



# **The State of the Judiciary in Some Arab Countries**

## **Regional Report**

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## **Regional Comparative Report on The State of the Judiciary in Some of the Arab Countries**

### **Introduction**

The first recommendation from Imam Ali to Malik Bin Al-Ashtar Al-Nakha'i when he made him the ruler of Egypt was *"choose for your judiciary the best from among your subjects..."*.

The judiciary was, and still is, a power that is founded on the principle of supplementing the power of the legislator and giving it prominence and application. And it was not just that, but even at times throughout history it assumed, in addition to its being a judge among people by applying the law, a function which was part of the legislative branch, as was the status of the Roman Judge Préteur who got to the point and authority where he himself laid the laws and regulations.

The rapid progress in life and the expansion in the various areas thereof as well as the diversity of its problems have increased the seriousness of the judicial function, i.e. they have forced upon the judge to exercise some legislative power – albeit the principle of separation of powers does not grant him this authority – by having to interpret the laws, fill their deficiencies, and derive rules and applications that are not provided for in the applied positive laws. He must do so in order to find the appropriate solutions for the new developments that have no precedent in law or interpretation.

The reform of the judiciary remains a major dilemma because of its impact on the rights of individuals and groups. A good judiciary cannot be good except through the goodness of those who watch over it and its affairs, and their awareness of the necessity that judges be endowed with mind, wisdom, knowledge and integrity and to find the adequate material and moral means to insure these principles, by establishing the judge's authority on the basis of his financial and professional independence and affording him the modern means to enhance his knowledge and develop his mental faculties, in addition to securing the means necessary to provide people unobstructed access to justice and an appropriate and effective execution of judgments.<sup>2</sup>

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<sup>2</sup> - Regional Best Practices: Enforcement of Court Judgements, Lessons Learned from Latin America, April 2004, by Keith Henderson, Angana Shah, Sandra Elena, Violaine Autheman, Editor Keith Henderson, IFES.

"The judiciary is an independent power by virtue of the principle of separation of powers, equal to the two executive and legislative branches. If the legislative branch is the one that makes the law and the executive branch is the one that enforces it, then the judicial branch, as an independent body, is the one that interprets and applies the law. The independence of the judiciary means its independence financially, administratively and juristically, and the criminalization of any interference in its affairs, including the independence of the judge as an individual when carrying out his duty... and there shall be no authority over judges but the law..."

"... the Judicial Branch is the courts and judges, and above them the Supreme Court of the Republic which is constitutionally entrusted with the exercise of review over the courts and judges and review of the constitutionality of laws, regulations, statutes and decisions issued by the other branches..."

**Opinion of "The Charter" .. A Judiciary that Wins the Respect and Confidence of the Citizenry. Dated 25/10/2004**

The judiciary has two concepts that seem to be contradictory. The first considers the judiciary a constitutional power among the other legislative and executive powers. It was given a specific function, which is the application and interpretation of the laws that are enacted by the legislative branch without giving the judge any right to render his judgments in the form of statutes, as the Roman Judge Préteur used to do. The second considers the judiciary a job and not a power due to the historical domination of the procedural power over the other powers in general and over the judicial power in particular.

"...whereas another side of jurisprudence gave the judiciary the power to review the constitutionality of laws, although the Constitution did not organize this review. We see that this opinion is the preponderant one because the soundness of its argument and the rationale behind its results and its guarantee of some review authority over the work of the legislative branch. When the judiciary is hearing a dispute, it searches for the legal rule to be applied to the dispute within the entirety of the legal system of the State, beginning with the organic law, which is the Constitution, and then moving down to the lowest stone of the legal pyramid of the State. Therefore, if he finds a conflict between a lower stone and a higher one, he dismisses the lower and applies the higher. If he finds in the law to be applied any violation of the Constitution, he must dismiss the rule that is in violation of the Constitution and adjudicate based on the constitutional rule as being the higher rung. All of this goes straight to the heart of the judge's work considering the judiciary is the authority on the interpretation of the law and on its work on all disputes brought before it. The first and most important of these laws is the highest of all which is the Constitution..."

Judge Rahim Hasan Al-Okaili, Review of the Constitutionality of Laws. The *Al-Sabah Al-Jadid* Journal. <http://www.newsabah.com>

However, most of the States that tested the principle of multiplicity of powers and the conflict and separation among them, have developed the two concepts to perfection. They have made the judiciary an independent constitutional power that performs one of the most exalted functions in the State and society, which is to establish the concept of justice by revealing, proving and establishing the truth. This guarantees the security and reassurance of the individual and society with all the economic implications thereof, in addition to pointing out the effective impact of a fair judiciary on encouraging investment and the prosperity and growth of economic activity through the safeguards that it provides investors.

A fair, good and competent judiciary was, and remains to be, the pursuit of all regimes and States however different they are in their capabilities and readiness to grant the judiciary the competence or independence. New societies have become aware of the need to elevate the judiciary to the level of being a real effective power, and secure the qualified talent, financial and moral resources and work tools that it needs. This will undoubtedly achieve the humanitarian and economic development of these societies, avoid having to resort to alternative justice, and rise to the level of safe and effective economic investment.

"No democratic country will be able to preserve its democracy without the commitment to impose the rule of law, which is made applicable, is enforced and enjoys protection by a judiciary that enjoys independence and credibility.

The need for reform is clear as a bell... investors will not come with their investments to a country that does not have guaranteed and reliable standards of judicial procedure. In order to attract these investors, the State must provide an acceptable degree of confidence and certainty in a judiciary able to administer justice within a reasonable timeframe.

<http://www.cipe-egypt.org/files/html/art0705.htm>

In the first section, we will present a brief review of the structure of the judicial body in the countries covered in this report. They are as follows:

***Lebanon, Jordan, Egypt, Yemen, Bahrain, Kuwait, Dubai, Morocco, Algeria and Tunisia.***

And we will show in the chapters of this section the structure of the judicial body and the administration of justice, then the independence of the judiciary and the state of affairs of judges.

Thereafter, we will move to a second section to review the development and reform plans that were put in place in these countries, whether implemented or not, and review the extent of success of, or difficulty in, their application and the reform plans that are either pending implementation or still pending preparation and research.

➤ **SECTION ONE: ORGANIZATION OF THE JUDICIARY**

➤ **SECTION TWO: REFORM PLANS AND THE HORIZONS FOR DEVELOPMENT**



Most of the regimes of the concerned States consider the judiciary an independent branch of government<sup>3</sup>, alongside the legislative and executive branches. In some of them the constitutions provided for this independence, and thus the judiciary became established as a branch of government by constitutional text; while others went a step further where their constitutions set forth the different types of courts, such as the Algerian and Tunisian constitutions, which provided for the duplicity of judicial institutions, i.e. the ordinary courts and administrative courts. As for the Yemeni constitution, it went even further when it prohibited exceptional courts.

All of these countries adopted the principle of a judiciary that is independent of the branches of government, despite the disparity of this separation of powers in the provisions in the practical sense, and in the application from one country to another, as will be demonstrated in another section of this report.

It should be noted that some of these constitutions, such as the Jordanian and Kuwaiti, guarantee the independence of judges in rendering their judgments, as they are not subject to any authority but the law. Moreover, they guarantee the safeguards granted to judges and the provisions for their irremovability.

However, the independence of the judiciary and judges varies from one country to another in the practical sense, when measured against the prevailing political, economic and social realities. However, it is necessary to remember that all the concerned countries are sincerely looking to apply recognized international standards to their judicial organizations.

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<sup>3</sup> - Independence of the Judiciary in the Arab World. A paper presented to the UNDP's Governance Programme in the Arab World, prepared by Dr. Adel Omar Sherif, President of the Commissioners' Body at the Supreme Constitutional Court in Egypt and Dr. Nathan J. Brown, Professor of Political Science and International Affairs, George Washington University.  
- Independence of the Judiciary. 2<sup>nd</sup> Edition 1999. The Arab Publications Center – Al-Mu'allif Publishing, Farouk Al-Kilani.  
- Reform of the Judiciary and Independence of the Judicial Branch: Italy's Experiment. Giacomo Uberto, March 2004.

### **Independence of the Judiciary**

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

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

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

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

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

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

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

**Basic Principles on the Independence of the Judiciary**<sup>3</sup>, 1985 (UN),  
[http://www.unhchr.ch/html/menu3/b/h\\_copm50.htm](http://www.unhchr.ch/html/menu3/b/h_copm50.htm)

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<sup>3</sup> - Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

























































































