killings that take place in Syria, especially considering its loose provisions that help target more people including anyone who helps supply...or anyone who helps...etc. In addition, the concept of terrorism overrides the concept of political crime set forth in the Penal Code, which is considered a reason for reduced punishment under Syrian law.

3. The Role of Civil Society Organizations

Some segments of the civil society, especially lawyers, played a vital role in calling for the rule of law and the independence of the judiciary. They also organized numerous sit-ins and issued many statements condemning the massacres committed by the security agencies and quasi-security agencies, or the *shabiha*, and demanded that the judicial authority assume its responsibilities in curbing those abuses.

The Public Prosecutor has not acted on any of the complaints submitted by lawyers against the *shabiha* mercenaries who killed, robbed and raped people.

Moreover, the free lawyers who submitted judicial complaints were subjected to detention, and in some cases torture, humiliation and abuse. The number of these lawyers who have been arrested over the past few months of the Syrian revolution is estimated to exceed 120 so far.

As civil rights activists, we believe that the driving force behind judicial agencies, especially the organs of criminal justice, should be primarily the interest of the society. In terms of objectives, this interest is supposed to unite civil society and human rights activists on the one hand and any future elected Syrian government that commits to advancing the country and improving the conditions for living on the other, rather than creating a split between them.

If there were an independent judiciary keen on protecting people's interests, we as human rights activists would certainly cooperate with it to stand by the victims and try to protect them from all sorts of abuse whether practiced by individuals or administrations.

A judicial system subordinate to the security agencies will be mainly concerned with punishing human rights activists and those who stand by victims, side with the oppressed on moral grounds and exercise the right of petition in their defense. Such a judicial system will not punish the perpetrators of abuses and violations and will aim to spread a culture of individual salvation within the society and eliminate the spirit of collaboration and solidarity in order to consolidate differences as well as class and social divisions and, by extension, facilitate fractures within the society when any calamity occurs, as is the situation in Syria.

Therefore, I believe that our goals as human rights organizations and civil rights activists intersect with those of the Public Prosecutor in terms of protecting victims' rights, whether victims of physical violence, collective punishment, domestic abuse, etc. Our natural position is supporting the vulnerable, i.e. the victim, in criminal proceedings, and our natural action is to defend those victims and demand the reinstatement of their rights.

Considering the fact that human rights organizations share the same goals with the Public Prosecutor, it would be fitting in the future to create an office under the Public Prosecutor to help victims who lost a breadwinner or a relative in the Syrian revolution pursue lawsuits to reclaim their rights. This office would extend advice to them, appoint volunteer lawyers for them, ensure their safety and security and facilitate the judicial process for them.

There should be an open channel of communication between volunteer humanitarian organizations in the future Syria and this office, which should have a certain level of independence, integrity, fortitude and flexibility. This channel would serve to provide the office with the support it needs to preserve the rights of the victims and achieve justice and equality.

4. Conclusion and recommendations

Any reform initiative in Syria that does not consider abandoning the aforementioned security and legal structure that consolidates autocracy and tyranny is nothing but a deceptive illusion.

Syria needs **radical constitutional and political reform** which rectifies the crucial historic deviation that took place when the military took over power and imposed a state of revolutionary violence and revolutionary legitimacy for fifty bleak years and counting, annulling the independence of the judiciary.

Syria needs to go back to that constitution which was drafted by a popularly elected commission. That constitution did not allow for an eternal ruler and was founded on the separation of powers, the independence of the judiciary and respect for fundamental rights, dignity and freedoms of opinion, expression and peaceful assembly as well as other gains which Syrian citizens have been deprived of over half a century of military rule.

The judicial institution which Syrians dream of and sacrifice their dear and precious to attain is an authority that safeguards peoples' rights and freedoms against any infringement and ensures the administration of justice in a manner that spreads security and sets the foundation for the rule of law.

The desired judicial institution is an authority with insight and commitment to achieve the public interest in the course of enforcing the law. It is an authority that undertakes a preventative and reformatory role in society, displays willingness to understand peoples' motives and devises punitive policies that aim to rehabilitate and reform convicts and facilitate their integration into the society.

The desired judicial institution is not a blind machine of suppression used for achieving political domination and endorsing predetermined sentences in mock trials.

The Syrian people have realized that the enforcement of social rights hinges on the effectiveness of the justice agencies which, in turn, hinges on those agencies' foresightedness, prudence, commitment to achieving the public interest and awareness of the feasibility of the measures they take, all of which hinges on their independence.

The Syrians dream of exercising popular oversight over the courts through ordinary people attending trials in courtrooms. This oversight may not be undermined. Lawyer Mohannad Al-Hasani attempted once to exercise this oversight over the Supreme State Security Court, which is an open court by law, but he paid his future as a price for doing so. He was deprived of practicing the legal profession for life in addition to three years in prison.

The legislature granted defendants trials before open courts to enable courtroom attendees to exercise popular oversight over the judges.

The desired judicial authority is one that is capable, fair, impartial and independent and fears no one in the administration of justice. It is the haven of the frightened and the oppressed in the face of the unjust aggressor. The desired judicial institution is compassionate when needed and firm when required. With this institution, people feel assured and certain of the administration of justice.

Chapter 6: The Reform of judiciaries in the wake of Arab Spring - Libya

By

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Preamble

A state of institutions, rule of law and independence of the judiciary were among the chief demands that demonstrators voiced on the morning of February 17, the day Libya revolted. Demonstrators recognized that an effective and independent judiciary would constitute a certain guarantee for achieving freedom, justice, equality and democracy. Nonetheless, the former regime encountered these peaceful demands with repression and brutality, killing young people who faced bullets with bare chests. Subsequently, the demonstrators raised the ceiling of their demands and called for the downfall of the regime. And down it went. Judicial members, legal professionals and jurists played a significant role in this revolution to which all segments of the Libyan people contributed.

In this seminar, we aim to investigate the issues that have obstructed the judiciary in Libya since its establishment as an independent and sovereign state and that affected judicial independence. We will present a historical overview of the establishment and evolution of the judicial system in Libya, describing the judicial environment during the Libyan Kingdom, the Libyan Jamahiriya and today. We will highlight the major violations committed by the executive authority against the independence of the judiciary and present a vision for the judiciary's future after pinpointing defects and flaws and exchanging views and experiences with colleagues from participating countries in order to arrive at the best possible solutions.

1. Overview of the Libyan Judicial System: History and Structure

1.1 *The Establishment of the Libyan Judicial System*

Libya became independent on December 24, 1951 as per Resolution 289 of November 21, 1949 of the General Assembly of the United Nations, requiring that Libya be granted independence before January 1, 1952. A commission was formed to implement the UN resolution, ensure the territorial integrity of Libya and transfer power to an independent Libyan government. The commission was a result of arduous negotiations by a delegation of Libyan freedom fighters who mobilized support for the independence and territorial integrity of Libya.

Naturally, the international commission, chaired by Netherlands national Adrian Pelt, had a major role in drafting the Libyan constitution, which provided for the principles of the separation of powers and unity of law which were adopted in the American and British systems. The commission was dominated by American and British members, a fact reflected in the Libyan constitution issued by the 60-member National Constituent Assembly on October 8, 1951. Article 42 of the constitution stated that “judicial power shall be exercised by the Supreme Court and other courts.” This constituted the cornerstone of the Libyan judicial system and the foundation for the Libyan legislature to issue laws and legislation governing judicial practice.

1.2 The Kingdom of Libya

During the monarchy, courts were established gradually as the need arose according to available capabilities. Judicial members were brought in from neighboring countries, especially Egypt and Tunisia. The characteristics of the judicial system became clearer after the Kingdom issued its first judicial legislation, the law of the Federal Supreme Court of November 10, 1953. In this law, the Libyan legislature affirmed its choice of the unified judicial system whereby independent courts of all classifications and levels ultimately report to one high court that oversees the standardization of the interpretation and enforcement of the law with regards to all courts nationwide.

A succession of legislations and laws governing courts and defining their jurisdiction followed, including: the Code of Civil and Commercial Procedure of November 10, 1953, the Code of Criminal Procedure of 1958 and the Judicial System Law No. 29 of 1962. The Supreme Court was given jurisdiction to hear constitutional and administrative appeals in its capacity as a court of first instance and a court of appeals until Law No. 28 of 1971 gave the court of appeals jurisdiction to hear administrative disputes in a manner similar to the French State Council.

A. Organization of the Judiciary

With the issuance of Law No. 29 of 1962 on the organization of civil and Sharia courts, criminal courts and the public prosecutor’s office were organized, giving shape to the judicial system as well as divisions of courts and jurisdictions as follows:

1. Civil and Criminal Courts:

Civil and criminal courts can be divided as follows:

- Limited Jurisdiction Courts:

Limited jurisdiction courts hear most personal status claims, limited civil suits that involve disputes valued at less than 1,000 dinars, misdemeanors and infractions.

- Courts of First Instance:

Courts of first instance hear two types of proceedings. First, in its capacity as a court of first instance, the court handles certain sharia cases and most civil and commercial disputes that do not fall within the jurisdiction of criminal courts. In its capacity as an investigating judge, the court of first instance reviews criminal cases prior to their referral to the criminal court and handles cases pertaining to mandatory enforcement of judicial decisions in civil lawsuits. Second, the court of first instance, as an appellate court, hears appeals brought against limited jurisdiction courts' rulings in civil, sharia and criminal lawsuits.

2. Court of Appeals

The court of appeals reviews rulings issued by the courts of first instance. The court of appeals also adjudicates appeals in criminal cases and administrative matters in which the executive authority is a party and which result in decisions affecting the legal statuses of natural or legal persons.

3. Public Prosecutor's Office

The Public Prosecutor's Office is legally competent to initiate criminal proceedings. The Office is headed by a chief public prosecutor assisted by other prosecutors of different ranks. Prosecutors are divided into limited jurisdiction prosecutors, prosecutors of first instance and prosecutors of appeals in a parallel manner to civil courts.

The Supreme Court

The Supreme Court was not established immediately after independence although it was set forth in the constitution endorsed by the Libyan National Assembly on October 8, 1951. Rather, it was established after the promulgation of the Law on the Federal Supreme Court of November 10, 1953, which was amended by the Decree of November 3, 1954. Since then, the Supreme Court has been exercising its jurisdiction as a court of first instance and a court of appeals, hearing constitutional, administrative and electoral appeals, in addition to its inherent jurisdiction as a court of cassation over civil, commercial and personal status cases.

Being the sole source of advisory opinions and legislation, the Supreme Court was entrusted with interpreting and reviewing laws given the Kingdom's need at the time for an expert legal entity to interpret and review laws prior to their promulgation and circulation to the federal and state governments.

B. Obstacles Affecting the Judiciary under the Monarchy

The Libyan monarchy did not witness many obstacles deeply affecting the judicial system save some troubles attributed to political and economic issues as well as the presence of foreign judges of different ranks.

The poor economy of the newborn state was a major reason for the shortage of courts and Libyan judges qualified to preside over the newly established courts. Politically, Libya attained independence by a UN General Assembly resolution, and the different nationalities of UN Mission members played a role in the drafting of laws organizing the judiciary and determining the eligibility and nationalities of judges.

While no one can deny the role of foreign judges in establishing and shaping Libya's judiciary, enriching its courts and contributing to training and qualifying Libyan judges, their presence impacted the independence of the judiciary. In his memoirs (pp. 62-63), Libya's Prime Minister under the monarchy, Mustafa Ben Halim, presents evidence that the head of the Constitutional Unit at the Libyan Supreme Court Egyptian Chancellor Ali Ali Mansour was obtaining instructions from Egyptian authorities through the Egyptian embassy in Benghazi requesting him to side with the people rather than the king and envisaging a crisis between the people and the king.

Example of Judicial Independence during the Monarchy: The Supreme Court issued a renowned ruling on April 5, 1954 declaring a royal decree to dissolve the Legislative Council of the State of Tripoli to be absolutely null and void.

1.3 The Libyan Jamahiriya

The overall shape of the judicial establishment and court divisions in Libya remained the same after the September 1969 coup and until Law No. 78 of 1973 on the Consolidation of Courts combined sharia and civil courts under one body. However, the main turning point in terms of the impact on the judiciary and its independence was the adoption of the Jamahiriya system by the head of state following the proclamation of the Peoples' Authority in 1977. This chaotic system contributed to the confusion in the Libyan judiciary and enhanced interferences in its jurisdiction and even impacted its integrity and independence. A closer look reveals that this was a deliberate and systematic attempt to tamper with the judicial system in its capacity as the guarantor of state stability as well as rights and freedoms that constitute the backbone of any state. The tampering with the judiciary started with restructuring the Supreme Court by means of Law No. 6 of 1982, which defined its jurisdiction in articles 23, 24 and 25 as follows:

As a court of cassation, the Supreme Court reviews final rulings issued by lower courts in civil and commercial disputes and the rulings issued by the court of appeals in administrative and criminal disputes. **In its non-cassation capacity**, the Supreme Court adjudicates in matters of conflicting jurisdiction and the execution of two contradictory rulings.

Nonetheless, this law did not contain any reference to the Supreme Court's jurisdiction over hearing constitutional matters, hence abolishing the Court's constitutional department. Consequently, the Supreme Court stopped hearing constitutional appeals until Law No. 17 of 1994 was issued amending Law No. 6 of 1982 and restructuring the Supreme Court. Article 23 of Law No. 17 of 1994 outlines the Supreme Court's jurisdiction over hearing:

- Appeals brought by anyone with direct personal interest against any unconstitutional legislation.
- Any substantial question of law concerning the constitution or its interpretation arises in the course of a case pending before any court.

However, article 51 of Law No. 17 of 1994 made reviews of constitutional matters conditional upon the issuance of internal regulations by the Court's General Assembly outlining procedures for filing appeals and setting costs and fees. It was not until 2004 that these internal regulations were issued under Supreme Court General Assembly Resolution No. 283/1372 of 2004.

This condition suspended the Supreme Court's jurisdiction over hearing constitutional appeals for more than 24 years in a historical precedent never experienced under any similar judicial system. The situation could be attributed to the Libyan legislature's philosophy at the time based on the Jamahiriya ideology which considers the people to be the authority that issues, abolishes and amends laws and legislation; hence the will of the people may not be subject to any control exercised by any authority even if it was judicial. The regime went even further when it angrily abolished the position and title of the public prosecutor after he had released anti-regime dissident suspects in political cases. The regime abolished this position by means of Law No. 8 of 1983 on amending certain provisions in the judicial system. Despite the importance and sensitivity of this position, the judiciary remained without a public prosecutor for more than nine years until the issuance of Law No.5 of 1992 on the reinstatement of the public prosecutor and the defense lawyer positions in response to pressures from the international community in the wake of the Lockerbie case.

2. Judiciary under Jamahiriya before the full down of Gaddafi

It is impossible to quickly summarize and identify the obstacles that beset the Libyan judiciary under the Jamahiriya and enumerate all executive authority violations of judicial independence and blatant interference in modifications and amendments to judicial system. However, we attempt below to provide a summary of some of these violations:

1. The creation of special courts that neither followed the judicial system nor adhered to the principle of criminal legality whether in terms of merit or procedure. Examples include the creation of the People's Court (established to try monarchy figures) under a resolution issued by the Revolutionary Command Council (RCC) on October 26, 1969. Article 2 of the said resolution provided for the establishment of a People's Court with jurisdiction to try those responsible for administrative and political corruption and hear matters referred thereto by the RCC (Article 4). The People's Court could criminalize any act and sanction the penalties it deems fit without compliance with the provision of the Penal Code. It could also take any criminal procedure and designate the appropriate enforcement of its rulings without complying with the Code of Criminal Procedure. In this fashion, the People's Court possessed all the authorities including the legislative authority and offered no safeguards to individuals in the face of its judges, who could not be disputed, and rulings, which were final and could not be appealed. This Court ceased to operate after fulfilling the purpose for which it was created.
2. The creation of agencies with powers to conduct investigations and issue indictments in parallel with the judicial system. The formation, jurisdiction, prerogatives and even laws of these agencies did not observe the characteristics of the judicial authority. Examples include People's Control which was created under Law No. 11 of 1994 and the People's Prosecution Office established under Law No. 5 of 1988 with the creation of the People's Court, both of which ran parallel to the Public Prosecutor's Office. The immunity of judges themselves was forfeited before these agencies as Article 23 stipulated that the People's Prosecution Office could initiate criminal proceedings without permission, implying no procedural immunity for prosecutors or judges in the face of the People's Prosecution powers. This violates the guarantees for the independence of judges who, in turn, represent a safeguard ensuring equality between individuals before courts. It was only to protect judges and their independence from malicious claims that procedural immunity was sanctioned.
3. The creation of the People's Court, a special judicial body parallel to regular courts, under Law No. 5 of 1988. Judges of the People's Court were not

required to belong to the judiciary or even hold legal qualifications. The People's Court was administratively subject to the People's General Congress, which had the power to refer any case to this Court. The People's Court and its members enjoyed significant financial and other privileges in comparison with regular courts. The People's Court was infamous for its arbitrary and unjust rulings amounting to the death sentence against political opponents and activists and those with whom the regime was not pleased. Among its most notorious rulings was the sentencing of 38 administrators and fans of Al-Ahly Club to death and prison for rioting after a match in the sports season of 1999/2000. Four were sentenced to death in case No. 353/2000 initiated by the People's Prosecution Office on charges of forming a secret group operating against Al-Fateh revolution and forming a political party under Law No. 71 of 1972 on criminalizing partisanship. The Supreme Court disgracefully upheld the decision. Faced with the notorious reputation of the People's Court and pressures from international human rights organizations, the regime was forced to abolish this court under Law No. 7 of 2005.

4. The creation of court-like committees to settle disputes without issuing judicial rulings. These committees include the Tax Appeals Committee, the Real Estate Appeals Committee, the Real Estate Designation Committee, and the Electoral Appeals Committee. The majority of these committees remain in operation.
5. The creation of the State Security Court and Prosecution under Resolution No. 27 of 2007 of the Supreme Council of Judicial Bodies. According to jurisprudential standards, the State Security Court was not a special court given the permissibility of appealing its rulings. However, it is considered a special court in terms of the laws it enforced, the duration of provisional detention, the extension mechanism of such detention, etc.
6. The intrusive appointment of non-judges to serve in courts and even assume the highest positions in the judicial system. For example, intelligence officer Brigadier General Mohammad Mahmoud Al-Misaurati was appointed as Public Prosecutor between 2002 and 2007, and Abdul Rahman Abu Tuta, an academic professor specialized in Jamahiriya ideology and revolutionary committees member, was appointed as Chief Justice of the Supreme Court between 2005 and 2009. Al-Misaurati and Abu Tuta were also key members in the Supreme Council of Judicial Bodies whose powers included the appointment, promotion, transfer, removal and discipline of judges.
7. The executive authority's control over judges and influence on their independence as a result of the Minister of Justice's presidency of the Supreme Council of Judicial Bodies and the membership of the Secretary General of the Ministry of Justice on the High Judicial Council.

8. The promulgation of a large number of laws granting immunity to executive authority public employees, which led to their impunity. Immunity was given, for example, to popularly elected figures such as ministers and members of parliament, police and customs officers as well as security personnel, national security staff, and employees of the tax authority, the Central Bank, the People's Control apparatus, the Audit Bureau, directors of banks and many others. These laws remain in effect to this day.
9. The creation and annexation of judicial bodies to courts and prosecution. These include the Government Cases Administration under Law No. 87 of 1971 and the Public Defender Administration under Law No. 4 of 1981. Members of the latter administration enjoy the same privileges and immunity as judges and report directly to the Minister of Justice.
10. The interference of the executive authority in the work of courts manifested in the Minister of Justice's decision preventing courts from applying immediate enforcement to their rulings against the state oil companies in regard to the right of the workers who have been wrongfully terminated their employment contract in violation of the Code of Procedure and from enforcing their final rulings against oil companies.
11. Promulgation of laws that restraint the judges in assessing the amount of compensation against the state and its companies by putting an arbitrary maximum amount of how much the state should pay as compensation.
12. The exaggerated number of laws and legislations issued without extensive studies on their relevance or the actual need for them. This situation led to inconsistency in legal provisions and confusion for courts and judges. Abstaining from inviting specialized judges and other experts to study these laws and express their opinions in their regard.
13. The Jamahiriya regime abolished the legal profession, which is one of the pillars of justice and an integral part of the judicial process under Law No. 4 of 1981 on the establishment of the Public Defender Administration. The private practice of the legal profession was allowed after nine years under Law No. 10 of 1990 on the regulation of the legal profession. Private lawyers were barred from representing litigants before the People's Court.
14. Carrying out summary executions against political opponents without trials. The executions were not only public but also broadcast on national TV. The most famous executions date back to the mid-1980s and involve members of the National Front for Salvation such as Sadiq Shwehdi and Abdel Bari Fanoush. University student activists were executed on campus.

15. Promulgation of laws that prevent access to courts in certain legal cases such as the law number (7) year 1988 which prohibit any court cases connected to the housing.
16. Promulgation of administrative orders to law enforcement agencies from enforcing court verdicts on evacuation tenants from the houses they live in.
17. Forcing litigants to set their legal conflicts before a local administrative body for reconciliation before they are allowed to raise their legal claims before the court. This means putting restraints on citizen to access justice via the legal system of courts.
18. State agencies failed to enforce final judicial rulings, particularly those that defied the wishes of the country's political regime

Judges' Struggle to Defend their Independence

Despite executive authority encroachment on the independence of the judiciary and its blatant interferences in the work of courts under the Jamahiriya regime, judges did not succumb to this interference but rather resisted with full force, aiming to preserve the integrity and independence of the judiciary. Examples of defending the independence of the judiciary include:

1. On October 16, 2000, the Minister of Justice issued Decision No. 7 of 2000 on the reconstitution of the Administrative Justice Division at the Benghazi Court of Appeals. The decision involved the transfer of Division Director Suleiman Zoubi as punishment for issuing a ruling against the administration and repealing one of its decisions. Judge Zoubi defended his independence and appealed the decision before the court, which accepted his appeal and ruled that the Minister's decision entailed abuse of power (appeal No 31/2000 Al-Jabal Al-Akhdar Court of Appeals).
2. Judge Ghaith Al-Fakhri contested the constitutionality of Article 93 of Law No. 6 of 2006 on the judicial authority, which gave immunity to the Supreme Council of Judicial Bodies' decisions and denied appeals against those decisions. The Supreme Court accepted the constitutional appeal No. 5/55 on November 11, 2009 and repealed the article as unconstitutional on grounds that the right to litigation is guaranteed to all. (A photocopy of the judicial ruling is attached).
3. Minister of Justice and President of the Supreme Council of Judicial Bodies issued a decision obliging courts to work in morning and evening shifts in violation of Article 31 of Law No. 6 of 2006 on the judicial system, which gave the general assemblies of courts the right to set session dates and times as well as the number of circuits. Judges, general assemblies of the

North and South Benghazi Courts of First Instance refused to enforce the decision, considering it a violation of the law and an infringement on the independence of the judiciary.

3. The Judiciary after the February 17th Revolution

The independence of the judiciary was one of the main demands of the February 17th Revolution. Libyans unanimously agreed on the importance of an independent judiciary, the sanctity of its mission and the need to support, reinforce and empower the judicial authority to hear all cases. They agreed on the need to solely assign the judiciary to the task of holding accountable those who violated the law before or after the February revolution. In summary, the independence of the judiciary manifested in the following:

- A. The Constitutional Declaration issued on August 3, 2011 explicitly provides for the independence of the judiciary, prohibits the establishment of exceptional courts, prohibits laws from granting immunity to administrative decrees against judicial control and guarantees the right to litigation (Articles 32 and 33).
- B. The promulgation of Law No. 4 of 2011 amending articles 1, 3, 6, 9, 92 and 93 of the law on the judicial system. The amendments abolished the presidency of the Minister of Justice over the High Judicial Council and reconstituted the Council with the Chief Justice of the Supreme Court as its president and the Public prosecutor and chief justices of the courts of appeals as members. The amendments were aimed at enhancing the independence of the judiciary and its separation from the executive authority. The amendments also abolished the immunity of High Judicial Council decisions.
- C. An ad-hoc committee composed of Supreme Court advisors is currently working on a draft law amending the Supreme Court Law in order to expand Court prerogatives and establish a mechanism to handle electoral appeals.
- D. Courts and the Public Prosecutor's office are gradually returning to work in the western region after resuming judicial activities in the eastern region last April. The Public Prosecutor's office returned to work a few days after the liberation of Tripoli and the actual defeat of the regime even though its return to work on a regular basis is hindered by the proliferation of weapons and the absence of police and security personnel. Meanwhile, prisons are also returning to work under the supervision of the judicial police and the direct oversight of the Public Prosecutor's office and enforcement judges.

Unfavorable Actions Affecting the Independence of the Judiciary

Although the National Transitional Council (NTC) has sought to consolidate the independence of the judiciary, revitalize the role of the judicial authority and provide guarantees, there have been interferences in the judiciary due to the nature of the conflict and the occurrence of some crises. These interferences notably include the following:

- The statement of the NTC Chairman and former judge Mustafa Abdul Jalil made concerning the adoption of sharia, or Islamic law, as the source of legislation and abolishing certain laws. His statement constitutes a clear infringement on the principle of separation of powers.
- Moreover, Abdul Jalil's handling of the assassination case of General Abdul Fattah Younes in terms of his statements to the media and accusations of persons who have neither been summoned nor questioned is yet another violation of the independence of the judiciary.
- More violations include the multitude of detention centers, the lack of Public Prosecutor supervision over these centers and the continued detention of persons affiliated with the Al-Gaddafi regime and forces without interrogating them or granting them a fair trial.

4. Proposed Legislative Solutions to Consolidate an Independent and Effective Judiciary

Judges, judicial personnel, civil society workers and concerned individuals have presented several important proposals that can be summarized as follows:

1. Ensure technical and scientific training and qualification of judges so they may keep pace with the situation after the revolution and the evolution of the judiciary. Educate judges regularly on regional and international law developments by extending support to local and national law journals and encouraging judges to participate in cultural courses and conferences.
2. Enable experts to investigate all faults and flaws in the current judicial system and look into the impediments hindering its independence and integrity. Those experts should also be empowered to carefully draft laws that ensure the independence and integrity of the judiciary as a pillar of the state of law.
3. Incorporate in the upcoming constitution of the third edition of the Libyan state all the principles that ensure the independence of the judiciary: separation of powers; the organization of courts, their jurisdictions and the powers of constitutional courts; the right to appeal and regulation of legal immunities.

4. Ban legislations that infringe on judicial authority powers by establishing special courts and committees outside the regular judicial framework to hear cases under the pretext of urgency. Improve the economic situation of judges and upgrade their living standard as a means to protect them from corruption and subordination that affect their independence.
5. Support sovereign security institutions and create a favorable environment for judges and courts, which would positively affect the performance of judges.
6. Vitalize the mechanisms for enforcing judicial rulings to realize their objective, i.e. maintaining and reinstating rights and punishing perpetrators. Judicial rulings are meaningless unless voluntarily or coercively enforced.
7. Ensure training and qualification of judicial assistants including clerks and experts.
8. Rehabilitate and furnish courthouses and further utilize computerized systems in judicial activities.

Conclusion

Enhanced rule of law is the foundation for freedoms and justice and the key to a relationship between the ruler and the people that is free of discrimination. Only a state with a genuine can offer this; an accountable state governed by fair laws and only concerned with fulfilling the interests of its people.

Therefore, the independence of the Libyan judiciary is a crucial requirement for upgrading the level of litigation services and advancing people's right to a decent life as prescribed in divine and man-made laws. Libya needs a fair and impartial judicial system independent from the regime and capable of indicting individuals, governments and the very regime that sustains it under constitutional and legal protection in order to achieve justice for all.

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Chapter 7: The reform of Judiciaries in the wake of the Arab Spring - Lebanon

By Nizar Saghieh
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The most significant accomplishment of the Arab Spring is the fact that citizens took to the streets to voice their demands in the face of authorities that had previously been somewhat sanctified and enjoyed dominance over public life. These developments raise several questions: will the decline of the executive authority in these societies enhance the status and role of the judiciary? Will the decline of the “parental authority” strengthen the independence of judges vis-à-vis the judicial institutions and specifically the judicial hierarchy? Equally important to Lebanon, what is the status and role of the judiciary in the country’s sectarian system? Is the judiciary an extension of this system including its existing polarization? Or is it, on the contrary, a shared space where litigants defend their rights independent of their religious affiliations in a fashion that mitigates such polarization?

The assumption this article is attempting to prove is that the Arab Spring has triggered a movement – that remains weak – among judges, while the executive authority and the High Judicial Council (HJC) remain largely confined to a discourse that favours the activation and purification of the judiciary, i.e. reforming the judiciary as a public facility, over the independence of judges.²⁴

1. Independence of judiciaries in Lebanon

1.1. The High Judicial Council: The Trojan Horse Within the Judicial System

To understand the judicial reality in Lebanon, one must consider the status of the HJC in the judicial organization. I, unhesitatingly, argue that the HJC is thus far the Trojan horse that allows the political and sectarian regime to infiltrate the judiciary. This reality is clearly manifested in the formation, powers and surrounding discourse of the HJC.

The HJC is composed of ten members; an even number of seats to allow for equal distribution between Christians and Muslims. The seats within each group are further distributed between the different denominations. Eight judges are directly appointed by the executive authority, three of whom are mandatory members

²⁴ It is worth noting that Lebanon acceded to the International Covenants on Civil and Political Rights and on Economic, Social and Political Rights; that the preamble to the Constitution contains a commitment to the Universal Declaration of Human Rights and to international conventions and that Lebanon’s legal system gives precedence to international treaties over domestic laws.

(President of the First Chamber of the Court of Cassation, President of the Judicial Inspection Department and the Public Prosecutor at the Court of Cassation) and five others represent the various levels and functions in the court system. All of the eight members are appointed by Cabinet decrees. Conversely, only two members are elected in order to ensure that control over the Council is not lost. Candidacy to fill these two seats is limited to the presidents of chambers at the Court of Cassation, whereas the right to vote is limited to the members of the Court of Cassation. The two members are elected before the five non-mandatory members are appointed so as to allow the government to fill the seats that belong to the other denominations and that remain vacant in a manner that allows the political forces to maintain the “agreed upon” quotas regardless of the outcome of the elections. Therefore, it is not surprising that the appointment of HJC members is subject to a rule of consensus whereby important decisions are taken by a qualified majority, a setup that allows the minority to obstruct them. The HJC has the right to impose draft decrees of judicial appointments and transfers on the Minister of Justice with a seven-vote majority whereby any four members may obstruct the decision. Moreover, the HJC has the right to dismiss judges upon their disqualification with an eight-vote majority. However, the disagreement regarding the membership quotas of HJC will simply obstruct the appointment decision, possibly for months, and could turn it into a national crisis. This was the case, for example, during the sharp division in the period 2006-2008 when politicians and media personnel unhesitatingly described the judges who were proposed for appointment as belonging to this or that political movement. The judges in question did not refute or even comment on these accusations. The division obstructed judicial appointments for a long period of time, including the appointment of newly-graduated judges who waited for years for the decree of their appointment to judicial positions.

Furthermore, the hierarchical nature of the HJC impacted its discourse and concepts as well, constituting an additional threat to the independence of the judges, i.e. their independence vis-à-vis judicial institutions. This trend clearly manifests in the use of the concepts of “judicial authority” and “independence of the judiciary,” in a manner that deprives them of some of their dimensions. Contrary to Article 20 of the Constitution, which confined the judicial authority to courts, many actors use the phrase “judicial authority” to refer to the HJC alone and more generally to indicate the body entrusted with the organization of the judiciary’s affairs. This usage is found in a number of reform initiatives put forward by deputies (Harb and Al-Husseini, 1998) and former ministers of justice (Joseph Shaoul, 2000). All of these initiatives explicitly vested the judicial authority in an intended high judicial body comprised of representatives of the various judicial bodies. Due to this discourse, the judicial authority seemed embodied in a specific council similar to the executive and legislative authorities, which would eventually consolidate an organic and central (superior) understanding of the concept of the judicial authority. This understanding exists independent of the meanings of judicial authority derived from the functions of judges in their respective courts, which presume the protection of judges in the face of any authority, including that of the HJC. As a result of this confusion, the

judicial authority was reduced to the body which was originally created to safeguard this authority. This situation entailed the risk of the judicial authority's transformation into a body that not only oppresses judges in the name of judicial independence but also marginalizes any proposition for reform that aims to grant judges personal safeguards. One can deduce this from the common belief that requiring HJC approval for the transfer of judges – as is the case under current laws – or even in exceptional and more serious matters such as “purging the judiciary” (draft law on lifting the immunity of judges, 1999), disqualification of judges and appointment of judges from among lawyers without a contest is a sufficient guarantee to ensure respect for the principle of judicial independence. Of course, the fundamental rights of judges that ensure their personal independence from any authority remain completely marginalized. These rights include the right to decline transfer, the right of self-defence and the freedoms of expression and assembly.

It is no secret that these powers, particularly those related to judicial appointments, are now the most powerful weapon used against judges.

Accordingly and due to the lack of collective action by judges and their lack of freedom of expression, the majority of reforms have been dictated from above. The majority of these reforms, since the Taif Agreement, have prioritized the issues of activating the judiciary and the accountability of judges over the issue of judicial independence. Whenever the independence of the judiciary has been raised, it has always been in terms of safeguarding the powers of the HJC as the primary stakeholder in such independence.

1.2. Special and Religious Courts

The Lebanese judicial system includes several special courts, notably the Justice Council which adjudicates high profile cases referred by the Council of Ministers and military courts. The Justice Council is empowered to try crimes committed by or against military personnel. Religious courts, on the other hand, review cases of personal status. Without going into the details of litigation in this field, it suffices to say that judges at military and religious courts do not have the minimum level of independence, while the special courts offer no guarantees of fair trial.

2. Reforms Proposed in the wake of the Arab Spring

Two approaches can be noted in this regard; a dominant approach primarily initiated by the Ministry of Justice and a second less prominent approach that exists at the level of young judges who assemble one way or another.

2.1. Reform Initiatives by the Ministry of Justice

The major reforms of 2011 can be categorized under four themes:

2.1.1. Increasing the salaries of judges

After intensive debates that lasted more than eighteen months, the National Assembly decided to almost double salaries (a 95% increase according to some studies). For the Minister of the Interior, the increase was clearly and most importantly aimed at stimulating the functioning of the judiciary. Indeed, the increase was endorsed in the wake of prison unrest (called the “prison uprising” at the time) initiated mainly by long time detainees with pending trials. On the same day the Minister of Justice announced the salary increase, he said that he was then able to persuade the judges to accelerate trials. A few days later, extensive meetings were held with senior judges for deliberations in this regard. The Minister has recently reminded us that he was “working hard with the judicial authority in order to accelerate trials and settle the cases of detainees as quickly as possible,” recalling that “*freedom is the rule*, and its restriction is the exception.” (December 21, 2011)

Another justification for the salary increase was to attract new judges with certain potentials (some do not hide their desire to attract males to counter the feminization of the judiciary) and reduce the migration of judges – specifically the migration of Sunni judges to the Gulf countries – and stimulate the functioning of the judiciary. This is evidenced in several statements made by Prime Minister Najib Mikati.

While the Prime Minister and the Minister of Justice cited the importance of raising the salaries to ensure the independence of the judiciary, such justifications have taken place in isolation of any judicial reform program.

2.1.2 Ensuring accountability of judges

This initiative took two forms; the first was more visible and involved the disqualification of some judges (a process known in the media as “the purging”) pursuant to Article 95 of the Code of Judicial Organization, while the second involved the revitalization of the Disciplinary Council.

In fact, the discourse of accountability was shared by most ministers of justice at the beginning of their ministerial term, at least since 1999, as if it was the key to declaring their intentions for reform.

Nonetheless, this discourse poses several problems, most notably:

- Bringing the accountability of judges under the spotlight without a meaningful initiative to support their independence will, first, highlight the downside of the judiciary, and second, will make the executive authority appear as

the saviour that purges the “corrupt” judiciary. Consequently, the demands for independence would naturally seem to the public less legitimate or, at least, less urgent. In fact, this very discourse leads to weakening the sense of independence, as it enhances the fears among a large number of judges of being “purged” or held accountable by the political authority. These fears prompt them to plead protection from this or that political camp, leading often to their immunity.

- Article 95 of the Code of Judicial Organization – the use of which is often threatened – allows the HJC to disqualify a judge after a hearing with an eight-vote majority; its decisions are final and cannot be appealed. Practically, Article 95 is difficult to apply since the agreement of eight HJC members basically means that the majority of influential political forces share one political will to remove a certain judge. This fact renders the application of this article limited to judges who are not affiliated with any of these forces. In principle, Article 95 sanctions the harshest measures against judges without granting them the minimum right to defence or fair trial. Why then do the Ministry of Justice and senior judges always threaten to enforce Article 95 despite the barriers that hinder its application? Is it logical to announce the implementation of Article 95 as the first indicator of judicial reform when the article actually contradicts its basic principles?
- Disciplinary proceedings have recently been reintroduced with the issuance of a decision inhibit a judge and the initiation of proceedings against others, according to newspapers.

2.1.3. Discussions on reforms to the Code of Judicial Organization

A mini-committee appointed by the Minister of Justice and composed of four lawyers (including one former judge and one former minister) and two former HJC presidents and no incumbent judges whatsoever. In spite of the confidential nature of this committee, leaked information indicates that it was entrusted with making observations with regards to certain matters contained in the Code of Judicial Organization such as the appointment of HJC members from outside the judiciary. Apart from the secrecy surrounding the work of this committee, excluding judges from the process of drafting reforms is rather a regression to a previously adopted approach that views judges as recipients of reform rather than reformers themselves.

2.1.4. Technical reforms

Those reforms timidly introduced with foreign funding (European and American funding in particular), including judicial rehabilitation, reform of judge-selection mechanisms and the automation of Beirut courts.

2.2. Are we witnessing an emergence of a reformist movement from within the judiciary?

In view of the fading reformist discourse, judicial initiatives occasionally emerge with the goal of reforming the judiciary from within.

In one such initiative, ten judges signed up to establish an unprecedented judicial association during a conference held to discuss the situation of judiciaries in the Arab region in light of the Arab Spring. Judges from Egypt and Tunisia were among the conference attendants. The signatories have held several meetings whose outcome has not yet been announced amidst wariness within the judiciary towards them. Another initiative involved the assembly of about 40 judges at the Palace of Justice. The judges created a mini-committee to call on the Judicial Inspection Department and the HJC to initiate reforms from within.

Although these initiatives have undoubtedly remained timid and uncertain, it is hoped that they will expand in order to uphold the principle of independence as the first and foremost theme in any judicial reform scheme. Indeed, the recent emergence of non-governmental groups advocating for the independence of the judiciary sparks hopes of expanding this reform movement.

Chapter 8: The reform of judiciaries in the wake of the Arab Spring - Palestine

By: Nasser Al-Rayes

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1. Introduction

The Palestinian Judicial Authority (PJA) is relatively young compared to the established judiciaries in neighbouring countries. The PJA was formed in the wake of signing the Declaration of Principles between the Palestinians and the Israelis on September 13, 1993, to which an array of bilateral agreements were later annexed addressing and regulating the status of Palestinian territories during the transitional, i.e. interim, phase between the signing of the Declaration of Principles and reaching a final settlement for the Palestinian-Israeli conflict.

The outcome of this phase included the creation of the Palestinian National Authority (PNA) on parts of occupied Palestinian territories and the sharing of administrative functions between the PNA and Israel to manage these territories. The bilateral agreements recognized the PNA's right to exercise numerous legislative, judicial and administrative powers alongside the Israeli occupation forces during this phase.

As for the effect of these agreements on the creation of a full-fledged Palestinian judicial authority, it is worth noting that the PJA, founded in the wake of the Oslo Accords, is deficient. The PJA is not permitted to exercise full jurisdiction over the Palestinian territories due to the interim agreements' established sharing of administrative functions between the PNA and the Israeli occupation forces during this transitional phase.

The interim agreements have had adverse effects on the establishment of an independent Palestinian judicial authority, including most notably the division of Palestinian territory during the agreed upon transitional phase into three major areas: in Area (A), the PNA exercises semi-complete security control, has many sovereign rights and undertakes administration and regulation; in Area (B), the Israeli occupation forces retain the right to security control, while the PNA maintains public order and undertakes administrative management.

Under the interim agreements, the Israeli occupation forces in Area (C) retain the absolute right to exercise security control and administrative management save certain administrative powers agreed to be transferred to the PNA.

The adverse effects of this division on the Palestinian judiciary can be summarized as follows:

- A. The criminal justice apparatus constitutes one of the most important tools and means of the judiciary for enforcing judicial decisions and orders. Therefore, limiting the jurisdiction and powers of the Palestinian executive branch in Areas A and B as a rule and in Area C as an exception in certain cases pre-arranged with Israel renders the Palestinian judiciary unable to enforce its decisions and orders in most of the occupied Palestinian territories due to the inability of the executive apparatus to officially access most of the area.
- B. Limiting the jurisdiction of the Palestinian judiciary to Areas A and B contributes to the impunity of hundreds of violators of the law.

Consequently, Palestinians often violate local laws, taking advantage of the inability of the Palestinian judiciary and its enforcement mechanisms to chase or reach them in Area C, which falls under Israeli security and administrative control. The most frequently occurring such criminal activities include the issuance of bad checks, fraud, swindling and the like.

- C. The division impacts the length of judicial proceedings since serving people residing in Area C can require long periods of time, thereby rendering recourse to the judiciary futile in many cases especially those requiring prompt review.

Additionally, the task of bringing wanted people to justice cannot be carried out by Palestinian apparatus without Israel's approval, which can require long periods of time to allow for preparation and coordination between both sides.

- D. The interim agreements recognize the right of the Israeli occupier to exercise the power of legislation and issue military orders in all Palestinian territory under its control. Naturally, this has subjected the Palestinian territories to a dual legal system. In addition, the occupier's continued exercise of legislative power has rendered Palestinian citizens unable to identify the legal system governing and regulating their life.
- E. The interim agreements explicitly exempt Israeli officials, citizens and settlers from the jurisdiction of the Palestinian judiciary which may not, under the agreements, review a criminal case involving those individuals or exercise its civil jurisdiction over any Israeli citizen unless he/she explicitly accepts Palestinian jurisdiction, which has never happened since the creation of PNA.

2. The Post-PNA Palestinian judiciary

The Palestinian legislative system governing the jurisdiction and composition of the Palestinian judiciary consists of several legislations, chief among which are the Palestinian Basic Law (the PNA's constitution during the transitional phase as approved under the Oslo Accords), the Code of Civil and Commercial Procedure No. 2 of 2001, the Code of Criminal Procedure No. 3 of 2001, the Law of the Formation of Regular Courts No. 5 of 2001, and the Judicial Authority Law No. 1 of 2002.

The Palestinian judicial system is founded on the dual or French system which divides judicial tasks into two streams. The first of these is judicial justice and is based on regular courts at all levels (magistrate court, court of first instance, court of appeals, court of cassation) which hear disputes arising between individuals and between individuals and the state when state or government actions take place outside the exercise of their public authority.

The second stream is administrative justice and is based on administrative courts at all levels which hear disputes arising between individuals and the state when the latter's actions are grounded in the exercise of its public authority and the privileges and immunity it enjoys under the law. The administrative court also hears election appeals, special appeals to repeal administrative regulations or final decisions affecting people or funds expended by public legal entities, including the professional associations, and the petitions brought by individuals demanding the administrative court to order the release of persons detained for illegitimate reasons.

Palestinian legislations are consistent in principle and substance with international standards on the independence of the judiciary despite the fact that Palestine is not a signatory to international conventions and treaties. The international community treats Palestine as less than a state and therefore has not granted it the legal status necessary to join international conventions and treaties.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) is the first UN agency to recognize the State of Palestine as a full member. During its 36th session, UNESCO granted the Palestinian request to join the agency on October 31, 2011 with 107 votes in favour. This means that Palestine can join numerous international conventions and treaties in the future.

Major impediments to the independence of the judiciary and the administration of justice

A number of impediments and challenges have traditionally prevented the Palestinian judiciary from attaining its independence. These include:

- The Israeli occupation of Palestinian territories. For the aforementioned reasons, this occupation undoubtedly constitutes the most significant impediment to an independent Palestinian authority capable of exercising its tasks and jurisdiction. The adverse effects of the Israeli occupation on the Palestinian judiciary manifest in the actions and measures the Israeli occupier takes in order to reinforce its control over the Palestinian territories.
- The Palestinian split. On June 12, 2007, the Islamic Resistance Movement (Hamas) took complete control of PNA offices and forces in the Gaza Strip, imposing de facto authority. This caused the Palestinians to split into two camps: the West Bank, which has remained under the control of the PNA headed by President Mahmoud Abbas, and the Gaza Strip as a separate entity under Hamas control and administration.

The adverse consequences of the split have not stopped at the division and sharing of power and administration in the occupied Palestinian territories between Hamas and the PNA. Indeed, the split has negatively affected political, economic and social aspects of Palestinian life. The most serious negative implications affecting the rule of law and the independence of the Palestinian judiciary include:

1. The undermining of institutionalized justice in Palestine as the Palestinian territory was reintroduced to duality in the judicial system. The judicial authority has split into two; one in the West Bank led by the High Judicial Council, and another in Gaza led by the High Council of Justice. The latter was established on July 20, 2007 and tasked by the deposed government to run the judiciary, undertaking appointments, promotions and other relevant procedures to manage and operate the judicial authority in the Gaza Strip.

Therefore, it is impossible to speak of one Palestinian judicial authority when the judicial body has actually split into two separate entities in the West Bank and the Gaza Strip.

2. The lack of implementation of and respect for court orders exhibited by the executive authority, the security apparatus in particular. Each party, the PNA and Hamas, refuses to enforce the judicial judgments and decisions made by the opposite party's courts.
3. Both parties' extension of military justice to include civilians and to exercise the powers of the regular judiciary with regards to many crimes, especially crimes of national security.
4. Both parties' lack of enforcement of court judgments conflicting with the wishes of their security apparatus. These security agencies abstained on numerous occasions from enforcing court orders, particularly those issued by the Supreme Court regarding the release of detainees.

5. The politicization of the judiciary as the security agencies in the West Bank prevent the appointment of any judge who is suspected to be affiliated with or ideologically close to Hamas. Likewise, the security agencies in the Gaza Strip prevent the appointment of judges who are not ideologically affiliated with Hamas.

The fact that the Legislative Council has been idle and has not been exercising its legislative role and oversight since the Palestinian split occurred has exacerbated the situation. The Legislative Council has been unable to convene since the split.

3. Impact of the Arab Spring on the Palestinian judiciary

The Palestinian situation has not been strongly affected by the Arab Spring for many reasons, including most importantly the Israeli occupation and the fact that the Palestinians have been busy with confronting the occupier's policies, measures and attempts to further the annexation of Jerusalem. The Palestinians have also been engrossed in the declaration of a state of Palestine and the Palestinian bid for membership in the United Nations. All formal and informal efforts have been directed towards supporting this bid, with the knowledge that ending occupation and liberating the Palestinian territories are the main concerns of all Palestinians.

On the other hand, the Arab Spring encouraged the Palestinian public to move strongly to urge both parties to end the split and reconcile with each other. Palestinians have intensified their calls for reconciliation as the solution that would eventually rectify the Palestinian situation. Whether in political parties or civil society organizations, Palestinians recognize that reconciliation will indirectly end many predicaments and violations undermining the rule of law, rights and freedoms during the split, given the fact that most of those violations have taken place due to the political split and will disappear when it is resolved.

4. Vision for judicial reforms

In spite of the Palestinian concern with the political situation, Palestinian civil society organizations have focused on the rule of law and the independence of the judiciary. The civil society movement supporting and advocating for the institutionalization and independence of the Palestinian judiciary has quietly risen since early 2010, when civil society organizations focused their efforts on demanding the reinstatement of the rule of law and the independence of the judiciary through:

1. The launch of an extensive campaign condemning the lack of respect for the independence of the judiciary as the security agencies refrained from enforcing court judgments. The campaign was eventually able to impose the enforcement of court judgments by all security agencies despite the latter's

attempt to circumvent this drive by applying a revolving door policy, i.e. the security agency would release a detainee in implementation of a court order but would immediately re-arrest that person on other charges after he was freed. Alternatively, one security agency would release a detainee in implementation of a court order just so another security agency could arrest that person.

2. The launch of structured campaigns by several Palestinian organizations to stop the encroachment of military justice onto civil justice powers. Eventually, the campaigns led the PNA to declare the end of trying civilians before military courts in mid-January 2011.
3. Demands to stop the security agencies' interference in judicial appointments.
4. Rejection of the executive authority's hegemony and interference in the work of the judiciary.
5. Rejection of quotas, as there is talk of an inclination by Fatah and Hamas to rearrange the Palestinian judiciary after the reconciliation on bases that honour the judicial positions created by Fatah and Hamas during the split. This would mean the re-politicization of the judiciary and its rebuilding on a partisan foundation, which civil society organizations reject and are working to thwart.

As such, concerned civil society organizations (the Palestinian Center for the Independence of the Judiciary and the Legal Profession - Musawa, Al-Haq Organization, the Palestinian Independent Commission, the Coalition for Integrity and Accountability - AMAN, Jerusalem Legal Aid and Human Rights Center, Al-Mezan Center for Human Rights) have focused on the independence of the Palestinian judiciary by devising a social vision for its reform based on the following considerations:

- The need to amend the Judicial Authority Law to ensure clarity of the powers vested in the various pillars of justice (High Judicial Council, Ministry of Justice, Public Prosecutor).
- The creation of a transitional high judicial council tasked with unifying the Palestinian judiciary, restructuring the judicial bodies, organizing courts and reviewing and assessing the judicial appointments and promotions that have taken place.
- Opening the membership of the Judicial Council to include, besides judges exclusively, representatives of civil society organizations seasoned in judicial affairs and renowned for their integrity and independence in order to ensure external participation and oversight as well as the transparency of the Council's performance.

- Abolishing life membership in the Judicial Council by periodically appointing or electing Council members and its president.
- Institutionalizing military justice by rebuilding the system of military justice legislation in a manner that delimits the jurisdiction of military courts in order to ensure the independence and sovereignty of regular courts.

Despite the presence of two bodies for Palestinian judges: the Palestinian Judges Association and the Palestinian Judges Club, they have not strongly intervened to defend the independence of the judiciary over the past years. As their role has been limited to social gatherings, their presence has not been felt on numerous occasions when they should have been involved. The same applies to the Palestinian Bar Association, which has intervened hesitantly in the face of executive authority hegemony and interference in the judicial authority.

Therefore, the effective and influential actors in this regard have been limited to the civil society organizations that have had a distinguished presence during the split and have even played a major role in halting the degeneration of the Palestinian judiciary and thwarting the attempt to implicate it in the split battle.

Challenges to civil society's vision for judicial reform

The principal challenges facing the implementation of the civil society vision for building an independent Palestinian judiciary lie in several impediments, notably:

- The continued political split, which will result in each party's attempting to maintain control over the Palestinian judiciary and in the reinforcement of the institutionalized duality of Palestinian judiciary.
- Achieving reconciliation based on partisan interests. If the splitting parties agree to reconcile in order to preserve their partisan gains, each party may attempt to impose its agenda, vision and interests concerning the Palestinian judiciary. Hence, that party would interact with justice based on a political vision and partisan interests that would inevitably lead to politicizing and transforming the judiciary into an administrative agency subject to the directives, supervision and wishes of political parties. Furthermore, the judicial establishment will become part of the political and partisan equation rather than an institution.

Building the judicial system and administering justice is undoubtedly a guarantor and protector of individuals' rights and freedoms and is a safeguard against the arbitrariness of the executive authority and against authorities' encroachment on each other's powers. The three authorities of the state (legislative, executive and judicial) and civil society must join ranks and adopt a philosophy of integration,

constructive partnership and mutual oversight in order to achieve this mission which constitutes the foundation for building a state of law, i.e. a state that enforces the law in its relations, decisions and actions.

Therefore, building an independent Palestinian judiciary requires concerted efforts from and collaboration between the various pillars of the Palestinian justice system:

1. The Palestinian judicial authority;
2. The legislative authority;
3. The executive authority and its agencies relevant to the justice system (prime minister, council of ministers, ministry of justice, ministry of the interior);
4. The Bar Association;
5. Civil society organizations.

Cooperation and coordination between these components, each with defined roles and responsibilities, will yield an independent Palestinian judiciary.

Despite the interest of the international community, including European Union institutions, in reforming judiciaries in general including the Palestinian judicial system, those institutions have been evidently keen on supporting the infrastructure of the Palestinian judiciary rather than supporting and enhancing its independence and intervening to encounter assaults targeting its sovereignty. The interventions of those institutions on some occasions, however, have not been serious enough.

5. Palestinian Civil Society's Vision for Judicial Reform

In order to advance the Palestinian Judicial Authority and enhance its independence, civil society organizations concerned with the independence of the judiciary (the Bar Association, Musawa, the Coalition for Accountability and Integrity - AMAN,²⁵ Al-Haq Organization, the Palestinian Center for Legal Assistance, and the Palestinian Independent Commission for Human Rights) agreed on the need to participate in drafting a clear societal vision for the role, powers and functions of the pillars of justice (Public Prosecutor's Office, Ministry of Justice, and the Palestinian Judicial Authority). After the draft vision has been fully discussed and adopted by the participating organizations, it will be presented before the Palestinian civil society for discussion and adoption as an action plan and program towards advancing and reforming the Palestinian justice system.

The motivation behind this initiative stems from participants' conviction that it is difficult for official justice institutions in Palestine (the Judicial Council, the Ministry of Justice, and the Public Prosecutor's Office) to draft a joint vision because of their

²⁵ The Coalition for Accountability and Integrity comprises the Palestinian Initiative for the Promotion of Global Dialogue and Democracy (Miftah), the Arab Thought Forum, the Palestinian Institute for the Study of Democracy (Muwatin), Al-Mezan Center for Human Rights, and the Palestine Trade Center (Paltrade).

heated disagreements and conflicts regarding the roles and powers of each party. Therefore, civil society, as a neutral party eager to build and consolidate the justice system, envisaged the need to intervene and set a vision for the requirements for consolidating the Palestinian judiciary and other components of the justice system.

The vision to reform the justice system in Palestine is founded on several themes, chiefly:

- Emphasize the need for an independent judiciary as an ultimate constitutional, legal and national value and a vital means to access and administer justice, maintain the principle of the rule of law and protect freedoms and rights. The independence of the judiciary should not be realized by derogating from other crucial values such as transparency, accountability, competence and professionalism but rather by creating a balance between these values that complement each other.
- Reconsider the standards and criteria for selecting members of the High Judicial Council (HJC); forming committees, departments and units and determining their subordination and the relationships between them; defining the functions and powers of the HJC and its president and the relationship between them and setting the mechanism for the issuance of decisions by the HJC, the committees and departments in order to avoid subjectivity and respect the institutional composition and performance of the HJC.
- Abolish the appointment of the position of the HJC president and adopt a mechanism to regularly elect a president in order to circumvent hegemony and autocracy and enhance the Council's role in promoting accountability and change.
- Form and empower an interim high judicial council to restructure the judicial bodies, organize the judiciary and the courts as well as review and assess the judicial appointments and promotions that have taken place.
- Open HJC membership to include in the interim and later the permanent Council members from outside the judiciary seasoned in judicial affairs and renowned for their integrity and independence in order to ensure external participation and oversight as well as the transparency of the Council's performance.
- Establish a mechanism to hold the HJC president accountable for his performance by subjecting the president to Legislative Council oversight and defining the length of the HJC presidency term following other comparative examples. Establish a mechanism to hold the Chief Justice of the Supreme Court accountable by means of judicial inspection after revoking the unjustified exemption of Supreme Court judges from judicial inspection and

amending the composition of the Judicial Inspection Department contained in the Judicial Authority Law. Unwarranted immunities set forth in the Judicial Authority Law affect the efficiency and effectiveness of performance. The law must apply to everyone without exception.

- Open a private account for the judicial establishment and another for the Public Prosecutor's Office at the Ministry of Finance in order to facilitate the provision of their needs without prejudice to their independence or subjecting the judiciary to donor influences. The accounts will help the judicial establishment and the Public Prosecutor's Office utilize donor grants and funds to fulfill their needs and develop their capacities. The executive authority shall be responsible for establishing relations and negotiating with donors, whereas the accounts must be supervised by the competent authorities.
- Resolve the issue concerning the subordination of the Public Prosecutor's Office by reiterating that prosecutors, in the exercise of their functions as initiators of public interest litigation, report to the Chief Public Prosecutor in his capacity as the high authority commissioned with initiating public interest litigation. Meanwhile, prosecutors and administrative staff at the Public Prosecutor's Office shall report administratively to their superiors first, then to the Chief Public Prosecutor and then to the Minister of Justice in his capacity as the high authority in the chain of command. This shall ensure transparency and accountability.
- Set forth clear mechanisms for appointments to the Public Prosecutor's Office, and task the appointments committee with submitting its recommendations to the Chief Public Prosecutor who shall in turn recommend the appointments to the Minister of Justice for endorsement within a period of time defined by the law. The Minister's powers with regard to appointments shall be limited to investigating the validity of the Chief Public Prosecutor's recommendation and issuing his reasoned endorsement or rejection of that recommendation in writing. Should that period elapse without the issuance of a reasoned written endorsement or rejection, the appointment shall be considered effective by law.
- Reconsider Article 43 of the Judicial Authority Law, which states that judges, with the exception of Supreme Court judges, shall be subject to judicial inspection at least once every two years. The exemption of Supreme Court judges from judicial inspection is not justified. Such unwarranted immunity affects the efficiency and effectiveness of their performance and is inconsistent with the principle of the rule of law. Moreover, the two-year period specified under this article is too long and should be reconsidered. The law must also provide for announced and surprise periodical inspection rounds and requires that inspection reports including performance indicators be published, especially since the Judicial Inspection Regulations made periodical inspection mandatory while surprise inspection was left as discretionary.

- Work towards maintaining the Judicial Inspection Department (evaluation and promotion) for judges independent from a department for the inspection of prosecutors (evaluation and promotion), and create the latter department under the Judicial Authority Law. This division is necessitated by the differing nature of the activities carried out by judges and prosecutors. The division will further judges and prosecutors' efficiency, effectiveness and level of specialization in their respective fields of work, which will ultimately have a positive effect on their independence and confidence in the quality of their performance.
- Reconsider the Judicial Authority Law, particularly those provisions governing the relationship between the pillars of justice (the Judicial Authority, the Public Prosecutor's Office, and the Ministry of Justice), so as to precisely define the powers and jurisdiction specific to each side and eliminate the vagueness and contradictions in the current provisions that led each side to discretionarily interpret the law and deduct its respective role and powers.
- Institutionalize military justice by drafting clear legislation that delimits its powers and jurisdiction and also empower regular courts to supervise the decisions and rulings issued by their military counterparts.

Annex

List of participants in alphabetical order according to their countries

NAME	ORGANISATION - PROFESSION	COUNTRY
Nour-Eddine Benissad	Algerian League for the defence of Human Rights- Ligue Algerienne la Defence Droits de l'Homme	Algeria
Annali Kristiansen	Danish Institute for Human Rights	Denmark
Ashraf Hussein	Justice WG coordinator- EMHRN	Denmark
Marc Shede-poulsen	Executive Director of EMHRN	Denmark
Gamal Eid	Arab Network for Human Rights	Egypt
Karim Alchazli	Jurist and Scholar	Egypt
Mohamed Al-ansari	Cairo Institute for Human Rights	Egypt
Naser Amin	Arab Center for Independence of Judiciaries	Egypt
Hourquebie Fabrice	International Organisation for the Francophone	France
Martine Ansette	International Organisation for the Francophone	France

NAME	ORGANISATION - PROFESSION	COUNTRY
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Faras Aazer	Lawyer and Legal expert	Jordan
Pascale Baritos	Restart: Center for rehabilitation of victims of violence and torture	Lebanon
Nazek el khatib	Judge from Lebanon	Lebanon
Nizar Saghieh	Lawyer and Legal expert	Lebanon
Samer Ghamroun	Legal Researcher	Lebanon
Saadeddine Shatila	Al- Karama- Beirut Office	Lebanon
Abdel Fatah Milad Ibrahim	Libyan prosecutor	Libya
El-Wesh, Tareg	Libyan prosecutor	Libya
Marwan Tashani	Judge from Libya	Libya
Abdelaziz Nouaydi	Professor of Law and Lawyer with the Rabat Bar Association and a founding President of the Association Adalah	Morocco

NAME	ORGANISATION - PROFESSION	COUNTRY
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Amina Bouayach	Director of Moroccan Organization for Human Rights	Morocco
Ahmed Abdellatif Boumas	IMDH	Morocco
Ahmed El Mouisseau	Lawyer- Advocatgeneral	Morocco
Allod Hassan	member of LRIDDH	Morocco
El bousachi Selim	ADFM	Morocco
Tarek Sbai Mohamed	INPBPM	Morocco
Driss Najim	Conseiller Minstermaroc justice	Morocco
Tass Rachid	AMDH	Morocco
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Chouviah	OMDH	Morocco
Gharrari Sofia	IMDH	Morocco

NAME	ORGANISATION - PROFESSION	COUNTRY
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Brahim Elansari	Human Rights Watch	Morocco- NY
Dawood Daraawi	Lawyer, Ministry of Justice, Palestine	Palestine
Emaan Nasr El din Abuhijleh	Judge from Palestine	Palestine
Gassan Abdallah	Palestinian Center for Human Rights	Palestine
Hussein Abu Hussein	Adalah Center for Human Rights, Palestine	Palestine
Nasser Al-Rayess	Al Haq Center for Human Rights	Palestine
Ibrahim Bargouthi	Executive Director, The Palestinian Center for Independence of Judiciary and the Legal Profession Musawa	Palestine
Emilio Gines	Chairman Federation of Associations for the Defence and the Promotion of Human Rights	Spain
Benarbia, Said	ICJ (international Commission of Jurists)	Switzerland
Carin Benninger-Budel	World Organisation Against Torture OMCT	Switzerland
Nael Georges	Jurist University of Geneva	Switzerland - Syria
Muhanad Al Hassani	President of Syrian Organization for Human Rights - Swasia- Founding of the coalition for the defenders of Syria	Syria

NAME	ORGANISATION - PROFESSION	COUNTRY
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Ayachi El Hammami	Lawyer and Human rights activist	Tunisia
Kelthoum KENNOU	Association des Magistrats Tunisiens- Association of Tunisian Magistrates	Tunisia
Mokhtar Trifi	Tunisian League for the Defence of Human Rights	Tunisia
Sharaf El din	Lawyer from Tunisia	Tunisia
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Syed Ahmed	Solicitors International Human Rights Group (SIHRG)	UK

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