

Part II

Reinforcing Freedom and Establishing Good Governance

Section 3: The Societal Context of Freedom and Governance

This section aims at explaining the deficit in freedom and good governance in Arab countries at present through an analysis of the determinants of the state of freedom and governance covering the institutional (legal and political) structure and the societal context, including the external environment.



The Legal Architecture

Introduction

Among the institutional prerequisites of freedom and good governance, respect for the fair enforcement of a legal structure that protects liberties takes decisive precedence. An analysis of the legal structure of freedom and governance is therefore key in explaining the current deterioration in the status of freedom and governance in Arab countries. Chapter Four traces and illustrates the origins of restrictions on freedom that are embedded in the legal provisions of constitutions, and which impact the autonomy of legal institutions.

This chapter explores two basic questions: What are the salient features of Arab legislation on public freedoms and human rights? What key variations exist between different legal standards?

The concept of freedoms and rights applied here is that of the various human rights instruments, including the UDHR, the ICCPR, the ICESCR and numerous conventions and declarations relating to different human rights. In discussing Arab legal systems, we shall examine different levels of legislation beginning with international rules by which the Arab states are bound, followed by the rules of constitutional law, ordinary legislation, regulatory rules and finally the practices of various State authorities, in particular the executive.

THE INSTITUTIONAL ARCHITECTURE OF FREEDOM AND GOVERNANCE

Two sets of discrepancies commonly mar Arab legislation concerned with different levels of freedom and human rights. The first set re-

flects a gap between international norms and national constitutions and one between those national constitutions and national laws. The second set reflects a breach between international norms, national constitutions and national laws on the one side, and actual practice on the other.

By no means all of the international human rights commitments of Arab states are incorporated in domestic legislation or applied in practice. Some Arab regimes seek to exonerate themselves on the international stage and to conceal violations of citizens' rights by embracing international human rights standards and signing the appropriate treaties. In addition, many Arab constitutions contain safeguards for citizens' freedoms and fundamental rights, which are rarely fully reflected in ordinary legislation. Finally, many safeguards prescribed by ordinary legislation may not be respected in practice and are violated in the absence of any legal sanction or effective monitoring mechanisms. This is discussed in detail below.

ARAB STATES AND INTERNATIONAL HUMAN RIGHTS STANDARDS

Arab states are bound by a number of the principal international human rights instruments, some having ratified or signed two such key instruments, namely the ICCPR and the ICESCR. The United Arab Emirates, Bahrain, Saudi Arabia, Oman and Qatar, however, have ratified neither, and the First Optional Protocol to the first Covenant¹, providing additional rights for individuals, has been signed only by Algeria, Djibouti, Somalia and Libya. The majority of Arab states have ratified the CAT, apart from the United Arab Emirates, Syria,

Some Arab regimes seek to exonerate themselves on the international stage and to conceal violations of citizens' rights by embracing international human rights standards.

¹ The Protocols to human rights treaties are important in that they provide effective mechanisms to monitor human rights violations within the State, enabling individual victims to submit complaints of violations committed by the State directly to the specialized Committee.

Most Arab states have shown no interest in acceding to international conventions relating to union rights and freedoms.

Iraq, Mauritania and the Sudan, which has, however, signed it. Neither the Sudan, Somalia, Oman nor Qatar has signed the CEDAW. No Arab State has signed its Optional Protocol. Only Jordan and Djibouti have ratified the Statute of the International Criminal Court, although nine states have signed it, table 4-1.

By and large, Arab states have paid scant regard to International Labour Organization (ILO) conventions relating to trade unions, the freedom of trade union organization and the protection of trade union rights, other than in a few cases, and then mostly in connection with a limited number of conventions. Arab states seem content to ratify certain international human rights treaties, but do not go so far as to recognize the role of international mechanisms in making human rights effective.

The proof lies in their position towards the rights enshrined in the ICCPR. While most have ratified the Covenant, they have not ratified its first Optional Protocol. This impedes the work of the Human Rights Committee established under the Covenant, as it is thus confined to considering the official reports of states on their implementation of the Covenant's provisions and has no opportunity to receive complaints of violations from citizens, whether directly or through non-governmental organizations (NGOs), when rights are violated by an Arab state which has not ratified the Protocol. Furthermore, most Arab states have shown no interest in acceding to the international conventions relating to union rights and freedoms.

TABLE 4-1
Status of Ratifications of the Principal International Human Rights Treaties, January 2005

Country	International Covenant on Economic, Social and Cultural Rights (CESCR)	International Covenant on Civil and Political Rights (CCPR)	Optional Protocol to the International Covenant on Civil and Political Rights (CCPR-OP1)	Second Optional Protocol to the International Covenant on Civil and Political Rights (CCPR-OP2)	International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP)	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT-OP)	Convention on the Rights of the Child (CRC)	Optional Protocol to the Convention on the Rights of the Child - the involvement of children in armed conflict (CRC-OP-AC)	Optional Protocol to the Convention on the Rights of the Child - the sale of children, child prostitution and child pornography (CRC-OP-SC)	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC)
Algeria	12 Sep 89*	12 Sep 89	12 Sep 89*		14 Feb 72	22 May 96*		12 Sep 89		16 Apr 93			
Bahrain					27 Mar 90*	18 Jun 02*		06 Mar 98*		13 Feb 92*	21 Sep 04*	21 Sep 04*	
Comoros					27 Sep 04**	31 Oct 94*		22 Sep 00**		22 Jun 93			22 Sep 00**
Djibouti	05 Nov 02*	05 Nov 02*	05 Nov 02*	05 Nov 02*		02 Dec 98*		05 Nov 02*		06 Dec 90			
Egypt	14 Jan 82	14 Jan 82			01 May 67	18 Sep 81		25 Jun 86*		06 Jul 90		12 Jul 02*	19 Feb 93*
Iraq	25 Jan 71	25 Jan 71			14 Jan 70	13 Aug 86*				15 Jun 94			
Jordan	28 May 75	28 May 75			30 May 74	01 Jul 92		13 Nov 91*		24 May 91	06 Sep 00**	06 Sep 00**	
Kuwait	21 May 96*	21 May 96*			15 Oct 68*	02 Sep 94*		08 Mar 96*		21 Oct 91	26 Aug 04*	26 Aug 04*	
Lebanon	03 Nov 72*	03 Nov 72*			12 Nov 71*	21 Apr 97*		05 Oct 00*		14 May 91	11 Feb 02*	10 Oct 01	
Libya	15 May 70*	15 May 70*	16 May 89*		03 Jul 68*	16 May 89*	18 Jun 04*	16 May 89*		15 Apr 93*	29 Oct 04*	18 Jun 04*	18 Jun 04*
Mauritania	17 Nov 04*				13 Dec 88	10 May 01*		17 Nov 04*		16 May 91			
Morocco	03 May 79	03 May 79			18 Dec 70	21 Jun 93*		21 Jun 93		21 Jun 93	22 May 02	02 Oct 01	21 Jun 93
Oman					02 Jan 03*					09 Dec 96*	17 Sep 04*	17 Sep 04*	
Qatar					21 Aug 76a			10 Feb 00a		03 May 95	25 Aug 02a	18 Jan 02a	
Saudi Arabia					23 Sep 97*	07 Sep 00		22 May 02*		26 Jun 96*			
Somalia	24 Jan 90*	24 Jan 90*	24 Jan 90*		26 Aug 75			24 Jan 90*		09 May 02**			
Sudan	18 Mar 86*	18 Mar 76*			21 Mar 77*			04 Jun 86**		03 Aug 90	09 May 02*	02 Nov 04*	
Syria	21 Apr 69*	21 Apr 69*			21 Apr 69*	28 Mar 03*		19 Aug 04		15 Jul 93	17 Oct 03	15 May 03	
Tunisia	18 Mar 69	18 Mar 69			13 Jan 67	20 Sep 85		23 Sep 88		30 Jun 92	02 Jan 03	13 Sep 02	
UAE					20 Jun 74*	06 Oct 04*				03 Jan 97*			
Yemen	09 Feb 87*	09 Feb 87*			18 Oct 72*	30 May 84*		05 Nov 91*		01 May 91		15 Dec 04	

Notes:
The dates listed refer to the date of ratification, unless followed by: "*" signifies accession, "***" signifies signature only.
Source: (Office of the United Nations High Commissioner For Human Rights).

LEGISLATIVE REGULATION OF FREEDOMS IN ARAB CONSTITUTIONS

LAW AND JUSTICE, PUBLIC ORDER AND NATIONAL SECURITY AS EXCUSES TO LIMIT FREEDOM

People do not allow legislators to pass whatever laws they please, especially laws contradicting freedom, unless they live under a harsh or despotic governance regime. Indeed, justice, as a standard for evaluating legislation, occupies a clear and important place in public affairs and has been the subject of considerable philosophical, religious, moral and legal discussion down the ages.

The standards and instruments of justice and freedom, as enshrined in the international legal and human rights system, have evolved from the laborious endeavours of humanity to develop a normative framework that controls the national legislator. The latter is not at liberty to bend the law to serve autocrats and violate human rights and public freedoms. Right is always above the legislative authority.

Nevertheless, many national legal systems twist various concepts to circumvent freedom and justice. These systems often invoke higher national considerations, which are held up as sacrosanct even if they affect the rights and freedoms of the public and individuals. Both the concept of public order and that of national security lend themselves to abuse, if interpreted wilfully. Invoking public order, the State can limit civil and commercial freedoms. By citing national security, it can justify any action it wishes, even those that infringe individual freedoms.

OVERVIEW OF ARAB CONSTITUTIONS

The move to adopt constitutions as high-level legal instruments to which all state authorities are subject and by which state legislation is governed has extended to all Arab countries, though some such as Saudi Arabia (1992), and

Oman (1996) were slower to do so. All provide for the protection of public freedoms and human rights. Measures taken to include certain rights and freedoms in constitutions and harmonize them with relevant international instruments are a welcome development, but more important is that they should be safeguarded in ordinary legislation, together with the conditions that secure them in actual practice.

Arab constitutions generally regard the people as the source and holder of sovereignty, apart from the Constitutions of Kuwait, Jordan and Morocco, which employ the term “nation”, which requires extending the circle of participation and strengthening accountability and oversight. Popular sovereignty theoretically increases opportunities for the people to have a say in the management of public affairs.

Arab constitutions refer to the principle of equal rights and public duties before the law and to the protection and assurance of fundamental rights and freedoms. The substance of those rights, however, varies along with the scope of freedom and protection in accordance with each state’s cultural and liberal heritage, the extent to which it adopts the principles of democracy and civil and political freedoms, and the overall religious or secular influence on the state’s system of governance. The provision for freedoms in national constitutions is an essential stage in the ascent of freedom to the point where it is constitutionally regulated, the constitution being the primary legal instrument in the hierarchy of legal rules.

Arab constitutions commonly prioritize rights and freedoms, placing them after the preamble and the initial section on fundamental provisions and principles. Some countries, however, have gone further and, have explicitly declared their commitment to the rights contained in international instruments, as decreed in article 5 of the Constitution of Yemen and the preamble to the Constitution of Morocco.

FREEDOM OF OPINION AND EXPRESSION

Many Arab constitutions² include special provisions on freedom of thought, opinion and

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² The Constitutions of Tunisia (article 8), Algeria (article 30), Morocco (section 9), the Sudan (section 1), Jordan (article 15), Kuwait (article 36), Yemen (article 26), Mauritania (article 10), the United Arab Emirates (article 30), Egypt (article 47), Bahrain (article 23) and Lebanon (article 13).

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belief, varying from concise to detailed references, according to the general style of the constitution itself. Few constitutions contain no reference to freedom of thought and opinion, although the Interim Constitution of Qatar, (article 13) simply states: "Freedom of publication and the press is guaranteed in accordance with the law." The Saudi Arabian Basic Law adopts an extremely conservative approach to freedom of opinion and expression, stipulating, in article 39, that the information and publishing media, as well as all other means of expression, shall employ courteous language and comply with state regulations.

FREEDOM TO FORM ASSOCIATIONS AND FREEDOM OF PEACEFUL ASSEMBLY

Arab constitutions contain special provisions on freedom of peaceful assembly, association and affiliation. The overall concept of association also includes political associations (parties) and professional associations (unions).

The right to form and join associations is essential to the exercise of freedom of opinion and expression, as well as to other freedoms and rights which people sharing the same opinions or interests cannot fully exercise without joint efforts. A study of the relevant Arab constitutional texts, however, reveals discrepancies between the provisions which encompass those rights; some constitutions provide for the right of association, without mentioning parties or trade unions, as in article 33 of the Constitution of the United Arab Emirates. Others elaborate in more detail on the freedom to form associations and unions but remain silent about the freedom to form political parties, as in article 27 of the Constitution of Bahrain.

Arab constitutions assign regulation of the right of association to ordinary legislation, which tends to restrict the right under the guise

of regulation.

The constitution may also stipulate numerous restrictions on the right of association in order to safeguard national security or national unity. The Egyptian Constitution thus recognizes citizens' right to form associations in the manner prescribed by law and prohibits the establishment of associations that are inimical to the order of society, secret or military in nature. The Tunisian Constitution guarantees the freedom to establish associations, provided it is exercised as regulated by law, and also recognizes trade union rights. The Syrian Constitution guarantees citizens' right of association and peaceful demonstration within the framework of its principles, provided that the exercise of that right is regulated by law. The Bahraini Constitution provides that: "The freedom to form associations and trade unions on national principles, for legitimate objectives and by peaceful means, is guaranteed in accordance with the terms and conditions prescribed by law, provided that the foundation of religion and public order is not undermined..." Other Arab constitutions, however, make no provision for the right to form associations (and trade unions), despite providing for most political freedoms, as in the Constitutions of Oman, Qatar and Saudi Arabia.

FREEDOM TO FORM POLITICAL PARTIES

The right to form political parties is permitted in 14 Arab countries. Libya and the member states of the Gulf Cooperation Council (Saudi Arabia, the United Arab Emirates, Qatar, Bahrain, Kuwait and Oman) prohibit the formation of political parties. Some states, which, for many decades, adhered to the one-party system have moved towards establishing the multiparty system in their constitutions. While this is an advance towards democracy and pluralism, it is hampered by lingering traces from the restrictive one-party phase, which detract from these constitutions.

Some regimes, forced to abandon the one-party system for pluralism at the end of the 1980s, also took care to place restrictions on the exercise of such freedoms, with the result that pluralism was in fact a continuation of the

BOX 4-1

The right to form political parties

Setting up a political party is not fundamentally contingent on a permit being issued by the [executive] authority when and as it wishes and withdrawing the permit when the party falls from favour. It is a fundamental right deriving directly from the Constitution and other legal texts defining the conditions. In this re-

spect the law has no function other than to regulate the exercise of this right and to provide it with the necessary elements and conditions.

Extract from the Administrative Court judgement in Case no 115, judicial year 38, New Wafd Party v. the Government, Egypt.

one-party system, as in Tunisia after 7 November 1987. In some constitutions, moreover, the provisions relating to pluralism were ambiguous and open to interpretation, as in the Permanent Constitution of Egypt of 1971. Although amendments made in 1980 to article 5 stipulated that “the political system in the Arab Republic of Egypt shall be established on a multiparty basis”, the Constitution continued to refer to the coalition of the people’s work force, representing the theoretical basis of the sole political organization (the Arab Socialist Union). This type of constitutional ambiguity is clearly attributable to the changes that occurred in the political and economic spheres, but with no accompanying amendment of constitutional values to reflect those changes. Certain constitutional provisions therefore fail to reflect the current reality.

THE HUMAN RIGHT TO LITIGATION AND THE PRINCIPLE OF THE INDEPENDENCE OF THE JUDICIARY

The international perspective and the Arab constitutional reality

Heading the list of civil rights is the human right to litigation, together with the associated guarantee of the independence of the judiciary and assurance of the necessary procedural safeguards that secure the right to a fair trial, in accordance with articles 8 and 10 of the UDHR. (Annex 3)

Similarly, article 14 of the ICCPR sets out in some detail the elements of the human right to litigation and the safeguards of that right in terms of the principle of equality before courts and tribunals, the right to a public hearing, the impartiality and independence of the judiciary, the right of defence and legal assistance, presumption of innocence and other principles required to make the right to fair trial operative.

Fair trial safeguards can generally be divided into three closely related and interdependent categories: institutional safeguards embodied in the principle of the independence of the judiciary, procedural safeguards set down in a body of procedural principles essential to protect the rights of litigants and the fairness of

trial, and objective safeguards embodied in the requirement to respect a number of objective principles during trial.

Recognizing that the independence of the judiciary is an important institutional safeguard to protect freedom, the international community has devoted considerable attention to the principle. The 1983 World Conference on the Independence of Justice, in Montreal produced the Universal Declaration of the Independence of Justice, which sets out detailed requirements for the independence of the judiciary. The most important elements include that judges shall be free to decide matters impartially in accordance with their assessment of the facts and their understanding of the law without any restrictions, pressures, threats or interference, direct or indirect, from any quarter; and the judiciary shall be independent of the executive and the legislature.

The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan, 1985) also adopted the Basic Principles on the Independence of the Judiciary and called for them to be implemented at the national and regional levels. These Principles are similar to those of the Montreal Declaration, most importantly the principle that the judiciary shall have exclusive authority to decide whether a case submitted for its decision is within its jurisdiction as defined by law. The fifth principle also provides that everyone shall have the right to be tried by ordinary courts or tribunals using fair legal procedures and that no tribunals shall be created that do not apply the duly established procedures of the legal process. The seventh principle calls for the provision of adequate resources to enable the judiciary to properly perform its functions.

Principles guaranteeing the independence of the judiciary can generally be divided into those relating to the independence of the judicial authority and those relating to judges as individuals. As an independent authority, the judiciary’s affairs are managed by a supreme council composed of judges, which has exclusive authority over all matters relating to the budget, determining judges’ remuneration, the appointment, discipline and transfer of judges, allocation of work and all other matters relating to the administration of justice, without

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interference from the executive. The judicial authority is embodied in the natural judiciary, which alone has jurisdiction to examine lawsuits. Consequently, no form of exceptional judiciary that displaces the jurisdiction belonging to the judiciary can be created.

Judges as individuals are independent in discharging their duties, which may under no circumstances be subject to any form of interference or influence. They may not be intimidated by punishment or induced by reward to settle disputes in a certain manner. Consequently, judicial office may not be combined with any executive and political office, to ensure that judges are removed from any context of partiality and bias. Judges cannot be dismissed for reasons other than disciplinary; additional safeguards are as indicated above.

The independence of the judiciary should not be seen as an end in itself. It is a prerequisite for ensuring the right to fair trial, a right that obtains in no other way, even if other conditions for a fair trial are satisfied.

Procedural safeguards for the right to fair trial can be summed up in a number of principles: there shall be no criminal punishment unless a final judgement is rendered by a properly constituted judicial court; crime and punishment are personal; trials shall be conducted without undue delay; no one may be tried or punished twice for the same act; trials shall be heard in public; the principle of oral proceedings and the right of litigants to attend trial proceedings (the principle of appearing in person); trial proceedings shall be recorded; and shall be restricted by the boundaries of the case, whether in terms of the persons concerned or its subject matter; the right to appeal against judgements before a higher court; and the principle that the appellant shall not be prejudiced by her/his appeal.

The most important objective principles guaranteeing the right to a fair trial, include: presumption of innocence, or, in other words, innocence as the rule; there shall be no crime and no punishment other than in accordance with a pre-existing law (nullum crimen, nulla

poena sine lege) that clearly and unquestionably covers the conduct which is the subject of the criminal offence; penal law shall be non-retroactive; the right of the accused to application of the most appropriate law; freedom of defence and the guaranteed right to defence; punishment shall fit the crime; and the operation of all such principles within the overall framework of human rights principles, in particular equality and the sovereignty of the law.

On paper, Arab constitutions encompass most of these principles and rules, following a consistent line on the independence and inviolability of the judiciary, that judges are independent and, in their administration of justice, subject to no authority other than the law. Some constitutions even elaborate at length, highlighting the status of judges, the importance of their independence and the rights of litigants, as in the Egyptian Constitution, which devotes the whole of chapter IV, consisting of nine articles (articles 64-72), to the subject. Article 147 of the Yemeni Constitution provides for the independence of both the judiciary as an authority and judges as individuals, stipulating that: "The judiciary is an independent judicial, financial and administrative authority and the Office of the Public Prosecutor is one of its organs. The courts shall assume responsibility for the settlement of all disputes and offences and judges shall be independent and subject to no authority other than the law in their administration of justice. No party may in any way interfere in lawsuits or in any affair of justice. Such interference shall be regarded as an offence punishable by law and legal proceedings relating to such offences shall not lapse by statute of limitation."

It is interesting to note that while a number of Arab constitutions refer to the independence of judges and not to the independence of the judiciary, others³ do refer to the independence of the judiciary. Such variations are, however, of little significance, since all Arab judicial systems have lost their independence to some degree or other by virtue of the executive's historical domination over Arab society

³The Yemeni Constitution, the Saudi Arabian Basic Law and the Syrian Constitution, do refer to the independence of the judiciary (compare, for example, article 97 of the Jordanian Constitution, article 96 of the Tunisian Constitution, article 82 of the Moroccan Constitution, article 94 of the Constitution of the United Arab Emirates and article 104 of the Constitution of Bahrain, which refer to the independence of judges or the judiciary, with article 46 of the Saudi Arabian Basic Law, which provides that the judiciary is an independent authority and that judges shall be subject to no authority in their administration of justice other than that of Islamic law (Shari'a), article 165 of the Egyptian Constitution, which provides that the judiciary is independent, and article 131 of the Syrian Constitution, which also provides that the judiciary is independent and that this is guaranteed by the President of the Republic).

and its sway over both the legislature and the judiciary.

While they may contain significant provisions establishing the principle of the independence of judges, Arab constitutions nevertheless maintain the executive presence within the judiciary and its institutions. Hence, not only are judgements delivered and enforced in the name of the head of state (of whatever designation or title), but also the head of state is additionally vested with the right to preside over the constitutional bodies that oversee the judiciary. Morocco is an instance: article 86 of the Constitution (1996) provides that: “The King shall preside over the Supreme Council of the Judiciary...”. The King also appoints judges by royal decree at the proposal of the Supreme Council of the Judiciary (article 84). Meanwhile, article 173 of the Egyptian Constitution provides that the President of the Republic shall preside over the Supreme Council of Judicial Organs. Article 100 of the Sudanese Constitution also provides that the judiciary is responsible for its actions before the President of the Republic and article 132 of the Syrian Constitution provides that the President of the Republic shall preside over the Supreme Council of the Judiciary. Other examples of the unbalanced relationship favouring the executive over the judiciary will be discussed when we examine legislative violations and the social reality of the independence of the judiciary.

Many Arab constitutions also stipulate safeguards for fair trial, such as the principles of criminal legitimacy in particular and the fairness of trial in general. In the absence of either, a trial is rendered unlawful and unfair, in addition to which any completed trial proceedings are invalid and both procedures and any judgements handed down are void. They are also rendered ineffective, if delivered pursuant to procedures incompatible with the principles of the rights system stipulated in the constitution, and they are regarded as a violation of human rights before the judiciary.

The legal profession and public freedoms

Independent, proficient lawyers give substance to the legal profession’s obvious concern with

protection of public freedoms, human rights and guarantees for the rights of defence. The independence of the legal profession and the freedom of lawyers has been a subject of significant interest to the international community; as early as 1955, the International Commission of Jurists organized a conference in Athens to address key issues on the rule of law, and which issued a declaration that: “Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law...”. In Oslo, the Congress of the Union Internationale des Avocats adopted a resolution introduced by the Arab Lawyers’ Union, urging international organizations to launch a wide-ranging campaign to defend the independence of the legal profession and the freedom of lawyers. The Universal Declaration on the Independence of Judges (Montreal, 1983), the third section of which is devoted to principles guaranteeing the independence of the legal profession and the freedom, safeguards and rights of lawyers was a major international achievement for the legal profession.

The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan, 1985) produced recommendations relating to the legal profession that called for lawyers’ protection from restrictions and controls that could influence their defence of their clients. They also called for greater attention to lawyers’ training and strengthening professional skills.

Independence of the legal profession is generally understood to include independence of the professional institution and lawyers as professional practitioners of the right of defence. The independence of the professional institution guarantees lawyers the right to form an independent professional union free from State interference. The independence of the lawyer in exercising her/his profession requires a body of legal safeguards to enable her/him to fulfil the duty of defence.

Some Arab states still do not permit lawyers’ unions or associations to be set up. Historically, certain Arab regimes were hostile to lawyers’ unions, a position not unrelated to their hostility towards freedoms in general. One example is the Egyptian Government’s intervention in the 1980s to dissolve the Bar

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Council of the Egyptian Bar Association and form a council to manage the Union's affairs (under Act No. 125 of 1981). Libya had already abolished the legal profession as such, eliminating the Bar Association under Act No. 3 of 1981, while the Syrian authorities had promulgated Legislative Decree No. 39 of 21 August 1981 regulating the legal profession so as to place it under excessive constraints.

In Arab legislation the presence of a lawyer at the preliminary investigation is not considered mandatory, other than for a number of major criminal offences (felonies). The different forms of exceptional judiciary impose restrictions on lawyers' exercise of the right to defence as well as on the right of appeal.

Some Arab legal and judicial systems suffer structural defects, with poor standards of education in law faculties given the massive increase in the number of students, so that many who join the legal profession lack proficiency. Other defects include corruption in the administrative apparatus supporting the courts, all of which contributes to denying the Arab citizen's right to litigation and appropriate legal advice to permit the full exercise of the right of defence.

Most Arab states have no effective systems of legal aid for the needy, even if guaranteed under constitutional or legislative provisions. In reality, the least financially able are also the least able to enjoy the right of defence or benefit from appropriate legal advice.

RIGHT OF NATIONALITY

Nationality is one of the more complex areas of civil rights. It gives a person the legal status that confers rights and duties and helps her/him to acquire full citizenship. International instruments therefore prescribe that: "everyone has the right to a nationality" and that "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." There is a noticeable difference between the status of this right and the situation of those who benefit from it in Arab countries; some constitutions remain silent on the subject, while others refer the matter of its regulation to the law, as in Egypt (article 6), Lebanon (article 6), Jordan (article 5), Saudi Arabia (article 35)

and Algeria (article 30). In addition, some constitutions allow for its forfeiture and provide the conditions required, as in Qatar (article 4), Oman (article 15), the United Arab Emirates (article 8) and Kuwait (article 27).

It is generally recognized that standards for conferring the original nationality vary between the right based on blood relations (i.e. with either parent holding the nationality of the state) or on the basis of the actual place of birth. A new trend is emerging in some Arab countries of granting original nationality to the children of a mother bearing the nationality of the state. This is commendable as it recognizes the principle of equality between mother and father in securing the nationality of their children and ends the misery that arises from the state denying nationality to the children, where the mother is married to a foreign national.

PERSONAL RIGHTS

Civil rights also include those affecting the person, private life and dignity of the individual. International standards emphasize respect for these rights, as in article 17 of the ICCPR, which states that: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

Arab constitutions variously address these rights in brief or in detail. All agree on the need to safeguard the inviolability of the home and the freedom of different types of correspondence, but matters other than honour are not encompassed within their protection. Some, like the Egyptian Constitution (articles 41-45) and, to a lesser degree, those of Algeria and Somalia, contain more detailed safeguards, providing that homes shall not be searched other than with the occupants' consent or in cases of utmost necessity as designated by law or with a written warrant by the competent judicial authority. They also contain special provisions on freedom of movement and choice of place of residence, although most invest the legislator with considerable authority to restrict the exercise of such freedom by means of the law. In rare exceptions, the judiciary is empowered to consider and rule on the lawfulness of the authorized grounds for restriction.

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Other rights, no less important, include the right to establish a family: the right of men and women to marry without discrimination, to enjoy the entitlements of marriage and to own and inherit property. A number of Arab constitutions accord the family a distinct status, regarding it as the basis of society, and emphasize the duty to ensure its preservation, safeguard it from disintegration and breakdown, secure the conditions for its survival and for its harmony with public order and the system of civilized and moral values.

CONSTITUTIONAL VIOLATIONS OF HUMAN RIGHTS

A number of Arab constitutions contain provisions that conflict with international human rights principles by assuming an ideological or religious character that removes public rights and freedoms or permits their removal. The amendments to the Yemeni Constitution of 1994 illustrate this. They strike at the very core of the principle of the legality of crimes and punishments and the right to fair trial. As an example Article 46 was introduced to replace article 31, which originally provided that “there shall be no crime and no punishment other than as stipulated by law”, the new provision stipulates that “there shall be no crime and no punishment other than on the basis of a provision of religious law (Shari’a) or law.”

There is no objection here to the principle that provisions of Shari’a should be a source of legislation prescribing crime and punishment, but rather that the discourse is directed to the judge, instead of the legislator. Investing discretionary powers in the judge to interpret the Shari’a text and choose among the multiple opinions of jurisprudence, entails a lack of legal precision. It is imperative, therefore, that the constitution of those states which adopt the Shari’a, stipulate the principle that there is no crime or punishment other than prescribed by law. Thus the legal text will be in harmony with the Shari’a, given that the constitution has provided that Shari’a is a source of legislation.

Furthermore, article 33 of the Yemeni constitution, which originally provided that “repugnant and inhuman methods of enforcing punishments shall not be permitted, nor

shall the enactment of laws which so permit”, was replaced with article 49 which provides that “punishments may not be enforced by unlawful means and the matter shall be regulated by law.” This essentially undermines the principles of the legality of crime and punishment, and equality before the law, since criminalization and punishment become dependent on subjective interpretations of Shari’a.

A further example is provided by article 26 of the Saudi Arabian Constitution (Basic Law), which provides that the state protects human rights in accordance with religious law (Shari’a), without specifying what is meant by religious law. Does this mean those Islamic schools of law that promote justice, equality, reason and respect for human dignity? Or does it refer to the doctrines of Islamic jurisprudence, which may be understood only within their cultural and historical context and which give rise to various forms of conflict between them and present-day human rights principles?

The above observation on the amendment to the Yemeni Constitution applies equally to article 38 of the Saudi Arabian Basic Law, which provides that there shall be no crime and no punishment other than in accordance with a provision of religious law (Shari’a) or statutory law, without specifying what is meant by a provision of religious law.

The confusion between religion and state is nowhere more clearly demonstrated than in articles 4 and 18 of the Sudanese Constitution of 1998. Article 4 provides that God, the Creator of humankind, holds supremacy over the State, without specifying the meaning of supremacy. Governance practice apparently sanctioned by God is likely to be immune to criticism and opposition (Box 4-2).

A number of Arab constitutions contain provisions that conflict with international human rights principles.

The confusion between religion and state is nowhere more clearly demonstrated than in articles 4 and 18 of the Sudanese Constitution of 1998.

BOX 4-2

Constitutional restrictions on rights

The citizen pledges his allegiance to the King on the Book of God Almighty and the Custom of His Prophet, to obey his least command in destitution and in prosperity and under any adverse circumstances.

(Article 6 of the Basic Law of Saudi Arabia)

Workers for the State and in public life shall observe at all times the subservience of the latter to the worship of God, Muslims adhering in this regard to the Book [of God] and the Custom [of the Prophet], and all workers preserving an intention for godliness and maintaining this spirit in their conduct of plans, laws, policies, and official business. This is applicable to the political, economic, social, and cultural spheres.

(Article 18 of the Sudanese Constitution)

Constitutional provisions for the creation of exceptional courts further illustrate the constitutional violation of liberties and human rights.

The Arab constitutional legislator is always careful to leave a loophole... so that the national legislator may violate rights and public freedoms.

Where certain Arab states consider Shari'a as a source of legislation, this does not constitute in itself a violation of human rights principles, provided that those principles, intentions and interpretations of the Shari'a that favour freedom and equality (of which there are many), are those employed. Oppressive rulers should be prevented from making use of the Shari'a as a pretext to conceal their tyranny, as various other pretexts have been exploited in different historical contexts. According to contemporary scholarship (ijtihad) on this issue there is no contradiction between Shari'a and human rights, as the intentions of the Shari'a are in harmony with international human rights law.

The constitutional violation of human rights may assume a confessional shape, as illustrated by article 24 of the Lebanese law, which provides that parliamentary seats in the Council of Deputies shall be divided on a religious and confessional basis. Article 95 of the Constitution adopts the same criterion dealing with the highest positions (among citizens) of the State. This situation arises from the legacy of historical and political circumstances experienced by the Lebanese legislator and the various sectors of the people of Lebanon at a particular stage in their history. With the Constitution of 1990 the legislator took the commendable course, with the intent of putting an end to sectarianism.

Constitutional violations of human rights can also take the form of an ideological bias, which excludes differing opinions or political affiliations. For example, article 8 of the Syrian Constitution, affirms the Ba'ath party as the leadership of society and the state, meaning that the multiparty system has no constitutional legality. The same applies to those constitutions where freedom of expression and criticism, contingent on criticism being constructive and that it guarantees the integrity of the national and pan-Arab structure and promotes the socialist system.

Constitutional provisions for the creation of exceptional courts further illustrate the constitutional violation of liberties and human rights. Examples include article 171 of the Egyptian Constitution, which provides for state security courts, article 179, on the

Socialist Public Prosecutor, and article 183, on military courts, referring their regulation and the definition of its jurisdiction to the law, without stipulating further details. This contrasts with the Constitution of Bahrain, Article 105b, which states that the jurisdiction of the military courts is limited to military crimes committed by members of the Defence Force, the National Guard, and the Public Security forces and does not extend to others except on the declaration of martial law. Article 122/3 of the Sudanese Constitution is similar to the Egyptian Constitution.

LEGISLATIVE RESTRICTIONS ON HUMAN RIGHTS IN ARAB LEGISLATION

Clearly, Arab constitutional provisions for rights and freedoms do not reflect the same comprehensive and effective level typical of international instruments. The Arab constitutional legislator is always careful to leave a loophole by referring regulation of rights and freedoms to ordinary legislation so that the national legislator may violate these same rights and public freedoms. In fact the legislative text frequently goes far beyond regulating rights and freedoms to the extent of restricting them, if not removing them altogether. Where the constitutional text therefore provides rights and freedoms - notwithstanding that they may at times be inadequate - it simultaneously deprives them of much of their worth, turning them into a mere facade before the international community in a display that is empty of any real substance. In other words, the constitution becomes a front for the legislative violation of freedoms and human rights.

LEGISLATIVE RESTRICTIONS ON THE RIGHT OF PEACEFUL ASSEMBLY

Arab countries provide many examples of legislative violations of human rights, some of which are reviewed here.

Examples include provisions which prohibit or restrict exercise of the right to strike, demonstrate, hold mass gatherings or assemble peacefully and which clearly show that Arab

authorities live in fear of the Arab street. In Egypt, the Assembly Act No. 10 of 1914 penalizes gatherings of five or more persons (Box 4-3).

The Meetings and Demonstrations Act No. 14 of 1923 requires advance notification to the police of any meeting. The police are empowered to ban a meeting from taking place and always have the right to be present at a meeting, choose the venue and disperse a meeting. Electoral meetings are confined by law to a brief period extending from the day when voters are called to the day of election, thus diminishing the importance of such meetings. The police also have the right to ban an electoral meeting from taking place and to disperse it if it is convened. In Jordan, the Interim Public Meetings Act No. 45 of 2001 regulates public meetings and marches, for which prior authorization is required from the competent administrative governor, whose decision on the matter is not subject to any judicial authority. The police also have the right to be present at and disperse meetings, as well as break up marches. The Jordanian Penal Code similarly provides for the offence of assembly (articles 164 and 165). Other Arab legislation is similar, with varying details regarding bans on public meetings, requirements of prior authorization for public meetings and demonstrations and the powers of the executive to disperse such events and impose penalties for violations (see Royal Decree No. 377 of 1958 in Morocco, Act No. 18 of 1973 in Bahrain, Act No. 65 of 1979 in Kuwait, section 13 of the Qatari Penal Code, Act No. 29 of 2003 in Yemen and article 335 of the Syrian Penal Code, pursuant to which any meeting of a non-private nature is deemed by law to be a form of stirring up unrest).

LEGISLATIVE RESTRICTIONS ON THE RIGHT OF POLITICAL ORGANIZATION

In addition to those constitutions which ban or place restrictions on the right to form political parties, as illustrated above, we find legislative restrictions limiting this right even in countries whose constitutions prescribe the multiparty system. In Egypt, the law requires prior authorization from the Party Affairs Committee,

BOX 4-3

Restrictions on the rights to assembly and association

Anyone who is present in a gathering on the public highway consisting of at least five persons shall be punished, even if no crime is committed, if a representative of the Public Authority believes that public peace may as a result be endangered and if he orders the members of the gathering to disperse and they do not comply.

(Article 2, Public Assembly Law No. 10, 1914, Egypt).

The holding or organization of a public meeting is not permitted without previously obtaining a permit for that purpose from the Governor in whose area of authority the meeting will take place, and all public meetings that are held without a permit will be prevented and dispersed.

(Article 4, Decree Law concerning the holding of public meetings and assemblies, Kuwait)

predominantly governmental in its composition, before any party can be established. The committee's decisions may be appealed before the Supreme Administrative Court, which, exceptionally, consists of both judicial and non-judicial members, and its rulings final and not subject to any appeal.

To establish a political party in Jordan the law requires prior authorization from the Interior Minister, who has the right to refuse, and party founders have the right of judicial appeal against such refusal. The party may not publicly declare itself or pursue its activities until either the Minister has approved it or the court has ruled to revoke the Minister's refusal. In Yemen, prior authorization must be obtained from the Committee on Party Affairs and Political Organizations, largely an administrative body, which may oppose the establishment of the party. In such case the party founders are entitled to appeal by all legal means. The Moroccan legislator adopts a more liberal approach: part IV, sections 15-20, of the law in question regulates political parties and politically oriented associations, requiring only notification of a political party being established (section 15).

In Syria, maximum restrictions apply, with no recognition of party pluralism. Act No. 53 of 1979 regulates the protection of the Arab Socialist Ba'th Party, the only political party for which the Constitution makes provision. The Arab Socialist Ba'th Party is the leading party for society and State (Article 1). Any party member who belongs to another political organization is punished by imprisonment of five to ten years (Article 5/a). Any person who infiltrates the party ranks with intent to work

Arab authorities live in fear of the Arab street.

The police have the right to be present at and disperse meetings, as well as break up marches.

There is no legal regulation of the freedom to form parties in Arab Gulf states since parties are illegal.

for the benefit of any other political or party organ receives the same punishment (article 5/b). Under Law No. 49 of 8 July 1980, any person belonging to the Muslim Brotherhood is a criminal and punished by the death penalty. Act No. 263 of 19 July 1960, disbands Baha'i assemblies and Legislative Decree No. 47 of 9 May 1967 disbands the Association of Islamic Guidance.

Political parties in Tunisia are regulated by Basic Law No. 32 of 1988, which requires prior authorization by the Interior Minister, who is entitled to object (Article 8). Appeals against a refusal are permissible before a special division of the administrative court, composed of judicial and non-judicial members, whose decisions are final and not liable to any form of appeal (Article 10).

There is no legal regulation of the freedom to form political parties in Arab Gulf states, since parties are illegal. In most Arab states, the law imposes restrictions on political party financing, either proscribing or setting heavy restrictions and controls over acceptance of donations from any foreign person or public bodies corporate, (Egypt, Jordan, Morocco, Tunisia and Yemen). Other laws contain vaguely worded conditions concerning party activity, permitting the state to exercise its power to dissolve a party whenever it considers the conditions have been breached. (Yemeni law, for example, stipulates that parties must not undermine the people's Islamic faith or engage in any activity opposed to the aims of the Yemeni revolution). Most legislation contains provisions empowering the executive to seek the dissolution of a party through a court ruling.

Given that most courts considering party affairs can hardly be said to be independent, it is safe to say that the power to dissolve a party rests with the executive.

LEGISLATIVE RESTRICTIONS ON FREEDOM TO FORM ASSOCIATIONS

In imposing restrictions on the freedom to form and establish associations, Arab legislation makes a distinction between charitable associations and other associations. All Arab

legislation requires advance notice of public benefit associations and that they be licensed. All Arab legislation, apart from Moroccan and Lebanese, requires private associations to have a prior licence with many imposing stiff penalties on those carrying out activities without licence. Restrictions are imposed on associations' right to receive donations, particularly from foreign entities, where prior approval from the executive is mandatory. Affiliation with foreign associations is also forbidden without executive approval. In most Arab countries, associations are subject to daily monitoring of their activities, and in some cases the executive can object to decisions taken by associations. Most legislation permits the administrative dissolution of associations or management structures or provides for a temporary board of management to be imposed, while in other cases the judiciary may dissolve an association at the executive's request. Clearly then, both the establishment of civil associations and their activities are heavily circumscribed and subject to rigorous control in Arab countries, with few exceptions, such as Morocco and Lebanon.

RESTRICTIONS ON FREEDOM OF OPINION, EXPRESSION AND THE PRESS IN ARAB LEGISLATION

Press freedom is blocked or curtailed in Arab countries under the guise of regulating laws that permit prior or other newspaper censorship. Laws impose restrictions on the right to publish newspapers by requiring a licence whose withdrawal or threat of withdrawal is used by the executive to deter newspapers from crossing the set boundaries of freedom of expression (articles 24 and 32 of the relevant legislation in the United Arab Emirates, article 13 of the legislation in Kuwait, article 44 of the legislation in Bahrain; similar provisions are contained in other Arab legislation). Not a single Arab regime can be said to have a liberal approach towards newspaper publication: in 15 Arab states the law requires prior licence or authorization and also restricts the freedom to publish newspapers. The following observations concern laws regulating freedom of expression, publication and the press in Arab countries:

Both the establishment of civil associations and their activities are heavily circumscribed and subject to rigorous control in Arab countries.

Pre-censorship and suspension by administrative decision

The Arab legislator believes that media of expression and information transfer can be substantially controlled by public authority agencies and has yet to grasp that, thanks to modern technology, the potential to control freedom of opinion and expression is steadily diminishing. A survey of legislation in 19 Arab states reveals that pre-censorship of newspapers is imposed in 11 cases (Algeria, Bahrain, Iraq, Kuwait, Libya, Oman, Qatar, Saudi Arabia, Syria, Tunisia, and the United Arab Emirates). It finds its actual implementation through the legislation giving the executive the authority to control national newspapers and impose administrative bans on them.

The study showed that all Arab legislation concerning the media with the exception of Jordan (subsequent to amendments by Act No. 30 of 1999), empower the executive, whether the Ministry of Information, the Interior Ministry or the Council of Ministers, to ban the circulation of newspapers, and exercise administrative impoundment. In Kuwait, Morocco, Oman, Qatar, Saudi Arabia and the United Arab Emirates, the executive can suspend newspapers by administrative decision. All states adopting the system of licence or prior authorization also provide for newspapers' suspension by administrative decision if they publish without licence or authorization. Arab legislation is therefore consistent in broadening executive powers to exercise administrative control, including suspension, over newspapers. In most cases the executive is similarly empowered to abolish a newspaper administratively providing legislative conditions are met. The study of 19 Arab states plainly shows that, of these, 10 give the executive free rein to revoke a licence with no judicial oversight. There is a striking similarity among the legislative provisions in this respect.

Curtailement of freedom on the pretext of security

When regulating freedom of opinion and expression, including the media and mass communications, the Arab legislator prioritizes what s/he perceives as security and public in-

terest considerations above freedom, diversity and respect for human rights. The result is that Arab legislation is full of provisions which regard newspaper publication, audio-visual broadcasting and the free exercise of expression in general as highly dangerous activities warranting a panoply of bans, restrictions and deterrent sanctions, all to preserve what the legislator believes to be in the public interest, for national security, doctrinal purity or the ideological or sacrosanct constants of the nation.

In Arab legislation, the fine balance between freedom and security/order is clearly weighted in the latter's favour. According to the study of legislation, the Arab legislator has enormous leeway to criminalize media activities given the broad scope for prohibiting media content. We shall therefore present here only the most salient features of this policy. The most obvious are the infringement of the principles that punishment is personal and the presumption of innocence. Given that the legislator has a free hand in providing for ambiguously worded offences, the principle of rule of law has become meaningless. Scrutiny of the body of Arab laws concerning freedom of opinion, expression and the press reveals that it is virtually identical, particularly regarding criminalization and prohibition. It would seem that the Arab legislator surpassed himself by copying the most draconian provisions enforced by despotic regimes around the world in specific historical circumstances, which, elsewhere, were eliminated with the passage of time. In the Arab world, however, they were to remain and even proliferate as part of the permanent legal system. The Arab legislator is clearly not inspired by the vision of democracy as, when it comes to setting down laws relating to opinion, s/he is at pains to seek out and apply any measures to the individual that involve tightening up, clampdown and excess.

Denying the right to obtain information

The principle of free circulation of information and the rights of journalists and citizens in general to obtain information are viewed with extreme scepticism by the Arab legislator. The overriding principles here seem to be prohibition and restriction rather than permission and

A survey of legislation in 19 Arab states reveals that pre-censorship of newspapers is imposed in 11 cases.

In Arab legislation, the fine balance between freedom and security/order is clearly weighted in the latter's favour.

Arab legislation consistently applies stringent restrictions on newspaper publication and ownership.

One of the most serious legislative violations of human rights...is where the Arab legislator permits the executive to declare a state of emergency and abuse all safeguards for individual rights and liberties.

opportunity. Journalists' right to obtain information and news is assured in law in only five Arab states: Algeria, Egypt, Jordan, the Sudan and Yemen. Circulation of information however, is heavily circumscribed under all Arab legislation. For instance, imported foreign newspapers and magazines are subject to censorship, control, and confiscation. Some Arab countries even forbid Internet access to shut out the electronic press, and even when permitted, access may be under surveillance.

Harsher conditions for newspaper publication

Arab legislation consistently applies stringent restrictions on newspaper publication and ownership and facilitates arbitrary clamp-downs. A total of 17 Arab states prohibit newspaper publication without licence or prior authorization and in some states the licence is conditional upon payment of a large deposit and sometimes a minimum level of capital.

While many Arab states have a system of public or mixed ownership of newspapers, all prohibit foreign ownership and any form of foreign involvement.

During states of emergency and other exceptional situations the clampdown on newspapers is even more acute.

LEGAL RESTRICTIONS ON PUBLIC FREEDOMS DURING A STATE OF EMERGENCY

One of the most serious legislative violations of human rights in the Arab world is where the Arab legislator permits the executive to declare a state of emergency and abuse all safeguards for individual rights and liberties. The state of emergency is a legislative weapon prescribed by constitutions and laws alike that enables the executive to confront unforeseen emergencies that endanger the homeland and threaten its integrity. In some Arab countries, however, the state of emergency has exceeded these boundaries to become permanent and ongoing, with none of the dangers to warrant it. What was the exception has now become the rule (e.g. in Egypt, Syria and Sudan).

Article 4 of the ICCPR states explicitly: "In time of public emergency which threatens the

life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

Most Arab constitutions lay down rules for declaring a state of emergency, though in some states it is no longer regarded as such, having acquired semi-permanent status. Human rights and freedoms are commonly violated under a state of emergency (or rules of martial law), as it strips the citizen of many constitutional rights, such as inviolability of the home, personal liberty, freedom of opinion, expression and the press, confidentiality of correspondence, rights of movement and assembly. It removes certain legislative powers from the elected parliament and transfers them to the executive or military governor (emergency authority); and it bars the natural judge from impartially and independently exercising her/his full authority, where judicial entities lacking independence are appointed to the judiciary, who are more concerned with giving a ruling than with neutrality, independence and the right to fair trial. Despite the adverse effects on public rights and freedoms, politicians and jurists loyal to the regimes vigorously defend the state of emergency on a number of pretexts. In this regard, perhaps the most commonly repeated argument is the need to fight terrorism, meaning that the state is in no position to combat terrorism by individuals unless it engages in intimidation through measures authorized under emergency measures.

Yet repugnant terrorist crimes have occurred in a number of Arab states during a declared state of emergency. The usual scenario is that the executive is swift to declare and extend a state of emergency, even without the backing of parliament, which is usually merely a pawn in the hands of the executive to carry out its orders. So it is that the executive can cement its control over legislative, executive and judicial matters and sweep aside the safeguards for individual rights, unfettered by the procedural and objective rule of law.

LEGISLATIVE REGULATION OF THE ROLE OF THE JUDICIARY IN PROTECTING HUMAN RIGHTS AND FREEDOMS

The justice system, with its two branches of an independent judiciary and a free legal profession, represents an institutional safeguard that is indispensable to human rights protection in a free democratic society. International instruments recognize this and set down elaborate criteria and prerequisites to ensure such independence.

Independence of the judiciary (legislative regulation and practice)

Our earlier discussion of this topic considered the international perspective and various provisions in Arab constitutions. International literature considers the independence of the judiciary to apply to both the institutional authority and the individual judge.

However, independence of the judiciary is assured not merely through constitutional and legislative guarantees and a body of related safeguards, nor does it come about only through the institutions with oversight of judicial affairs. Independence of the judiciary relates to more universal and profound considerations; for instance, the extent to which the political system embraces democracy as a value and respect for the law as a framework governing the whole of society. Accordingly, in an undemocratic society, neither the judiciary nor judges enjoy independence, regardless of constitutional and legislative guarantees. It relates also to the judge as individual, the level of training, the nature of her/his education and qualifications, and the value system governing her/his conduct, or, professional ethics in general.

While the independence of the judiciary is a prerequisite for justice, it does not guarantee a credible justice that wins trust and enjoys the respect of litigants unless the conditions to promote it are in place. Hence, for the individual judge, independence demands moral and intellectual probity on her/his part, since the judge's role does not acquire the profound connotations desired unless the judge is neutral, impartial and upright, both morally and

intellectually. Essentially, this calls for a system to be set up to monitor professional ethics and conduct to ensure that the independence of the judiciary remains intact, while also guaranteeing judges their right to progress by increment and benefit, as they are entitled to, and so maintain their distance from enticements by the state or society. Credible justice also calls for judicial and procedural regulation to make it effective, since judicial rulings are not the work of the judge alone, but are the outcome of concerted efforts by lawyers, experts, judicial assistants and others. Just as the system must be rigorous on judges' neutrality, in accordance with professional ethics, the law must similarly guarantee an effective system that ensures the right of defence, lawyers' rights and duties, and the availability of highly skilled experts and judicial assistants. Without this the ills afflicting the legal profession or the performance of judicial assistants are bound to undermine credible justice in society.

Arab constitutions refer regulation of the judiciary to ordinary legislation. However, when the Arab legislator steps outside that framework and imposes restrictions on freedoms and human rights in breach of international standards and national constitutional provisions, s/he is inhibiting the human right to litigation and invalidates the principle of the independence of the judiciary, turning constitutional texts into facades to conceal flaws in substance.

Despite constitutional and legislative guarantees for the independence of the judiciary and fair trial safeguards, scholars and human rights activists note a disparity between the texts and reality. Legal experts, for instance, hold that constitutional and legislative provisions on the independence of the judiciary and the right to fair trial are not applied in their countries, for mainly political reasons, while others point to the traditional kinship structure in certain countries, which also makes it difficult to apply such legal provisions.

Where there is conflict between a political regime unfettered by legal controls and the judiciary, whose independence is upheld in the constitution and law, the Arab regime swiftly sweeps aside the independence of the judiciary without any hesitation (Source: Ahmad Makki,

In an undemocratic society, neither the judiciary nor judges enjoy independence, regardless of constitutional and legislative guarantees.

Where there is conflict between a political regime unfettered by legal controls and the judiciary... the Arab regime swiftly sweeps aside the independence of the judiciary.

Inevitably, in Arab countries where there are millions of lawsuits and no more than several thousand sitting judges, court cases are delayed for years.

1990), as numerous historical examples in Arab countries show.

Independence of the judiciary as an institution and of judges as individuals is jeopardized on two counts in the Arab world. First, ideological and autocratic regimes frequently interfere, using the pretext of “protecting the ideological foundations” of their authoritarian regimes. Second, the decline in living standards among those of fixed income, including judges, opens the profession to corrupting enticements from certain sectors of the nouveau riche.

As regards the separation and balance of powers, the authority accorded to justice ministries to inspect courts and control the judiciary’s budget clearly constitute a restriction on the independence of the judiciary as an institution. This situation, in which the executive controls their finances and intervenes in the appointment, transfer and dismissal of judges, means that, in practice, judges in many Arab countries are not independent. Indeed, many are sometimes fearful in delivering their judgements, particularly when the State has a direct or indirect interest in the case in question.

In some Arab countries, judges are tempted with material and moral inducements to make them pliable instruments in the hands

of the executive particular in cases where the executive has a special interest, This may take the form of a part-time appointment to conduct legal business for the executive for additional remuneration, and/or appointment to high executive and political office on leaving the judiciary. These are all too persuasive and can cause judges to discharge their functions less than impartially in return for short or longer-term reward.

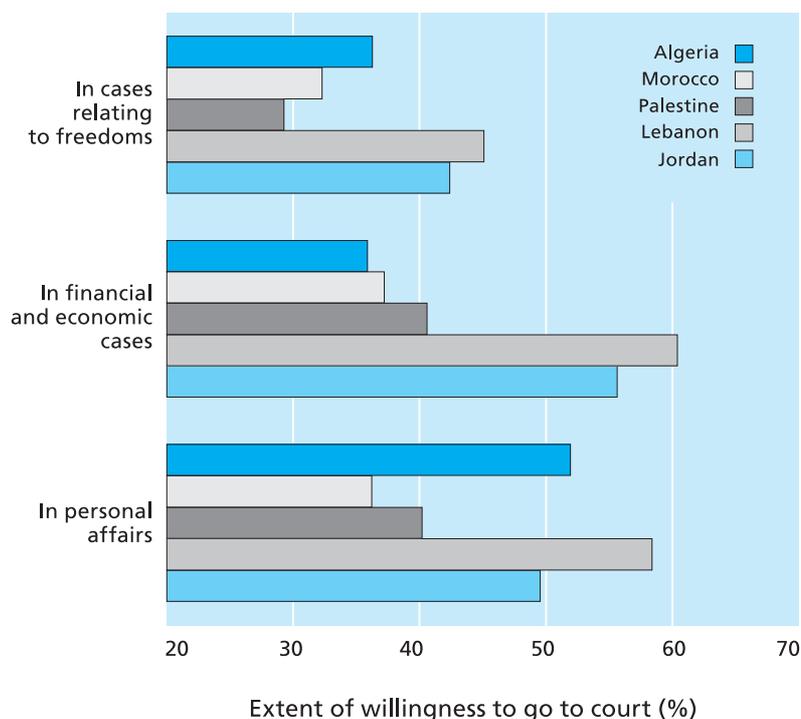
The vast increase in the number of cases brought to court in some Arab countries obstructs the administration of justice and exercise of the human right to litigation to a considerable degree. Inevitably, in Arab countries where there are millions of lawsuits and no more than several thousand sitting judges, court cases are delayed for years before they are settled. Meanwhile litigants’ rights are set aside, particularly the rights of defence and to prompt and consummate justice. This slow pace of litigation harms both the economy and society; in such an environment rights are delivered only with the greatest difficulty, with the judicial system seen as an obstacle to the growth of national and foreign investment. The absence of an authority capable of enforcing the law, and within a reasonable time, can encourage recourse to violence and individual reprisals, and make people less willing to go to court to seek a solution (figure 4-1).

According to the Freedom Survey, Annex 1, willingness to go to court to settle disputes barely exceeded 50%. This percentage showed a relative decrease in cases related to freedoms, and in Palestine and Morocco in general

Corruption within the auxiliary apparatus of the judiciary, including secretaries, clerks and experts, has an adverse impact on the justice system in a number of Arab societies. Civil servants who eke out a living by breaching the law and justice every day are scarcely fitted to help apply them. Ultimately, the situation resembles a farce in which justice is trampled underfoot and rights degraded, with little standing in the way.

Various forms of exceptional courts undermine the jurisdiction of the natural judiciary, primarily State security courts and military tribunals, which diminish fair trial safeguards, as demonstrated below.

Figure 4-1
Extent of willingness to go to court, Five Arab countries, Freedom Survey, 2003



Exceptional courts

The Arab legislator has learned through experience that direct clashes with judges and the judiciary may bring public odium, with judges portrayed as martyrs of freedom in an autocratic regime. Many Arab regimes therefore prefer other methods of dealing with the judiciary that cause less public outcry and also more effectively strip the judiciary of its independence and ensure it complies with the regime's wishes. The regime's first method is to create an exceptional judiciary under the executive's direct influence, to which it refers politically sensitive cases and major security cases. This tradition descends from the time of foreign occupation when the British and French occupying powers created emergency courts to try their opponents.

In the Arab world, the exceptional judiciary that is most threatening for human rights is the military. The military judicial system exists in a number of states, including democratic ones. Its existence alone does not breach public freedoms or human rights, provided that stringent controls are in place to safeguard against the military judiciary aiding the ruling authority to encroach on liberties, human rights and safeguards. The first control is that judges in military tribunals must be legally qualified. Secondly, the tribunals' rulings must be subject to appeal before the ordinary judiciary. Thirdly, their jurisdiction should be confined to military offences committed by individual members of the military in the course of duty within their military units. Fourthly, legal guarantees for the neutrality and impartiality of military judges must be effective.

Most of these guarantees are lacking in Arab military tribunals. The most blatant example is provided by Egypt's Act No. 25 of 1966, where article 6 greatly expands the jurisdiction of the military judiciary, particularly during a state of emergency, when it may consider any offence in the Penal Code and referred to it by the President of the Republic. Cases in which Islamic movements are accused of violence are commonly referred to military courts. In fact recourse to the military judiciary (even though properly a type of professional judiciary with a narrowly defined jurisdiction)

is encouraged by Arab constitutions which make explicit provisions for it, (article 183 of the Egyptian Constitution, for example). Other forms of exceptional judiciary lacking fair trial safeguards include state security courts, courts of values, revolutionary courts, people's courts and tribunals dealing with economic and judicial matters, such as revolutionary committees and so on, that are run by popular communities loyal to the regimes. State security courts exist in several Arab countries in the Near East and North Africa. In Egypt, for example, the State security court provided for under emergency law continues to exercise jurisdiction even after the permanent state security courts have been abolished. State security courts were established in Jordan pursuant to Act No. 17 of 1959, as amended, which can consider offences relating to internal and external State security and drug offences. Article 7 (a) of the Syrian State Security Court Act states: "The State security courts shall not be bound by the usual procedures stipulated in the legislation in force during any of the stages or procedures of prosecution, investigation and trial." Their sessions are held in camera and their rulings are not subject to appeal.

Another model exists in Arab countries with a traditional liberal heritage influenced by practices and methods of foreign occupation. One example is the Justice Council in Lebanon, which, although composed of ordinary judges, lacks independence and does not offer litigants recognized guarantees for fair trial, since its decisions may not be reviewed or appealed before a higher court. More importantly, its jurisdiction to examine cases is determined by political decision of the Cabinet. This Council was set up during the French mandate pursuant to Decree No. 1905 of 12 May 1923, which has been amended several times, and it now considers offences against external state security.

THE IMPACT OF AUTHORITARIAN POWER RELATIONS ON FREEDOM AND HUMAN RIGHTS

One of the principal reasons that violations of freedoms and human rights, both in law and practice, are widespread in the Arab region

The Arab legislator has learned through experience that direct clashes with judges and the judiciary may bring public odium...

In the Arab world, the exceptional judiciary that is most threatening for human rights is the military.

The way to approach the question of legislation is to deal with the issue of power.

lies in the nature of the political authority and its relationship with society. Consequently, the way to approach the question of legislation that violates freedom is to deal with the issue of power in the Arab world. Distribution of power should be based on genuine respect for the principle of separation of powers; the principle of political alternation should be set down and this, together with ending the monopoly of power, should be assigned to the ballot box alone for decision. Sound laws that are supportive of freedom can only come about where the Arab political regime as a whole is supportive of the values of democracy and people's right to participate in political life.

The monopoly of power, which renders the regime untouchable in terms of accountability, is at the heart of the deteriorating state of freedom and human rights in the Arab world.