

# JUSTICE IN THE SOUTH - EAST MEDITERRANEAN REGION



**EMHRN**



**THE EURO-MEDITERRANEAN HUMAN RIGHTS NETWORK**

**PROMOTION AND PROTECTION OF HUMAN RIGHTS IN THE EURO-MEDITERRANEAN REGION**

# JUSTICE IN THE SOUTH – EAST MEDITERRANEAN REGION

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## Foreword

This report addresses one of the most important aspects of human rights in the South and East Mediterranean region: the issue of the legal system and people's access to an independent, impartial, and fair system of justice.

The report is part of an initiative launched by the Euro-Mediterranean Human Rights Network that will contribute to the development of justice conforming with international human rights standards, by:

- Strengthening debate and cooperation within the judiciary in the EuroMed region (promoting the development of relevant programs and activities on a regional as well as a national level).
- Strengthening civil society work that addresses questions of justice.
- Providing policy inputs to the decision making process under the Barcelona process<sup>1</sup> (including governments in the North and the South), the EU Neighbourhood policy,<sup>2</sup> and the Wider Middle East Strategy.<sup>3</sup>

Justice lies at the heart of all human rights concerns. It is central to peoples' well being and dignity. Justice is crucial to the development of the rule of law, and to fostering general human rights culture and good governance.

The South and East Mediterranean countries, and the wider Middle East, suffer from deficits in the judiciary systems that are based on repressive laws, and function in support of authoritarian regimes.

This report seeks to address these issues in a comprehensive manner with the goal of recommending measures to the EU and the Euro-Mediterranean Partnership (EMP) and civil society actors, in order to promote the independence of the judiciary in the EuroMed region.

### **The Euro-Mediterranean Partnership**

In November 1995, the EU and 12 South Mediterranean partners initiated the Barcelona process by establishing the Euro-Mediterranean Partnership and adopting the Barcelona Declaration.

The EMP marked a turning point in the relationship between Europe and the Mediterranean region. It was established to create a zone of peace, prosperity and stability between the two areas. The EMP was founded on the belief that economic development, political liberalisation, the building of democratic institutions, respect for human rights and a strong, independent civil society, go hand in hand.

The main elements of the Barcelona process are: 1) The establishment of a free trade zone before the year 2010; 2) Increased political dialogue and cultural, social and human exchange; 3) Enhanced civil society participation in the development process; and 4) The promotion of respect for human rights, democratic principles and the rule of law.

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<sup>1</sup> In particular, the EMP Home and Justice Affairs Program and the EU Communication on Reinvigorating European Actions on Human Rights and Democratisation (COM(2003) 294 final)

<sup>2</sup> EU Commission Communication on Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours (COM(2003) 104 final)

<sup>3</sup> EU Strategic Partnership with the Mediterranean and Middle East. Final Report. EuroMed Report 78.

After the breakdown of the Oslo process, September 11<sup>th</sup> 2001, and the War in Iraq, the EU and the EMP have been increasingly focussed on reform initiatives in the South. One issue of particular interest is the reform of the legal system. On a bi-lateral level, a number of programs relating to justice have either been started, or are being negotiated by the EU with its Mediterranean Partners.<sup>4</sup>

At the regional level, the Foreign Ministers of the EMP adopted a 'framework' document at the Summit in Valencia (April 2002<sup>5</sup>) that advances the issue of the judiciary system. A small budget has been made available to run a regional programme on justice over a period of three years during which a series of workshops will be held for judges, prosecutors and lawyers in order to strengthen professional Euro-Med networks.<sup>6</sup>

Another policy development within the framework of the EMP was the EU Communication on Reinvigorating European Actions on Human Rights and Democratisation which states that, 'the implementation of Human Rights standards in the region falls short of compliance with international norms [...] and] that legal and judicial systems lack sufficient independence.'<sup>7</sup> It recommends establishing national human rights plans, *inter alia*, to support the development of appropriate legislative and administrative structures.<sup>8</sup>

Finally, the EU Commission Communication on Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours<sup>9</sup> mentions 'that Democracy, pluralism, respect for human rights, civil liberties, the rule of law [...] as prerequisites for political stability, as well as for peaceful and sustained social and economic development.'<sup>10</sup> and suggests that closer relations between the South Mediterranean Partners with the EU be built on bench marking that 'include ratification and implementation of international commitments which demonstrate respect for shared values, in particular the values codified in the UN Human Rights declaration, the OSCE and Council of Europe standards.'<sup>11</sup>

While drafting action plans, the Enlargement Directorate of the Commission has drafted country reports (for Israel, Jordan, Morocco, Tunisia, and the Palestinian National Authorities) that highlight questions related to the judiciary. The latter is an outcome of debates that followed September 11th and EU enlargement, where European policy makers have increasingly looked beyond the Barcelona process to find ways to foster political dialogue and initiate reforms. Throughout this process, questions of law have been a key issue influenced by international institutions (the World Bank and the UNDP in particular) through the Arab Human Development reports (2002 and 2003), Program on Governance in the Arab Region (POGAR), and also general US policies after the Iraq War.

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<sup>4</sup> Projects have begun or are planned in Algeria (Training of Judges and police); Palestine National Authority: (training of Judges), Morocco (court construction/renovation, provision of computers to courts, and training of Judges), and Tunisia (a program was envisaged, but was stalled by the government. There may be some progress this year).

<sup>5</sup> Cf. EuroMed Report no. 44, 29 April 2002, Regional Cooperation Programme in the Field of Justice, in Combating Drugs, Organised Crime and Terrorism as well as Cooperation in the Treatment of Issues Relating to the Social Integration of Migrants, Migration and Movement of People. Framework Document.

<sup>6</sup> Euro-Mediterranean Partnership. MEDA. Regional Indicative Program 2005-2006.

<sup>7</sup> *ibid.* p. 4.

<sup>8</sup> *ibid.* p.14.

<sup>9</sup> COM(2003), *op.cit.*

<sup>10</sup> *ibid.* p.7.

<sup>11</sup> *ibid.* p.16.

The EU Strategic Partnership report related to the Arab World mentions human rights, good governance and rule of law as being among primary political concerns of the EU, and suggests the following general goals in its approach to the Mediterranean and Middle East:

- Develop systematic support for the rule of law and good governance, with emphasis on legal reform and human rights with a constructive involvement by national authorities;
- To support electoral processes and judiciary reform
- To engage with non-violent political organisations and civil society movements at all levels in society<sup>12</sup>

The G8 *Partnership for Progress and a Common Future with the Region of the Broader Middle East and North Africa*<sup>13</sup> emphasises the need for reform and standards related to human rights, good governance and rule of law.

In short, the international community is increasingly exerting pressure for change on the legal systems in the Arab world<sup>14</sup> making the reform of the judicial systems a condition for cooperation.

But the international community has also shown itself to be limited in its actions. Legal reform initiatives prompted by international bodies like the World Bank, are more concerned with technological modernisation (computerisation), and improving training or adapting to the demands of international investment, than with the independence or equity of justice. To a large extent, the same might be said of the EU; until now, conditions relating to human rights were placed at the governmental level in the context of EuroMed association. Agreements have remained purely academic – such as the country reports mentioned above, which are rudimentary when it comes to the analysis of the legal system.<sup>15</sup>

The MEDA Regional Indicative Program for 2005-2006 provides no funds – out of a budget of 155,000.00 Euros – for activities addressing the question of independent and impartial justice. This is despite MEDA's insistence on the importance of human rights in relation to justice and home affair issues, and the need for promotion of an independent judiciary. In fact, one must look to programs that 'circumvent' the inter-governmental level, such as the European Initiative for Human Rights to find EU sponsoring of activities

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<sup>12</sup> EU Strategic Partnership with the Mediterranean and the Middle East, Final Report, 2004, p.7.

<sup>13</sup> Sea Island, 9 June 2004.

<sup>14</sup> In fact, the problems associated changing legal systems in the Arab world have been at the centre of international governmental initiatives or the programmes of international bodies for some time. The topic of justice was the object of a number of meetings in the context of the 'Conference of Francophone Ministers of Justice' in the 1990s. The topic of the third meeting, held from 30 October to 1 November 1995, was 'Justice, Rule of Law, Human Rights linked to Development.' In 2000, under the auspices of the Ministry of Justice, a seminar was held in Marrakech on the legal systems of the European Mediterranean Countries. More recently, the Arab countries met at Manama from 15-17 September 2003 in the context of the 'Arab Judicial Forum' at the initiative of the Governments of Bahrain and the United States, with the participation of the United Kingdom and the assistance of the American Bar Association. Over 150 participants from a number of Arab countries (Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Morocco, Oman, Occupied Territories, Qatar, Saudi Arabia, Tunisia, Yemen, and Arab Emirates) attended. One should also mention the Inter-Governmental Regional Conference on Democracy, Human Rights and the Role of the International Criminal Court, held in Sana'a, Yemen, on 10-12 January 2004; the Arab Civil Forum meeting in Beirut, 19-22 March 2004 on Democratic Reform and Enhancement of Human Rights; and the Conference on Arab Reform Issues: Vision and Implementation', conference held in Alexandria, 12-14 March 2004

<sup>15</sup> For an early and similar analysis of the MEDA programs, please see, *The Human Rights Implications of the MEDA Programmes*, (Iain Byrne and Charles Shamas), EMHRN, 2003.



targeting access to justice, legal assistance and /or which enhance the capacity of legal communities. Even at that level funding remains insufficient to produce lasting structural change.

This report is an effort to promote justice in the region by offering recommendations regarding key features of the Judiciary in the Mediterranean Partners of the EU as seen from a civil society perspective. The report does not only target decision makers of the EU, the EMP and other intergovernmental institutions. Rather, it is also aimed at civil society in the Euro-Mediterranean region, providing a comprehensive analysis of the judiciary in order to enhance its active involvement in the promotion an independent, impartial, transparent and effective judiciary system.

## About the study

The report is the outcome of a participatory process in which a large number of specialists and civil society activists have contributed.

EMHRN was founded in January 1997 as a civil society response to the establishment of the Euro-Mediterranean Partnership. It represents eighty human rights organisations, institutions, and individuals in the EuroMed region who embrace the Barcelona process's aim to link human rights and democracy promotion with political dialogue and economic development.

Since its establishment, EMHRN has sought to highlight the human rights dimension of the Barcelona process. Very early the issue of justice became a priority of EMHRN; it was clear that development of the region (based on the programmatic declaration of the Barcelona process) would remain illusory without the reinforcement of legal guarantees for the protection of rights, fundamental freedoms, and a total reform of judiciary systems.

EMHRN took an active part in the organisation of the EuroMed Conference on *Access to Justice*, in Uppsala, Sweden, during April 2001. The conference gathered representatives of governments, magistrates, lawyers and civil society activists from the all 27 Euro-Mediterranean countries and concluded that there was a need to focus on the following points:

- The interdependence of national, regional and international levels of cooperation and the need for an operational inventory of problems relating to access to justice in the region.
- The need to establish a permanent dialogue on access to justice between those responsible in various states, independent experts and civil society.
- The need to create a forum for dialogue and the adoption of specific measures in order to favour this dialogue.<sup>16</sup>

EMHRN adopted a concept paper prepared by its working group on justice and agreed to monitor the ongoing work of the EU under the Home and Justice Affairs, and to continue promote the diffusion of the recommendations from Uppsala Conference. EMHRN proposed to prepare a survey report on justice in the Euro-Mediterranean region, followed by a seminar.

Subsequently, EMHRN had meetings and regular contact with the Swedish International Development Agency resulting in financial support for its justice program. The EMHRN working group on justice convened on the 9<sup>th</sup> to the 10<sup>th</sup> of May 2003, in Paris<sup>17</sup> and established the main themes and the terms of reference for a report on the state of affairs of justice in the Euro-Mediterranean region.

Shortly after the meeting, EMHRN commissioned two researchers Ms. Sian Lewis-Anthony (Human Rights Lawyer and a consultant), and Mohammed Mouaquit (Professor at the University Hassan II Casablanca) to write the report. The team began desk studies in June of 2003 and later went on individual field trips to Brussels, Egypt, Jordan, Lebanon, Morocco and Tunisia. In addition, a number of lawyers from Syria travelled to Lebanon to

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<sup>16</sup> Cf. *Equal Access to Justice in the Euro-Mediterranean Region: Report from the Conference at the Faculty of Law, Uppsala University 27-28 April 2001* (ed. Iain Cameron, Marc Schade-Poulsen and Marit Floe Joergensen) Uppsala University and EMHRN, 2001.

<sup>17</sup> Generously hosted by Penal Reform International.

meet with one of the researchers when she was refused a visa to enter Syria. The researchers' studies were complemented by special country reports drafted by Mr Negad El Borai, (Lawyer, Egypt), Ms Nour el Emam (Lawyer, Jordan), Mr Khaled El Taher (Jordan), Mr George Assaf (Lawyer, Lebanon) and Ms Claudia Marinaro (Political scientist, Italy).

An interim report was prepared for discussion at a second working group meeting, 3-4 December 2003 in Malta.<sup>18</sup> Thereafter a comprehensive draft report was subsequently presented for discussion at the EMRHN seminar in Rabat, 18-20 June 2004, on *Justice in the South and East Mediterranean Region*<sup>19</sup> that gathered 60 participants, lawyers, magistrates and human rights activists from the EuroMed region.

At the end of the seminar, participants finalized a series of recommendations on the basis of a draft that had been prepared by Mr Michel Tubiana (Lawyer, President of the French Human Rights League, and member of EMHRN Executive Committee in charge of justice) and Mr Abdelaziz Bennani (lawyer and former president of EMHRN in charge of the question of Justice).

In total, over one hundred people have participated actively in the process leading to this report. EMHRN is deeply grateful to each of these individuals for their contributions.

EMHRN also wish to thank SIDA (The Swedish International Development Cooperation Agency) and the EU Commission for generously sponsoring the report and the process leading to its conclusion.

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<sup>18</sup> The participants in the Justice Working Group meetings have been: Mr Hassan Jabareen (Adalah); Mr Ignazio Juan Patrone (MEDEL, Italy); Ms Marie Anne Swartenbroekx, (MEDEL, Belgium); Ms Caroline Stainier, (individual member and ASF); Ms. Jennifer Geen and Chris Jacobs (Bar Human Rights Committee of England and Wales); Mr Adel Abdelatif (UNDP POGAR); Ms Nour al Imam, (Lawyer, Jordan) Abdelaziz Bennani (EMHRN); Mr Marc Schade-Poulsen (EMHRN Secretariat); Mr Mostafa Bouchachi (Algerian Human Rights League); Mr Georges Assaf (Human Rights Institute, Beirut Bar Association); Mr Per Stadig, (ICJ Sweden and individual member of EMHRN); Mr Awad EL Mur (Counselor, Egypt); Ms Anna Bozzo (individual member of EMHRN); M. Ahmed Othmani (Penal Reform International); Ms Dalila Romdhane (Penal Reform International); Mr Neijib Hosni (CNLT); Mr Mokhtar Trifi (LTDH); Mr Mohammed Mouaqit (Professor, Morocco); Ms Sian Lewis-Anthony (Human Rights Legal Consultant, United Kingdom); Mr Stavros Mantakiozidis (MEDEL Greece); Ms Lefkia Kammitis (MEDEL, Cyprus); and Ms Line Gamrath Rasmussen (EMHRN Secretariat).

<sup>19</sup> The meeting that was organised in collaboration with EMHRN members Democratic Association of Moroccan Women (ADFM), l'Espace Associatif, the Moroccan Association for Human Rights (AMDH) and the Moroccan Organisation for Human Rights (OMDH).

## Summary of the report

The report seeks to assess the state of justice in the following southern Mediterranean countries: Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestine, Syria, and Tunisia.

Two major questions form the yardstick against which the state of justice in these countries is measured:

- How well does the legal system conform to international legal standards of justice?
- How does justice function in reality, particularly in light of international standards, when these countries conform, *de jure*?

The two questions are interlinked. The first presupposes that justice is part of the principles that formally constitute the basis of a state's political and institutional system. Yet, a simple examination of the laws to see if they conform with international standards will not suffice, if in the practice, reality is at odds with these standards. This is why the second question is relevant. The questions are also inter-dependent, as formally adopting fine and noble principles may be a preliminary stage towards their implementation. For human rights defenders, the mere act of promoting international standards of justice is a major issue in itself when seeking – in a long-term process - to alter values and culture in an authoritarian environment.

The enshrinement of these noble principles by authoritarian regimes legitimates action in defence of human rights values. However, the efforts of human rights defenders often get no further than preventing the political authorities from replacing the principles with overtly repressive rules.

This report also seeks to measure the disparity between the reality of the systems of justice and the international standards of justice. Where a disparity is identified, the first aim must be to get the countries to conform to the standards. Where it has been established that there is formal conformity with international standards, namely that the standards have been incorporated in the domestic law of the state concerned, the aim is to 'measure' the disparity between the declared conformity and the practical reality.

Those who defend human rights must combine both a legalistic and a democratisation approach and be aware that developments in these two fields are often temporally disconnected. Adoption of the international legal standards of justice is often not accompanied by the implementation of these principles. But justice can also sometimes attain a degree of (relative) independence vis-à-vis the political power even in a context of political authoritarianism. For example, in Egypt, a country where the judicial system embodies a tradition of (relative) independence, judges have in some cases 'Islamised' the interpretation of the law at odds with the secular ideology and prejudicial to individual freedoms. The report argues that in considering the challenges of legal justice, it is necessary to bear in mind that the principle of the independence of justice cannot be a requirement independent from the requirement of democracy.

Bearing in mind the two guiding questions of this report, the focus of this study is not so much on listing breaches of international standards. Rather it is to describe the incorporation of the international standards into the legal systems of the countries concerned and their progress towards formal, institutional development of the rule of law and democracy.

The report does not seek to deal exhaustively with all aspects of the legal systems in the countries concerned. Instead an approach based on highlighting the central problems of the legal systems has been chosen based on three questions:

- What is the place of the judiciary in the institutional build-up of the States, and what does it say about the integration the ideal of the rule of law into of the political systems of these countries?
- How far have the countries concerned gone towards enshrining developing an independent system of justice and judiciary?
- To what extent does justice in these countries perform its function as guarantor and protector of individual rights?

### **International standards concerning justice**

An introductory chapter is devoted to examining and analysing explaining international standards relating to justice. It is the yardstick against which the state of justice and the legal systems in the countries concerned are measured. The chapter provides an overview of international human rights standards related to justice.

Although it is not possible to claim that there exists a normative 'international procedural standard,' this standard having not yet been 'codified' by the United Nations, it is nevertheless agreed that there are a number of international sources from which a set of principles may be deduced.

Standards relating to the *independence and impartiality of the judiciary* impose a number of detailed obligations upon states. Impartiality relates to the individual judge; he or she must not be biased in favour of, or prejudiced against, any party to the proceedings. Independence requires that there should be legal safeguards protecting the ability of all judges to carry out their duties independent of the executive, the parties, and any other influence.

The *independence of the prosecution* is a key aspect related to the independence and impartiality of the judiciary. First of all it requires the prosecution to be separate from judicial functions. Apart from requiring prosecutors to protect the public interest, it involves that prosecutors should give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights etc. They should also refuse to use evidence that was obtained as a result of subjecting the suspect to torture.

*Administrative detention* tends to possess few or no guarantees as to the safety of the detainee, including no means of redress and often no access to the outside world. It might therefore be deemed a particular case of *arbitrary detention*.

*Fair trial provisions* are important parts of the international standards. This right begins at the point at which a person is arrested, since the way s/he is treated during the investigation phase has a direct impact on the conduct of the trial. The guarantee to a fair trial ends upon the completion of all available avenues of appeal. The right of access to a court, is also an inherent element of the right to a fair hearing and applies both to civil and criminal proceedings

*The right to fair trial* requires that an accused should have access to a lawyer from the initial stage of the investigation and that the accused is entitled to the presumption of innocence. It is *not*, therefore, accepted that the fight against terrorism will, *ipso facto*, justify restriction or suspension of these fundamental rights. Furthermore the defendant

has the right to silence and confessions extracted through coercion should not be considered. A person detained on suspicion of having committed an offence should be brought 'promptly' before a judge and during the trial both parties (the state - represented by the prosecution, and the accused), should be given equal opportunity present evidence

In a time of *war or emergency* threatening the life of the nation, certain rights may be subject to derogation, under certain treaties. However derogations must be strictly required by the exigencies of the situation. In accordance with these principles, a state is not justified in citing a state of emergency justifying the use of courts of exceptional jurisdiction to try an alleged terrorist, for example. Nor is it justified for a state to impose a blanket ban on access to a lawyer for extended periods of time.

Concerning *courts with exceptional jurisdiction* international bodies have not uniformly called for the abolition of exceptional courts. However, the trend is moving in this direction. The continued use of state security courts or military courts to try civilians can be contemplated therefore, where the state can ensure both in law and in practice, the independence of these courts, and the guarantees of due process to be afforded to each accused person without discrimination.

Finally, the right of *access to justice* is not explicitly guaranteed in international treaties. However, it is a right that has been universally recognised by the human rights courts and treaty monitoring bodies. It imposes both positive and negative obligations on the state. The negative obligation is the duty not to place obstacles in the way of potential litigants, preventing or impeding their access to a court. The positive obligations require that states take action to ensure that all persons and groups have effective access to a court. Furthermore the right of access to a court must be guaranteed to all without discrimination on any ground.

### **Dependence and Independence of Justice**

In relation to international standards of a binding legal nature, all the states discussed in this report have ratified the International Covenant on Civil and Political Rights (the ICCPR) and all states, with the exception of Syria have ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It is interesting that the new charter adopted by the Arab League in Tunis in May 2004, contains detailed provisions requiring the States to guarantee the independence of the judiciary. In fact the Charter goes further than current international standards with regard to derogations. It illustrates the fact that member States of the Arab League do accept internationally recognised human rights standards relating to justice.<sup>20</sup>

Nevertheless the adoption of the principles of the rule of law remains superficial. The integration of the legal culture associated with the liberal, democratic Western model is, to a wide degree, still purely formal and the countries concerned are largely dominated by authoritarian political systems.

In most of the countries examined by the report, the development of the judicial system is part of a process of superseding the traditional conception of 'justice.' Public law now operates on the basis of the modern concept of a legal system constitutionally raised to the status of 'authority.' But the significance of the traditional model of justice and the

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<sup>20</sup> Israel is a special case as it is deemed responsible for the implementation of the ICCPR in the Occupied Territories as well as bound by international humanitarian law, although it contests this legal position. The Palestinian Authority (PA), not having an internationally recognized state to govern, has not ratified the ICCPR, and is therefore entirely dependent upon Israel implementing its provisions to the benefit of the population of the Occupied Territories.

judiciary is still felt in the legal and political culture. The modernisation of the judiciary takes place within a system under political tutelage. In practice, justice continues to be delegated by the State in the countries under consideration.

The principle of the independence of the judiciary from political authority which exists in the modern conception of the rule of law now acts as a normative constraint on national legal systems. All the States covered by the report have embraced the principle of the independence of the judiciary and judicial authority into their constitutions. However, protection of the independence of the judiciary requires much more than Constitutional provisions or even a Constitutional Court that is robust in its judgments. The law and practice must provide safeguards that are capable of providing effective independence to the judiciary as a body and to judges as individuals.

The challenges in all of the countries concerned derive primarily from the fact that there are insufficient safeguards in place. This is the case in particular with regard to the lack of independent budgets over which the judiciary has sole authority: low salaries that leave judges vulnerable to corruption; no respect for the principles of irrevocability of judges; and the lack of independent High Judicial Councils.

A judge's lack of freedom to set up or join associations is revealing of the subservience in which the authorities seek to keep them. The only organisations tolerated by political power are the ones it sponsors. Hence, a career as a judge, from appointment to retirement, including promotion or demotion, is heavily marked by the intervention of the executive. Consequently, the principle of independence generally remains elusive.

#### **Justice and the rule of law**

The countries discussed in this report formally adhere to a modern concept of the rule of law wherein political power is subject to scrutiny of the lawfulness of its actions and its responsibility for them. In general, the judiciary system should be seen as a process of growing institutional and functional independence. It is admittedly a slow and difficult process, which has proceeded further in some countries than it has in others.

The trend has been towards the adoption and institutionalisation of *constitutional courts* that in principle regulate both the executive and the legislative branches of political power. At the same time the countries have been reluctant to create a jurisdiction that monitors political power and the constitutional courts have become highly politicized. The role of the constitutional court in providing a concrete symbol of the rule of law has therefore by and large remained limited.

There is also a recent trend towards establishing *administrative courts* although they remain undeveloped, and are still far from putting an end to the immunity of the executive.

Finally, development towards greater modernity can be measured by greater complexity, specialization, and professionalism of the judiciary. This includes the training and recruiting professional judges, developing auxiliary legal professions, and the improvement of specialised courts for certain types of cases.

However, the professional training of judges is often weak and national judges are often poorly acquainted with international law standards or reticent about their implementation in a domestic context. Furthermore the trend towards increasing professionalism of the law is thwarted by the existence of courts in which non-professional judges practice.

### **Courts with exceptional jurisdiction**

All the countries discussed in this report have various types of courts with exceptional jurisdiction, although the role of these courts differs in importance from one state to the other. These courts are the most glaring and blatant expression of the subordination of justice and the judiciary to political power. In a number of countries, military courts operate in parallel with, or instead of, state security courts. These courts possess a number of common factors. The tribunals often have personnel that do not qualify as judges, and who may lack any legal training. Sometimes the 'judges' are members of the armed force, and they are appointed directly by the head of state, or by the head of the armed forces. The executive often has complete discretion over who should be referred to these courts and they frequently possess their own prosecutors. The courts can impose heavy sentences, including the death penalty. There is often no appeal and lawyers are often prevented from gaining access to the person they are defending.

In most of the countries under consideration here, crimes against 'national security' are automatically tried in these exceptional courts. The problem with the term 'national security' is that there is no clear definition of what is included, and it is therefore subject to wide interpretation.

However, it is not necessarily an advantage to abolish these courts, as it would leave the ordinary courts open to political interference. In the absence of exceptional courts, ordinary criminal courts have often operated as courts with exceptional jurisdiction. The recent incorporation of 'anti-terrorist' legislation' in a number of the countries, has resulted in the undermining of the standards of justice in all courts with criminal jurisdiction.

### **Justice and the Protection of Rights**

The challenges linked to 'access to justice' and of the enforcement of legal decisions are directly linked to the issue of judicial independence, as well as to the wider legal environment.

In the countries where citizens are subject to the Muslim personal status laws, the problem of access to justice is linked to the inherent inequalities imposed by the family law. It is not just women who face obstacles to the proper enforcement of their rights; minority groups (refugees, ethnic groups, those living in poverty and others) face greater difficulties than the rest of the population.

Crucially, the issue of protection of rights also arises in relation to the question of independence and fair trial. Many states considered in this report do not permit early access to a lawyer and not only is a lawyer prevented from meeting with his/her client for several days or even weeks, but the accused is also not brought before a judge for a similar period of time. Persons arrested and detained by police or security forces are often deprived of access to a judge who can determine the lawfulness of the arrest and detention.<sup>21</sup> It is generally recognised that a person detained in such circumstances, is at greater risk of being subjected to torture or other forms of ill-treatment. Where legal representation is either absent or inadequate, the lack of a right of appeal is of particular significance.

Finally, most countries examined in this report lack a truly independent body of prosecutors. This fact alone has a significant impact on the quality of criminal justice in the

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<sup>21</sup> One of the most egregious violations of the right to access a court concerns persons who are detained under administrative detention orders.



region and it has become even more important after September 11<sup>th</sup>. The prosecution services are not accountable for their decisions and in most of the countries it is not required by law to give reasoned decisions for their actions. (Additionally, there is no code for prosecutors available to the public.)

The Public Prosecutor's Office has the right to charge and prosecute. It has also the right of investigation, which it does by supervising the criminal police that operate under its authority. These rights taken together with the right of investigation (preliminary and final), leaves the system open to the abuse of justice resulting in potentially unfair trials.

## **Recommendations**

The following recommendations are based on the discussions of the report at the Seminar on Justice in the Mediterranean, in Rabat from the 18<sup>th</sup> to the 20<sup>th</sup> of June 2004:

### **Ensuring the Rule of Law and Legal Security**

As the legal system is dependent on the legal norms it is called upon to apply, the norms of reference and methods for monitoring them need to be precisely defined.

Accordingly, it is essential for states to:

- Sign and ratify all international conventions relating to civil and political rights and other relevant conventions in the field of justice.
- Ensure (in their constitutions) that international undertakings take precedence over domestic law and that domestic law comply with the norms laid down by these conventions.
- Organise a system for monitoring domestic legislation by an appropriate national court, whose members' independence must be guaranteed with effect from their appointment/election. Not only the legislator and the executive but also citizens themselves should be able to initiate such monitoring procedure in accordance with the conditions and limits established by law.

Moreover, it is equally essential for Mediterranean states not yet party to a regional convention (such as the European Convention for the Protection of Human Rights) to adopt a regional instrument guaranteeing rights and individual freedoms and the criteria for proper justice. This instrument must entail the creation of an independent court able to hear individual complaints.

Finally, commitments made by non-EU Mediterranean States under the Barcelona Declaration and bi-lateral association agreements with the European Union in relation to the promotion and protection of human rights and the reform of justice (the essential basis of the rule of law) need to be implemented.

### **Ensuring the Independence of Justice**

The independence of the judiciary (*vis-à-vis* the political system, religious denominations and all other powers) must be expressly stated and recognised in the constitution. The status of judges must form the object of an organic law to guarantee that it complies with the constitution.

Above and beyond this institutional recognition, members of the judiciary must enjoy specific guarantees.

- Judges must be recruited in conditions of equal access to posts through competitive examinations and appointed exclusively on the basis of their competence. They must be remunerated by the state at a satisfactory level.
- Their careers must be managed by an independent body consisting of fellow judges, but also of persons not from the judicial system and without any interference by the legislature or the executive.
- Judges must enjoy the benefits of further training and education, and should have the right to form or join trade unions.
- Ordinary judges must be irremovable, except in the event of disciplinary measures taken by an independent body.

- The judges in the public prosecutor's office must have an independent status in the same way as ordinary judges. They must be subject to rules necessary for the proper application of the criminal procedures adopted by the executive power.

Conscious of the fact that there can be no proper justice without an effective and independent defence, it is recommended that:

- The training of lawyers should at least be identical to that of judges;
- The independence of lawyers and of their professional associations should be legally recognised and protected.

### **Ensuring Respect for a Fair Trial**

Rules permitting a fair trial in all fields are a corollary of the independence of the judiciary and its representatives.

It is therefore recommended that:

- Strategies are adopted that permit access to justice for all citizens and that appropriate state funding is made available to guarantee effective access to justice
- Precise definitions of the powers of the judicial police be drawn up and implemented
- Strict regulation of police custody is enshrined in the law of criminal procedure, to protect the suspect's right to dignity and physical integrity.
- Strict observance of the principle of equality of arms (between the defence and prosecution) in terms of legal powers and material resources, involving the establishment of binding rules of procedure; violation of such procedures must be factors capable of being taken into account on appeal challenging the fairness of the trial proceedings.
- The rights of defence at the stages of custody, preliminary inquiry and trial, be incorporated into domestic law and strictly observed
- The provision of effective remedies be established by law and access to such remedies be made available to victims
- States reform the legal aid systems to facilitate access to justice for all.

These requirements entail the abolition of all courts with exceptional jurisdiction, either by virtue of their composition or the rules applicable to them.

Finally, a fair system of justice develops under the scrutiny of society. The role of civil society should therefore be recognised and promoted.

### **The Role of Civil Society: Activities proposed to pursue the process initiated by the present report**

It is recommended that civil society strengthen the development of a regional synergy, in particular by cooperating in the following fields:

- a. Setting up constitutional justice and the control of the constitutionality of laws from top to bottom;
- b. Setting up administrative courts and expanding their field of exercise to include the decrees of Heads of State;
- c. Campaigning for recognition in the constitutions of the pre-eminence of ratified conventions over domestic law;

- d. Rejecting any cultural or religious specificity running contrary to international human rights norms and the fundamental principles of the rule of law;
- e. Promoting the independence and impartiality of justice;
- f. Promoting the abolition of all exceptional state systems;
- g. Promoting the abolition of exceptional jurisdictions and abolition of the ability of military courts to try civil cases;
- h. Recognition of lawyers' rights as they are defined by international texts and instruments, notably their right of association and social position;
- i. Training of judges and lawyers to implement international human rights pacts and conventions;
- j. Promoting conditions for fair trial as defined by international norms;
- k. Observing of trials;
- l. Training in trial observation;
- m. Promoting reform of the legal aid system;
- n. Promoting civil society action in the matter of legal aid;
- o. The implementation of conventional and unconventional UN protection mechanisms;
- p. Stepping up co-ordination and the exchange of information;
- q. Creating larger and more numerous spaces for free discussion on justice with all concerned parties: human rights NGOs, lawyers, judges, universities, representatives from all walks of civil society, political and union activists;
- r. Developing advocacy within the national parliaments, partner governments, European institutions, international NGOs.
- s. Disseminating the final report and its recommendations;
- t. Promoting the compiling of national reports on the legal systems.
- u. Instituting a mechanism for observing legal systems.
- v. Setting up a library which holds works and studies on justice in the region.

## Introduction

This report seeks to assess the state of justice in the following southern Mediterranean countries: Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestine, Syria, and Tunisia.

Two major questions form the yardstick against which the state of justice in these countries is measured:

- How well does the legal system conform to international legal standards of justice?
- How does justice function in reality, particularly in light of the international standard when these countries do theoretically conform?

The two questions are interlinked. The first presupposes that justice is part of the principles that formally constitute the basis of a state's political and institutional system. Yet, it is pointless to seek to ratify the international legal standards if reality is at odds with these. This is why the second question is relevant. The questions are also interdependent, as formally adopting fine and noble principles may be a preliminary stage towards their implementation. For human rights defenders, the mere act of promoting international standards of justice the principles of is a major issue in itself when seeking – in a long-term process - to alter values and culture in an authoritarian environment.

The enshrinement of these noble principles by authoritarian regimes legitimizes action in defence of human rights values, although the efforts of human rights defenders often get no further than preventing the political authorities from replacing the principles with overtly repressive rules.

This report also seeks to measure the disparity between the reality of the systems of justice and the international standards of justice. Where a disparity is identified, the first aim must be to get the countries to conform to the standards. Where it has been established that there is formal conformity with international standards, namely that the standards have been incorporated in the domestic law of the state concerned, the aim is to 'measure' the disparity between the declared conformity and the practical reality.

### **General outlook: Justice, the rule of law, and democracy**

From an academic perspective, the relation between justice, the rule of law and democracy is certainly more complex than the one frequently established by human rights and democracy activists.

The historical development of each of these concepts is separate and distinct and the links established between them is the product of a recent historical process. One need only refer to *habeas corpus*, which historically preceded the development of modern democracy, to see how separate and distinct the development of each of these concepts has been.

The activist must necessarily ask what the exact relation is between justice, the rule of law, and democracy. In fact, it may be questioned whether democracy is a prerequisite of justice or indeed whether it is justice which is a necessary condition for the process of building the rule of law and democracy. Clearly, a relevant reply must consider the aim pursued. When this aim is to implement principles already enshrined by the legal apparatus of the state, the problem of justice is generally one of democratising an authoritarian political system that subordinates the judiciary to its needs. When the aim is

to make the principles comply with the requirement of a fair system of justice the problem of justice then becomes part of a formal legalistic approach to justice.

Those who defend human rights must combine both a legalistic and a democratisation approach and be aware that developments in these two fields often are temporally disconnected. Adoption of international standards relating to justice is often not accompanied by the implementation of these principles. But the judiciary can also sometimes attain a degree of (relative) independence vis-à-vis the political power, even in a context of political authoritarianism. In Egypt, a country where the judiciary embodies a tradition of (relative) independence, judges have in some cases 'Islamised' the interpretation of the law at odds with the secular ideology and prejudicial to individual freedoms.

In considering challenges relating to the system of justice, it is therefore necessary to bear in mind that the principle of the independence of justice cannot be a requirement independent from the requirement of democracy.

Bearing in mind the two guiding questions of this report, the following study will not focus on listing breaches of international standards. Rather it will describe the incorporation of international standards into the legal systems of the countries concerned and their progress towards formal, institutional development of the rule of law and democracy.

For some activists, the short-term time factor is important when evaluating the progress of the legal systems towards implementing international standards of justice. But this report argues, from a heuristic perspective of the history and sociology of legal systems, that the process of transformation of the countries concerned, though still inadequate, is at once recent and relatively advanced.

This report seeks to combine the normative and heuristic requirements to describe the development of the legal systems in the countries concerned.

### **Democracy, human rights and development in the region**

Although the challenges to systems of justice discussed in this report vary (largely for historical reasons) from one country to another, they are similar when looking at the requirements of modern, independent and equitable justice. Three fundamental factors characterise the countries' social and political systems: authoritarianism in the political sphere, lack of development in the economic sphere, and poverty and illiteracy in the social sphere.

The lack of justice is directly linked to the following factors: authoritarianism regimes produce a lack of independence of the judiciary, the subordination of the courts and justice to political power, the restrictions on fundamental freedoms by the judiciary, the immunity of human rights violators from prosecution, and the unfair trials against opponents of the political order. The economic situation leads to a weak development of specialised courts and to corruption. The social discrepancies are conducive to discrimination and unequal access to justice.

Additionally, other factors may add to the dysfunctional situation of justice in certain countries, such as the denominational or ethnic composition of the country and regional conflicts. In particular, the conflict between Israel and the Palestinians has had, and

continues to have, a significant impact on the systems of justice in Israel and the Occupied Territories.<sup>22</sup>

### **Defining the subject, methodology and structure of the report**

This report does not seek to deal exhaustively with all aspects of the legal systems in the countries under consideration. It would be an unnecessarily cumbersome approach that would fall outside the practical objectives of the study.

Instead, an approach based on highlighting the central problems of the legal systems has been chosen. Under this paradigm, there are three fundamental preliminary questions for assessing the legal systems in the region:

- What is the place of the judiciary in the institutional build-up of the states, and what does it say about the integration the ideal of the rule of law into of the political systems of these countries?
- How far have the countries concerned gone towards enshrining an independent system of justice and judiciary?
- To what extent does justice in these countries perform its function of guarantor and protector of individual rights?

This report focuses on the basic themes associated with justice and judiciary systems measured against a yardstick of the international legal standards of justice. In connection to this, a whole introductory chapter is devoted to explaining this standard because it is the measuring stick against which the state of justice and the legal systems in the countries discussed are evaluated. However, the idea is also to disseminate information about these standards, as well as about the development of international legal opinion on its contents, benefiting NGOs, human rights activists, as well as key decision makers in the field.

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<sup>22</sup> It is not possible, in the context of this report, to document or to comment in depth on the particular problems posed by the conflict there. To this end, it is proposed only to discuss the Israeli systems (in Israel and in the Occupied Territories) and the Palestinian system of justice, in the same manner as we comment on the systems in other countries. Wherever possible, suggestions for further research are given. In this report, the authors have referred to the territories occupied by Israel, both as Palestinian territories and the Occupied Territories. This has been done in order to distinguish between discussion of the Palestinian laws and practice over areas under their jurisdiction, on the one hand and discussion of Israeli jurisdiction over Palestinians living in the territories, on the other.

## **1. INTERNATIONAL STANDARDS CONCERNING JUSTICE**

### **1.1. Introduction to international standards concerning justice**

It is not yet possible to claim that a normative 'international procedural standard' exists, simply because no such standard has been 'codified' by the United Nations. However, it is agreed that there are a number of international sources, from which a body of international principles derive, that provide for a fair system of justice. Jurists have therefore spoken of an internationally valid, common 'procedural law'.<sup>23</sup>

International sources of a binding legal nature:

- Universal Declaration of Human Rights<sup>24</sup> 1948, Articles 8 to 11
- International Covenant on Civil and Political Rights, 1966, Articles 9 and 14;
- UN Convention on the Rights of the Child, 1990,
- UN Convention on the Elimination of All Forms of Discrimination against Women, 1979
- UN Convention on the Elimination of all forms of Racial Discrimination, 1969
- UN Convention Against Torture and Other Cruel and Inhuman Treatment or Punishment, 1984

Universal instruments of a non-binding nature:

- UN Basic Principles on the Independence of the Judiciary, 1985
- UN Basic Principles on the Role of Lawyers, 1990
- UN Guidelines on the Role of Public Prosecutors, 1990
- Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA region, 1995.

Regional treaties:

- The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
- The African Charter on Human and Peoples' Rights, 1981
- The Arab Charter on Human Rights 2004 (not yet in force)
- American Convention on Human Rights, 1969<sup>25</sup>

Other regional instruments of a non-binding nature:

- The Council of Europe's Recommendation No. R (94) 12 concerning the independence, efficiency and role of judges, adopted by the Committee of Ministers
- The Council of Europe's Recommendation on the Role of the Public Prosecution in the Criminal Justice System recommendation No (2000) 19
- Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

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<sup>23</sup> S. Guinchard, M. Bandrac, X. Lagarde, M. Duchy. Droit processuel. Droit commun du procès. Dalloz. 2001. 1<sup>st</sup> edition.

<sup>24</sup> While the Universal Declaration of Human Rights was never adopted as a treaty, it is widely regarded as having acquired binding legal force.

<sup>25</sup> This treaty applies to the countries of the Americas.



Mention should also be made of the recommendations and declarations of conferences convened by non-governmental organisations, as well as declarations of professional associations.

Relevant NGO Declarations:

- Beirut Declaration: Recommendations of the First Arab Conference on Justice, June 1999
- Cairo Declaration on Judicial Independence, The Second Arab Justice Conference, February 2003

Declarations of international associations of jurists:

- International Association of Judges: Universal Charter of the Judge, 1999
- International Association of Prosecutors: Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, 1999

NGOs and other bodies have published additional manuals relating to the right to a fair trial; these manuals are relevant for this report to the extent that they seek to define international standards.

Manuals relating to fair trial:

- Amnesty International: On-Line Fair trials Manual, 1998
- UN High Commission on Human Rights: Manual on Human Rights in the Administration of Justice, 2003
- USA Office of Democracy: Manual on the Independence of the Judiciary, 2002

All of these principles, declarations, treaties, and manuals, which constitute an international standard of credible, equitable and independent justice, are the culmination of a process of transformation. They represent reality in those countries that are democratic and accept the rule of law. In a great many other countries with authoritarian political systems, these documents are still unrecognised or no more than illusive dreams or non-enforced principles.

### *1.1.1 Human rights treaties*

#### **States' obligations**

In ratifying international treaties concerning human rights, states become bound by international law, and must in turn look to the domestic effects of the law's provisions. Failure to do so involves a violation of rights, and may result in an array of political consequences.

All the states included in this study have ratified the International Covenant on Civil and Political Rights (ICCPR), guaranteeing, *inter alia*, the rights to liberty and security<sup>26</sup> and fair and public hearing before an independent and impartial tribunal established by law.<sup>27</sup> ICCPR also requires states to respect and ensure to all individuals in the territory of a

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<sup>26</sup> Article 9 of the ICCPR.

<sup>27</sup> Article 14 of the ICCPR.

state party, all the rights contained in the treaty without discrimination on any ground.<sup>28</sup> Three of the four African states have also ratified the African Charter on Human and Peoples Rights, guaranteeing, *inter alia*, the right to liberty and security,<sup>29</sup> the right to be tried by an impartial court,<sup>30</sup> the right to equality before the law,<sup>31</sup> and to the equal enjoyment of rights under the Charter without discrimination on any grounds.<sup>32</sup> This Charter also requires states guarantee the independence of courts.<sup>33</sup>

All of the States, except Syria<sup>34</sup> have ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In ratifying the ICCPR and African Charter, each state party must protect rights not only of its citizens, but also of all persons within the territory of that state.<sup>35</sup> Israel is deemed by international human rights law, and by the Human Rights Committee, to be responsible for the implementation of the ICCPR in the Occupied Territories.<sup>36</sup> The Human Rights Committee has stated in its Concluding Observations, following its consideration of Israel's State Report, that:

... the provisions of the Covenant apply to the benefit of the population of the Occupied territories, for all conduct by [Israel]'s authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility under the principles of international law.<sup>37</sup>

More recently, the Human Rights Committee issued a General Comment on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, stating clearly that States' obligations are not limited to persons within their own territories. It states that member parties are obliged, by virtue of Article 2 of ICCPR, to:

...respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. .... the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside the territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.<sup>38</sup>

Israel adamantly contests this legal position. The Palestinian Authority (PA), not having legal control of a state, has not ratified the ICCPR, and is therefore dependent upon Israel implementing its provisions for the benefit of the Palestinian people.

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<sup>28</sup> Article 2 of the ICCPR.

<sup>29</sup> Article 6 of the African Charter on Human and Peoples' Rights.

<sup>30</sup> Algeria, Tunisia and Egypt. Morocco has not ratified it to date.

<sup>31</sup> Article 3 of the African Charter on Human And Peoples' Rights.

<sup>32</sup> Article 2 of the African Charter on Human And Peoples' Rights.

<sup>33</sup> African Charter on Human and Peoples' Rights, Article 26.

<sup>34</sup> As of 17 March 2004.

<sup>35</sup> See Article 2 ICCPR, and Article 2 of the African Charter.

<sup>36</sup> see Consideration of reports submitted by states parties under article 40 of the covenant, Concluding Observations of the Human Rights Committee, Israel. 21/08/2003, and 28/7/98.

<sup>37</sup> Concluding Observations of the Human Rights Committee 21/08/2003, paragraph 11.

<sup>38</sup> Human Rights Committee, General Comment No 31, The nature of General Legal Obligations Imposed on States Parties to the Covenant, adopted 29 March 2004, paragraph 10; emphasis added.

However, customary international law charters relating to occupation (binding for all states) also affect Israel. The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) is of particular importance as its applicability to the Occupied Territories has been repeatedly affirmed by the High Contracting Parties to the Geneva Conventions.<sup>39</sup> Indeed, the International Court of Justice has recently reaffirmed this position in its Advisory Opinion delivered on the 9<sup>th</sup> of July 2004, concerning the legality of Israel's so-called security wall.<sup>40</sup>

Israel does not accept this position, nor does it believe itself to be bound by an advisory opinion. The scope of this paper does not permit an in-depth examination of this issue, however it is important to note the position of the High Contracting Parties and the International Court of Justice, as well as the purpose of the Fourth Geneva Convention: guaranteeing humane treatment of civilian populations of occupied territories, and respect for their fundamental rights.<sup>41</sup>

There is now a regional human rights treaty in existence that merits attention within this report. The Arab Charter on Human Rights, 2004, replaces a treaty of the same name that was adopted in 1994, but which was never ratified by any of the parties. (The provisions of the 1994 Charter were weak and fell short of international standards in a number of significant ways.) The new charter, adopted by the Arab League in Tunis in May 2004, is more in line with international standards,<sup>42</sup> but it has no legal force yet since it needs at least 7 states to ratify it in order for it to enter into force. However, the documents mere adoption (with its detailed provisions requiring the member states to guarantee the independence of the judiciary,<sup>43</sup> equality before the law and before courts and tribunals,<sup>44</sup> protection of the magistracy from all interference, pressures or threats,<sup>45</sup> the right to a fair hearing before an independent and impartial tribunal,<sup>46</sup> as well as detailed guarantees regarding liberty and security,<sup>47</sup> the provision of minimum guarantees to be provided by the state to persons accused of criminal offences) illustrate the fact that member States of the Arab League<sup>48</sup> do accept internationally recognised human rights standards relating to justice.

Further, it is particularly noteworthy that the new charter goes further than current international standards with regard to derogations,<sup>49</sup> to be discussed in the pages that follow.

The question of whether states are bound to include the provisions of international treaties in domestic law is dependent upon each state's arrangements for the implementation of treaties. In some states, such as Egypt, treaties ratified by head of state, are automatically given the status of domestic law, in which case national courts are bound to give effect to

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<sup>39</sup> See, for example, the concluding statement of the Conference of High Contracting Parties to the Fourth Geneva Convention, 5 December, 2001.

<sup>40</sup> Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.

<sup>41</sup> See Article 27 of the Fourth Geneva Convention, as well as the Commentary of the International Committee of the Red Cross, pages 200-201.

<sup>42</sup> Tunis Declaration of 16th Arab Summit, 23 May 2004.

<sup>43</sup> Article 12 of the Charter.

<sup>44</sup> Article 11 and Article 12 of the Charter.

<sup>45</sup> Article 12 of the Charter.

<sup>46</sup> Article 13 of the Charter.

<sup>47</sup> Article 14 of the Charter.

<sup>48</sup> Including all the Arab states under consideration, including Palestine.

<sup>49</sup> See Arab Charter on Human Rights, 2004, Article 4(b).

their provisions.<sup>50</sup> In other countries, such as Jordan, treaties ratified by the head of state, need to be incorporated into domestic law by the legislature in order to have the force of law.<sup>51</sup> Jordan has not yet legislated to give effect to the human rights treaties that the state has ratified, and they have not been published in the official gazette; notwithstanding this fact, Jordan informed the UN Committee against Torture that national courts accord precedence to international treaties, except in cases that 'pose a threat to public order'.<sup>52</sup>

International human rights treaties do not dictate how states should organise their legal systems; instead, they impose standards on the quality of justice dispensed from national courts. Under this arrangement, individual states organise their own legal system, and are able to take account of local needs and conditions. Accordingly, the decision as to whether or not to create a constitutional court (currently a matter of debate in Jordan), or to develop specialised courts such as administrative courts and labour courts, is a matter for the domestic authorities.

As will be seen, the creation of administrative courts is generally seen as a positive development, capable of strengthening the protection of human rights in national jurisdictions. All nine of the countries under consideration have developed such courts. Where the quality of justice delivered by these, or any courts, falls short of international standards, civil society could usefully engage in applying pressure on the governments concerned. This could work to ensure they take remedial action, such as amending laws, providing additional courts, providing legal aid, eliminating discriminatory practices, enhancing judicial independence etc. As long as domestic courts bear all the hallmarks of independence and impartiality, and so long as they guarantee fair hearings, such courts are in keeping with the requirements of international human rights law, no matter how they are organised.

International humanitarian law, applicable to Israel's Occupied Territories, makes more specific demands. For example, the Fourth Geneva Convention requires that the status of judges, like that of public officials, may not be altered by occupying powers.<sup>53</sup> Existing tribunals shall continue to function, retaining their jurisdiction over offences of domestic criminal law by inhabitants of the occupied territory.<sup>54</sup> Furthermore, Article 64 of the Fourth Geneva Convention stipulates that the 'penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention'. The official ICRC Commentary on the Geneva Conventions states that this 'applies to the whole of the law (civil law and penal law)'. Article 64.2 of the Fourth Geneva Convention stipulates that the occupying power may enact its own legislation only in order to 'subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them'.<sup>55</sup>

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<sup>50</sup> Egypt: Article 151 of the Constitution states that treaties shall have the force of law after their conclusion, ratification and publication.

<sup>51</sup> Jordan: Article 33(1) of the Constitution states that the King ratifies treaties; Article 33(2) states that treaties affecting the public or private rights of Jordanians shall not be valid unless approved by the National Assembly.

<sup>52</sup> Jordan's Initial Report to the CAT, CAT/C/16/Add.5, paragraph 26.

<sup>53</sup> Fourth Geneva Convention relative to the Protection of Civilian Persons in a time of War, 1949, Article 54.

<sup>54</sup> Ibid, Article 64.1.

<sup>55</sup> Ibid. Article 64.2.

### **Complaints mechanisms and relevance of case law**

In some instances, it is possible for individuals or groups of individuals to submit complaints of violations of the treaty provisions to international or regional bodies. For example Algeria has ratified the optional complaints' mechanism of the ICCPR,<sup>56</sup> and both Tunisia and Algeria have accepted the competence of the Committee against Torture (CAT) to receive complaints from individuals.<sup>57</sup> This means that persons within the jurisdiction of Algeria are entitled to submit complaints of human rights violations to the Human Rights Committee<sup>58</sup> and the CAT,<sup>59</sup> and persons within the jurisdiction of Tunisia can submit claims of violations of the Torture Convention to the CAT.

The Committees are empowered to rule on the question of whether or not there has been a violation of their respective treaties. So far, none of the other States under consideration have accepted the jurisdiction of these committees over individual complaints.

The African Commission is empowered, *inter alia*, to receive and rule on complaints submitted to it by individuals or NGOs, claiming a violation of one or more of the rights contained in the African Charter by one of the state parties. The advantage of this complaint mechanism is not only the possible redress that may be made available to the victim or their family,<sup>60</sup> but also development of an international jurisprudence on the meaning and scope of the rights, and the concomitant state obligations.

In many instances, the body considering an issue in a particular case will consult and draw upon the case law of another human rights body. In this way it can be seen that international and regional human rights jurisprudence is tending to develop in a consistent manner. The body of jurisprudence of each of the treaty's bodies, including the European Court of Human Rights, offer authoritative interpretations of the rights contained in the human rights instruments, and a yardstick against which to measure each state's achievement in the field of justice and human rights.

National courts in a number of states rely on international and comparative human rights jurisprudence in the interpretation of their laws and constitutional provisions. For example, in 1995 the Constitutional Court of South Africa declared the death penalty unconstitutional, after consideration of case law of (among other bodies) the European Court of Human Rights and the Human Rights Committee.<sup>61</sup> Indeed, the South African court went further than those bodies in its declaring that the European Court and the HRC have so far failed to declare the death penalty to be contrary to the right to life.<sup>62</sup>

### **Treaty provisions relating to fair trial and equal access to justice**

The guarantee of the right to a fair hearing applies to both civil and criminal proceedings. Consideration in this report will be given only to the right to a fair hearing in the context of criminal proceedings. This right begins from the point a person is arrested, since the way s/he is treated during the investigation phase has a direct impact on the conduct of the

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<sup>56</sup> Under the First Optional Protocol, which provides for the right of individual petition.

<sup>57</sup> Pursuant to a declaration made under Article 22 of the Convention.

<sup>58</sup> Up until 3 July 2003, 5 cases had been examined at the pre-admissibility stage only; no decisions have been taken by the HRC on any case against Algeria.

<sup>59</sup> Up until 3 July 2003, no single complaint against Algeria had been the subject of any decision by the CAT.

<sup>60</sup> Formal enforcement of the decisions of these bodies is not provided for in the treaties, though enforcement may result from the application of political pressure.

<sup>61</sup> *The State –v- T. Makwanyane and M. Mchunu*, case no CCT/3/94, 6 June 1995.

<sup>62</sup> The reason for this is that the death penalty is not prohibited under either the ICCPR or the ECHR. However, both treaties now have additional protocols outlawing the death penalty, binding only those states that ratify those protocols.

trial. For example, failure to permit access to a lawyer or an interpreter at an early stage may have adverse consequences for the conduct of the defence.

The guarantee to a fair trial ends upon the completion of all available avenues of appeal. The right of access to a court, which will be examined below, is an inherent element of the right to a fair hearing and applies both to civil and criminal proceedings. Article 9 of the ICCPR and Article 6 of the African Charter guarantee the right to liberty and security. They provide that no one shall be denied their liberty except on certain grounds and in accordance with such procedures as are established by law. But, the ICCPR also provides additional guarantees to those who are detained, including the right to be informed at the time of arrest, and being informed as to the reasons for one's arrest. (The Arab Charter of 2004 guarantees the right to liberty and security in a manner that follows the ICCPR guarantee.)

Article 14 of the ICCPR, and Articles 7 and 26 of the African Charter guarantee the right to a fair trial before an independent and impartial tribunal. The ICCPR additionally requires that the courts are established by law, and that hearings are public except in specified circumstances provided for in Article 14(1). In addition, Article 2 of both treaties guarantee the right of equal enjoyment of the rights contained therein, without any discrimination on grounds of race, colour, sex, political or other opinion, social or national origin, etc. Article 2 of the ICCPR and the African Charter require therefore, equal access to justice. Laws or practices that restrict access to courts to certain groups, or operate to exclude certain groups, violate Article 2 of these treaties.

Article 12 of the 2004 Arab Charter on Human Rights, guarantees equality before the law. Additionally, it requires member parties to guarantee the independence of the judiciary and to protect 'magistrates' against any interference, pressure or threats. Article 13 of the Charter guarantees a fair trial before a competent independent and impartial court constituted by law. It further requires that trials be held in public except in 'exceptional cases' (which are not specified).

There is a right on the part of states to derogate from their obligations under the ICCPR and CAT. This will be examined further in the pages that follow,<sup>63</sup> in the context of criminal proceedings. It is sufficient to say here, that while, for example, states may derogate from their obligations under the ICCPR to protect the rights of liberty and security and fair trial, no derogation may completely undermine the object and purpose of a human rights treaty or its provisions. Further, a state may not use derogation as an excuse to take discriminatory action against a section of its population.<sup>64</sup>

The particular significance of fair trial rights contained in the Arab Charter (while not yet in force), is that the right to liberty, security, and a fair trial is listed in Article 4 as inalienable rights. This is not the case in any other human rights treaty. This means that for contracting states, these crucial rights may never be curtailed, even during a state of emergency. Inclusion on the list of inalienable rights illustrates the weight such rights are accorded by the member states of the Arab league.

The right to liberty, security, and to a fair trial coupled with prohibitions against discrimination are found in many human rights treaties, such as the European Convention

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<sup>63</sup> See section 2.8: States of Emergency and Derogation.

<sup>64</sup> See Article 4(1) of the ICCPR, and HRC General Comment 5, Derogation of Rights, paragraph 1, and HRC General Comment 29, Derogations from the Covenant during a State of Emergency, paragraph 8.

on Human Rights, and the American Convention on Human Rights,<sup>65</sup> and have generated a large body of case law. This case law offers authoritative interpretations of states' obligations, and may be used to hold states accountable for their violations of human rights.

### *1.1.2 Non-binding standards*

#### **Regional standards**

In addition to the treaties already mentioned, there are a number of non-binding instruments relevant to justice that are of particular relevance to the region. They include the African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa adopted in July 2003,<sup>66</sup> the Beirut Declaration, Recommendations of the First Arab Conference on Justice, June 1999, and the Cairo Declaration on Judicial Independence, the Second Arab Justice Conference, February 2003.<sup>67</sup> Held together, these represent a broad consensus form jurists across the region, with the exception of Israel.<sup>68</sup>

The African Union Principles flesh out the obligations of the right to a fair trial, as guaranteed by the African Charter (specifically relevant to Algeria, Tunisia and Egypt). While the African Union Principles are not legally binding instruments, they manifest a strong consensus among political leaders in Africa on the requirements of the right to a fair trial, consistent with developing international standards. The extremely detailed provisions have drawn from, among other sources, the European Convention on Human Rights, whose case law provides a powerful illustration of the relevance of human rights instruments from other regions (namely the region under consideration in this report). From this moment forward, the African Commission on Human and Peoples' Rights will apply the Principles and Guidelines in all its work related to detention and fair trial.<sup>69</sup>

#### **Universal instruments**

A number of universal non-binding instruments are relevant, such as the UN Body of Principles on the Independence of the Judiciary, the UN Basic Principles on the Role of Lawyers, and the UN Guidelines on the Role of Prosecutors, 1990. They provide useful guidance on the interpretation of treaty provisions applicable in each country and represent an international consensus on issues concerning judges and prosecutors.

#### **Declarations of NGOs, heads of state, etc**

Other instruments, including declarations made by heads of states, declarations of the UN General Assembly, and statements produced by international NGOs etc, offer useful guides as to the direction of development of human rights standards. Indeed, many of them have drawn heavily on the jurisprudence of human rights treaty bodies and courts. Accordingly, they may be usefully relied upon in the course of legal proceedings or in political dialogue with state authorities.

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<sup>65</sup> A treaty covering the Americas.

<sup>66</sup> Adopted at Second African Union Summit of African Leaders, Maputo, July 2003.

<sup>67</sup> The Beirut and Cairo Declarations were adopted following two Conferences convened by the Arab Centre for the Independence of the Judiciary and the Legal Profession to consider judicial independence in the region.

<sup>68</sup> Israel was not included in the meetings responsible for drafting these documents.

<sup>69</sup> It will be used by the Commission in examination of State reports, in examination of individual or collective complaints, and by all the Commission's Special Rapporteurs.

Declarations of professional bodies, such as the International Association of Prosecutors<sup>70</sup> and the International Association of Judges,<sup>71</sup> are also influential. They demonstrate a shared understanding of the obligations and responsibilities of these professions in the administration of justice. A number of manuals relating to justice and the right to a fair trial are useful tools; they serve to shed light on the meaning of the nature of States' obligations. Of particular importance are the Amnesty International Fair Trials Manual,<sup>72</sup> the UN High Commission on Human Rights Manual on Human Rights in the administration of Justice,<sup>73</sup> and the USA Office of Democracy manual on the Independence of the Judiciary<sup>74</sup>

### **Apparent contradictions contained in standards**

It is worthy to note that some instruments appear to contradict one another. Of particular importance for present purposes are the provisions concerning the role of the prosecution. The UN Guidelines on the Role of Prosecutors and the African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa both state that 'The office of prosecutors shall be strictly separated from judicial functions.'<sup>75</sup> This statement is consistent with a line of jurisprudence that has emerged from both the HRC and the European Court of Human Rights.<sup>76</sup> By contrast, the Beirut Declaration states that, 'The public prosecution shall be considered a branch of the judiciary.'<sup>77</sup> (However, the Declaration does go on to state that the authority undertaking prosecutions must be separate from those of investigation and referral.)

It is suggested that the Beirut Declaration is attempting to reflect the reality of the region (by stating that the prosecution be part of the judiciary). Adding that the functions of the prosecution be separate from those of investigation or referral, it appears that the Declaration is attempting to address the problems that can ensue where the prosecution is part of the judiciary, namely that overlap in functions can lead to undermining of the fairness of criminal proceedings. This does seem to be in keeping with the UN Guidelines, whose aim in paragraph 10 is to keep the functions of the two offices separate. Nevertheless, the membership of the prosecutions of the judiciary in the countries under consideration, certainly does pose problems: These are addressed as part of this report below.

The question of the status of prosecutors in the region is certainly a matter ripe for debate; in eight of the countries<sup>78</sup> examined, the prosecution lacks independence and is greatly influenced by the executive. The ninth country, Israel, has an independent prosecution that operates, as far as the Jewish population is concerned, justly. However, where Arab Israelis and Arab inhabitants of the Occupied Territories are concerned, this situation is different. For instance, in the Occupied Territories, where Palestinians are tried by Israeli

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<sup>70</sup> None of the prosecution services of the countries under examination are members of the International Association of Prosecutors.

<sup>71</sup> Associations of Judges in Egypt, Israel, Morocco and Tunisia are all members of the International Judges.' The text of the Universal Charter of the Judge was unanimously approved by the delegations attending the meeting of the Central Council of the International Association of Judges in Taiwan on 17 November 1999. Israel, Morocco and Tunisia were among those attending.

<sup>72</sup> On Line Manual.

<sup>73</sup> Office of the High Commissioner for Human Rights, Professional Training Series, Human Rights in the Administration of Justice, A Manual on Human Rights for Judges, Prosecutors and Lawyers, 2003.

<sup>74</sup> USA Office of Democracy and Governance, Guidance for Promoting Judicial Independence and Impartiality, January 2002.

<sup>75</sup> Paragraph 10 of Guidelines on the Role of Prosecutors, 1990, and Paragraph F (f) of the African Union Principles and Guidelines.

<sup>76</sup> Discussed below.

<sup>77</sup> Paragraph 4 of the Beirut Declaration.

<sup>78</sup> Included in the eight, is the Palestinian National Authority.



Military Courts in respect of crimes deemed to involve the security of Israel, prosecutors are drawn from officers serving in the Israeli army or in its reserves. They tend to have very close links with judges, who are also drawn from army ranks.

## **2. STANDARDS RELATING TO ACCESS, INDEPENDENCE AND FAIR TRIAL**

### **2.1. Standards relating to access to justice**

The right of access to justice is not explicitly guaranteed in international treaties. It is, however, a right that has been universally recognised by the human rights courts and treaty monitoring bodies as an inherent part of the right to a fair hearing. Both the Human Rights Committee and the European Court of Human Rights have stated clearly that the right to a fair trial is dependent upon effective access to court being guaranteed, in law and in practice.<sup>79</sup>

The right of access to a court is also contained in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.<sup>80</sup> Failure to guarantee access to a court amounts to a denial of the right to a fair hearing, and is a violation of a person's human rights. The right of access to a court imposes both positive and negative obligations on the state. The negative obligation is the duty to not place obstacles in the way of potential litigants, preventing or impeding their access to a court. The positive obligations require that states take action to ensure that all persons and groups have effective access to a court. This might require the state to ensure the building and equipping of new courts to serve remote areas. It may also require the state to take positive measures to assist groups who have traditionally suffered discrimination, and to provide legal aid.

The elements of the right of access to a court include the right to free legal assistance where required in the interests of justice.<sup>81</sup> There are some circumstances that will *always* require the provision of legal aid to an indigent litigant. The HRC has stated that where a challenge is made regarding to the legality of the death penalty, the conditions on death row, and the length of time spent on death row, the interests of justice requires the provision of legal aid to ensure access to a court.<sup>82</sup>

The right of effective access to a court also includes the right to have confidential meetings with a lawyer, out of earshot of the police, in order to eliminate the possibility of pressure or intimidation being brought to bear on the defence.<sup>83</sup> It also requires the right to unhindered postal communication with a lawyer.<sup>84</sup>

However, the European Court has stated that there may be special features of an investigation requiring the restriction of right to confer privately with a lawyer. There must, however, be proper justification for restricting this right and such restriction must not operate so as to deny the accused of the right to a fair trial.<sup>85</sup> Certainly, any practice that routinely denies the right to confidential meetings with a lawyer violates the right of effective access to a court. Effective access to a court also includes the assurance that

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<sup>79</sup> See, for example, *Airey –v- Ireland* (ECHR) and *Bahamonde –v- Equatorial Guinea*, (HRC) A/49/40 vol II 183, at paragraph 9.4.

<sup>80</sup> Principle K, Access to Judicial Services.

<sup>81</sup> *Airey –v- Ireland* referred to legal proceedings to effect a judicial separation; in any event, Article 14 of the ICCPR and Article 6 of the ECHR require the provision of legal aid in criminal cases where necessary.

<sup>82</sup> *Henry –v- Trinidad and Tobago*, 752/1997, CCPC/C/64/D/752/1997, 3 February 1999, paragraph 7.6.

<sup>83</sup> *Ocalan –v- Turkey*, Application 46221/99, 12 March 2003.

<sup>84</sup> *Campbell and Fell-v-United Kingdom*, 7819/77 and 7878/77, 28 June 1984.

<sup>85</sup> *Ocalan –v- Turkey*, Application 46221/99, 12 March 2003, paragraph 146; also see discussion below on the right to a fair trial.

judicial decisions will be enforced.<sup>86</sup> Therefore the execution of judgments must be regarded as an integral part of a fair trial.<sup>87</sup>

The issue of the allocation of costs in civil proceedings is relevant to the question of providing effective access to a court. Where a private individual seeks to enforce their rights protected by a human rights treaty in a domestic court, a rigid application of a rule imposing costs on the losing party may violate the right of access to a court. The reasons for such rigid rules do not take into account the implications for the litigant, and they also have a deterrent effect on the ability of any person claiming a right under that treaty to pursue a remedy before the courts.<sup>88</sup> Therefore, effective access to a court requires the implementation of rules that are sufficiently flexible for the trial court to take such matters into consideration when awarding costs.

The right of access to a court must be guaranteed to all without discrimination on any grounds. No obstacles may be placed in the way of a detainee from gaining access to his/her lawyer, in order, for example, to consider legal action against the prison authorities.<sup>89</sup> Laws or practices that effectively bar certain groups from litigating (such as women, certain tribal groups etc) offend the right of access to a court. In situations where women are prevented from gaining access to courts on the grounds of lack of financial means, the state is obliged to take action to ensure that free legal assistance is provided to them. This may mean supporting the establishment of law centres or other advice agencies, competent to give free legal advice and representation to women in need.

Where affiliation to a particular religion or religious denomination determines both the process and the outcome of judicial proceedings, such as is the case with religious courts with jurisdiction over matters of personal status, equal access to justice is an issue. International norms have not yet addressed this issue specifically. It is, nevertheless, relevant since it raises the question of equal access to justice. This will be discussed in more detail below.

## **2.2. Standards relating to the independence of the judiciary**

Both the ICCPR and ACHPR protect the right to a fair hearing before an independent and impartial court. The Arab Charter on Human Rights requires the state parties to guarantee the independence of the judiciary, and to protect magistrates against any interference.<sup>90</sup>

The requirement of independence and impartiality impose a number of detailed obligations upon states. Impartiality relates to the individual judge; he or she must not be biased in favour of, or prejudiced against, any party to the proceedings. Impartiality is assessed by the application of both subjective and objective tests.

The subjective test determines the presence or absence of bias in the judge concerned. For example, if a judge were related to one of the parties in the proceedings, s/he would, by application of the subjective test, be deemed to be biased. A judge would also be deemed biased in accordance with this test, where s/he previously had been a prosecutor in the same case.

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<sup>86</sup> *Hornsby –v- Greece*, Application No 18357/91, 25 February 1997.

<sup>87</sup> *Hornsby –v- Greece*, Application No 18357/91, 25 February 1997, paragraph 40.

<sup>88</sup> *Aarela and Nakkalajarai –v- Finland*, 779/1997, CCPR/C/73/D/779/1997, 24 October 2000.

<sup>89</sup> *Golder –v- United Kingdom*.

<sup>90</sup> Article 12 of the Arab Charter on Human Rights.

The objective test determines whether the judge offers guarantees that are sufficient to exclude any legitimate doubt as to the presence of bias.<sup>91</sup> Legitimate doubt would arise in instances where the judge had previously been a member of the prosecution, hierarchically superior to the prosecutor in the case, and with powers to discuss the case, even if there was no evidence to suggest that s/he did in fact take part in such a way.<sup>92</sup> What is at stake is the confidence that the courts must inspire in the public in a democratic society.

A Canadian Supreme Court judgment expresses the notion of independence succinctly. It states that the requirement of an independent judiciary involves:

Both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court, as reflected in its institutional or administrative relationships to the executive and legislative branches of government.<sup>93</sup>

Independence of the judiciary relates to the status of the judicial system as a whole, and its relationship to the other branches of government. Independence requires that there should be legal safeguards protecting the ability of all judges to carry out their duties independent of the executive, the parties, and any other influence. Such safeguards are generally accepted to include the following:<sup>94</sup>

- Constitutional guarantee of the independence of the judiciary
- Judicial training prior to appointment to the judicial system, as well as continuous education and training of judges throughout their careers
- A transparent system of appointments, by an independent body<sup>95</sup> based on merit, integrity and appropriate qualification that is not influenced by executive bias
- Appointment of judges on a permanent basis, rather than on a contractual basis
- The guarantee of security of tenure for judges
- The guarantee of effective and independent disciplinary mechanisms<sup>96</sup>
- Guarantees that the executive branch will not interfere in the allocation of cases to particular courts or the conduct of any given case
- An independent budget for the judicial system
- The right of judges to join professional associations to represent their interests
- Salaries that are commensurate with the duties and status of judges

A fair hearing is dependent upon a court being capable of ruling on the facts, and the law, without bias. Therefore judges must be independent from the executive branch and of the

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<sup>91</sup> See *Piersack –v- Belgium* (ECHR).

<sup>92</sup> See *Piersack –v- Belgium*.

<sup>93</sup> *Valiente –v- The Queen*, (1985) 2 S C R 673, at paragraph 20.

<sup>94</sup> See, for example, the UN *Basic Principles on the Independence of the Judiciary* (1995), African Union, *Principles and Guidelines on the Right to a Fair trial and Legal Assistance in Africa* Principle A (4), Council of Europe *Recommendation No R (94) 12 on the Independence, Efficiency and Role of Judges* (1994), and the International Association of Judges, *Universal Charter of the Judge* (1999).

<sup>95</sup> Not all of the instruments require this. For example, the UN Basic Principles do not, but other instruments do, such as: The African Principle and Guidelines states in Principle 4 (h) in relation to judicial appointments that 'the establishment of an independent body for this purpose is encouraged'; the Council of Europe Recommendation No R (94) 12 Article 2(c) states 'the authority taking the decision on the selection and career of judges should be independent of the government and the administration'; the European Charter on the Statute for Judges section 2.1 assumes the existence of an independent body for the appointment of judges.

<sup>96</sup> HRC, Consideration of Morocco's State report, A/55/40 Vol 1 (2000) 24, at paragraph 116.

parties, in law and in practice. HRC has declared the right to a fair trial by an independent and impartial tribunal is, 'an absolute right that may suffer no exception.'<sup>97</sup>

This assertion means that a state cannot point to the dangers posed by terrorists or extremists in order to justify a system of justice that lacks independence. Independence cannot be guaranteed where the executive branch exerts any form of control. The HRC states:

... a situation where the functions and competences of the judiciary and executive are not clearly distinguishable or where the latter is able to control or direct the former, is incompatible with the notion of an independent and impartial tribunal within the meaning of Article 14 (1) of the Covenant.<sup>98</sup>

The establishment of safeguards to guarantee independence must therefore be central to all reforms concerning the judiciary. This includes the establishment and reform of high councils of the judiciary, but also the training of judges, and many other forms of change and development. The executive branch should have no role in the professional responsibilities of judges.

### **2.3. Standards relating to independence of prosecution**

A legal system based on respect for the rule of law, also needs strong, independent and impartial prosecutors willing resolutely to investigate and prosecute suspected crimes committed against human beings even if these crimes have been committed by persons acting in an official capacity.<sup>99</sup>

There are contentious issues in the region concerning the status and role of the prosecution. In most of the countries under consideration, prosecutors are members of the judiciary. As a result, the chiefs of the prosecution services are usually entitled to membership in the High Councils of the judiciary. The question of whether they should be members of the judiciary is a complicated one, particularly as it is generally the case that prosecutors are party to criminal proceedings, presided over by a judge. They frequently fulfil other roles, such as the supervision of criminal investigations, and making decisions about whether to charge an individual. In addition, they are often subordinate to, and supervised by, their senior prosecutor. This means that decisions made by a junior prosecutor may be overturned by a superior prosecutor, rather than being subjected to review by the courts.

The roles they fulfil, their subordination to superior prosecutors and ministers of justice, indicate that prosecutors in many of the countries under examination do not possess the requisite independence to enable them to be members of the judiciary. Their presence as members of the High Councils of the judiciary can therefore be said to undermine the independence of these bodies. Additionally, there is a question of the ability of prosecutors to operate independently of the executive branch. It is imperative that their role in investigating corruption be free from any outside influence. While there are no treaty provisions expressly directed at this issue, the case law of the European Court of Human Rights provides guidance on the role and functions of the prosecution. Further, the role of the prosecution in criminal proceedings has been the subject of a UN Declaration,

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<sup>97</sup> *Gonzalez del Rio –v- Peru*, 263/1987, 28 October 1992, (A/48/40) 1993 CCPR/C/46/D/263/1987 at paragraph 5.2.

<sup>98</sup> *Bahamonde –v-Equatorial Guinea* (468/1991), ICCPR A/49/40 vol II, 20 October 1993, CCPR/C/49/D/468/1991) at paragraph 9.4.

<sup>99</sup> Human Rights in the Administration of Justice: A Manual for Judges, Prosecutors and Lawyers, Office of the High Commissioner for Human Rights, chapter 4, page 116.

a statement by the International Association of Prosecutors (the IAP),<sup>100</sup> a Council of Europe Recommendation, and is addressed in the African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

The IAP is a non-governmental organisation, whose aims include the promotion and enhancement of ‘standards and principles that are generally recognised internationally as necessary for the proper and independent prosecution of offences’. It has produced the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors.<sup>101</sup> While having no binding legal force, these instruments illustrate a consensus among prosecutors from around the world, defining the requirements of their office.<sup>102</sup>

There is significant consensus between the UN Guidelines, and the African Union Guidelines. They both require the following:

- For the prosecution to be separate from judicial functions.<sup>103</sup>
- For prosecutors to perform their duties fairly, respect human dignity and uphold human rights.<sup>104</sup>
- For prosecutors to carry out their functions impartially and avoid all discrimination.<sup>105</sup>
- For prosecutors to protect the public interest.<sup>106</sup>
- For prosecutors to give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, and grave violations of human rights, and to investigate such crimes.<sup>107</sup>
- For prosecutors to refuse to use evidence that was obtained as a result of subjecting the suspect to torture or cruel or inhuman treatment or punishment.<sup>108</sup>

In addition, the UN Guidelines stipulate that:

- Where prosecutors are vested with discretionary functions, the law or published rules or regulations must provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver or prosecution.<sup>109</sup>

The Council of Europe Recommendation 19 (2000) on the Role of Public Prosecution in the Criminal Justice System<sup>110</sup> contains similar requirements. In addition, it lays considerable weight on the accountability of the prosecution and the transparency of relations between it and the executive.<sup>111</sup>

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<sup>100</sup> [www.iap.nl.com](http://www.iap.nl.com).

<sup>101</sup> Adopted by the International Association of Prosecutors, 23 April, 1999; see <http://www.iap.nl.com/>

<sup>102</sup> [www.iap.nl.com/stand2.htm](http://www.iap.nl.com/stand2.htm). It should however be noted that none of the prosecution services of the countries discussed in this report are organisational members of IAP. Notwithstanding this fact, its usefulness can be attested to by the fact that the IAP does include in its membership, the prosecution services of a number of Arab countries, including Saudi Arabia and Oman.

<sup>103</sup> UN Guidelines, 10; African union Principles, F (f).

<sup>104</sup> UN Guidelines 12; African union Principles F (h).

<sup>105</sup> UN Guidelines 13(a); African Union Principles F (i) (1).

<sup>106</sup> Guidelines 13 (b); African Union Principles F (i) (2).

<sup>107</sup> UN Guidelines 15; African Union Principles F (k).

<sup>108</sup> UN Guidelines 16; African Union Principles F (l).

<sup>109</sup> UN Guidelines 17.

<sup>110</sup> Adopted by the Committee of Ministers.

<sup>111</sup> Recommendation (2000) 19, paragraphs 11 and 13.

The IAP Standards of Professional Responsibility require that prosecutors be independent and impartial. Any instructions given to prosecutors are required to be ‘transparent, consistent with lawful authority and subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.’<sup>112</sup> A lengthy section of the Standards is devoted to ensuring the practical independence of prosecutors, including, protection from arbitrary actions by governments, the provision of physical protection for themselves and their families, and to form and join professional associations.

#### **2.4. Standards relating to administrative detention**

Administrative detention is a form of detention that, in practice, tends to possess few or no guarantees as to the safety of the detainee. It offers no means of redress, and often creates a situation in which detainees have no access to the outside world. It is detention that is ordered by the executive branch, and is not part of criminal process.

Thus, the basis for arrest need not be on suspicion of having committed an offence. For example, national authorities often use this form of detention on persons whom they consider dangerous due to their political opposition to the regime.

Sometimes, the distinction between pre-trial detention, which is part of the criminal process, and administrative detention, which is not, is blurred. The key to determining what amounts to administrative detention, is ascertaining whether or not the detainee is being held on a criminal charge and awaiting trial. In many states, there is no possibility of reviewing the legality of administrative detention.

The European Court of Human Rights found that administrative detention could not be justified under the Article 5 of the Convention.<sup>113</sup> ECHR provides an exhaustive list of permitted grounds of detention, and administrative detention falls completely outside this list. The rationale for Article 5 is the prevention of *arbitrary detention*; accordingly the court regards administrative detention as a form of arbitrary detention, and a violation of Article 5. The Human Rights Committee has not declared the use of administrative detention a violation of the ICCPR. This can perhaps be explained by reference to Article 9 of the ICCPR which imposes fewer restrictions upon states; rather than providing for an exhaustive list of permitted grounds of detention, Article 9 simply states that ‘No one shall be arbitrarily deprived of his liberty, except on such grounds and in accordance with such procedure as are established by law’.

It does offer specific guarantees to those detained on a criminal charge, but does not address any other grounds of detention.

Therefore, the HRC has focussed its attention on ensuring that administrative detention complies with domestic law, and that its use is not arbitrary, and that its use complies with the requirements of Article 9 of the Covenant. In carrying out this task, it has clearly stated that strict limitations apply to the use of administrative detention. First, it has held that it may only be used in circumstances where ‘a person constitutes a clear and serious threat to society which cannot be contained in any other manner’<sup>114</sup>; Second, it has stated that domestic law should limit the permitted duration of administrative detention, that it should be based on grounds and procedures established by law, that information and reasons for

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<sup>112</sup> Principle 2.2.

<sup>113</sup> *Lawless –v- Ireland and Guzzardi –v- Italy*.

<sup>114</sup> *Schweizer –v- Uruguay*, (66/1980), 12 October 1982, paragraph 18.1.

detention must be given to the detainee, and that the detainee must be brought before a judge and must be able to challenge his arrest and detention. Indeed, it will not suffice for the purposes of Article 9, for the detainee to be brought only once before a court to challenge his/her detention; there must be a means by which s/he can have the question of continued detention reviewed periodically.<sup>115</sup>

The court responsible for reviewing the lawfulness of the any detention under Article 9 of the ICCPR must have power to order release, where the detention does not comply either with domestic law, or the Covenant.<sup>116</sup> The HRC has also stated that compensation must be available in the case of a breach of such laws and procedures, and that if criminal charges are later brought, the full protection of Articles 9 and 14 of the ICCPR must be given.<sup>117</sup>

## **2.5. Standards relating to fair trial in the pre-trial phase**

### *2.5.1 Introduction*

The fairness of criminal proceedings is, in part dependent upon the way in which investigations are carried out at the initial stages, particularly where the accused is held in detention. Accordingly, the right to liberty and security of the person is relevant to a consideration of the right to a fair criminal trial. This right is contained in Article 9 of the ICCPR, Article 5 of the EHCR, and Article 6 of the ACHPR.

Taken together, the rights to liberty, security, and to a fair criminal trial require that an accused should have access to a lawyer from the initial stage of the investigation. In all criminal proceedings, the accused is entitled to the presumption of innocence. This means that his/her innocence must be assumed in both law and in practice, up until the moment s/he is found guilty by a court of law, or acquitted. It therefore requires that the prosecution prove its case, in conditions guaranteeing a fair trial.

Inherent in the right of presumption of innocence, are the rights to silence and the right to not incriminate oneself. These rights have been recognised by international standards as being at the heart of the notion of a fair and proper procedure.<sup>118</sup> The rationale behind this is the protection of the accused against the use of improper forms compelling an accused to make confessions.

### *2.5.2 Access to a lawyer*

International standards guarantee the accused prompt, unimpeded, and confidential access to a lawyer after arrest. For example, Principle 18 of the UN Body of Principles for the Protection of all Persons under Any Form of Detention and Imprisonment, states: (1) A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel. (2) A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel. (3) The right of a detained or imprisoned person to be visited by and consult and communicate without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in

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<sup>115</sup> *A –v- Australia*, (560/1993) 3 April 1997, paragraph 9.4.

<sup>116</sup> *A –v- Australia*, (560/1993) 3 April 1997, paragraph 9.5.

<sup>117</sup> HRC General Comment 8, 1982. See also *Schweizer –v- Uruguay*, (66/1980), 12 October 1982, paragraph 18.1 and 19.

<sup>118</sup> See, for example, the Inter-American Convention on Human Rights, Article 8(2)(d), the Council of Europe Standard Minimum Rules, paragraph 39. *Saunders –v- United Kingdom*, 17 December 1996, paragraph 68.



exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security

The Human Rights Committee and the CAT have both repeatedly emphasised the importance of the presence of a lawyer at the investigation stage. In its General Comment No 20, the HRC states that protection of a detainee requires 'prompt and regular access' to doctors and lawyers, as well as members of their families.<sup>119</sup>

In their concluding observations regarding the examination of periodic reports, both the CAT and the HRC have insisted on states ensuring that detainees have access to lawyers. The CAT has frequently called upon states to grant access to a lawyer, as a matter of right, in the earliest stage of the process.<sup>120</sup> In its concluding observations, the Human Rights Committee stated, that 'free access to lawyers, doctors and family members should be guaranteed immediately after the arrest and during all stages of the investigation.'<sup>121</sup>

This is vital not only to protect the physical integrity of the accused, but also to assist in the right to a fair trial. The European Court of Human Rights has also recognised the right to confidential access to counsel at the investigation stage,<sup>122</sup> which may only be restricted where there is justification, as noted above.<sup>123</sup>

The European Court of Human Rights has *not* accepted that the fight against terrorism will, *ipso facto*, justify the restriction or suspension of this fundamental right. The Court has been careful to examine each case on its very particular facts, in order to determine whether delayed access to a lawyer, or access to a lawyer in the sight and hearing of the authorities, is justifiable on the facts.

Where delay of access to a lawyer is part of a plan calculated to exert psychological coercion on a detainee, and is conducive to breaking down the resolve of an accused person to remain silent, it is a violation of the right to a fair hearing.<sup>124</sup> Also, where consequences follow from the behaviour of the accused that are decisive for the prospects of his/her defence, e.g. the drawing of adverse inferences by the court of trial from refusal to answer questions, delay of access to counsel is likely to violate the right to a fair hearing.<sup>125</sup> Where it can be shown that access to a lawyer within the sight and earshot of the police impeded the usefulness of communications between the accused and counsel, e.g. in circumstances where counsel is not permitted to be present during interrogations, this too will amount to a violation of the right to a fair hearing.

A fair trial cannot be guaranteed where access to a lawyer at the investigation stage is denied, as noted above. Unregulated detention has frequently led to the abuse of detainees, including the use of torture and other forms of ill-treatment to extract confessions, the evidential value of which is highly questionable. Access to a lawyer at the

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<sup>119</sup> General Comment 7, A/47/40 (1992) paragraph 11.

<sup>120</sup> See, for example, CAT's Concluding Observations to China's Periodic Report, A/51/44 (1996) at paragraph 150.

<sup>121</sup> See HRC's Concluding Observations to Uzbekistan's Periodic Report, A/56/40 vol I (2001) paragraph 79(7).

<sup>122</sup> *John Murray –v- United Kingdom*, 18731/91, 25 January 1996, paragraph 62.

<sup>123</sup> *Ocalan –v- Turkey*, paragraph 146.

<sup>124</sup> *Magee –v- United Kingdom*, Application No 28135/95, 6 June 2000, paragraph 43.

<sup>125</sup> *John Murray –v- United Kingdom*.

investigation stage is widely regarded as necessary tool in the prevention of ill-treatment during detention.<sup>126</sup>

### *2.5.3 Right to silence and issues surrounding confessions extracted through coercion*

The right to silence and the right to not contribute to incriminating oneself are regarded by international standards as at the core of a fair procedure in accordance with the right to a fair trial.<sup>127</sup> The right to silence protects the accused against improper compulsion, contrary to the prohibition against inhuman and degrading treatment.<sup>128</sup> This right thereby contributes to the avoidance of miscarriages of justice, and the fulfillment of the right to a fair trial.

Confessions gained as a result of coercion are notoriously unreliable; their use as evidence against the accused is prejudicial to his/her right to a fair trial. Guideline 16 of the UN Guidelines on the Role of Prosecutors, enjoins prosecutors to refuse to use evidence obtained by means of the infliction of torture or inhuman or degrading treatment of the suspect. The ICCPR specifically states that in the determination of a criminal charge, everyone shall be entitled not to be compelled to testify against himself or to confess to guilt. The HRC has interpreted this to mean: 'The absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused with a view to obtaining a confession of guilt.'<sup>129</sup>

Human rights treaties are not consistent with regard to the admissibility of confessions obtained under duress.

The UN Convention against Torture, Inhuman or Degrading Treatment or Punishment refers only to the question of admissibility of confessions obtained under torture; it requires that such confessions must not be used as evidence in any proceedings except against a person accused of torture as evidence that the statement was made.<sup>130</sup> The ICCPR is silent on the question of admissibility of confessions, whether obtained under torture or lesser forms of ill-treatment prohibited by Article 7. The American Convention on Human Rights<sup>131</sup> states that a confession of guilt by the accused shall be valid only if it is made without coercion of any kind.<sup>132</sup>

Notwithstanding this seeming lack of consistency, the Human Rights Committee's General Comment No 20 concerning the prohibition of torture and cruel treatment or punishment, is very clear. It states that in order to discourage the use of torture and the other prohibited treatments, the law must prohibit the use of statements or confessions obtained through torture or other prohibited treatment.<sup>133</sup>

### *2.5.4 Access to a judge*

Both the ICCPR and the ECHR require that a person detained on suspicion of having committed an offence should be brought 'promptly' before a judge or 'other officer

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<sup>126</sup> See, for example, the HRC's General Comment No 20, paragraph 11.

<sup>127</sup> See, for example, ICCPR Article 14 (2).

<sup>128</sup> See, for example, Article 7 ICCPR, and Article 3 ECHR.

<sup>129</sup> *Kelly -v- Jamaica*, 253/1987, 8 April 1991, A/46/40, 1991, at paragraph 5.5.

<sup>130</sup> Article 15, UN Convention Against Torture, Inhuman or Degrading Treatment or Punishment, 1984.

<sup>131</sup> A human rights treaty of Organisation of American States, governing the Americas.

<sup>132</sup> Article 8(3) of the American Convention on Human Rights, 1969.

<sup>133</sup> Human Rights Committee, General Comment 20 concerning prohibition of torture and cruel treatment or punishment, paragraph 12.

authorised by law to exercise judicial power.<sup>134</sup> This is a fundamental right of an accused person, that s/he should have access to a court in a timely fashion, so that the court can rule on the legality of detention, examine the need for continued detention, and so that an detainee can lodge complaints regarding the conditions of detention.

The notion of promptness has been examined many times by the European Court of Human Rights. That court has held that the right to be brought promptly before a judge also confers an alternative right, the right to be released promptly (e.g. in cases where, after interrogation, it is decided not to charge the accused).

In a landmark case, *Brogan and others v United Kingdom*,<sup>135</sup> the Court was asked to rule on whether the applicants were released promptly in accordance with Article 5(3) of the ECHR. The applicants were held for between 4 days and 6 hours, and 6 days and 16 hours in connection with alleged terrorist offences, before being released without charge. The Court held that none of them had been released promptly, and that therefore there had been a violation of the right to liberty and security. The difficulty with this and subsequent cases, is that the court has not indicated an upper limit for 'promptness'. Nevertheless, the case offers a useful yardstick for measuring promptness in the context of the ICCPR, and other instruments.

It is also worth noting that even where a state has entered a derogation limiting the application of the right to liberty and security, owing to the fight against terrorism, the court has not accepted delays of 14 days before bringing an accused before a court.<sup>136</sup> There are reports of very convincing reasons for such a delay, reasons that the court has, as of yet, not been presented with. The fight against terrorism cannot be used as a blanket justification for extended preliminary detention in every case investigating alleged terrorists.<sup>137</sup>

The HRC has also ruled on the issue of prompt access to a court, in the examination of individual complaints. Like the courts, HRC has not yet ruled on the maximum time period defined by the word 'promptly'. However, in one case, a concurring individual opinion of one of the members of the Committee stated, 'the word promptly does not permit a delay of more than two or three days.'<sup>138</sup> In its General Comment, the HRC stated that 'delays must not exceed a few days.'<sup>139</sup> While these definitions are vague, they provide a basic sketch of the parameters of what is normal and acceptable.

## 2.6. Who constitutes a judge in the context of pre-trial detention?

An accused person has the right to appear before a judge (or other person authorised by law to exercise judicial power). The judge or (other person) must be independent, impartial and have power to order a release.<sup>140</sup> In some countries, such as Jordan, accused persons are brought before a prosecutor. The Human Rights Committee has stated that 'It is inherent to the proper exercise of judicial power, that it be exercised by an

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<sup>134</sup> Article 9(3) ICCPR, and Article 5(3) ECHR.

<sup>135</sup> *Brogan –v- United Kingdom*, Application 11209/84, and others, 29 November 1988.

<sup>136</sup> *Aksoy –v- Turkey*, Application 21987/93, 25 November 1996.

<sup>137</sup> See below regarding the discussion of derogations.

<sup>138</sup> *Kelly –v- Jamaica*, 253/1987) ICCPR A/46/40 (8 April 1991), (CCPR/C/41/D/253/1987, Individual Opinion of Mr Bertil Wennergren.

<sup>139</sup> ICCPR General Comment 8 (Sixteenth session, 1982): Article 9: Right to Liberty and Security of Persons, A/37/40 (1982) 95, paragraph 2.

<sup>140</sup> See, for example, *Ireland –v- United Kingdom*, Application No 5310/71

authority which is independent, objective and impartial in relation to the issues dealt with'.<sup>141</sup>

It concluded in *Kulomin v Hungary*, that the public prosecutor who made a number of decisions extending the applicant's pre-trial detention, could not be regarded as having the institutional objectivity and impartiality necessary to be considered an 'officer authorized to exercise judicial power' within the meaning of article 9(3) of the ICCPR.

According to the case law of the European Court of Human Rights, prosecutors seldom have the appropriate guarantees of independence and impartiality required. Case law since the 1990s has tended towards the position that prosecutors are in fact unable to make any guarantees. Thus, wherever a prosecutor's decision is capable of being influenced by the executive body, or his/her decisions are subject to review by a senior prosecutor, or where the prosecutor has power to intervene at a later stage in the proceedings on behalf of the prosecution authorities (i.e. is likely to become one of the parties), s/he will not possess the requisite guarantees of independence and impartiality.<sup>142</sup>

## 2.7. Standards relating to fair trial: trial phase

While the right to a fair trial has generated an enormous body of case law, it is not proposed to be examined in detail here, since this paper does not examine in detail, criminal trial process. For present purposes, it will suffice for this report to outline the main requirements of the right to fair trial.

The right to a fair trial is premised on the independence and impartiality of the court, as discussed above. One aspect of impartiality that is of particular importance in the region, deals with judges in criminal trials who once served as prosecutors. The case law of the ECHR relating to judges and prosecutors recognises the practice in a number of countries of judges being drawn from among the ranks of prosecutors. The court has found that a judge merely having previously held the post of a prosecutor does not call into question the impartiality of the judge. Therefore, there is no violation of the right to a fair trial before an independent and impartial tribunal in such circumstances. However, where a judge in a particular case, previously acted as a prosecutor in circumstances where s/he intervened or merely had the opportunity to intervene in the case, impartiality of the judge is compromised, and there will be a breach of the right to a fair hearing.<sup>143</sup>

Also relevant is the position of a judge who, during earlier stages of the proceedings, was involved in pre-trial decisions that involved an assessment of guilt. Where the trial judge also, during pre-trial proceedings, issued a decision rejecting an application of bail in circumstances where he made an assessment of the guilt of the accused, the impartiality of the judge would be seriously impaired.<sup>144</sup>

In addition to the nature of the court, other guarantees ensure the fairness of the proceedings. The right to a fair trial requires that both parties, namely the state (represented by the prosecution), and the accused, be given equal opportunities to present evidence and to engage in examination and cross-examine of witnesses. It also

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<sup>141</sup> *Kulomin –v- Hungary*, Communication No. 521/1992, 1996

<sup>142</sup> See, for example, *Brincat –v- Italy*, Application No 13867/88, 1992, *Niedbala -v- Poland*, Application No 27915/95, 2000, and *Pantea –v- Romania*, Application No 33343/96, 2003.

<sup>143</sup> See *Piersask –v- Belgium*, Application No 8692/79, 1982

<sup>144</sup> *Perote Pellon –v- Spain*, Application No 45238/99, 2002

requires that the prosecution disclose the evidence to the accused with ample time for the defence to prepare its case. This is known as 'equality of arms'. This, in turn, requires not only that the accused is represented at trial and subsequently in the exercise of any appeals open to him/her, but also that the accused has access to a lawyer at an early stage in criminal proceedings. Other rights during a trial include the right to an interpreter if needed.

Central to the notion of the fair administration of justice is that hearings should be held in public. Article 14 (1) of the ICCPR and Article 6(1) of the ECHR both require that trials should be held in public, except in carefully prescribed circumstances. The press and the public may not be excluded in any given case, unless their exclusion can be justified by reference to those circumstances. Public hearings offer protection against the secret administration of justice with no public scrutiny, and provide a means by which to maintain the confidence of the public. This visibility of justice contributes to ensuring the fairness of trials.

The Arab Charter is not as stringent in this regard. It states that trials shall be in public except in exceptional cases that may be warranted by the interests of justice in a society that respects human rights.<sup>145</sup> It does not further qualify the 'interests of justice', leaving this open to a loose interpretation.

The right of appeal is widely recognised in international law and is usually mentioned in the context of the right to a fair trial.<sup>146</sup> Article 14 of the ICCPR guarantees the right of appeal, as does Article 7(2) of the ACHPR. The Human Rights Committee has stated that the right of appeal applies to any person convicted of any criminal offence, and not just the most serious offences.<sup>147</sup>

Appeals that are limited to questions of law do not appear to satisfy the right to appeal. A UN Special Rapporteur<sup>148</sup> has, on a number of occasions expressed concern over the fact that appeal procedures failed to examine both facts and law. He has done this, *inter alia*, in relation to appeals against sentences imposed by Algeria's Special Courts by the Supreme Court, which has power only to review by Cassation, as well as in relation to appeals against convictions of the Kuwaiti State Security Courts. He stated:

The Special Rapporteur is also concerned that the appeal procedure against convictions and sentences passed by the Special Courts, namely the review of cassation before the Supreme Court, does not ensure the full right to appeal, as the Supreme Court only reviews legal aspects and not facts.<sup>149</sup>

## 2.8. States of emergency and derogation

In a time of war or emergency that threatens the life of a nation, certain rights, including the right to liberty and security, the right to a fair trial before an independent and impartial court, may be subject to derogation, under certain treaties, such as the ICCPR.<sup>150</sup> By contrast, Article 4 of the Arab Charter forbids derogation from the right to a fair and public

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<sup>145</sup> Arab Charter of Human Rights, 2004, Article 13(b)

<sup>146</sup> Note, it is not recognised in the main body of the ECHR; it is recognized in a separate protocol which state parties must ratify separately (Article 2 of Protocol 7 of the ECHR).

<sup>147</sup> UN Human Rights Committee, General Comment 13, para 17.

<sup>148</sup> The Rapporteur on Extrajudicial, Summary or Arbitrary Executions.

<sup>149</sup> UN Doc, E/CN.4/1994/7, 7 December 1994, at paragraph 113.

<sup>150</sup> Article 4 of the ICCPR. See also Article 15 of the ECHR.

trial before a competent independent and impartial court. There is, however, no such provision in the African Charter.<sup>151</sup>

Derogations in international law must be strictly required by the exigencies of the situation. In other words, even in time of war, or during a declared state of emergency, a state may not pass laws, or issue decrees or regulations that constitute an undermining of the system of justice. Nor can such laws completely undermine the fairness of proceedings in an individual case. Such laws may only limit a person's rights provided they can be strictly justified. Measures derogating from treaty provisions must be shown to be vital to meet the needs of the situation. In the words of the HRC:

If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.<sup>152</sup>

Accordingly, each and every restriction to individual liberty and the right to a fair hearing must be justified by the circumstances prevailing at the time.<sup>153</sup> This reflects the principle of proportionality, common to derogation and limitation powers<sup>154</sup> under the Covenant.

In accordance with these principles, a state is not justified in citing a state of emergency, which justifies the use of courts of exceptional jurisdiction to try an alleged terrorist, for example. Nor is it justified for a state to impose a blanket ban on access to a lawyer for extended periods of time. Furthermore, a state may not introduce measures that involve discrimination on the grounds prohibited in Article 2, in pursuance of its derogation.<sup>155</sup> The state must ensure, that any restrictions imposed in individual circumstances, do not completely undermine his/her right to liberty and security and to a fair trial. A state of emergency can *never* be relied upon to justify torture or inhuman or degrading treatment.

Again, in the words of the HRC:

Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.<sup>156</sup>

The particular circumstances in each and every case must determine the restrictions imposed. Therefore, the only way a state may legitimately take actions derogating from,

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<sup>151</sup> This can be read as meaning that there is no right to derogate at all, under the African Charter.

<sup>152</sup> HRC General Comment 13, Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, paragraph 4.

<sup>153</sup> See, for example, *Brannigan and McBride –v- United Kingdom*, where the Court examined the individual circumstances of the applicants, and not just the law governing the restriction of their liberty, and *Aksoy –v- Turkey*.

<sup>154</sup> In some articles of the covenant, for example Article 19, the right to freedom of expression, states are permitted to limit the right, but must meet strict criteria, one of which is the notion of proportionality.

<sup>155</sup> HRC General Comment 5, Derogation of Rights.

<sup>156</sup> HRC General Comment 29: Derogations from Provisions of the Covenant during a State of Emergency.

for example, Article 14, is to ensure that other measures are taken to provide safeguards against abuse. Cases before the European Court of Human Rights concerning the right to liberty and security illustrate this point; while these judgments are not binding on the states under consideration in this report, they comprise an authoritative interpretation of the requirements of justice during a state of emergency.

The first case illustrates that a state may not simply undermine rights by reference to a fight against terrorism. More precise justification is required. The second case illustrates the point that states must, in addition, ensure that its safeguards protect to the greatest extent possible under the circumstances, the rights of the detainee, notwithstanding the derogation.

In *Aksoy v. Turkey*,<sup>157</sup> the applicant was held *incommunicado* (detention) for more than 14 days, without any judicial supervision. Turkey sought to justify this action by referring to its derogation, and the fact that it was engaged in a fight against the terrorist activities of the PKK.<sup>158</sup> The Court found it relevant that the state failed to give reasons why judicial intervention was impossible in the circumstances. Further, the Court stated that there were no safeguards in place against abuse of the powers to detain. In conclusion, notwithstanding the state of emergency, the state had violated the applicants' rights to liberty and security.

The Court contrasted the findings of this case, with those in the case of *Brannigan and McBride v. United Kingdom*.<sup>159</sup> In this case derogation was in force as a result of the state's fight against terrorism related to the conflict in Northern Ireland. In the latter case, the applicants were held for more than four days in police detention, before being released. The Court held that there were sufficient safeguards in place capable of reducing the risk of abuse of those detained. Safeguards included that delayed access to a lawyer (delay was permissible up to 48 hours following arrest) was subject to speedy and effective judicial challenge, and that there was a right to take habeas corpus proceedings. The applicants were also entitled to inform a relative or friend of their detention, and to be seen by a doctor.

## 2.9. Standards relating to courts with exceptional jurisdiction

International standards concerning the existence of courts with exceptional jurisdiction, such as state security courts and military courts with jurisdiction to try civilians are still developing. While such courts have not been expressly forbidden in treaties such as the ECHR, the African Charter or the ICCPR, the case law of these bodies has uniformly found to violate most, if not all, fair trial guarantees. The HRC's General Comment 13, states: 'Quite often the reason for establishment of [exceptional courts] is to enable exceptional procedures to be applied, which do not comply with normal standards of justice.'<sup>160</sup>

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<sup>157</sup> *Aksoy –v- Turkey* (1996).

<sup>158</sup> The PKK were the Workers' Party of Kurdistan.

<sup>159</sup> *Brannigan and McBride –v- United Kingdom*, (1993). In another earlier case, *Brogan and others –v- United Kingdom*, (1988), where there was no derogation in place, the applicants were held for more than four days before being released. They were never brought before a judge. The Court held that the periods of detention were excessive and did not comply with the notion of promptness, required by Article 5 (the right to liberty and security). The State then entered a derogation, to enable them to hold suspected terrorists for longer periods, legitimately. In *Brannigan and McBride* the Court examined both the necessity of the derogation, and the legitimacy of the measures taken pursuant to the derogation.

<sup>160</sup> General Comment 13, *Equality before the Courts and the right to a fair and public hearing by an independent court established by law*, paragraph 4.

Many other institutions have also found this to be the case. For example, the 1995 Report of the UN Working Group on Arbitrary Detention stated:

One of the most serious causes of arbitrary detention is the existence of special courts, military or otherwise, regardless of what they are called. Even if such courts are not in themselves prohibited by the ICCPR, the Working Group has nonetheless found by experience that virtually none of them respects guarantees of the right to a fair trial enshrined in the Universal Declaration of Human Rights and the said Covenant (the ICCPR).<sup>161</sup>

The use of state security courts in Turkey was the subject of many cases in the 1990s and 2000s, before the European Court of Human Rights.<sup>162</sup> In each case, numerous violations of the right to a fair trial were found. In particular, the presence of military judges in these courts was found to undermine the independence of the courts. In so deciding, the Court pointed out that military personnel take their orders from the executive, they are subject to military discipline and they are appointed by the army.

The Court also pointed out that the *appearance of independence* is important in deciding whether such courts violated the ECHR. Where the doubts of an accused can be objectively justified, there will be a violation of the right to a fair hearing before an independent and impartial tribunal. In the Turkish cases, the Court frequently found that military personnel served on courts responsible for trying civilians. This raised the concern that the courts might be unduly influenced by considerations that have nothing to do with the nature of the cases before them.<sup>163</sup>

Exceptional courts exist in most of the countries under examination. Though the compositions of these courts vary, all of them include military officers, or the law permits the inclusion of military officers. The European Court of Human Rights' observation on this point is highly relevant. Where military judges have jurisdiction over civilians, such courts cannot, *per se*, guarantee independence. The UN Committee against Torture (CAT)<sup>164</sup> has recommended the abolition of state security courts. For example, in its concluding observations on Jordan's periodic report, CAT stated: The authorities are expected to consider abolishing exceptional courts such as the state security courts and allow the ordinary judiciary to recover full jurisdiction in the country.<sup>165</sup>

While the international bodies have not uniformly called for the abolition of exceptional courts, the trend is moving in this direction. The continued use of state security courts, military, or other similar courts to try civilians, can only be contemplated where the state can ensure (both in law and in practice) the independence of these courts. Furthermore, states must guarantee due process to be afforded to each accused person without discrimination.

The challenge is that the establishment of such courts by States has been precisely to avoid the normal guarantees. This lies behind the logic in calling for their abolition. Such courts exist throughout the region under consideration and none of them comply with

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<sup>161</sup> Report of the Working Group on Arbitrary Detention, 1995, UN Doc. E/CN.4/1996/40, at paragraph 107.

<sup>162</sup> See, for example, *Incal –v- Turkey*, Application No 22678/93, 9 June 1998 and *Ocalan –v- Turkey*, Application No 46221/99, 12 March 2003.

<sup>163</sup> *Incal –v- Turkey*, Application No 22678/93, 9 June 1998, paragraph 72.

<sup>164</sup> The treaty body responsible for the implementation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment.

<sup>165</sup> CAT, A/50/54 (1995), at paragraph 175.



international standards relating to the right to a fair hearing before an independent and impartial court. There is, therefore, a strong argument to be made for their abolition.

## 2.10. Action points

- Encouraging ratification of human rights treaties;
  - Syria should be encouraged to ratify the UN Convention Against Torture.
  - Israel should be encouraged to accept the applicability of the ICCPR to the Occupied Territories.
  - Morocco should be encouraged to ratify the African Charter on Human and Peoples' Rights.
- Encouraging the acceptance of the right of individual petition;
  - Israel, Morocco, Tunisia, Lebanon, Jordan, Syria and Egypt, should be encouraged to ratify the right of individual petition under the Optional Protocol of the ICCPR.
  - Israel, Morocco, Lebanon, Jordan, Syria and Egypt should be encouraged to accept the right of individual petition under the UN Convention against Torture.
- Encourage all Arab states to ratify the Arab Charter on Human Rights 2004.
- Encourage incorporation of international standards in domestic law and ensure that they take precedence over domestic law.
- Remind states of their positive obligations under human rights treaties; examples might include the following:
  - The provision of legal aid at a level sufficient to guarantee proper legal defence for the accused.
  - The provision of sufficient numbers of courts, court staff and facilities.
  - The provision of initial and continuous or in-service training, to include human rights training, of law enforcement officers, judges, prosecutors, court staff, staff in detention facilities, etc.
- Remind states of their obligations to provide constitutional and legal protection for a judicial independence and impartiality;
  - Such protection should include the independence of the judiciary and the independence of each judge.
  - It should also recognise and provide effective protections for the objective and subjective impartiality of judges.
- Establish or enhance international standards relating to prosecution;
  - The establishment of a regional standard guaranteeing an independent prosecution service, bound by the law, and accountable to the public for its actions.
  - The establishment of a strong legal standard may contribute to an emerging international standard.
- Establish a regional standard on administrative detention;
  - An absolute right to challenge administrative detention on a regular basis.
  - An alternative approach would be to establish a regional standard outlawing the use of administrative detention, consistent with the case law of the European Court of Human Rights.
- Establish a regional standard relating to courts with exceptional jurisdiction;
  - Consideration might be given to developing a standard outlawing the use of courts of exceptional jurisdiction.
  - Alternatively, consideration might be given to developing a standard that ensures that all such courts accord with fair trial standards.

### **3. THE CURRENT STATE OF LEGAL SYSTEMS**

#### **3.1. Dependence and independence of justice**

International standards require, *inter alia*,

- Constitutional guarantees of independence of the judiciary as a body, as well as individual judges.
- Guarantees of impartiality of judges.
- Judicial training prior to appointment as well as compulsory in-service training throughout a judge's career.
- Transparent system of appointment by an independent body, based on objective criteria including proper qualification and integrity.
- Transparent system of promotion, retirement, transfer.
- Guarantees of security of tenure and a transparent and fair disciplinary mechanism
- Right to join professional associations.
- An independent budget and adequate salaries.

There can be no doubt that a judiciary independent of political power is the yardstick by which to measure the transition from an authoritarian or despotic political system, to the rule of law.

In the history of the development of the western liberal democracies, this transition extends over several centuries, and in certain respects is not yet complete, if it is ever possible to envisage an end to this historical process. One has only to think of the status and role of public prosecutors in the French judicial system and the attempts in France to transcend it by freeing it from the political control of the Ministry of Justice. The Arab world, like other regions, is part of the historical dialectic of modernity and modernisation. The transformation of the cultural and institutional profile flowing from this, combined with economic globalisation, have a knock-off effect on the countries dealt with by this report, and serve to accelerate their history, with results that can be clearly ascertained.

However, the changes that occur remain superficial, as illustrated by the still purely formal state of the integration of the legal culture associated with the liberal, democratic Western model. In theory, the problem of the independence of justice and the judiciary arises as much in relation to the executive body as to the legislature. In practice, and this is the case, precisely, of the countries considered in this report, it arises more acutely in relation to the executive. This is why the report considers this problem exclusively from the standpoint of its relation to the executive body.

##### **3.1.1 From delegated justice to judicial authority**

In the countries under consideration in this report, the relationship of political power to justice has conformed to a secular tradition, which considers justice as a royal attribute and function in the manner similar to certain monarchic European traditions of the past. In these countries, justice was 'reserved' (to use a term belonging to the political history of traditional western monarchies), or was at most delegated. Through the course of history,

and through practice (reflected by 'Islamic public law'<sup>166</sup>), the judicature has taken on the form of a delegation (*wilayat*).

Up to a point, a degree of independence has in the past characterised the operation of the judicature of the judge (*Qâdî*). This owes to the existence of a set of divine rules (the *Shari'â*) which more or less escaped the legislative or interpretative intervention of political power, even though the judicature was under its tutelage. The result was that the subordination of the judicature to the power of the Sultan was more evident in the statutes of other judicatures than those of the *Qâdî* (*mûhtassib*; *diwan al-mazalem*). However, this relative independence was merely a consequence of the autonomy of the legal system of the *Shari'â*, built on the contentious function of the judicature of the *Qâdî*. It was not the expression of a political aim whose ambition it was to make judge and judiciary an independent authority both inherently and in its *modus operandi*.

The development of the systems of justice in the countries considered is part of a process of superseding the traditional conception of justice. In these countries, public law now operates on the basis of the modern concept of a legal system constitutionally raised to the status of 'authority'.

There can be no doubt that the notion and definition of a judge and of justice varies depending on whether it is seen as a 'power or as an authority'. This characterisation is linked to the reserve exhibited by political power (inherited from the French model), with respect to a notion of the legal system that risked placing it on par with the executive and the legislature.

All the countries under consideration in this report characterize the judiciary as an authority, not as a power. In the French version of the Tunisian Constitution, both terms are used: the section devoted to the judicial system is entitled 'Judicial Power,' whereas the terminology used in the provisions of that section refers to the judicial as an 'authority.'

However, there is now consensus regarding international legal standards of justice, so that the difference there may be between the perception of the judge and of the legal function as a 'power' or 'authority' is now no more than one of terminology. Consequently, the constitutions in all the countries considered by this report make the judicial system an 'authority' and at the same time raise it to the status of an independent constitutional institution is already in itself significant of the development of an idea and ideal of justice free from subordination to political power.

But the significance of the traditional model of justice and the judicature is still felt in the legal and political culture of these countries. The institutional and functional modernisation of the legal system takes place within a system in which the judiciary is under political tutelage. In practice, in monarchical as in political regimes of the secular, republican type, justice continues to operate as a 'delegation,' which the modernisation of the state has bureaucratized through management services (ministries, courts, official bodies...) rather than liberating it from the tutelage of political power. The transformations undergone by justice and judicial systems in Arab countries during the process of their assimilation into modernity and modernisation have not, hitherto, in practice made these systems to break with the status of simple delegation.

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<sup>166</sup> The *faqîh* (jurist) and political thinker Al-Mâwardî, author of *Al ahkâm assûltâniya* (The Government Statutes) is the reference work with respect to Islamic public law.

In certain cases, practice continues to perpetuate the traditional conception of royal justice, notwithstanding all the institutional trappings and the rhetoric of modern, independent justice.

**Jordan** For example, the Jordanian Constitution provides that no death sentence shall be carried out except after confirmation by the King. Every death sentence must be placed before the King by the Council of Ministers, together with their opinion on the matter.<sup>167</sup>

**Morocco** The pardon conferred in January 2004 by the King of *Morocco* on over thirty individuals involved not only persons already sentenced to prison after trial, but also persons who were awaiting trial and for whom the verdict had not yet been pronounced. The result of this was both interference in the course of justice, which was thus halted, and also in prejudging the guilt of those persons and the court's decision to deliver a guilty verdict.

The power to pardon in such circumstances also means that the Head of State may confer pardons on persons close to him, whom he does not wish to be prosecuted, undermining the independence of the prosecution.

**Tunisia** The former Tunisian President Bourguiba had no scruples, during his career as Head of State, in regarding himself as ultimate *'qâdî'* and intervening as such.

**Egypt** In Egypt, although there is no right of appeal from the Emergency State Security Courts, which can impose long periods of imprisonment or the death penalty, it is the President who ratifies or annuls the convictions.<sup>168</sup>

**Lebanon** In Lebanon, the executive (the Council of Ministers) can determine, in case particular crimes, that it should be treated as a crime against internal security or tends to de-stabilise the political system. Where such a decision is made, the Council of Ministers will appoint a Judge to investigate the crime, and will direct the case to be tried by the Court of Justice, a court with exceptional jurisdiction.

Conversely, when the judicial system acquires a degree of independence, it can prove paradoxical, as indicated at the beginning of this report. In Egypt, the relative independence of the judge has prompted the 'Islamisation' of the interpretation of the law at odds with the secular ideology of political power and prejudicial to individual freedoms (case of *Abou Zayda* and *Nawâl Assa'daoui*). But this was made possible by the fact that, under the Egyptian Constitution, the Sharî'â is a source of legislation, which is not the case in other countries (such as Morocco, Tunisia and Algeria).

### *3.1.2 Recognition of the principle of the independence of the judiciary*

The development of the judicial systems in the countries covered in this report is unequivocally part of a process whereby the traditional definition of justice is superseded. However, this traditional conception is perpetuated through modern forms of subordination. In institutional terms, justice is incorporated into the renovated form of the authoritarian state by becoming the instrument of an ideology of the modernisation and centralisation of political power in secular, republican regimes.

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<sup>167</sup> Jordanian Constitution, Article 39.

<sup>168</sup> Article 12 of the Emergency Law of 1958

The affirmation of the independence of judges goes paradoxically and contradictorily hand in hand with his/her official enrolment in the function of custodian of the orthodox ideology of the state. This was long the case, or indeed still is the case in certain countries.

**Syria** In Syria, under Hafez Al-Assad, the role of defender of the socialist regime appertained, to the State Security Court (and still does so in that the relevant provisions are still in force).

**Algeria** Similarly in Algeria, the Constitution conferred this function upon the judge. The purpose of judges was to exercise the 'specialised function of sole revolutionary power,' as stated in the 1969 Statutes of the Judiciary (that was amended later).

**Egypt** In Egypt, the Constitution provides for the office of the Socialist Prosecutor.<sup>169</sup> His function is to be responsible for taking 'steps which secure the people's rights, the safety of the society and its political system, the preservation of the socialist achievements, and commitment to the socialist behaviour.'<sup>170</sup> The Socialist Prosecutor is appointed and dismissed by the President of the Republic, and is subject to control by the Peoples' Assembly. The law provides his other competencies. It appears that the role of the Socialist Prosecutor has been to clamp down upon opposition groups. For example, in 2000, the Egyptian authorities froze the activities of the Islamist opposition Labour Party and closed its newspaper *Al Shaab*. The Political Parties Affairs Committee<sup>171</sup> claimed that it did not recognise the three men who were then contesting the leadership of the Labour Party. It stated that *Al Shaab* would stay closed until the dispute was settled; it then referred accusations against the party and its leaders to the socialist prosecutor for investigation.<sup>172</sup> The Labour Party has been suspended since May 2000.<sup>173</sup>

The ideological withdrawal of authoritarian socialism which has recently occurred in these countries has made such a conception redundant or outmoded. Yet, it has, at the same time not led to liberation of the judiciary from government control.

The centrality of the principle of the independence of the judiciary from political authority in the modern conception of the rule of law now acts as a normative constraint on national legal systems, so that no state openly declares its opposition to this principle. All the states covered in this report have enshrined the principle of the independence of the judiciary and judicial authority into their constitutions.

### Exceptions

However, while the constitutions of Egypt, Syria, and the Basic Law of the Palestinian Territories each guarantee both the independence of judicial authority and the independence of judges, the Constitutions of Algeria, Morocco and Tunisia guarantee only the independence of the judiciary, and the Lebanese and Jordanian Constitutions guarantee only the independence of judges. Israel's Basic Law section on the Judiciary employs the word independence only as a subheading; the text that follows states that the judiciary shall be subject only to the law.

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<sup>169</sup> Chapter VI Article 179 of the Egyptian Constitution.

<sup>170</sup> Article 179 of the Egyptian Constitution.

<sup>171</sup> Established under Law 40/1977 of the Political Parties' System.

<sup>172</sup> See for example, Middle East Times, Issue 2000-20.

<sup>173</sup> Economist, Intelligence Unit, Country Views Wire, 5th Jan 2004; [www.economist.com/countries/Egypt/profile](http://www.economist.com/countries/Egypt/profile).

The distinction between the independence of the judicial authority and the independence of judges is critical. The former protects the judicial system as an institution; the latter protects individual judges. Provisions stating that in the exercise of their functions, judges are subject only to the law (such as are present in the Tunisian and Syrian Constitutions), serve to guarantee the independence of individual judges. While variations in the constitutions of different States are to be expected, provisions that protect both the institution of the judiciary and the exercise of the judicial function of each individual Judge, offer the protection envisaged in the Canadian Supreme Court mentioned above.<sup>174</sup>

**Egypt** The importance of the principle of independence has recently been highlighted in Egypt in a ruling of the Court of Cassation. In that ruling, dated 21/5/2003, the Court of Cassation ruled that there had been irregularities in the parliamentary elections in a Cairo constituency because judges in six of the forty-nine electoral committees had been replaced by officials from the State Legal Department and from the administrative prosecution.

In the view of the Court of Cassation, the state legal department and the administrative prosecution are administrative bodies that are subordinate to the executive body. For this reason, they cannot be considered judicial organs, as the 'judicial' should be associated with the qualities of neutrality and independence, as implied by the principle of the separation of powers. It does not entail membership of the judiciary to exercise responsibilities in the state legal department or to be connected with justice, as otherwise, the police, legal personnel, lawyers, legal experts, to name only a few, would also have to be included.

The Court specified that, although the legislator has the power to create judicial bodies, this does not mean that he also has the power to make an existing administrative body into a judicial body. From this it concludes that even if the legislator has provided for the presence of members of the state legal department and the administrative prosecution in the high council for the judiciary, these two bodies, and the members of them, retain their character of administrative bodies or administrative officials. Otherwise, the executive would have a predominance of representation and influence within the judiciary, which would conflict with the principle of the separation of powers.

A number of countries make extensive use of the term 'judge.'

**Tunisia** In Tunisia, Article 12 of the Law relating to the status of the judiciary<sup>175</sup> lays down that it is not only the ordinary judges and judges of the Public Prosecutor's Office who form part of the judiciary, but also judges in the Administration of the Secretariat of State for Justice.

**Morocco** In Morocco, Law No. 1-74-467 on the status of the judiciary lays down in its Article 1 that the judiciary also includes judges practising in the departments of the central administration of the Ministry of Justice.

Conversely, certain categories of judges exist side by side within the same body of officials in a department, regardless of their category and of the principle of the separation of powers.

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<sup>174</sup> See Chapter 1 International Standards.

<sup>175</sup> Law 67-29 of 14 July 1967.

**Tunisia** In Tunisia for example, Article 11 of the Code of Criminal Procedure lays down that cantonal judges officiate as officers of the Attorney General of the Republic, under whose authority, the duties of the criminal police fall, pursuant to Article 10.<sup>176</sup> While the investigating judges are not considered to be officers of the Attorney General, they nevertheless, as laid down by Article 10, carry out criminal investigations under his authority.

In countries which follow the French legal model, the guarantee of the independence of the judge and the judiciary formally resides, *inter alia*, in the legal force which the principles determining it are recognised to have, in other words at their particular hierarchical level in the legal system. The law governing the rights and duties of the judicial system is an organic law, except in Morocco and Lebanon, where it is an ordinary law. When the rights and duties of the judicial system are stipulated in a simple law, less protection is afforded than would be in organic law.

Constitutional guarantees of independence frequently draw a distinction between ordinary courts and constitutional courts.

**Egypt** For example, in Egypt, Chapter IV entitled Judiciary Authority, governs the independence of the judiciary, and Chapter V entitled Supreme Constitutional Court (SCC), declares that this court shall be an independent judicial body. From the way these provisions are organised, the Constitution does not appear to recognise judges of the SCC as part of the judicial authority. Indeed, the Constitutional protections guaranteed to the ordinary judiciary are greater than those guaranteed to the SCC. Thus, whereas Article 165 guarantees the independence of the judicial authority, and Article 166 declares that judges are independent and are subject to no authority but the law, Article 174 (contained in a separate chapter) governing the SCC states ‘the SCC shall be an independent judiciary body.’ Judges of the SCC are not guaranteed independence, and are not required to be subject only to the law.

**Algeria** Egypt is not alone in this regard.<sup>177</sup> For example, the Algerian Constitution similarly provides, in a chapter entitled ‘Judicial Power’ for the independence of the judiciary;<sup>178</sup> a separate part of the Constitution, entitled ‘Part Three Control and Consultative Institutions, Chapter I Control.’ The Constitution provides for a Constitutional Council to guarantee respect for the Constitution. It does not, however, grant its members any guarantees of independence.

Protection of the independence of the judiciary requires much more than constitutional provisions or even a constitutional court that is robust. The law must further provide safeguards that are capable of providing effective independence to the judicial as a body and to judges as individuals. The problems in all of the countries considered in this report derive primarily from the fact that there are insufficient safeguards in place. Israel is a

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<sup>176</sup> In France, under the 1808 Code of Criminal Investigation, the criminal police included police officials, officials of other administrations granted criminal investigation powers, judges (Attorney Generals of the Republic and their deputies, investigating judges, judges of the peace). But since 1959, the Attorney General of the Republic and investigating judges, while retaining their powers attached to their status as officers of the criminal police, no longer have this status.

<sup>177</sup> The Constitutions of Algeria, Morocco, and Syria treat the Constitutional courts in a similar fashion. The Israeli Basic Law; judiciary does not draw such a distinction, nor does the Palestinian Basic Law. Jordan and Morocco do not possess Constitutional Courts; Lebanon has a Constitutional Council that is not regarded as a court.

<sup>178</sup> Part II Chapter III, Article 138; sections 147 and 148 in the same chapter provide that judges are subject only to the law and are protected from any form of pressure.

case apart and will be mentioned briefly separately. The sorts of safeguards necessary to guarantee independence in practice have been examined in Part I above.

Of all the countries under consideration, only the Palestinian Basic Law has granted the judicial system an independent budget over which it has sole authority. Judicial training in the region is generally in place for trainees, but there is little evidence of continuous judicial education taking place.<sup>179</sup> Training in international human rights law appears to be more or less absent. Low salaries in most of the countries under consideration leave judges vulnerable to corruption, and the failure to implement effective and independent disciplinary mechanisms contributes to further problems.

### 3.1.3 *The principle of security of tenure*

The principle of security of tenure poses challenges. For example in Egypt it is enshrined in the Constitution, for both judges and prosecutors<sup>180</sup> and in Morocco,<sup>181</sup> for judges of the ordinary courts. This is not so in Jordan, Algeria, Lebanon, Syria and Tunisia.

**Algeria** In Algeria, Article 16 of the Law of the 12<sup>th</sup> of December 1989, outlined rights and duties of the judiciary, for the first time in the history of the country introduced the principle of security of tenure by proclaiming that a judge with ten years' effective service cannot be transferred or receive a new appointment (in the public prosecutor's office, or in central government) without her/his consent. The Minister now only has the power to transfer judges in the public prosecutor's office and central government, it being understood that such decisions could be challenged before the Council of Ministers (*Conseil des Ministres, CM*). But the Decree of the 24<sup>th</sup> of October 1992 limited this independence of judges by amending the provisions of the Law of the 12<sup>th</sup> of December 1989. Whereas Article 16 of the Law of 12/12/89 stated that: 'an ordinary judge with ten years' effective service shall be irremovable and cannot, without her/his consent, be transferred or accept a new appointment in the public prosecutor's office or the Government or in the administration of the Supreme Court,' and that Article 42 permitted her/him to reject a transfer even where accompanied by a promotion, the Decree of 24/10/92 obliges her/him to accept a promotion, even if it results in a transfer. Similarly, secondment and delegation, which was previously a matter for the *CM*, are now solely in the hands of the Ministry of Justice.

**Israel** The Israeli Basic Law specifies the events that trigger the termination of his/her period of tenure; such events are retirement, resignation, being elected to or appointed to certain posts upon the decision of the Judges' Election Committee (passed by at least 7 of its nine members, and upon the decision of the Court of Discipline.<sup>182</sup>) However, the Basic Law leaves open the possibility of temporary, or even permanent transfers, without the consent of the judge concerned. The only instance when the consent of the judge is required is where it is proposed to appoint him/her to an acting position at a lower court.<sup>183</sup>

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<sup>179</sup> The Jordanian Judicial Institute has started continuous training for judges and prosecutors; in the last three years approximately 200 out of a total of 650 judges and prosecutors have participated in continuing education. Information derived from discussion with staff at the Judicial Institute.

<sup>180</sup> Article 168 of the Egyptian Constitution.

<sup>181</sup> Moroccan Constitution Article 85.

<sup>182</sup> Article 7 of the Basic Law: The Judiciary.

<sup>183</sup> Article 9(a) forbids the permanent transfer of a Judge to another locality without the consent of the President of the Supreme Court, unless it is pursuant to a decision of the Court of Discipline. It does not mention the consent of the judge concerned. Article 9(b) forbids the transfer of a judge to an acting position in a lower court without his consent.



**Palestinian Territories** The Palestinian Basic Law does not establish the principle of security of tenure; instead, it specifies that appointment, transfer, secondment, delegation, promotion and dismissal of judges are all governed by the Independence of the Judiciary Law.

**Tunisia** The principle of security of tenure is not, in certain cases, guaranteed by law. Tunisia<sup>184</sup> is an example of this. Judges may therefore quite legally be transferred.

Even when the principle of security of tenure is guaranteed, the legislation weakens or contradicts this principle, notably through transfer or promotion or even both at once. This is not specific to the countries covered by this report, but it may be imagined that the principle of security of tenure is circumvented by a mechanism of punishment through a transfer or removal disguised as a promotion.

**Morocco** In Morocco the Minister of Justice has the power to provisionally delegate or suspend a judge. Another provision lays down that 'Any judge being promoted shall be bound to accept the post assigned to her/him in her/his new grade. Should she/he refuse her/his promotion shall be cancelled'.<sup>185</sup> It may be surmised that such a provision makes it possible to use 'transfer' as blackmail for the purpose of removing a judge on whom the political authorities cannot rely. The intervention of judicial councils in such a measure is no guarantee against the dangers of interference by the political authorities in the workings of justice, as the councils are themselves under the influence of those authorities, and of the executive in particular.

Throughout the region under consideration there are plenty of instances where judges have been forced to retire or have been transferred to other courts. In some countries, the law itself permits temporary transfers.

**Jordan** In Jordan, the former President of the High Court of Justice and Head of the High Judicial Council, Mr Farouk Kilani, was forcibly retired in 1998 following three cases in which the High Court of Justice issued judgments that were unpopular with the Prime Minister.<sup>186</sup> One of these judgments had declared the 1997 amendments to the Press and Publications Law unconstitutional.

**Syria** In Syria, where the Prosecutor General in each province has the task of supervising the judiciary, there is anecdotal evidence of judges being transferred from court to court at the will of the Prosecutor General.<sup>187</sup>

In many countries under consideration, the law gives the executive body power to effect transfers and delegations.

**Egypt** For example, the Egyptian Judicial Authority Law<sup>188</sup> regulates the delegation and transfer of judges by the Minister of Justice. This law enables the Minister of Justice to

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<sup>184</sup> Law 67-29 of 14 July 1967.

<sup>185</sup> Article 24 of the Dahir Law of 11 November 1974.

<sup>186</sup> Information gathered from interviews in Jordan. See also: ICJ Attacks on Justice 2000 Jordan which noted that Mr Kilani was 'forced to retire.' Article 14 of the Law on the Independence of the Judiciary permits the High Judicial Council, upon the recommendation of the Minister of Justice, to require the retirement of any judge, on certain grounds.

<sup>187</sup> Information gleaned from interviews with human rights activists.

transfer a member of the Court of Appeal to the Public Prosecution for renewable periods of six months.<sup>189</sup> Other Articles of the same law enable the Minister of Justice to delegate heads of courts of first instance to work in other courts for renewable periods of six months, and to carry out legal work, other than judiciary work.<sup>190</sup> It permits the President of the Republic to transfer hearings and judges, of courts of first instance,<sup>191</sup> and to delegate a judge from the Court of Appeals to become the head of a court of first instance, for renewable periods of one year.<sup>192</sup> Although all these transfers are in law, supposed to have the consent of the Supreme Judicial Council, in reality, the power is held in the hands of the executive body.<sup>193</sup> In Egypt, the law permits the executive to transfer judges it deems to be an irritant to its authority, to inferior positions within the judiciary. Indeed, it is well known, according to Egyptian NGOs, that judges risk being removed to remote parts of the country, if their judgments are regarded as constituting direct challenges to the government. At the other end of the scale, NGOs assert that judges who toe the government line may be rewarded for their loyalty, for example, being seconded to the Gulf States, where they are likely to receive considerably higher salaries.

**Lebanon** In Lebanon, the executive body, having decided that the judicial council should try a certain crime, will select a judge of its own choosing to become the 'examining magistrate' of this court, to investigate the case. In Lebanon, where the principle is not guaranteed by the Constitution, it is common practice for judges to be rotated around the courts, on the premise that there is a shortage of judges to fill the posts. Pressure seems to have been brought even more to bear where judges have taken decisions regarded as confrontational by the government.

While it may be the case that transfers of such kinds do not actually produce injustice, the fact that the executive is involved in the decisions relating to transfers challenges the notion of the independence of the judiciary.

The principle of the independence of justice excludes judges in the public prosecutor's office from these requirements. They are not covered by the guarantee of security of tenure in which, in particular, the principle of the independence of judges is embodied. The status of the public prosecutor's office, as broadly inspired by the French model, still retains its archaic legal form, which, paradoxically and aberrantly, combines the judiciary and subordination to the executive body.<sup>194</sup>

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<sup>188</sup> Egypt: Law No 46 of 1972.

<sup>189</sup> Article 57 Egyptian Judicial Authority Law No 46, 1972.

<sup>190</sup> Articles 58 and 62, Egyptian Judicial Authority Law No 46, 1972.

<sup>191</sup> Article 53 of the Egyptian Judicial Authority law No 46, 1972.

<sup>192</sup> Article 9 of the Egyptian Judicial Authority law No 46, 1972.

<sup>193</sup> The Supreme Judicial Council does not operate independently, as will be seen below.

<sup>194</sup> In France, the country in which the reference model of the role of the public prosecutor's office originated, the aberration of the status of that office measured against the concept of the separation of powers and the independence of justice has been noted. It is accepted that there is a necessity to release judges in the public prosecutor's office from subordination to the *Garde des sceaux*, thus following the trend of this category of the judiciary, which was clearly no longer obeying orders in practice anyway. Certain innovations also form part of this development. The Constitutional Act of 27 July 1993 created, in the *Conseil des Ministres*, two separate benches; one of them with jurisdiction with respect to judges of the ordinary courts and the other with respect to the judges of the public prosecutor's office. The twelve judges of the judiciary are divided in equal numbers between each bench, five ordinary judges and one judge from the public prosecutor's office in the bench with jurisdiction regarding ordinary judges, five judges from the public prosecutor's office and one ordinary judge on the bench with jurisdiction regarding the judges of the public prosecutor's office. However, in its report for 2001, the *Conseil des Ministres* notes its attachment to the hierarchical link between the Ministry of Justice and the public prosecutor's office and to the practice of individual investigations, with the exception of cases to be discontinued.

### 3.1.4 The organisation of the judiciary. The High Councils of the Judiciary, HCJ (*Conseils Supérieurs de la Magistrature*)

The independence of the judiciary is also, in principle, based on the organisational and operational 'self-determination' of the judges. The High Councils of the Judiciary (HCJ) that exist in all the Arab countries under consideration are designed to fulfil this role. In Israel, the equivalent body is the Judges Election Committee (JEC).<sup>195</sup>

The function of the HCJs and the JEC is to take part in the appointment, transfer, career management and disciplining of judges. In some cases the creation of the *HCJs* is very recent and has been accompanied with a degree of reluctance and often driven by an attempt to void an institution of its meaning.

The creation of the HCJs has had the effect of limiting the power of the executive body in the appointment of judges. However, the laws establishing the HCJs in the Arab countries have tended to ensure that the power of the executive body is not completely curtailed. The laws differ significantly in the amount of control the HCJs have been accorded.

**Egypt** In Egypt for example, the HCJ must be consulted with regard to the majority of judicial appointments.

**Syria** In Syria, the Minister of Justice appoints all judges, placing them under the control of the executive body.

The historical experience of the HCJ in Egypt is worth considering in more detail. It displays the same tendency of control of the judiciary by the political authorities, but has encountered strong resistance from judges, thus resulting in a less regressive notion of the HCJ.

The first attempt to create a High Council of the Judiciary in Egypt dates back to 1936; the year which saw the proclamation of a royal decree setting up the council and empowering it to hear all cases concerning judges. That first HCJ was presided over by the Minister of Justice, and consisted of four judges as *ex officio* members: the Chief Justice of the Court of Appeal, the President of the Cairo Court of Appeal, the Under-Secretary of State for Justice and the Attorney General of the Republic. Additionally, there were four senior justices belonging to the Court of Cassation and the Cairo Court of Appeal elected by the plenary of their respective courts.

As the above-mentioned decree had not entered into force (not having fulfilled the procedural conditions required by the Constitution), an interim Committee<sup>196</sup> entrusted with the task of giving its opinion on the appointment, promotion, transfer, secondment and retirement of justices and ordinary judges was set up by the Minister of Justice in December 1938. It performed its duties until the promulgation of Law N.66 of 1943 on the independence of the judiciary, which set up a 'High Council of the Judiciary.'<sup>197</sup> The High

<sup>195</sup> Israel Basic Law: The Judiciary.

<sup>196</sup> Presided over by the Chief Justice of the Court of Cassation, its other members being the Under-Secretary of State for Justice, the Presidents of the Court of Appeal of Cairo and Assiout, the Attorney General of the Republic and three senior justices from the Court of Cassation elected by the plenary of that Court.

<sup>197</sup> That Council, presided over by the Chief Justice of the Court of Cassation, was made up of the following members: the President of the Cairo Court of Appeal, the Attorney General, a senior justice from the Court of

Council of the Judiciary duly performed its duties, and the advent of the Revolution of 23 July 1952 did not affect its powers. The Law of 1965 even removed the Under-Secretary of State for Justice from membership of the Council in order to guarantee a bench consisting solely of judges.

But under cover of a reorganisation of the judiciary, the HCJ, as well as other judicial bodies, was abolished in 1969 and replaced by a 'Supreme Council of Judiciary Organisations,' whose jurisdiction encompassed civil court judges, the *Council of State*, the Administrative Prosecution and also the justices of the Supreme Court created in 1969. This body is a creation of the Constitution, which provides: 'a Supreme Council, presided over by the President of the Republic, shall supervise the affairs of the judiciary organisations.'<sup>198</sup> The Constitution further provides that this body is to be consulted with regard to draft laws organising the affairs of the judiciary organs. The Council presided over by the President of the Republic but actually run by the Ministry of Justice, consisted of judges and officials from the Ministry of Justice. It inherited the powers of the councils that had been revoked.

This measure was met with hostility from judges, who called for the return of the High Council of the Judiciary in its previous form. On the 19<sup>th</sup> of January 1976, the Court of Cassation, sitting in plenary, passed a resolution asserting that the independence of the judiciary laid down by the Constitution was only possible if it enjoyed total monopoly over its cases.

The judges won the day. A new law (law N.35) was proclaimed in 1984, creating the High Council of the Judiciary, and, amending law N.46 of 1972 on the judiciary. This law lays down that the council shall be presided over by the Chief Justice of the Court of Cassation and shall consist of the following members: the President of the Cairo Court of Appeal, the Attorney General, two senior Deputy Chief Justices of the Court of Cassation and two senior Presidents of the other Courts of Appeal. In the event of the post of Chief Justice of the Court of Cassation falling vacant, of his absence or prevention, the Council shall be presided over by the most senior Vice-President not a member of the Council. In the event of the post of one of the members of the Council falling vacant, of his absence or prevention, the Attorney General shall be replaced by the Senior Deputy Attorney General, the Presidents of the Courts of Appeal shall be replaced by the next in order of seniority among the other Presidents of the Courts of Appeal, the Deputy Chief Justices of the Court of Cassation by those next in order of seniority among the Vice-Presidents.

Since the Supreme Council of Judicial Organisations is a constitutional body, it is still in existence. Although the powers of appointment of judges have been transferred to the High Judicial Council, it still wields powers relating to the organisation of courts, and prosecutors are still subordinate to the Supreme Council of Judiciary Organs, as well as the Ministry of Justice.<sup>199</sup>

**Egypt** The Egyptian system of appointing judges through the High Council of the Judiciary is compromised by the fact that almost all judges are appointed from among the ranks of prosecutors. The appointment of the public prosecutor is effected by presidential decree, without any reference to the High Council of the Judiciary. The other members of the prosecution are appointed after consultation with the Council however, the public

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Cassation, a senior justice from the Cairo Court of Appeal, selected by the plenary of their respective courts, the President of the Cairo Court of First Instance and the Under-Secretary of State for Justice.

<sup>198</sup> Constitution of Egypt issued on 11 September 1971, and amended on 30 April 1980, Article 173.

<sup>199</sup> See Nathan J Brown, *The Rule of Law in the Arab World* (1997), chapter 4.

prosecutor and all his assistants are answerable to the Minister of Justice who has power to monitor and supervise all members of the prosecution.<sup>200</sup> The Law of 1984 restored some of the powers of the HCJ, at the same time limiting its jurisdiction to civil and criminal courts. The HCJ deals with all matters appertaining to the appointment, promotion, transfer, delegation and secondment of the ordinary judges and judges in the public prosecutor's office. But the Supreme Council of the Judiciary Organisations has been retained with, among other things, powers regarding the budgetary administration of the judicial bodies.

**Morocco** In Morocco, the original conception of the HCJ dating from 1958 (that was more in line with the requirement of the autonomy and independence of the judiciary) has given way to a conception more in step with the status of 'delegated justice' and one under the control of political power. Even in this form, the HCJ has not met for a number of years and has thus not been able to perform its function (the King, has not convened it, though he has the power to). At present, the HCJ is a constitutional body.<sup>201</sup> The Council has a purely advisory role, since it is the King who accepts or rejects its recommendations.

In other countries, where the HCJ is a more recent creation, experience in this area has also seen setbacks and challenges.

**Algeria** In Algeria, the Law of 12 December 1989 lays down the rights and duties of the judiciary system. Additionally it sets up a High Council of the Judiciary, which marked a conceptual break with the past in that it was given exclusive responsibility for managing the careers of judges and proclaimed the principle of the security of tenure of judges. Under the terms of this Law, the HCJ was composed of 25 members, 16 of whom were elected judges, not counting the Chief Justice of the Supreme Court, the Attorney General at the Supreme Court and the Deputy Chief Justice of that Court, all *ex officio* members. It appointed the judges and alone decided on their transfer and career development, promotion and disciplinary measures. For the first time in the country's history, Article 16 introduced the principle of security of tenure by proclaiming that a judge with ten years' effective service cannot be transferred or receive a new post (in the public prosecutor's office, in central government, without her/his consent. The Minister now only had the power to transfer judges in the public prosecutor's office and central government, it being understood that such decisions could be challenged before the HCJ. With the promulgation of Executive Decree 05/92 of 24 October 1992, the Minister of Justice reassumed his prerogatives as regards the appointment and tenure of judges (Article 3) in place of the HCJ, now reduced to 17 members with only six judges elected by their peers. If the two judges who are members as of right are included (Chief Justice of the Supreme Court and Attorney General at the Supreme Court) the judges are now in a minority. Four prominent figures appointed by the President of the Republic now enter the HCJ: the director-general of the civil service and three senior figures from the Ministry.

**Tunisia** In Tunisia, the High Council of the Judiciary was set up in 1976 by Constitutional Law No. 98-76 amending Article 75 of the Constitution. The following members of the High Council of the Judiciary are elected by presidential decree: the Chief Justice of the Court

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<sup>200</sup> Article 125 Judicial Authority Law.

<sup>201</sup> Presided over by the King, with the Minister of Justice as Deputy-President, it consists of the Chief Justice of the Supreme Court, the 'General prosecutor of the King' at the Supreme Court, the President of the First Chamber of the Supreme Court, two representatives among them elected by the judges of the Appeal Courts, four representatives elected, among them, by the judges of the courts of first instance. For some years, the Secretary General of the Ministry of Justice has attended the meetings of the Council, although this is not laid down by the Constitution.

of Cassation, the Attorney General at the Court of Cassation, the 'General Prosecutor,' the Director of Legal Services, the 'General Inspector' at the Ministry of Justice, the First President of the Immovable Property Court, the first president of the Tunis Court of Appeal, and the 'General Prosecutor' of the Tunis Court of Appeal. It is the President, or, if he so chooses, the Vice-President, who convenes the meetings of the High Council. Its decisions are adopted by simple majority. In the case of a tied vote, the President of the Republic or the Minister of Justice has the casting vote.

**Lebanon** In Lebanon, the Constitution does not expressly stipulate the setting up of a High Council of the Judiciary. It is however, envisaged by the Taif Agreement (the Lebanese accord for national reconciliation), a document that is recognised as having constitutional status<sup>202</sup> and therefore there exists such a council. The council consists exclusively of judges, who sit on it as a right or by election by their peers. The judges are appointed by decree on a proposal from the High Council of the Judiciary and on opinion from the Ministry of Justice. However, the executive body is not bound to take account of the opinion of this body of members, so its power is limited.

**Jordan** In Jordan, as in Egypt, the HCJ is presided over by a barrister, the Chief Justice of the Court of Cassation. Its other members consist of the President of the Supreme Court, the President of the Prosecution at the Court of Cassation, the two most senior judges at the Court of Cassation, the three Presidents of the Courts of Appeal, the senior Inspector of the regular courts, the Secretary General of the Ministry of Justice and the President of the Amman Court of first Instance. At first glance, it appears that apart from the presence of the Secretary General of the Ministry of Justice,<sup>203</sup> the members of this committee appear to be independent. However, when one considers the method for appointment of these judges to their posts within their courts, it can be seen that this council is by no means independent. For example, the President of the Court of Cassation is appointed to that post directly by Royal Decree, without recommendation of the High Judicial Council; in other words, his appointment is a political one. Other members of this Council are also directly appointed to their judicial posts, by the executive body. Thus, the President of the Supreme Court is appointed to his post in the same way as the President of the Court of Cassation. The President of the Prosecution at the Court of Cassation is directly attached to the Ministry of Justice. The power of the Jordanian High Judicial Council is, in any event, limited owing to the fact that the Minister of Justice has power to recommend persons of his choosing to the judiciary, and that his power appears to be more than merely persuasive.<sup>204</sup> The powers and independence of the High Judicial Council is further undermined in Jordan, by the fact that the under-secretary of the Minister of Justice is a senior Judge appointed to this position by the High Judicial Council, from among its members. Whether or not in reality independence is compromised, the fact that a member of this council sits under the authority of the minister responsible for justice, any claim of independence is certainly open to question.

**Israel** In Israel, Basic Law requires that judges be appointed by the President, after having been selected by the nine-member Judges Selection Committee. This committee is composed of the President of the Supreme Court, two further members of the Supreme Court, the Minister of Justice, and one other Minister, two members of the Knesset, and two members of the Chamber of Advocates. A majority vote of the committee is required in order to appoint a judge to a post. While this committee cannot be regarded as being

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<sup>202</sup> The Taif Agreement. Chapter III, C.

<sup>203</sup> The Secretary General to the Minister of Justice is a judge chosen by the High Council of the Judiciary, from among its number. His position is anomalous, since he is simultaneously an independent judge and the deputy of a Minister. He is appointed and removed at the will of the Council.

<sup>204</sup> Information gathered during discussions in Jordan

entirely independent (owing to the presence of two government ministers) its composition is not a source of discontent or debate among NGOs. Since the executive, legislative, judiciary and the legal professions are all represented on this Committee, it has not attracted criticism.

**Syria** In Syria, a High Judicial Council exists, however, the protection it affords is necessarily limited, given the fact that all its members are also members of the Ba'ath Party.<sup>205</sup>

**Palestinian Territories** In the Palestinian Territories, the Palestinian Judicial Authority Law<sup>206</sup> provides that judicial positions shall be appointed by decree of the President of the National Authority, based on 'the nomination'<sup>207</sup> by the High Judicial Council.<sup>208</sup> This suggests that the President is bound to accept such nominations. However, this is not the view taken by Al Haq, one of the leading human rights organisations in the West Bank.<sup>209</sup> Al Haq is of the opinion that the High Judicial Council's power is limited to giving recommendations<sup>210</sup> and also that the President is not legally required to consult the council. Given the current circumstances, it is in fact hard to tell which way the law has been interpreted, or is likely to be interpreted in the future.

In these countries, the status of the HCJ is far from appropriate to the tasks assigned to it, to guarantee the independence of the judges. The composition of the HCJ is based more on appointment by the executive body than on the elective representation of the judges. Not all appointments to the judicial system are submitted to the HCJ for approval or consultation. The appointment of the constitutional judges by the executive body is in all cases exempted even from consulting the HCJ, which is liable to reinforce the political character of such courts. Other categories of judges also escape the formality of consulting the HCJ, the executive body thereby signifying that they are subordinate to it. For example, the judges of the emergency/state security courts are appointed directly by the executive body. It is strange to consider the judges of these courts and those of the constitutional courts as bedfellows, in escaping the influence of the High Councils of the Judiciary. It is perhaps on account of their actual or perceived political roles that appointments to these courts are purely political.

Where consultation of the HCJ is a requirement, it is sometimes purely formal, the opinion of the HCJ not being binding upon the authority with power of appointment.

**Egypt** In Egypt, the HCJ must be consulted regarding the appointment of judges and prosecutors in certain, but not all courts; consultation is not required with regard to the presidents of some courts. In either event, the HCJ's opinion may be ignored by the President, who makes all judicial appointments (including prosecutors). The law permits the President to make certain appointments without any recourse at all to the HCJ. For example, the Attorney General is appointed by the 'Head of State,' who does not have to refer to the HCJ at all,<sup>211</sup> while the appointment of the other judges in the public

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<sup>205</sup> Information obtained from discussions with a number of lawyers and NGO representatives.

<sup>206</sup> Law No 14/97

<sup>207</sup> Translation used on the website of the NGO 'LAW.'

<sup>208</sup> Palestinian Territories: Judiciary Authority Law, Article 18.

<sup>209</sup> See Al-Haq, 'The Palestinian Judiciary: Impediments to its Development', Al-Haq, 2004 (Arabic title is: Al Kada' Fi Filasteen wa mu'awekat tataweroh'- second versions, Al-Haq, September, 2003.)

<sup>210</sup> The word 'recommendation' is used by the Al-Haq in its translation of the Arabic.

<sup>211</sup> Egypt: Article 119 of the Law on the Status of the Judiciary.

prosecutor's office is made after a simple formality of consulting the HCJ. The appointment of the President and members of the 'State Council' by the 'Head of State' does not engage the HCJ at all; rather, the President is required to take the view of the Supreme Council of Judiciary Organs, a body over which he presides, as well as the General Assembly of the 'State Council.'<sup>212</sup> There is nothing to prevent the President from ignoring the suggestions of these two bodies. The appointment of judges to the Court of Appeal is made by the President of the Republic, after consultation with the Supreme Council of Judiciary Organs, rather than by the HCJ.<sup>213</sup> The President of the Supreme Constitutional Court is appointed directly by the President of the Republic, without any consultation with the HCJ or the Supreme Council of Judiciary Organs. By contrast, the other members of this court are appointed after consultation with the HCJ.<sup>214</sup> The potential for appointing judges favourable to the President is therefore readily apparent from the law itself; this scope for interference by the executive is of particular concern given that the *Conseil d'Etat* is the court responsible for adjudicating on cases brought by individuals against the state.

The appointment of judges to religious courts is usually described and defined by the laws relating to these courts. The HCJs play no role in the appointment of judges to these courts.

**Jordan** In Jordan, the law stipulates that a person appointed as a judge must, *inter alia* hold a degree in *sharia*' law, or a university diploma from an Islamic law faculty or a law faculty teaching Islamic law.<sup>215</sup> Appointment is made by the Judicial Council, comprising senior members of the Shariite courts, and confirmed by Royal decree published in the official gazette. The same law governs judges' duties, their salaries, promotion, discipline and dismissal. By contrast with the Muslim *sharia*' courts, there are no similar laws for the other denominational courts in Jordan. While there is a law requiring non-Muslim faiths to organise their personal status courts, with jurisdiction over the same subject matter as the Muslim *sharia*' courts, it does not govern the operation of such courts. Accordingly there is no law governing the following matters in respect of the non-Muslim faith courts: the matters of the appointment of judges, their rights, authority, supervision, working methods, conditions for a judge to be appointed president of such a court, or the payment of their salaries.

In some instances, while the HCJs are supposed to restrict the influence of the executive body over the careers of judges, inspection and disciplining of judges remains with the Ministry of Justice.

**Egypt** In Egypt, the Judicial Inspections Directorate is based in, and under the authority of, the Ministry of Justice,<sup>216</sup> and is said to be greatly feared by judges. This is in accordance with the Judicial Authority Law.<sup>217</sup> The Directorate has jurisdiction, *inter alia*, to investigate the way any judge (apart from the judges of the Supreme Constitutional Court) has conducted him/herself during court proceedings. It creates secret files on each judge, which include reports of inspections, and warning notices that have been issued against him/her. The Directorate also assists the Ministry of Justice in supervising courts

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<sup>212</sup> Egypt: Article 83 of Law No. 136 of 1984.

<sup>213</sup> See Negad El Boura'i: The Independence of the Judiciary – The Truth as it is! 2003.

<sup>214</sup> Egypt: Articles 4 –5 Constitutional Court Law.

<sup>215</sup> Jordan: Law No 19 of 1972 on the Establishment of Shariite Courts.

<sup>216</sup> Egypt: Judiciary Inspection regulation issue by Minister of Justice, entry into force, 28 October 1963.

<sup>217</sup> Egypt: Judicial Authority Law No 46 of 1972, Article 93. 'The Minister of Justice has the right to supervise all courts and judges.'



and judges, and prepares reports regarding promotions and transfers. At the end of an investigation, which takes place in secret, a judge may be forcibly retired by the Ministry of Justice.<sup>218</sup> Further, disciplinary actions against judges are largely in the hands of the Ministry of Justice. For example, a request for disciplinary action may be filed by the Minister of Justice, in accordance with the law,<sup>219</sup> and then pursued by a public prosecutor, who, by virtue of the same law, is under the direct control of the executive authority.<sup>220</sup> At the end of the disciplinary proceedings, it is the Minister of Justice who notifies the judge concerned of the disciplinary penalty, and supervises its implementation.<sup>221</sup>

Many Arab States have drawn on the Egyptian model and experience, including:

**Jordan and Syria** In these countries, an Inspector's Department exists within the Ministry of Justice. In Jordan, the duties of the inspectors include ensuring that judges apply the law and procedure correctly in cases before them.<sup>222</sup>

The existence of the High Councils of the Judiciary does not protect the judicial system and judges in other courts from interference by the executive body. In the authoritarian context of the countries considered in this report, the provisions conferring decision-making powers on the executive body with respect to the judicial system are very real, thus making the precariousness of the judges' independence equally real. In any event, the symbolic Head on the Council is the Head of State, which is under the administrative tutelage of the Minister of Justice.

The symbolic significance of the appointment of the President of the Council by the Head of State, in the political context of these countries where the perception of justice still largely follows royal tradition and where, in practice, it is still at the stage of delegated justice, is assuredly not just symbolic. Its actual effectiveness is commensurate with the effectiveness of the power of intervention conferred on the Head of State by the texts. This symbolic meaning tallies with the actual power of the executive body to intervene may be the inscribed in the legal provisions, given that the function of the High Judicial Council is clearly defined as being purely advisory.

**Syria** This is the case in Syria, where the constitution makes the Head of State the guarantor of judicial independence and authority, the High Council of the Judiciary merely assisting him in this task.

Therefore, the decisions affecting judges' careers, from appointment to retirement, and including their promotion or demotion, inevitably bear the marks of intervention by the executive body. This is so either because the authoritarian nature of political power often implicitly makes recruitment to public office and a career a matter of loyalty, or because suspicion accompanies the decisions taken when they coincide with the refusal by judges to be docile (as in the case of the transfer-promotion of a judge who is to be disciplined). In the political context of these countries, it may be imagined that the principles, such as

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<sup>218</sup> Nedad el Boura'i : The Independence of the Judiciary: The truth as it is! 2003; also, information gathered from discussions with NGO representatives in Cairo.

<sup>219</sup> Egypt: Judicial Authority Law No 46 of 1972, Article 99.

<sup>220</sup> Egypt: Judicial Authority Law No 46 of 1972, Article 125.

<sup>221</sup> Egypt: Judicial Authority Law No 46 of 1972, Articles 109 and 110.

<sup>222</sup> Information taken from interview with the President of the High Judicial Council during visit to Amman, November 2003.

that of security of tenure, which are intended to guarantee the independence of justice, stand little chance of being effective.

**Tunisia** For example, in Tunisia, the High Council of the Judiciary proposes candidates for the office of judge, whose appointment is made by the President of the Republic. Each year, he decides the transfers of the ordinary judges. For the 'needs of the service,' a judge may even be transferred during the judicial year by decision of the Minister of Justice. Additionally, the HCJ decides the tenure of assistant judges or their dismissal after at least two years' service; it draws up and revises the 'aptitude list' and the 'promotion table,' which determine a judge's appointment to a higher grade. It deals with complaints regarding the contents of these documents. It may decide to extend the period at the end of which a judge may receive an 'increment'; lastly, the High Council of the Judiciary is the Judges' Disciplinary Council. It is the Minister of Justice who is responsible for bringing disciplinary proceedings against a judge before the High Council of the Judiciary of which he is a member. However, he may temporarily suspend payment of the salary of a judge who is the object of a disciplinary enquiry, pending a ruling by the High Council of the Judiciary. The Minister of Justice is also empowered to issue warnings to judges. While judges of the public prosecutor's office operate 'under the authority of the Minister of Justice,' the ordinary judges are under the authority of their hierarchical superior. However, the public prosecutor's office is involved in their grading, via the opinion of the council for the prosecution and the Attorney General of the Republic.

**Lebanon** A similar practice exists in Lebanon, where at the start of each judicial year, judges are rotated around courts; individual judges can expect to be transferred at least once every two years.<sup>223</sup>

**Algeria** The powers of the HCJ, which in 1989 had made moves towards genuine independence of justice, have since 1992 been in the hands of the executive body. A judge is therefore obliged, under this decree, to accept a promotion, even if it leads to a transfer. Likewise, secondment and temporary suspension, which were hitherto the responsibility of the HCJ, are now solely in the hands of the Minister of Justice.<sup>224</sup>

**Egypt** Although the principle of security of tenure of judges is laid down in the Constitution for all courts, as is the requirement for the executive not to interfere in the affairs of justice, the relationship of the executive nevertheless varies according to the categories of court.

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<sup>223</sup> Information received during mission to Lebanon.

<sup>224</sup> In the Algerian political context, justice and the judiciary have been widely exploited in the struggle for political power, in particular on the occasion of the presidential elections of 2004. The judiciary became involved in the struggle between President Bouteflika and his former Prime Minister Benfliss, by prohibiting the holding of an extraordinary congress of the FLN, which was to appoint Benfliss FLN candidate. The Deputy Attorney General of the Republic at the Court of Algiers revealed that his signature had been wrongfully used in the operation resulting in the prohibition of the Extraordinary FLN Congress. The President of the Judges' Union was stripped of this title for denouncing the unlawfulness of that operation. In this electoral context, presidential candidate Bouteflika made waves within the judiciary. The declaration issued on this subject refers to the dismissal of a number of presidents of courts and the transfer of various others and also of general prosecutors: 'Ten court presidents and eleven general prosecutors have been relieved of their duties, being replaced by judges mostly from the Supreme Court, where the higher courts were concerned. The President of the Republic also took the decision to transfer to other courts eight court presidents and fourteen general prosecutors.' According to the declaration, this decision was a step forward regarding 'the comprehensive reform of justice.' According to another view, the presidential candidate was seeking, by this measure, to ensure judges that were to his liking. The scope of the changes announced in the judiciary as a whole conceals a desire to subjugate justice and to back up the 'putschist judges' in the FLN affair. These measures were only possible thanks to the executive's control of the HCJ. According to the Algerian President of the HCJ, Mohamed Ras el Aïn, the members of the present HCJ were elected in circumstances marked by a boycott of the election by 97 % of judges.

The Supreme Constitutional Court is 'self-determining' in regard to the procedure for the assessment and disciplining of its members through the 'General Assembly of the Court.' Disciplinary proceedings, investigations and final decisions on such matters are its responsibility and the same applies to the State Council. On the other hand, the disciplinary procedure in the case of the judges of ordinary courts involves the Minister of Justice, who supervises such courts.<sup>225</sup> The Minister of Justice has the right to issue a warning to the presidents and judges of courts of first instance after hearing their arguments.<sup>226</sup> Disciplinary action against a judge from a court of first instance is initiated by the Advocate-General at the request of the Minister of Justice, or directly by the Minister.

Even when the decision-making process regarding judges' recruitment and careers actually falls within the purview of the judges in the High Council, the nature of political power is such that the credibility of their recruitment and the management of their careers is poor. The recent judicial history of the countries considered in this report is too littered with cases of interference by the executive in judges' careers for it not to be a history of the subordination of judge and judiciary to political power, more particularly the executive.

As a rule, the principle of independence, therefore, remains a pious wish. The legal and institutional guarantees accompanying the principle of the independence of the judiciary, even when they are equivalent to the ones on which the independence of the legal system is based in the democratic models, are perverted by the hold exercised over society by political power.

In sum, despite the creation of High Judicial Councils in the Arab countries considered in this report, in most cases the executive body has been careful to retain power over the judicial system. The composition and function of high councils of judicial systems fall short of guaranteeing real independence to the judiciary.

Examples of ways in which the executive body retains power include:

- Members of the executive are members of the councils in some countries. In Jordan, the Secretary General of the Minister of Justice is a member, in the Occupied Territories, the deputy Minister of Justice is a member, in Tunisia, the inspector of Judges attached to the Minister of Justice is a member, in Syria, the Constitution<sup>227</sup> stipulates that the President of the HJC is the President, and four of the seven members of the HJC are members of the executive.
- Senior members of the prosecution, who in turn are under the authority of the Ministries of Justice, are often members of the councils – for example the Prosecutor General of the Palestinian Territories.
- The power of appointment of judges remains with the Head of State. For example, in Egypt, the President of the Republic only has to consult the High Council of the Judiciary, and does not have to appoint the judges suggested. Furthermore, some posts are appointed by the President of the Republic without the need even to consult this body. In Jordan, the Minister retains power to recommend persons for the judicial system, and the High Judicial

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<sup>225</sup> Article 93 of the Law on the Status of the Judiciary.

<sup>226</sup> Article 94(4).

<sup>227</sup> Article 132 of the Syrian Constitution.

Council is pressured to choose one of the two of the persons recommended for each post.

- The power of High Judicial Councils does not extend to the appointment of constitutional courts or courts with exceptional jurisdiction, in Egypt and Jordan.
- The power to transfer judges remains in the hands of the executive body in Egypt.
- Budget is kept in the Ministry of Justice in Egypt, Lebanon, and Jordan, though not in the Palestinian Territories.
- Members of the High Council of the judicial system have their offices in the Ministry of Justice in Jordan and the Chief Inspector of Judges has his office in the Ministry (it is his duty to monitor judgments)
- The law relating to the High Judicial Council is ignored with impunity in the Palestinian Territories – where President Arafat extended the life of the High Judicial Council he created prior to the enactment of Judicial Law, thereby ignoring the provisions of the new law.

### *3.1.5 Judges' freedom of association*

The subordination of judges takes the form of a legal denial of their freedoms. Most countries go so far as to simply to deny them certain rights of citizenship. Judges are not only bound to carrying out their duties, but rather by a duty of discretion, which extends as far as having to seek authorisation for publications (even academic ones). Judges are also deprived of other fundamental freedoms afforded to other citizens. For example, judges' lack of freedom to set up or join associations is revealing of the subservience in which the authorities seek to keep them. The authorities limit their scope to develop independent interests by limiting their freedoms, sometimes enshrining their subservience to authorities by prohibiting judges from joining a political party. This silences judges from expressing a form of political loyalty other than that which ties them to the power that appoints them. The only organisations tolerated by political power are the ones it sponsors.

**Morocco** In Morocco, judges cannot belong to a political party or a political association.<sup>228</sup> Nor do they have the right to form or belong to trade unions (Law on the Rights and Duties of the Judicial System). However, they are organised in an 'association,' the 'Amicale Hassanienne des magistrats,' whose name reveals its symbolical and actual proximity to political power. However, in practice, judges have lobbied in an 'Association for the defence of the independence of judges,' until coming into conflict with the Ministry of Justice, by which they have been forced to terminate their membership of the Association following a royal letter to the HCJ notifying them of the prohibition on membership of any Association but the 'Amicale.'

**Tunisia** A provision added to Law 67-29 on the 14<sup>th</sup> of July 1967 now prohibits judges from striking and taking any concerted action (Article 18). However, the law does not prohibit them from membership of a political party, as it does in Morocco.

**Lebanon** In Lebanon, judges, like all other government officials, are not authorised to form professional unions. However, they do have a mutual association run by them. According to one source, a proportion of court fees are paid to the Judge's Solidarity Fund, for which there is no public accountability. Judges are permitted to apply for special

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<sup>228</sup> Article 7, para. 4 of the Dahir of 17 November 1958 relating to freedom of association.

loans from this fund; the same source asserted that since these are never repaid, the Judges Solidarity Fund provides the executive with a hold over judges.<sup>229</sup>

**Jordan and the Palestinian Territories** In these two examples there are no laws prohibiting judges from forming an association or union; nevertheless, no such association or union currently exists in either country. In Jordan, according to the Minister of Justice, it simply has not been an issue. However, there is a Jordanian association of jurists, one of whose functions is to develop a judicial culture. The board of this association consists of three judges, the president of which is a judge of the Court of Appeal, as are two of his colleagues. In addition, earlier in 2004, a women and law conference was held in Amman, under the patronage of Queen Rania. One of the recommendations of this conference was the establishment of a forum for women judges.

**Egypt** The constitution of Egypt guarantees the right of citizens to form societies as defined in the law, but it prohibits the establishment of societies whose activities are *inter alia* 'hostile to the social system.'<sup>230</sup> The Constitution also guarantees the right to create syndicates and unions. However, it further stipulates that the law regulates the participation of syndicates and unions 'in carrying out the social programmes and plans, raising the standard of efficiency, consolidating the socialist behaviour among their members, and safeguarding their funds.'<sup>231</sup> Thus, the constitutional guarantees of these rights are considerably restricted.

*The Egyptian Experience.* Notwithstanding the limitations of the constitutional guarantees, the judiciary managed to establish a judges' syndicate representing the interests of the judiciary as long ago as 1939. It discussed and made recommendations about a number of matters, including calling for an increase in salaries and allowances, in 1961.<sup>232</sup> In the 1980s and 1990s, many of the material requests made by the judges' club, such as increased salaries, and improved facilities, were met.<sup>233</sup> The Judges' Club continues to function, though a recent interview with members of the Club suggested that its functions are currently predominantly social.<sup>234</sup> The Government has made several attempts to try to curb its powers in recent times. For example, the Ministry of Social Affairs asserted that the Judges Club was a non-governmental organisation (NGO), in order to bring it within the restrictive provisions of the controversial NGO law No 84 of 2002. Had it been successful, this would have brought the Club under the direct authority of the Ministry. However, the Judges' Club resisted the Ministry's efforts; the General Assembly of the Judges' Association met in June 2002 and declared that the Club was not an NGO, stating that the Club was concerned solely with the affairs of judges which were not subject to outside interference. Accordingly, it declared that the Club was not subject to the NGO law.<sup>235</sup> This successful rebuff against the Government represents a significant step in the exercise of judicial independence.

The Judges' Club has made a number of shows of independence despite efforts on the

<sup>229</sup> Interview conducted during visit to Lebanon, March 2004.

<sup>230</sup> Egyptian Constitution Article 55

<sup>231</sup> Egyptian Constitution Article 56

<sup>232</sup> Nagi Derbala, A study in the developments on the basic role of the Judges' Association – the Judges Association, issue of January-August, 2003

<sup>233</sup> Nathan Brown : The Rule of Law in the Arab World, Courts in Egypt and the Gulf, 1997, Cambridge University Press, chapter 4.

<sup>234</sup> Meeting with the vice-president of the Judges' Club, October 2003

<sup>235</sup> Negad Al Bourai, The Independence of the Judiciary : The Truth As It Is, 2003

part of the government to curtail their activities. In 2000, the Judges' Club was active during parliamentary elections that were supervised by the judiciary for the first time. The Club issued guidelines containing instructions on how to guarantee a fair voting process to all judges engaged in supervising the elections. In addition, following the elections, the Club protested against a number of electoral irregularities.<sup>236</sup> In 2002, the Judges' Club exerted its independence in resisting the election of the candidate favoured by the government, to the post of president of the Board of Directors. The Club elected as its president an outspoken critic of the government.<sup>237</sup> In contrast to the previous 10 years or so, when the board was dominated by pro-government tendencies, the 2002 elections produced a board with members known for their defence of the independence of their profession.<sup>238</sup>

**Algeria** In Algeria, the right of association has been guaranteed since the Law of 12 December 1989 (as amended by the Executive Decree of 24 October 1992). Under this guarantee, judges have created the 'Syndicat National des Magistrats' and the 'Union Nationale des Magistrats.'

Apart from defending members' interests, the existence of judges' unions, makes it possible to mobilise judges on wider issues, such as the defence of justice from interference by the political power in the running of justice.

### *3.1.6 Budgetary independence of the judiciary and the remuneration of judges*

The self-determination of judiciary bodies in area related to budget administration, or at least the involvement of judges in the administration of the judiciary bodies and judges' remuneration, are also part of the issue of the independence of justice and of judges. The lack of autonomy and/or involvement of judiciary bodies in budget administration characterises each of the countries discussed in this report, with the exception of Egypt, where the 'Supreme Council of Judiciary Organs' confers a degree of autonomy on the organs of the judiciary in budgetary matters. In all the countries considered by this report, it is the Minister of Justice who controls the budget of justice.

Remuneration of judges, in the countries discussed in this report is generally described as a factor sapping their independence. However, this aspect must be seen in perspective, owing to the fact that a lack of material wealth is most relevant for judges at middle or lower grades in the judicial hierarchy. Senior judges, who are better paid, at least by comparison with their colleagues in lower grades, are in some cases too privileged.

Although in all cases this situation may be attributed to deliberate government policy, it is nevertheless hard not to see how this situation coincides with the following observation: relatively speaking, the affluence of more senior judges coincides with their proximity to political power, while the economic straits of judges of middle or lower rank coincides with their greater proximity to private interests, not excluding their subordination to political power. This assertion is supported by the fact that corruption cases involving judges, mostly involve judges of middle or lower rank (at least those that come to attention through scandal and disciplinary measures). A lesser degree of corruption of the judiciary

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<sup>236</sup> Information gleaned from interviews in Egypt

<sup>237</sup> Information gained from interviews in Egypt

<sup>238</sup> Negad El Bourai, *The Independence of the Judiciary : The Truth As It Is*, 2003

by private interests coincides with greater proximity to political power, which in turn coincides with greater affluence.<sup>239</sup>

### 3.2. Action Points

- Call for amendments to constitutions to ensure the guarantee of independence of the judiciary as well as independence of judges.
- Calls for amendments to constitutions calling also for independent prosecutions.
- Calls for improving the nature and role of the High Councils of Judiciary;
  - To ensure that *all* judges in all courts are appointed on the recommendation of the High Councils.
  - To ensure that the councils comprise only judges, thereby removing the direct influence of the executive.
- Call for the judiciaries to be granted independent budgets.
- Call for any inspection units to be the responsibility of solely of the High Councils of the Judiciary.
- Call for the High Councils of the Judiciary to have sole responsibility for management of judicial careers.
- Call for a right of freedom of association of judges;
  - To allow unhindered membership of domestic, regional and international associations to enhance their professional standards and share experiences.
  - To provide a conduit for open and public dialogue between the judiciary and other branches of government.
  - To enhance transparency and hence the confidence of the public on the judiciary and encourage dialogue with civil society on matters such as human rights training.

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<sup>239</sup> This interpretation may be confirmed by a further observation: the questioning by judges of their situation of subordination to political power is more vociferous among judges of middle or lower rank than among their more senior colleagues.

## **4. JUSTICE AND THE RULE OF LAW**

### **4.1. International standards**

- Do not require the establishment of specific courts such as courts with specialised jurisdiction.
- Where courts with specialised jurisdiction (such as constitutional and administrative courts) are established, they must comply with international standards governing the independence of the judiciary and the right to a fair and public hearing by an independent tribunal established by law.
- Where such courts are established, they must be accessible to all without discrimination on the basis of race, sex, religion, poverty, etc.

### **4.2. From state-judge to judge-supervised state<sup>240</sup>**

#### *4.2.1 Progress and limitations of constitutional justice*

The trend in countries discussed in this report is to adhere to a formal model of the rule of law, wherein political power is itself subject to scrutiny of the lawfulness of its actions and its responsibility for them. The place of the function of the judge and the judiciary in the political and institutional order is proof, formally at least, of adherence to the legal symbolism of the rule of law.

This adherence is expressed in the creation of a constitutional court that regulates both the executive and the legislative branches of political power. It does this by scrutinising the legality of the electoral procedures governing access to power, by 1. ensuring that in exercising their powers, each of those two branches respects order, and 2. by monitoring the constitutionality of the laws created by these two branches.

The adherence to this symbolism is still a very recent phenomenon, although it is becoming stronger in the countries considered here. Reluctance to create a constitutional court with jurisdiction to monitor political power has tended to be the prevailing attitude, and one which still prevails in certain cases. It expresses the will of political power to remain the custodian of justice, and not to subject itself instead to supervision by the courts and judges.

The status of constitutional courts or councils, and of constitutional judges, makes them special under the law. The constitutional provisions devoted to these courts or councils lie outside the provisions devoted to the judiciary. This means that the provisions relating to the independence of the judiciary do not apply to these courts. The constitutional courts are not included in the composition of the High Council of the Judiciary (HCJ), a feature common to each of the countries covered by this report. Among other things, this explains

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<sup>240</sup> Introductory note: In this chapter, reference will be made from time to time to the Palestinian Authority and the Palestinian Territories. It must be noted however, that while laws have been passed in an attempt to form a functioning legal system, the situation on the ground has been severely hampered by the actions of the Israeli security forces. In reality, few courts are able to function properly owing to closures, preventing court personnel, witnesses and lawyers from attending courts, as well as the destruction of detention facilities, etc. We do not propose to discuss these issues as they have already been the subject of numerous reports (See, for a recent example, Al-Haq, *The Judiciary in Palestine and Obstacles to its Development* (2nd Edition, Al-Haq, September 2003)). We will, however, discuss certain aspects of Israeli military justice in the occupied territories, where they are illustrative of a common trend.



the fact that, even in democratic countries, the appointment of constitutional judges escapes the procedure of intervention by the HCJs.

### **Incorporation of the principle of monitoring the constitutionality of the law**

In general, it can be said that the countries dealt with by this study have been developing been towards the adoption and institutionalisation of a constitutional court.

**Morocco** The most long-standing experience among the countries considered by this report would appear to be that of Morocco. There, the institution of constitutional justice dates back over forty years, when in the context of the first constitution (promulgated in December 1962), a new Constitutional Chamber was created in the Supreme Court. In 1992, a Constitutional Council was set up as an independent court.

**Egypt** In Egypt, prior to the present Constitution of 1971, none of the previous Egyptian constitutions had laid down the principle of monitoring the constitutionality of the law. But the Egyptian ‘State Council,’ created in 1946 under the Royal Constitution of 1923, delivered a major judgment of principle in 1948 – the Judgment of 10 February 1948 – which granted every court the right to review the law applicable to the dispute in question for compliance with the Constitution. If it transpired that the law or one of its provisions was at odds with the Constitution, the court was not to apply it during the case in question.<sup>241</sup>

In 1969, by Law No. 81, a Supreme Court was set up as ‘supreme judicial organ.’ Under Article 4 of the above-mentioned law, that Supreme Court now had sole power to review the constitutionality of laws. In 1971, the Constitution provided for the creation of a Supreme Constitutional Court with sole power to review the constitutionality of laws and regulations. However, the Supreme Constitutional Court was not actually created until 1979. The Supreme Court, whose organisation and powers are similar in a number of ways to the present Supreme Constitutional Court, would continue to function after entry into force of the 1971 Constitution until 1979, on which date the legislator annulled the constitutional text by virtue of Law No. 48.

**Algeria** In Algeria, a Constitutional Council was created for the first time by the Constitution of February 1989. In 1996, the number of members of the Constitutional Council rose from seven to nine, and the method of referral was enlarged to the benefit of the President of the ‘Second Chamber of Parliament,’ also empowered to refer cases to it. The prerogatives of the Constitutional Council were also broadened, since it is automatically requested by the President to deliver mandatory opinions on the constitutionality of organic laws after their adoption by Parliament and on the rules of procedure of the National Parliamentary Assembly and the National Council.

**Lebanon** In Lebanon, the ‘Taif Agreement’ (‘Accord for National Reconciliation’ stemming from the Conference of November 5<sup>th</sup> 1989) made a provision for the creation of a Constitutional Council. Following its amendment by the Constitutional Law of 21 September 1990, the Constitution (Article 19) for the first time instituted a review of the constitutionality of laws.

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<sup>241</sup> The ‘State Council’ used the same argument as the American Supreme Court had done in its celebrated *Marbury –v- Madison* Judgment of 1803, holding, like Chief Justice Marshall, that it was a court’s duty, if faced with a legislative text conflicting with a provision in the Constitution, to refrain from applying the text to ensure compliance with the Constitution.

**Tunisia** In Tunisia, a Constitutional Council was created in 1987 by Presidential decree. In 1995, it was incorporated into the Constitution. In 1998, Constitutional Law 98-76 amended Article 75 of the Constitution, making decisions of the Constitutional Council opposable to all public powers and authorities. A special law<sup>242</sup> laid down its composition and operational procedures.

**Jordan** In Jordan, the call for the creation of a constitutional court has so far not been actualised despite the political covenant created by the National Charter of 1988, which enshrined the idea of the right to review the constitutionality of the law. It is nevertheless theoretically possible for any court to declare that a law is unconstitutional. Such a judgment would have only a declaratory effect, and would not in itself invalidate the law. The High Court of Justice has availed itself of the opportunity to declare a law unconstitutional, when, in January 1998 it declared the restrictive temporary law<sup>243</sup> - the Press and Publications Law<sup>244</sup> - unconstitutional.<sup>245</sup> It did so on the basis that the Constitution permits the passing of temporary laws only in the case of necessity;<sup>246</sup> in this instance, the Court held that such necessity had not been shown. As has been noted above, the head of the High Judicial Council, who was also the President of the High Court, was dismissed in 'apparent retaliation for his perceived role in the ruling.'<sup>247</sup> The Late King Hussain then publicly criticised the High Court's ruling in the case, and declared that 'such a precedent should not be repeated.'<sup>248</sup> Parliament then proceeded to pass a law that was even more restrictive than the impugned emergency law.<sup>249</sup> Thus, while the possibility for making such declaratory judgments exists, there is little likelihood that they will be tolerated by the King or the executive.

**Palestinian Territories** The Basic Law of the Palestinian Territories<sup>250</sup> provides for the establishment of a High Constitutional Court; so far, no such court has been created. In the meantime, the same law provided for the temporary assumption of the powers of the Constitutional Court by the High Court.<sup>251</sup>

### **The quasi-jurisdictional status of constitutional courts**

Owing to the way constitutional courts are appointed, and the way cases are brought before them, constitutional councils incorporate both political and jurisdictional elements. This is a trait shared with constitutional courts in democratic countries (such as France, which often serves as model). It is clear that, in the authoritarian political context of the countries considered by this report; this ambivalence reinforces the politicisation of such courts.

**Morocco** In Morocco, the Council has since 1966 consisted of twelve members; six are appointed by the King for a nine-year term and six appointed for the same term - half of these by the President of the Chamber of Representatives and half by the President of the Second Chamber, after consulting the parliamentary groups. A third of each category of members is renewable every three years.

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<sup>242</sup> Translated from French "loi organique"

<sup>243</sup> The law was passed by Royal Decree, without the involvement of Parliament.

<sup>244</sup> Jordan: Temporary Law No 27/97 Press and Publications Law.

<sup>245</sup> Jordan: High Court of Justice, decision No 266/97.

<sup>246</sup> Jordan: Article 94 of the Constitution.

<sup>247</sup> Press Freedoms in Jordan, EMHRN, Copenhagen, 2002.

<sup>248</sup> Ibid.

<sup>249</sup> Jordan: The 1998 Press and Publications Law

<sup>250</sup> Palestinian Territories, Basic Law: Article 94 Basic Law

<sup>251</sup> Ibid., article 95

**Egypt** In Egypt, the President of the Supreme Constitutional Court is appointed by the Head of State, without consulting the High Judicial Council. The other members of the Court (a minimum of seven) are appointed by decree of the President of the Republic, after consulting the High Council of the Judiciary, by selecting them from two lists submitted to it separately by the Plenary Assembly of the Court and the President of the Court. The President of the Republic is not confined to appointing the head of this court from among the deputy presidents or other senior members of the Court. He may in fact appoint a judge from outside the Constitutional Court, and even from outside the judiciary. Thus, in September 2001, the President appointed the Head of the Legislation Directorate in the Ministry of Justice as the President of the Supreme Constitutional Court. It is unlikely that such an appointment was consistent with the notion of the independence of the judiciary, given that this person had been responsible for drafting the very laws that might form the subject of a constitutional challenge.<sup>252</sup>

**Lebanon** In Lebanon, the Constitutional Council consists of ten members; five of them are elected by Parliament, the other five are appointed by the Council of Ministers by majority of two thirds of its members. The President and Vice-President of the Constitutional Council are elected by its members by absolute majority and by secret ballot for a three-year renewable term. The qualification for membership of the Council is 20 years' experience as a judge, lecturer in law, or practising lawyer. The term of office of the members of the Constitutional Council is six years, not renewable. This term may not be curtailed. The composition of the Constitutional Council must respect the principle of parity between the Christian and Muslim communities (not counting the distribution within each community, e.g. There is no differentiation between Druze Shiites and Sunnis, or Greek Orthodox and Greek Catholic communities are concerned). If Parliament chooses two Christians and three Muslims, the Council of Ministers will be bound to make up the difference to ensure that the total number respects the rule of parity between communities.

**Tunisia** In Tunisia, the Head of State designates a portion of the members of the Council, as well as its President.

**Syria** In Syria, the status of the Supreme Constitutional Court was established by Law No. 19 of 2 July 1973 creating the Supreme Court. The court consists of five members, appointed by decree of the President for a four-year renewable term. It is responsible for reviewing the constitutionality of laws prior to their promulgation, as requested by the President or a quarter of the Assembly; for considering the constitutionality of legislative decrees, at the request of a quarter of the members of the Assembly; for reviewing the constitutionality of draft laws and legislative decrees as requested by the President.

#### **Jurisdiction of constitutional courts and referral to them**

**Morocco** In Morocco, where jurisdiction and referral are concerned, the Constitutional Council has since 1992 been empowered to rule on whether not only organic laws and rules of procedure of parliament comply with the constitution, but also ordinary laws, by reasoned decisions which 'are not subject to appeal and are mandatory for public authorities and all administrative and judicial authorities.'<sup>253</sup> A case may be referred to the Constitutional Court by a quarter of the members of each chamber of Parliament.

**Egypt** In Egypt, the Supreme Constitutional Court reviews the constitutionality of laws after referral by a court and does so in the form of an objection if the reviewed law is

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<sup>252</sup> Negad El Bourai: The Independence of the Judiciary, The Truth as it is!, 2003.

<sup>253</sup> The Moroccan Constitution, article 81

unconstitutional. Such review also applies to laws already in force, whereas in Morocco, such review can only be carried out before laws are promulgated. The Court also has jurisdiction regarding decisions on conflicts of jurisdiction, settling conflicts arising from the enforcement of two final, irreconcilable decisions and also regarding the interpretation of the texts of laws issued by the legislature, as well as decree-laws.

**Lebanon** In Lebanon, under Article 19 (paragraph 1) of the constitutional law adopted on 21 September 1990, the Constitutional Council may be asked to review the constitutionality of laws by the President, the President of the National Assembly, the President of the Cabinet or by ten members of the National Assembly, and also by the spiritual heads of legally-recognised communities (the latter exclusively with respect to personal status, freedom of conscience, the performance of rites of worship and freedom of religious instruction).<sup>254</sup> However, this body is limited to consideration of laws within a certain number of days following their publication in the Official Gazette.

**Tunisia** In Tunisia, referral to the Constitutional Council, which originally had a purely consultative role, is confined to the Head of State since became empowered to review the constitutionality of laws. It is mandatory to refer draft laws with national scope or relating to general requirements of the Constitution to the Council.

**Egypt** In Egypt, the review of constitutionality remains the most open of any, despite the restriction on review by objection since the creation of the Constitutional Court. In principle, review of a law's constitutionality is only possible by the direct action of any citizen or group of citizens. However, review by objection is only permitted under certain conditions. The law lays down three procedures:

1. First, *the procedure of review by objection*. This presupposes that, during proceedings brought before one of the civil, criminal or administrative courts, one of the parties raises an objection that a law (or one of its provisions), or the rules applicable in the case, are unconstitutional. If the trial court considers that there is serious doubt of non-compliance with the constitution, it adjourns the proceedings, fixing a time limit not exceeding three months for the interested party within which to bring constitutional proceedings before the Supreme Constitutional Court. If, this time-limit having expired, the matter has not been referred to the Supreme Court, the objection lapses and the proceedings in the trial court resume their normal course;
2. The second procedure was not initially contemplated by the law on the former Supreme Court. It gives every court seized with proceedings, the power to defer a decision and to refer the case back to the Supreme Constitutional Court;
3. The third procedure does not presuppose any case pending before any court; it gives the Supreme Constitutional Court the opportunity to raise of its own motion and rule on the unconstitutionality of a law or rule, or of certain of their provisions, when considering a question relating to its jurisdiction.

#### **Limitations of constitutional courts**

The role of the constitutional court in providing a concrete symbol of the rule of law has by and large remained limited in the experience of these countries and continues to be limited today. This is true whether in regard to the review of the constitutionality of laws, or in regard to review of the lawfulness of electoral procedures.

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<sup>254</sup> Lebanon: Law 250/1996.

It should be noted that reviewing the constitutionality of laws must, in most countries, take place before the laws are promulgated. The exception is Egypt, where such review applies even to laws already in force. As to the reality of such review, it sometimes happens that the constitutional court counterbalances the omnipotence of political power, and that it takes decisions whose long-term symbolic significance for assimilating the ideal of the rule of law and for strengthening the guarantee of public freedoms is important.

It is above all in the political field that the role of the constitutional court is liable to become significant to the issue of democracy, even if this role cannot alone ensure that the political system moves towards democratisation.

**Egypt** In Egypt, the Supreme Constitutional Court has delivered two Judgments asserting the unconstitutionality of texts organising the general elections for the People's Assembly (Parliament).

The former dates from the 16<sup>th</sup> of May 1987, when the Supreme Constitutional Court ruled that the texts of the law on the People's Assembly instituted in 1983 and the electoral lists drawn up by the political parties were unconstitutional. The judgment ruled that the text adopting this system was unconstitutional because it ran counter to Article 62 of the Constitution, which conferred the right to vote and stand as a candidate to all citizens directly, rather than on parties and their lists. The impugned text also ran counter to Article 40 of the Constitution which sets forth the principle of equality between citizens, the impugned system having confiscated the right of independent candidates to stand in elections.

Before this judgment on the 16<sup>th</sup> of May 1987, the Supreme Constitutional Court, through the effect of the procedures for review by objection, had in a celebrated decision on the 19<sup>th</sup> of May 1990, declared the provisions instituting the new system,<sup>255</sup> to be unconstitutional. Among other things, this decision asserted that the Assembly elected on the basis of this voting method was null and void, which thereby brought about its dissolution. The chief ground of the unconstitutionality was discrimination to the detriment of independent candidates, with no attachment to political parties. The parties all but monopolised the chances of election by virtue of their lists, whereas the independent candidates only have one seat, which they are not even guaranteed, as here too they are in competition with the party candidates.

**Lebanon** In Lebanon, the Constitutional Council has been called upon to preserve the independence of judicial power and has declared the Law of 12 January 1995 unconstitutional. This law authorised the President of the 'Council of Ministers' to suspend the *Jaafarite* President of the Supreme Court, without the authorisation of the High Council of the Judiciary. The Council held that, by reducing the guarantees that the members of the judiciary must enjoy in the exercise of their duties, that law prejudiced the independence of justice. The Decision was especially significant as the impugned law had been adopted by parliamentary majority in order to neutralise a decision by the 'State Council,' which had suspended the implementation of a decree by the Head of Government for the suspension of the President of the Supreme Court. The law was therefore destined to validate an unlawful act on the part of the executive.

In Decision No. 4 of 7 August 1996, which abolished the electoral law of 12 July 1996, the Lebanese Constitutional Council stressed that the unlawfulness established by the

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<sup>255</sup> Which was a combination of two different voting methods, the usual one consisting of a list, the exception being the voting for a single candidate.

legislator in the distribution of electoral constituencies could only be accepted if warranted by exceptional circumstances.<sup>256</sup>

On the other hand, the Lebanese Constitutional Council has been less protective where Palestinian refugees in Lebanon are concerned.<sup>257</sup> Having before it the text of Law No. 296 dated 03/4/ 2001,<sup>258</sup> (the purpose of which was for the first time to explicitly implement the constitutional clause of the '*Tawfīn*' opposing the legal possibility for the Palestinians to purchase real estate), the Lebanese Constitutional Council affirmed that the text was in conformity with the Constitution. It furthermore rejected an appeal on merits that the international human rights covenants and conventions allow a state to place restrictions on the rights proclaimed and guaranteed by those instruments with reference to the principle of the state sovereignty.

Clearly, the courts, and in this case the Constitutional Court's power of interpretation, allows it to make more than just one legal response in the context of its own legal system. With respect to the merits of a case, it may opt for a judicial response that is more favourable to the state than to human rights principles.

If the court is more concerned about human rights, it can tip the scales in favour of a legal interpretation that offers the best protection to human rights. The fact is that the Lebanese Constitutional Council has adopted an interpretation in which the '*Tawfīn*' clause, which would normally to be construed as a clause opposing any collective settlement, becomes a clause by which the right of a foreign individual to purchase immovable property is simply disregarded.

**Algeria** In Algeria, the Constitutional Council has, thanks to the new post-1988 political context, delivered decisions marking a positive inauguration of its role as constitutional regulator of political influence. In a short time (1989-1990), the Constitutional Council had delivered three decisions, by which it overturned a number of legislative decisions adopted by the A.P.N.<sup>259</sup>

#### 4.2.2 Administrative justice

Jurisdictional duality, in an authoritarian political system, is the most telling concrete manifestation of the subordination of the executive and the administration to the principle of legality. The bulk of the states discussed in this paper has adopted the French solution of jurisdictional duality, but have not put an end to the immunity of the executive.

**Egypt** It is in Egypt that the experience of administrative courts, which were created in 1946 based on the French model, is the most highly developed, with an appeal court in the 'State Council' (*Majlis ad-dawla*).

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<sup>256</sup> It accompanied its decision by a directive to the legislator, explaining how, in future, the legislative text was to be established in order for it to be declared in conformity with the Constitution.

<sup>257</sup> Refugees also have Rights ! Palestinian Refugees in Lebanon and Jordan, EMHRN 2001.

<sup>258</sup> Published in Official Journal No. 15 of 5/4/ 2001 amending Decree-law No. 11614 dated 4/1/1969 relating to the purchase of real estate in Lebanon by non-Lebanese.

<sup>259</sup> The Decision of 20 August 1990 on the Electoral Law of 7.7.1990, setting aside the provisions relating to the conditions of eligibility of candidates in the legislative election and the presidential election, the conditions governing the presentation of candidates, etc.; the Decision of 30 August 1990 relating to the law laying down the rights and duties of parliamentarians (incompatibility, parliamentarian's extra-parliamentary role); the Decision of 28.8.1989 relating to the separation of powers.

**Tunisia** In Tunisia, the Administrative Court, set up in 1972, has jurisdiction in administrative matters. Together with the Audit Court, the Administrative Court makes up the 'State Council.' In 1995, administrative justice was the subject of numerous reforms, intended to consolidate the rights of the defence in the following areas: the right of appeal at two levels before the Administrative Court, in areas relating to the abuse of power; hearings in the regions, bringing administrative justice closer to the citizen; the gradual creation of regional chambers of the Administrative Court; and, the creation of a Council for settling conflicts of jurisdiction between the justice of the judicial courts and that of the administrative courts.

**Morocco** In Morocco, administrative cases from 1962 to 1993 fell within the purview of the administrative division of the Supreme Court. Since 1993, administrative courts have been set up; the Supreme Court, Administrative Division, now serves as a court of appeal for the administrative courts of first instance.

**Algeria** In Algeria, administrative justice has been reinforced, since the revision of the Constitution in 1996, by the creation of a State Council, introduced to regulate the activity of the administrative courts, and to give advice on all draft laws prepared by the Government before submitting them to Cabinet and Parliament. There are five regional courts, created by Law No.90/23 (18/08/90). A Jurisdiction Disputes Court has also been set up to deal with disputes between the Supreme Court and the State Council.

**Lebanon** In Lebanon, it is the State Council that is the administrative court. Abolished in 1953 after having been created by the Act of 10 May 1950, it was re-established by Decree-law No.15 of 7/1/1953.

**Syria** In Syria, there are two levels of jurisdiction, the State Council and the High Administrative Court.

**Jordan** In Jordan, the Supreme Court of Justice was established in 1992.<sup>260</sup> Lawsuits may only be filed by persons having a personal interest in the proceedings.

**Palestinian Territories** In the Palestinian Territories, the law has provided for the establishment of administrative courts. So far none have been created and in the meantime, the High Court of Justice has assumed responsibility over administrative cases.<sup>261</sup>

In general, administrative justice is still rather recent and underdeveloped. Sometimes administrative jurisdiction is reduced to just one administrative court situated in the national capital, as in the Tunisian case. The administrative action that covers the whole country thus remains outside all control, inaccessible as it is to litigants.

Also, political and administrative power is not yet reconciled to the idea of forming the object of a contentious appeal and of being subject to the right to review a court's acts and decisions. Reviewing the lawfulness of the acts of the political and administrative power leaves something to be desired, either because political power and its direct implementing bodies see their being put on trial as a crime of *lèse-majesté*, or because the enforcement of judgments remains at the mercy of the impugned administration.

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<sup>260</sup> Jordan: Law of the Supreme Court of Justice No 12 of 1992.

<sup>261</sup> Palestinian Territories: Article 37 Formation of Regular Courts Law; see also Al Haq, Study of the Status of the Palestinian Judiciary, 2003, page 177.

**Morocco** In Morocco, the royal acts (*dahirs*) have become exempt from any contentious appeal by the case law of the Supreme Court, on the basis of the sanctity of the royal personage. Significantly, the recent creation of an enforcement court for commercial cases was rejected for administrative cases.

**Jordan** In Jordan, the actions of the King are immune from all contentious appeals.

**Tunisia** In Tunisia, regulatory decrees adopted by the President are not subject to appeals for abuse of power under Article 3 of the Act of 1 June 1972 relating to the Administrative Court.

### 4.3. Action Points

- Call for amendments to Constitutions so that Constitutional Courts are contained in the sections relating to judicial power.
- Call for laws governing the judiciary to be amended to include Constitutional courts.
- Call for increased jurisdiction of Constitutional Courts;
  - allowing individuals to seize the court.
  - alternatively, giving jurisdiction to all courts to refer a question to the Constitutional Court during the course of legal proceedings, where an arguable claim regarding the constitutionality of a law or act arises.
- Call for expanding on the development of administrative courts;
  - including, for example, the provision of administrative courts throughout the country, not just the capital.
  - including more than one level of jurisdiction (i.e. including a court of appeal).

### 4.4. Modernisation

#### 4.4.1 *Increasing the professionalism and specialisation of the legal system*

The modernisation of justice should be seen as a process of growing institutional and functional independence, however formal the adoption of a standard model for the organisation and operation of justice by the legal systems in the Arab world is. It is admittedly a slow and difficult process, which has gone further in some cases than it has in others.<sup>262</sup>

The development of justice and the judicial system towards greater modernity can be measured by the trend towards greater complexity of the organisation of the legal system and the specialisation of powers. This development includes a trend towards the incorporation of an external model, taking the form of a two-tier system of courts and of machinery for legal self-regulation (the Court of Cassation); the benefits of this development are in some cases very recent.

**Jordan** In Jordan, the ‘High Crown Court,’ (a criminal court) has only existed since 1976, following the repeal of the Law of 1936 relating to the tribal courts. The Supreme Court dates back only to 1989.

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<sup>262</sup> Various analysts concur in viewing the Egyptian legal system as the most highly developed in the Arab world specifically with regards to its independence.



**Lebanon** In certain cases, the incorporation of the external model also has certain original features: in Lebanon, decisions of the Court of Cassation cannot be appealed; the Supreme Court rules on disputes in the manner of a court of appeal, which enables it to consider the case as a whole both from the standpoint of the law and of the facts.

**Morocco** In the case of Morocco, the recent reform of the Code of Criminal Procedure, which entered into force on the 1<sup>st</sup> of October, 2003, introduced a third level into criminal cases, namely 'cassation' or appeals on points of law, with a possible re-examination of the entire decision process, back to the court of first instance rather than referral of the case to the court of appeal.

In commercial cases, the creation in Morocco of commercial courts has also introduced two levels of court (court of appeal) into this area of jurisdiction, unlike the French model.

**Tunisia** In *Tunisia*, the two levels of court in criminal cases is a recent introduction. There is also a trend towards modernisation involving consolidation of various aspects of the legal system by increasing the professionalism of the legal profession and by training and recruiting professional judges, developing auxiliary legal professions, and specialised courts for certain types of cases. The recruitment of judges is increasingly dependent on specific training at special institutes or training schools.

All the countries discussed in this paper now have a training centre.

**Morocco** In Morocco, a 'National Institute of Judicial Studies' was set up in November 1969, which has close ties with the Ministry of Justice. A major reform of this institute has recently been undertaken, with backing from the World Bank, with an aim towards achieving greater autonomy and more training, as well as becoming better adapted to the international environment.

**Tunisia** In Tunisia, a 'Higher Institute of the Judiciary' was created in August 1985, though for nearly four years it was no more than an abstract proposal, given that it did not start to function for administrative and teaching purposes until December 1987. The Institute comes under the remit of the Ministry of Justice and Human Rights. It has legal personality is financially independent, and its budget is notionally part of the general national budget.

However, the professional training of judges can be considered mediocre or weak in certain cases. National judges, often with little specialisation, and poorly acquainted with international standards of law (particularly in the courts of first instance), are ignorant of or reticent about the implementation of international law and its precedence over its domestic counterpart.

This trend towards increasing professionalism of the law is thwarted by the existence of courts in which non-professional judges practise or may do so.

**Egypt** In Egypt, justice and the judicial function are highly professional, but the 1971 Constitution lies down that the people shall play a part in justice, which may mean the involvement of non-professional judges in the legal process. This is the case in the military courts, which allow 'people's' judges to sit on them.

**Algeria** This is also the case in Algeria, where the Constitution states that people's assessors may sit on the bench. Furthermore, the criminal courts have adopted the formula of 'people's' juries in 'special courts' as laid down by the 'anti-terrorist' law.

**Morocco** In Morocco, non-professional judges practice in lower level of court, where judicial tasks are hard to distinguish from administrative ones. The community and district courts were created by the *dahir* on the 15<sup>th</sup> of July 1974, in a political context of institutional and constitutional redefinition favouring the hegemony of monarchical power. The fact that these courts may be composed of non-professional judges may confuse the minds of the litigant as to the relation between administrative power, linked to the executive, and the judiciary, maintaining the image of justice as an attribute and function of royal sovereign power.

In such courts, justice is rendered by judges elected from among members of the elite and supported by officials of the local administration. They are not required to have any legal or judicial training. This innovation, challenged at the time by the opposition, marked a backward step in the process of developing a judicial system that is (at least outwardly) independent of political and administrative power. However, in the criminal sphere, the revision of the Code of Criminal Procedure in 1974 abolished the criminal court, which consisted of judges and juries, and assigned the jurisdiction of that court to a division of the Supreme Court consisting solely of professional judges.

The experience of juries in authoritarian contexts has left a lot to be desired in certain instances. The use of non-professional judges, although inspired by a conception of popular sovereignty, lends itself to the manipulation of the judicial function by political power, enhancing the latter's interference in the workings of justice.

There is a variation in legal systems stemming from the process of specialisation. Among other things, this process is linked to denominationalism and religious communities, which often form the basis of family law. Litigation on matters of personal status, namely divorce, custody of children, matters of inheritance, and similar matters are not dealt with in the ordinary civil courts in the countries discussed here, but by the religious courts.

The problems associated with enforcement of personal status laws, which are dependent upon the religion or denomination to which an individual belongs, stem from the lack of independence of courts, and the multiplicity of courts. Different denominations inevitably treat individual matters differently from one another, depending on the precepts of the faiths concerned. There is therefore also a problem of inconsistency in matters of personal status, something that is particularly problematic in countries such as Lebanon and Jordan. In Lebanon, there are 17 recognised religious denominations and 17 types of religious courts with jurisdiction over issues of personal status. In Jordan, in addition to the Muslim *Sharia*' courts, nine non-Muslim faiths and denominations are recognised in law, each with its own denominational court.

Accordingly questions arise concerning equality before the law where numerous religions and denominations exist. In some countries, the Ministry of Justice exerts its influence on some religious courts and not others. For example, in Lebanon a judge is appointed by the Ministry to inspect the Muslim courts. However, the Christian courts are not subject to such inspection.

Specialisation is also an effect of the recent development of these systems. This development mirrors the transformations affecting these countries in favour of economic liberalisation and opening up to foreign capital, reflected in the creation of commercial courts.

In Morocco, commercial courts were created in 1997, but in other cases, such as Syria and Tunisia, no such commercial courts have been created, only a bench specialising in commercial cases, consisting of judges in civil courts (chambers of commerce). The specialisation is an attempt to respond to the need for an appropriate judicial system, but is also sometimes associated with a revision or fundamental reform of the law. This is the case in Morocco, where since 2003 the creation of courts specialising in family cases has accompanied a fundamental revision of family law.

The growing complexity and specialisation of the legal institution and function also make the problem of the relationship between justice and political power more complex: the status of delegation which *de facto* characterises justice is tending in some cases to give way to greater autonomy and independence, as a result corporatism and a concomitant professional 'ideology.'

Not all areas of the law present the same interest for the political power to interfere, so the autonomy and independence of the judiciary are not totally fictitious.

In certain areas of the legal system, the problem of autonomy and independence is tending to move from the domain of political interest to that of economic and social interest, reflected in corruption that is more social and economic than political in nature, or in economic corruption that blights the administration almost to the heart of political power.<sup>263</sup>

The issues of judicial autonomy and of judicial function tend to be focused on courts likely to be susceptible to interference by the political power (courts with exceptional jurisdiction above all). But, the same issue of the independence of the legal function is also found in the sphere of private interests and of their power to corrupt. In fact, the independence of the courts vis-à-vis political power may be related to a subordination of justice to private interests with perilous consequences for the state itself.

It would require more detailed analyses than is possible within the confines of this report to support the interpretation just suggested. But these suggestions have been made to avoid the simplistic attitude of denying that the transformations of the judiciary have no point or purpose.

In the event, the changes currently occurring in the countries under consideration, with regard to the conception and function of the law are not without effect; this is despite the fact that many of the changes remain largely formal, limited as they often are to formal changes in the law. This is because one may always find people who believe in the noble principles that are supposed to govern their work.

It is always possible to find persons who believe in the principles which govern their duties. One has only to refer to the 'conscientious objections' frequently voiced in support of respect for the principles of the autonomy and independence of justice and which denounce that justice is 'dysfunctional' of justice.

It may be added that the law, even when it is more formal than real, obliges deviant practice to become secretive and dishonourable, and in order to avoid not necessarily to

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<sup>263</sup> In Morocco, the recent legal tribulations of a drug trafficker (the *Erramach* case), in the northern region, revealed the involvement of judges and senior Government officials in a substantial scale of the corruption and showed how deep the tentacles of its power reach. Corruption, having served the state as a means of government, has become a means of enfeebling it.

fall under the stigma of unlawfulness. No state will openly engage in the practice of issuing 'directives' to courts in order to steer judgments one way or the other, yet most do not hesitate to do so even if it has to deny or conceal them.

All the states discussed in this report, in one form or another, experience interference in the exercise of judicial function, but none would venture to openly criticise the noble principles governing the autonomy and independence of the judiciary. It is therefore necessary for those who struggle to promote the rule of law, continuously to expose practices that violate international standards of justice. Further, they must take action to prevent the executive from interfering in the exercise of judicial power”

#### *4.4.2 The judge and the regulation of political action*

The incorporation of judges into guaranteeing the transparency and lawfulness of electoral procedures forms part of the overall development of the political systems concerned. Although this remains insignificant in a political context marked by authoritarianism and the monopoly of power by the ruling regimes, it has, in certain cases, a relative effect of limiting the arbitrary nature of the ruling power in an electoral process that continues to be strongly controlled.

**Egypt** It was in the context of reviewing the lawfulness of the electoral process that, in 2003, an Egyptian judge defended a restrictive conception of the notion of 'judge,' by holding that exercising responsibilities in the Ministry of Justice, or in related spheres of justice, does not entail membership of the judiciary, and also into declaring that the parliamentary elections in a Cairo constituency were irregular because judges in six of the forty-nine electoral committees had been replaced by officials from the State Legal Department and Administrative Prosecution.

In Egypt, a Law of 1956 provided for the control of parliamentary elections. In July 2000, the Supreme Constitutional Court declared that that this law was unconstitutional due to the absence of full judicial supervision. Judicial supervision in the elections of 1990 and 1995 had only been partial in accordance with this law which called for the judicial supervision of principal polling stations only, while civil servants supervised auxiliary stations. The Supreme Constitutional Court declared the elections of 1990 and 1995 illegal. As a result of this judgment, two extraordinary sessions of both houses of Parliament were held on the 15<sup>th</sup> and 16<sup>th</sup> of May, 2000.<sup>264</sup> During these sessions, parliamentarians voted in favour of Presidential decrees amending the law to provide for full judicial supervision, in time for the 2000 elections.<sup>265</sup>

**Lebanon** In Lebanon it is possible for an unsuccessful parliamentary or presidential candidate to initiate litigations before the Constitutional Council, alleging certain electoral irregularities. The Constitutional Council is also competent to examine the validity of the candidature itself.<sup>266</sup> The remedies available to the Constitutional Council are (a) an order declaring the winning candidate's election invalid, or (b) an order requiring a fresh election. In one recent case contesting the validity of an election, the Constitutional Council declared that the votes of both the complainant and the winner of the election

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<sup>264</sup> See Human Rights Watch, World Report, 2001.

<sup>265</sup> Egypt: Article 24 of the Law on the Exercise of Political Rights No 73 of 1956 was amended, to include full judicial supervision.

<sup>266</sup> Laws governing the Constitutional Council's jurisdiction in this regard are the Law No 250 of 14 July 1993, Articles 23-32, as amended by Law No 150 of 30 October 1999, and the By-laws of the Constitutional Council, Law No 243 of 7 August 2000, Articles 45-50.

were invalid, and instead of ordering a fresh election, the candidate who came a very distant third, was elected MP.

#### **4.5. Action Points**

- Consider conducting an audit of judicial training in the region or individual countries.
- Building on the information gathered, establish a programme to train the trainers, to ensure a high quality of training is given to judges both before qualifying, and during judicial career.
- Campaign to ensure that training programmes are made compulsory throughout a judge's career.
- Campaign for the inclusion of human rights training, to include the right to liberty and security and the right to a fair trial.
- Campaign for the inclusion of ethics in training programmes.
- Campaign for greater role of judiciary in parliamentary elections.

## 5. COURTS WITH EXCEPTIONAL JURISDICTION

### 5.1. International standards

International standards on courts with exceptional jurisdiction require complete compliance with international standards on the right to a fair trial.

International standards on the right to a fair trial include:

- Access to a lawyer (out of sight and hearing distance of the authorities), at an early stage of the investigation and throughout the investigation phase
- Right to silence and right not to incriminate self
- Right not to be subjected to torture or other forms of coercion
- Right of prompt access to a judge
- Right to be informed of the nature of the charge in a language the accused understands
- Right to access to prosecution's papers and evidence in order to prepare defence
- Right to adequate time and facilities to prepare defence
- Right to be represented by a lawyer, free of charge where necessary and where the interests of justice require it
- Right to a public hearing by an independent and impartial tribunal established by law
- Right to equality of arms, including the right to examine and cross examine witnesses
- Right to an interpreter if accused does not understand the language of the court
- Right of appeal

Courts with exceptional jurisdiction are the most glaring and blatant expression of the subordination of justice and the judiciary to political power. All the countries considered by this report have various types of courts with exceptional jurisdiction, although their role differs in importance from one case to another.

Certain states shelter behind the distinction between specialised courts and courts with exceptional jurisdiction in order to offset the negative image their legal system gives through the existence of courts with exceptional jurisdiction, and do so by making courts with specialised jurisdiction into specialised courts. In some cases, these courts are known as state security courts. In others, they have been accorded different names, but their functions are very similar. For example, *Lebanon* has a court known as the '*al majlis al adli*,' (frequently translated as 'The Court of Justice,' but is probably more accurately translated as 'Judicial Council'). This court is chaired by the first president of the Court of Cassation, and has four other members of the Court of Cassation, appointed by the Council of Ministers.

In a number of countries under consideration, military courts operate in parallel with, or instead of, state security courts. Such courts, established to try military personnel, may acquire jurisdiction over civilians in circumstances where the executive so determines, as is the case in Egypt. Since 1992,<sup>267</sup> the President of the Republic has had the power to

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<sup>267</sup> This coincided with the escalation of violence perpetrated by the Muslim brotherhood at the time – see Egyptian Organisation for Human Rights Report: Together against Referrals of Civilians to Military Courts, EOHR report on Case No 29/2001.

decide that a particular person should not be tried in the ordinary criminal courts, but should instead be tried either by an emergency state security court, or a military court. The president is not required to provide any justification for such choices. Between 1992 and 2000 (inclusive), 34 cases, involving 1012 defendants, have been referred to military courts.

Military courts may acquire jurisdiction over crimes committed by civilians when involving some element of the military, as is the case in Lebanon and in the Occupied Territories of Gaza and the West Bank. In the Occupied Territories, Palestinians are tried in Israeli Military Courts where crimes have been committed against Israelis, or are deemed to affect Israel's security.<sup>268</sup>

In Lebanon, examples of cases involving the military frequently involve Palestinian refugees. The Lebanese military guard the perimeter of Palestinian refugee camps (but do not have an authority to enter the camps), therefore a refugee caught illegally bringing in building materials may be arrested by the military.<sup>269</sup> Such a case would, as it involved an arrest by a member of the military, be tried in a military court.

### *5.1.1 Justice in the service of political repression*

In certain states, courts with exceptional jurisdiction are less involved in the political life of the country, but their existence is nonetheless abnormal. Such is the case with the Special Court of Justice in Morocco (which it recently decided to abolish<sup>270</sup>). The Special Court of Justice is generally regarded as a specialised court, not a court with exceptional jurisdiction. But in fact, The Court is at once a specialised court (in corruption cases of certain categories of officials) and a court with exceptional jurisdiction – in that the trial procedure before this court is intended to deprive persons charged of the common right to a trial.

**Algeria** In Algeria, the special courts have been abolished.<sup>271</sup>

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<sup>268</sup> Israel: Military order 378 'Order Concerning Security Provisions,' 1970.

<sup>269</sup> Palestinians are not allowed to take building materials into the refugee camps, see Palestinian Human Rights Organisation: International Convention on the Elimination of All Forms of Racial Discrimination, Shadow Report of the Fourteenth, Fifteenth and Sixteenth period Report of State Parties in 2002, Lebanon, February 2004.

<sup>270</sup> Created in 1965 in the context of riots and aimed at raising moral standards in public life, and directed against the corruption of public officials, this Court was completely under the control of political power by virtue of its composition: the President, Vice-Presidents and the 'General Prosecutor' of the Court were all appointed by the King; the other judges (deputies of the 'General Prosecutor'; the investigating judges; the judges making up the Trial Chamber) were appointed by the Minister of Justice (after 1975, the assessors-juries, who are non-professional judges, no longer formed part of the composition of the Court). Referral to the Court was in the control of the Minister of Justice, who handed 'a written order' to the 'General Prosecutor' for the institution of proceedings. The 'General Prosecutor' had no discretionary power as regards whether proceedings were appropriate. He was obligated to implement this order, even if he considered that the Court lacked jurisdiction or if the facts were covered by the statute of limitations; nor could he amend the criminal characterisation of the facts by the Minister of Justice. The Court's jurisdiction, to the exclusion of all other courts, applied to crimes 'of misappropriation of public funds, corruption, log-rolling and embezzlement by public officials' concerning sums amounting to 25,000 DH or more, and the sentences the Court could hand out were double those possible in ordinary criminal courts (as referral to it was solely in the hands of the Minister of Justice, the victims of these crimes could also be the victims of a true denial of justice if the Minister of Justice decided not to bring proceedings via the 'General Prosecutor,' which was precisely the case, numerous cases involving the corruption of public officials concerning sums often exceeding 25,000DH having never been prosecuted by one Minister of Justice after another).

<sup>271</sup> There were three of them for the whole of Algeria. Each court consisted of five judges, including a President and four assessors. The duties of the Attorney General's Department fell to a 'General Prosecutor,' appointed from among the justices of the public prosecutor's office. The Court also included an Investigation Chamber, entrusted to an ordinary judge. Article 17 of Legislative Decree 92/03 of 30 September 1992 laid

In countries where a 'state of emergency' has become the norm (e.g. Egypt, Syria), or was applied in the exceptional circumstances of what was really civil war (e.g. Algeria), courts with exceptional jurisdiction frequently operate (or have operated) against political opponents.

**Syria** In Syria, side by side with the ordinary legal system, there is a system of exceptional jurisdiction, thus giving the Executive branch a parallel system of justice under its control and exploited for ideological purposes and for political repression. The system of exceptional jurisdiction covers the military courts,<sup>272</sup> the Economic Security Court, and the State Security Court. This was instituted by Decree No. 47 of 28.3.1968 and placed under the authority of the President of the Republic in his capacity as governor of the state of emergency. The president has jurisdiction to try crimes linked 'activities considered contrary to the socialist regime, whether they take the form of acts, words, spoken or written, or by any other form of expression or publication,' to crimes concerning 'opposition to the attainment of union between Arab countries or any other aim of the revolution, or any attempt to obstruct it whether by demonstrations, mob gatherings, disorder, agitation or by the dissemination of false information aimed at undermining the trust of the masses in the aims of the revolution.' Under the declared powers of this institution, it is possible to transfer criminal cases to courts with special jurisdiction, and therefore to punish activities which are not necessarily political. The State Security Court is not obliged to respect criminal procedure and refuses to refer to criminal law or to hear the arguments of lawyers. Its verdicts are final and irrevocable, other than by the President of the Republic simply by virtue of the fact that it is his task sign them.

**Egypt** In Egypt, the Constitution recognises the existence of state security courts. It states that, 'The law shall regulate the organisation of the State Security Courts, and prescribe their competences and the conditions to be fulfilled by those who occupy the office of judge in them.'<sup>273</sup> In other words, state security courts in the Egyptian legal system constitute, by virtue of the Constitution, part of the regular court structure. The law establishing these courts is the Emergency Law;<sup>274</sup> however, it is hard to imagine how these courts could legally be abolished, without an amendment to the Egyptian Constitution. By contrast, other states regard them, at least at an official level, as exceptional courts whose existence is tied with states of emergency.

In addition to the constitutionally recognised state security courts (confusingly known as Emergency State Security Courts), Egypt also possessed until recently, courts known as State Security Courts.<sup>275</sup> These courts possessed appeal divisions. However, in June 2003, the government announced the abolition of the State Security Courts and the

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down that judges of the Special Court were appointed by Presidential decree (the appointments were not published), on a proposal from the Minister of Justice, and that anyone permitting the identification of these judges would be punished with a prison term of two to five years. Referral to the Special Court entailed the removal of the case from the ordinary court previously hearing the case. The preliminary investigation was to be conducted under the supervision of the 'General Prosecutor' at the Special Court with territorial jurisdiction, and permitted holding persons in custody for up to 12 days. The investigation authorised the investigating judge, or the officers of the criminal police or persons delegated by them to carry out house searches and seizures, by day or by night, in any place in the national territory. The hearings of the Special Court were normally public, but the Court could decide of its own motion, or at the behest of the Attorney General's Department that all or part of the hearings would be held in camera. Only the operative parts of the judgments delivered on the merits were in all cases delivered in public. Judgments delivered by the Special Court, except where delivered *in absentia*, were only subject to an appeal on a point of law.

<sup>272</sup> Created by the Law for the Protection of the Revolution, No. 6 of 17.1.1965.

<sup>273</sup> Egypt: Article 171 of the Constitution.

<sup>274</sup> Egypt: Emergency Law No 162 of 1958 as amended.

<sup>275</sup> Egypt: Law No 105 of 1980 on Supreme State Security Courts.



transfer of all proceedings to other courts. On the face of things, this looked like a progressive move. However, the reality is that cases that would have been tried before these courts are now tried by the Emergency State Security Courts, from which there is no right of appeal. A judgment of these courts becomes final when the President of the Republic ratifies them.<sup>276</sup> Accordingly, the abolition of the State Security Courts can first be described as having worsened the situation for defendants, and second, to be merely cosmetic (perhaps designed to respond to political pressure from outside Egypt). In addition to the Emergency State Security Courts, the military courts have jurisdiction over any civilian case that is referred to it by the President of the Republic.<sup>277</sup>

**Lebanon** In Lebanon, the exceptional courts principally consist of the military courts and the Court of Justice. The military courts come under the Ministry of Defence. Their members are appointed by the executive. The composition of the Permanent Military Court includes four judges, only one of whom is a civil judge (and has been trained as a judge); the others are officers, not necessarily in receipt of any legal training. The Permanent Military Court is presided over by an officer. The military courts have jurisdiction not only over crimes, offences, and misdemeanours committed by military personnel as prescribed by the military criminal code, but also over any crime, offence or act incurring criminal liability with which a military person is directly or indirectly associated. When considering the report of the Lebanese Government on the application of the Convention on Civil and Political Rights in April 1997, the Human Rights Committee observed that their jurisdiction exceeded disciplinary matters and extended to civilians.

The Lebanese Court of Justice has general jurisdiction over offences committed against the external and internal security of the state, and over offences affecting general security. Consisting of the Chief Justice of the Court of Cassation (who is also the President of the High Council of the Judiciary), and of four senior judges from the Court of Cassation, cases are brought before it by decree adopted in Cabinet, which decides which cases shall be referred. An investigating judge, with broad powers, is appointed by decision of the Minister of Justice for each case referred. The indictment is presented to the Court by the General Prosecutor with his own submissions. The Court of Justice then deems that it has jurisdiction to rule on any incidental or preliminary matter that might arise during the case, even if that matter falls within the exclusive jurisdiction of another court. The judgments delivered by this court are not subject to appeal (or any other form of redress). The majority of cases that the Court of Justice has ruled upon are political, as they concern political or religious groups in opposition to the Government.

**Tunisia** In Tunisia, courts with exceptional jurisdiction no longer consist of just military courts, as the State Security Court was abolished in 1987. Exceptional courts fall within the remit of the Ministry of Defence, and are presided over by an ordinary civil judge. The judge is assisted by four military assessors (two proposed by the Minister of Justice, two proposed by the president of the Chamber of Deputies), all being appointed without reference to the High Council of the Judiciary; proposals are normally supposed to come under Article 66 of the Constitution. The 'General Prosecutor' for these cases is a military officer. In principle, the prosecutor's powers are limited to hearing cases involving military personnel or officials of the military administration, but he may also hear civilians, where military personnel appear with them in cases involving offences against national security and domestic security. The proceedings are governed by the Code of Military Procedure. However, the rights of civil litigants are, in principle, covered by the same guarantees as before ordinary courts. The decisions of the military court may on only be appealed on

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<sup>276</sup> Egypt: Article 12 of the Emergency Law No 162 of 1958 as amended.

<sup>277</sup> Egypt: Article 6 Military Rule Law.

points of law to the Court of Cassation. There is no general right of appeal on the facts. In the past, military courts in Tunisia were used against trade union opposition members and left-wing militants. The practice of hearing civilians in military courts has resumed in the context of the struggle against Islamic opponents, particularly since 1998.

**Jordan** In Jordan, State Security Courts were originally intended to be temporary courts. However, in 1997 Parliament passed amendments to the law that effectively extended their mandates indefinitely.<sup>278</sup>

**Palestinian Territories** The Palestinian Authority established State Security Courts, largely under pressure from Israel and the United States.<sup>279</sup> The EU has been highly critical of these courts, and has called repeatedly for their abolition. These courts, are governed neither by the Basic Law of the Palestinian Territories, nor by the Palestinian Judicial Authority Laws. In July 2003 the Minister of Justice attempted to abolish the State Security Courts, however because these courts were created by a Presidential decree, the Minister of Justice had no authority to abolish them. To date, the President has not himself opted to abolish them; accordingly, they remain in existence. The only thing the President has done in this regard is to issue a Presidential decree merging the office of the Security Court's Attorney General with the office of the ordinary Attorney General. This was in clear violation the Formation of Courts Law, the Law of the Judiciary and the Palestinian Basic Law, since it acknowledges the presence of a judicial body not established by law.<sup>280</sup>

### *5.1.2 Characteristics of Courts with exceptional jurisdiction*

Courts with exceptional jurisdiction in the countries examined possess a number of traits in common, including:

- The tribunals are comprised of personnel who include persons not qualified as judges and indeed may lack any legal training at all.
- Sometimes these 'judges' are members of the armed forces.
- Judges are often appointed by the head of State or by the head of the armed forces without any participation by the High Judiciary Councils.
- The executive often has complete discretion over whether and who should be referred to these courts.
- The law on the independence of the judiciary frequently does not apply to these courts.
- These courts frequently possess their own prosecutors, i.e. State Security Prosecutors, or military prosecutors, who wield considerable power vis-à-vis the courts.
- These courts can try a wide variety of criminal offences.
- Such courts can impose heavy sentences, including the death penalty, to which there is often no appeal.
- Lawyers are often prevented from having access to accused persons.<sup>281</sup>
- Lawyers are often prevented from having access to the evidence against the accused at all, or until the last possible moment before a trial begins.
- Trials are often brief.
- Judgments are often poorly reasoned.

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<sup>278</sup> US Department of State, Country Reports on Human Rights Practices, Jordan, 2000.

<sup>279</sup> Presidential Decree of 1995.

<sup>280</sup> Information provided by Al-Haq.

<sup>281</sup> For example, in Egypt, where lawyers have been known to have been beaten up in attempts to see their clients.

### 5.1.3 Method of appointment and nature of judges in the courts of exception

Most of the courts concerned are made up of judges who have been handpicked by the executive, without participation of the High Judicial Councils, or any other independent body.

**Egypt** In Egypt, there are two levels of state security courts: the Summary Emergency State Security Court and the High State Security Court. The jurisdiction of these courts depends on the nature and seriousness of the crimes in question. The President of the Republic appoints judges to the Emergency State Security Courts by decree, after consultation with the Minister of Justice. The law also permits the President to appoint members of the armed forces to these courts, after consultation with the Minister of Defence;<sup>282</sup> indeed, he has the authority to form a Summary Emergency State Security Court entirely of military officers. To date, however, it does not appear that he has appointed any military personnel to either court.<sup>283</sup>

**Jordan** Similarly, in Jordan, the Prime Minister has the power to appoint State Security Courts, comprised of three civilian or military judges.<sup>284</sup> The law does not specify the ratio of civilian to military judges; it is possible for the Prime Minister to create such a court comprised only of three military 'judges'.<sup>285</sup> The military officers appointed are not necessarily legally qualified.<sup>286</sup> The Prime Minister, like the President of Egypt, must consult with both the Minister of Justice and the Minister Defence, when appointing such judges.

**Palestinian Territories** In the Palestinian Territories, the state security courts were also appointed by Presidential Decree.<sup>287</sup> The Basic Law and the Judicial Authority Law are not applicable to these courts.

Military courts (with jurisdiction over civilians in some countries) are comprised solely or mainly of military personnel. Such courts are appointed by the either the Minister of Defence, or a high-ranking military officer. In the majority of military courts in the countries under consideration here, judges have little or no legal training.

**Lebanon** In Lebanon, the military courts comprise panels of 5 judges, only one of whom is a civilian judge and s/he is also the only one with legal training; the presidents of these courts are always military officers.<sup>288</sup>

**Egypt** In Egypt, the military courts have, by law,<sup>289</sup> jurisdiction over any crimes committed by civilians, when referred by Presidential decree.<sup>290</sup> The law says that the Department for Military Justice shall be one of the departments of the High Command of the Armed

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<sup>282</sup> Egypt: Article 7 Emergency Law No 162 of 1958 as amended.

<sup>283</sup> See Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Egypt, CCPR/C/EGY/2001/3, paragraph 657(g).

<sup>284</sup> Jordan: Article 2 Law 17 of 1959, as amended by temporary Law No 44 of 2001.

<sup>285</sup> Khaled el Taher, *Criminal Justice in Jordan*, 2004.

<sup>286</sup> See Nour el Emam, *The Judicial Organisation in Jordan*, 2004.

<sup>287</sup> Palestinian Territories: Presidential Decree 7 February 1995, based on Order 55 of 1964 issued by the Egyptian Governor General of Gaza, which in turn were based on British Emergency Regulations of 1945.

<sup>288</sup> Information acquired during interviews in Lebanon.

<sup>289</sup> Egypt: Article 6 of Law No 25 of 1966, Act on Military Rulings, as amended by Law No 1 of 1983 and see *The Human Rights Centre for the Assistance of Prisoners, The Truth*, 2002.

<sup>290</sup> Article 6 of the Law No 25 of 1966 as amended by Law No 1 of 1983.

Forces.<sup>291</sup> Such courts are comprised solely of military officers. The law further requires that the chief of the department of the military judiciary shall have the rank of officer and possess a law degree; he is directly answerable to the Minister of Defence.<sup>292</sup> The chief military prosecutor is also required to possess a law degree.<sup>293</sup> The law does not require that other members of the military judiciary, or the prosecution, to possess legal qualifications. Military 'judges' are appointed for renewable periods of two years by the armed forces.<sup>294</sup>

**Occupied Territories** In the Occupied Territories, Israeli Military Courts have jurisdiction over Palestinian civilians, wherever Israeli military authorities decide that Israeli security was at stake in the commission of any particular crime. Two levels of such courts are in existence, commensurate with the seriousness of the crimes committed.<sup>295</sup> The first comprises one judge, and the second comprises three judges. Judges of the court comprising only one judge must have legal training. However, only the heads of the courts comprising three judges are required to have legal training. Judges of these courts are assigned by the Military Commander. Most of those with legal training are reserve officers in the Occupying Forces.<sup>296</sup>

Frequently, judges of the exceptional courts are not granted the protections afforded to judges in ordinary criminal courts. For example, in Jordan and Egypt, these judges are not governed by the Judicial Authority Laws, which offer some protection for their independence and their immunity from dismissal.<sup>297</sup> An anomaly to the generally rule that courts of exception are comprised of handpicked judges or members of the military is the Court of Justice in Lebanon. This court is composed of Presidents of the Chambers of the Court of Cassation, and they are appointed on a permanent basis. The problems with this model are discussed below.

#### *5.1.4 Referral to and jurisdiction of courts with exceptional jurisdiction*

In some instances, it is the executive that decides whether to refer a case to a court with exceptional jurisdiction. In others, it is the prosecution or the military authorities who makes this decision, in accordance with the law.

**Egypt** In Egypt, the President of the Republic has absolute discretion on the question of referral to a military court during a state of emergency, though he is not accountable for his decision.<sup>298</sup> Egypt is now in its 23<sup>rd</sup> uninterrupted-year of a 'state of emergency.' The President of the Republic, or his representative, can also refer any crime to the State Security Courts;<sup>299</sup> this is in addition to the provisions in the law which grants the State

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<sup>291</sup> Egypt: Article 1 of the Law on the Military Judiciary No 25 of 1966.

<sup>292</sup> Egypt: Article 3 of the Law on the Military Judiciary No 25 of 1966.

<sup>293</sup> Egypt: Article 25 of Law on the Military Judiciary No 25 of 1966.

<sup>294</sup> Egypt: Article 59 of the Law on the Military Judiciary No 25 of 1966.

<sup>295</sup> Israel: Articles 3 and 4 of Military Order No 378 of 1970.

<sup>296</sup> Al-Haq, *The Israeli High Court of Justice and the Palestinian Intifada: A Stamp of Approval for Israeli Violations in the Occupied Palestinian Territories*, Al-Haq, Rammallah, (2003), Chapter 2, *Israel and the Occupied Palestinian Territories*.

<sup>297</sup> Egypt: see *The Centre for Human Rights Legal Aid: Military Courts in Egypt: Courts Without Safeguards, Judges Without Immunity, Defendants Without Rights*, 1995; for Jordan, see Khaled al Taher, *Criminal Justice in Jordan*, 2004.

<sup>298</sup> Article 6 (2) of the Law on the Military Judiciary No 25 of 1966, as amended by Law No 1 of 1983

<sup>299</sup> Article 9 of the Emergency Law No 162 of 1958, as amended; see also Human Rights Centre for the Assistance of Prisoners, *Judicial Verdicts, Part 1 The Legal Status of the Verdicts in Modern Legal Systems*.

Security Courts jurisdiction over any crime that violates the orders emanating from the state of emergency (i.e. offences against the security of the state).<sup>300</sup>

**Lebanon** In a similar fashion, the executive in Lebanon can determine, upon the commission of a particular crime, that this is a crime against the security of the state and should therefore come under the jurisdiction of the Court of Justice.<sup>301</sup> However, a military court can only try civilians if the offence involved the military in some way. Accordingly, there is less scope for executive interference with respect to this court than there is with regard to the Court of Justice.

**Occupied Territories** In the Occupied Territories, the Israeli military has complete discretion to determine whether a crime committed by a Palestinian is an offence against the security of Israel and if so, to refer the case to the military courts.

In most of the countries under consideration here, crimes against national security are automatically tried in the exceptional courts. The problem, of course, is that this notion is capable of wide interpretation.

**Jordan** In Jordan, for example, amendments to the Penal Code in October 2001<sup>302</sup> immediately following the terrorist attacks in the USA enabled the authorities to prosecute journalists and editors before the State Security Courts for a wide variety of offences.<sup>303</sup> The very existence of such a law has a chilling effect on journalism, resulting in self-censorship. Indeed, it has been reported that journalists are routinely detained and prosecuted, or threatened with prosecution as a means of intimidating the press.<sup>304</sup>

In May 2002, Jordan's first female Member of Parliament was sentenced to 18 months' imprisonment by the State Security Court for publishing material 'tarnishing the Jordanian state,' defamation of the judiciary, 'uttering words' before another deemed to be 'detrimental to his religious feeling,' 'publishing and broadcasting false information abroad which could be detrimental to the reputation of the state,' and inciting 'disturbances and killings.'<sup>305</sup> She had publicly accused the Prime Minister of benefiting financially from a government decision to double car insurance costs. It is hard to see how her 'crimes' could be even remotely connected with terrorism, or national security. It has been suggested that these laws, under the guise the 'war on terrorism' are in fact being used to silence legitimate political opinion.<sup>306</sup> She was later pardoned after going on a hunger strike.

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<sup>300</sup> Article 7 of the Emergency Law No 162 of 1958, as amended.

<sup>301</sup> Assaf, *Recherche sur La Justice, Liban*, 2003.

<sup>302</sup> Jordan: Law Amending the Penal Code (Provisional Law No 54) 2001.

<sup>303</sup> The offences include: written, published, or aired any statements 'harmful to national unity'; instigating criminal actions; sowing the seeds of hatred and malice; inciting divisions among members of society; instigating acts of religious and racial fanaticism; insulting the dignity of individuals, their reputation or personal freedoms; committing acts of corruption or publishing false information or rumours; inciting people to organize strikes or sit-ins, or to hold meetings in a manner that violates the law; or committing any act considered harmful to the state's reputation and dignity Jordan: Law Amending the Penal Code (Provisional Law No 54) 2001, amended Article 150 of the Penal Code. Also included, are illegal public gatherings of more than 6 people, criticism of the royal family, the government, its allies and friendly countries. Middle East Report Online, Don't Blink, Jordan's Democratic Opening and Closing, 3 July 2002.

<sup>304</sup> US State Department Country Report on Human Rights Practices, 2002, Jordan.

<sup>305</sup> AI Index: MDE 16/008/2002 (Public) News Service No: 87 16 May 2002 Jordan: Sentence against Toujan al-Faisal a blow to freedom of expression.

<sup>306</sup> See, for example Human Rights First (Formerly Lawyers' Committee for Human Rights), Media Alert, 22 May 2002.

**Egypt** In Egypt, journalists have been tried by the Emergency State Security Courts; for example, Talaat Hashem, editor of the newspaper, *Misr al-Fatah*, was sentenced by such a court to one year imprisonment for the offence of having published a newspaper without a licence.<sup>307</sup> Employees of NGOs have also been tried by these courts. For example, Saad Ibrahim, Director of the *Ibn Khaldoun Centre for Development Studies* was tried and found guilty by a State Security Court of seeking to harm the reputation of the state, accepting foreign funding without government approval, and defrauding a donor (the EU, despite the fact that the EU was satisfied with the way the funds were used).<sup>308</sup>

In December 1998, the secretary general of the Egyptian Organisation of Human Rights, Hafez Abu Sa'ada was accused by the State Security Prosecutor of disseminating information abroad that harmed Egypt's national interests and other related offences, following publication of EOHR's report documenting police abuse of Christian residents in a village in Egypt.<sup>309</sup> Anti-war protesters and members of the banned Islamic Brotherhood are among other groups that have been tried in the Emergency State Security Courts. Emergency State Security Courts have also been used to crack down on homosexual activities.<sup>310</sup>

#### *5.1.6 Detention and the pre-trial stage in cases before the state security courts*

##### **Prosecutors**

Most of the exceptional courts possess their own prosecutors, who are endowed with greater powers than regular prosecutors. Police who have arrested a person on suspicion of an offence normally tried before exceptional courts may also have extended powers. Frequently, they have power to detain suspects for longer periods prior to the first appearance before the public prosecutor or a judge, than is the case with regard to crimes that will be tried in ordinary courts. This detention period often involves torture and other forms of physical and psychological abuse during detention.

In some countries, the prosecutors attached to exceptional courts enjoy so much power that they are (or appear to be), in charge of the whole legal proceedings from arrest to conviction, in place of the judges in the courts.

**Egypt** In Egypt, the Emergency State Security Courts have their own system of prosecutors, the State Security Prosecution; the law endows these prosecutors with powers similar to those of a judge during the investigation of alleged crimes against security. There is no judicial supervision of such investigations;<sup>311</sup> the Prosecutors are free to decide whether to refer the case to an Emergency State Security Court, or a Military Court. Originally these prosecutors had jurisdiction over military crimes and crimes affecting the security of the state only. Their jurisdiction was expanded by decrees of the Minister of Justice to include jurisdiction over any crime in any part of the country. They also have jurisdiction over any crimes referred to them by the President of the Republic.

**Jordan** In Jordan, the Chief of the Joint General Staffs appoints the director of the Military Justice or one of his/her assistants to the attorney general of the State Security Courts.

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<sup>307</sup> US State Report, Egypt, 2003.

<sup>308</sup> The Conviction of the State Security Court concerned was over-turned twice by the Court of Cassation, and finally reheard by the Court of Cassation; he was acquitted by the Court of Cassation on 18 March 2003. See Human Rights Watch. Egypt: High Court Overturns Conviction of Rights Activists, 18 March 2003.

<sup>309</sup> Human Rights Watch, Word Report 1999.

<sup>310</sup> The so-called Queen Boat trials – 52 men were tried on charges of 'obscene behaviour.'

<sup>311</sup> Military Law No 1 of 1981, and see Egyptian Organisation of Human Rights, the Effect of the Emergency Situation on the Human Rights Situation in Egypt : 1992-2002, Part II, February 2003.

The attorney general can appoint any of the military judges to acts as his assistant, and he can appoint one or more military judges to acts as prosecutor.<sup>312</sup>

**Lebanon** In Lebanon, the military courts have their own prosecutors. They are appointed without their consent, from among the ordinary judiciary. There is much anecdotal evidence suggesting that military prosecutors have accrued a great deal of power, and that they effectively run this court and its trials.<sup>313</sup>

**Israel** Israeli military courts in the occupied territories also have their own military prosecutors.

### **Powers of detention; access to a lawyer and to a court**

The powers of the military (or security authorities) to detain persons suspected of offences that can be brought before courts with exceptional jurisdiction, are usually greater than is the case under ordinary criminal laws. For example, it is usually possible for the police or prosecution to detain persons for weeks or even months before they are brought before a judge with power to determine the legality of their detention. Further, the police or prosecutors often have legal powers to restrict access to lawyers for long periods of detention. Indeed, it is common practice for accused persons to be deprived of access (or effective access) to a lawyer for the whole duration of their detention pending trial.

Mechanisms for complaining about torture are frequently ineffective. In some cases, even where an accused person is able to secure a court order for release, the security forces ignore such decisions or find ways to circumvent them; and frequently no action is taken against them for such behaviour.<sup>314</sup>

**Egypt** The Egyptian experience is typical, illustrating the problems associated with the powers to detain persons for long periods without safeguards normally associated with the detention of suspects. The Minister of the Interior is responsible for state security investigations and organisation of the security agencies.<sup>315</sup> The law permits a police officer or member of the security forces, to arrest and detain a person for 7 days before charging him or even bringing him before a prosecutor.<sup>316</sup> This is compared to the obligation under the ordinary criminal law, to refer a case to the prosecutor within 24 hours. The Prosecutor, by application of the law, acquires the powers of an investigating judge, and can order the detention of a person for up to six months.<sup>317</sup> Challenges to the legality of detention under the emergency law can be made, but the procedure is long and drawn out, with the possibility of interference by the executive: first, complaints against detention orders may only be made after the accused person has been in detention for 30 days. Thereafter, the court has a further 15 days during which to make a decision on the complaint. If it fails to consider the case in a timely fashion, the detainee is entitled to immediate release. If the court orders release, the detainee must be released, however the President of the Republic may object to this ruling within 15 days of the release

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<sup>312</sup> Jordan: State Security Law, Article 7 A, See also Khaled el Taher, *Criminal Justice in Jordan*, 2004 and Nour el Emam, *Judicial Organisation in Jordan*, 2004.

<sup>313</sup> Information gleaned from interviews conducted in Lebanon, March 2004.

<sup>314</sup> See, for example, Human Rights Centre for the Assistance of Prisoners, *Detention and Detainees in Egypt 2002*, Fifth Annual Report on the Conditions of Prisons and Detention Centres.

<sup>315</sup> Egyptian Organisation for Human Rights and the World Organisation Against Torture Report, *Comments on the Report of the State of Egypt Concerning the Implementation of the UN Convention Against Torture and Other Cruel Inhuman or Degrading Treatment*, November 2002.

<sup>316</sup> Amendment no.79 of 1992, Article 7, paragraph 2 of the Code of Criminal Procedure.

<sup>317</sup> Egypt: Law n 105 of 1980; this law was repealed June 2003, but it seems that the law repealing it, Law 95 of 2003, may have amended the Criminal Penal Code to include these powers.

order.<sup>318</sup> Where the President objects, the case must be referred back to a court within a 15 days of the objection, and this court is given 15 days to make a final ruling. There is evidence that the Minister of Interior renews detention orders, despite being in receipt of final release orders.<sup>319</sup> Indeed, the powers of detention under the emergency law are used in many instances to keep persons in detention without any intention of pressing charges and bringing the detainee to trial. One NGO has reported instances of persons being held for six months without ever being brought before a court.<sup>320</sup> Complaints of torture must be made to the State Security Prosecutor, who alone has power to refer a complaint to a judge. However, such complaints are rarely investigated.

**Jordan** In Jordan, laws relating to state security courts grant the police and State Security Prosecutors extensive powers to detain suspects. The law permits members of the military judicial police to keep an arrested person for up to seven days before s/he is committed to the prosecutor.<sup>321</sup> This stands in contrast to ordinary crimes where the judicial police must send the detainee to the public prosecutor within 24 hours of the arrest.<sup>322</sup> Once an accused person has been referred to the state security prosecutor, the latter can detain him for renewable periods of 15 days, up to a total of 2 months.<sup>323</sup> This is the case, even where the person is accused of a misdemeanour. (Within ordinary criminal law, a person accused of a misdemeanour carrying a maximum penalty of 2 years is not permitted to be detained by a prosecutor.<sup>324</sup>) During the 2-month period detention, the accused is not entitled to submit a grievance to a judge.

Access to a lawyer is in practice usually prevented with regard to persons held under the Emergency Law in Egypt. Lawyers have reported that they have been subjected to humiliating searches and even beaten up in their attempts to see their clients. In cases where they are permitted to see their clients, the meetings are attended by police or security forces.

**Jordan and Lebanon** In Jordan and Lebanon, during pre-trial detention, the accused is normally denied access to a lawyer.<sup>325</sup>

**Occupied Territories** In the Occupied Territories, Israeli security personnel may arrest (without warrant), any persons suspected of having committed a criminal or security offence. It has been reported that accused persons can be prevented from having access to a lawyer for up to 90 days.<sup>326</sup> Since July 2001, all Palestinian lawyers from the West Bank and Gaza have been prevented from having access to their clients held in prisons in Israel.

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<sup>318</sup> Egypt: Article 3 Emergency Law No 162 of 1958, as amended; see also the Human Rights Centre for the Assistance of Prisoners, *The Truth*, 2002.

<sup>319</sup> See, for example, The Egyptian Organisation of Human Rights: *Political Detention Closed Door Policy and Criminal Detention, Revolving Door Policy*, 2003.

<sup>320</sup> Egyptian Organisation of Human Rights, summary of the 2002 Annual Report.

<sup>321</sup> State Security Court Law No 17 of 1959, as amended, Article 7B.

<sup>322</sup> Jordan: Article 100 B of the Criminal Procedure Code, as amended by Law No 16 of 2001.

<sup>323</sup> Jordan: Article 7 B 2 of the State Security Court Law.

<sup>324</sup> Jordan: Article 14 of the Code of Criminal Procedure.

<sup>325</sup> Jordan: Amnesty International, *Legal Safeguards Needed to Eradicate Torture*, AI Index MDE 116/02/95, 1995 and US Department of State Country Reports on Human Rights Practices, 2003. Lebanon: Assaf, *Recherche sur La Justice*, Lebanon, 2003.

<sup>326</sup> The Israeli High Court of Justice and the Palestinian Intifada: A Stamp of Approval for Israeli violations in the Occupied Palestinian Territories, AI-Haq, Rammallah, 2003.



### 5.1.7 Conduct of trials in exceptional courts

Trial of persons accused under security related offences are usually compromised long before the trials begin. Torture and other pressures are often used when accused persons are held *incommunicado*. Also, where the accused has not had access to his lawyer, it is likely that s/he will not have been able to give information to the lawyer relevant to her/his defence, or to receive appropriate legal advice related to the progression of the defence during trial. Trials in the military courts in Egypt,<sup>327</sup> and the State Security Court in Jordan are also frequently held *in camera* (in secret). Trials are, furthermore, usually short and the defence tends to be given inadequate time to examine the prosecution evidence prior to the trial.

**Occupied Territories** Palestinian lawyers are not permitted to represent their clients who are tried before Israeli Military Courts, since they are cannot qualify under the Israeli Bar.<sup>328</sup>

**Lebanon** Judgements of courts with exceptional jurisdiction are often brief and unreasoned. In *Lebanon*, the judgments tend to consist of a one-page document, giving only the barest of information.<sup>329</sup>

### 5.1.8 Other executive powers in relation to courts of exceptional jurisdiction

In some instances, the executive has further scope for interference in the criminal process, in relation to cases referred to courts with exceptional jurisdiction. In Egypt, the President has the power to terminate proceedings before a case under the emergency law is tried.<sup>330</sup> He may also order the temporary release of an individual prior to his/her trial at an emergency state security court.

## 5.2. Appeals from courts with exceptional jurisdiction

**Jordan** In Jordan, a law passed in 2001 removed the right of appeal with respect to persons convicted of crimes carrying a penalty of less than three years.<sup>331</sup> Those convicted of crimes carrying heavier penalties may appeal to the Court of Cassation. The Court of Cassation ruled recently that the State Security Courts could not impose the death penalty on the basis of a confession obtained by torture.

**Egypt** In Egypt, there is no right of appeal from the Emergency State Security Court. However, the President of the Republic may alter or annul the decision of an Emergency State Security Court, or order a re-trial. The President must affirm a judgement of the Emergency State Security Court, in order for the judgment to become final. This court has the power to award the death penalty.

**Lebanon** In Lebanon, there is no right of appeal from the High Court; it too, can impose the death penalty.

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<sup>327</sup> Egyptian Organisation for Human Rights and the World Organisation Against Torture Report, Comments on the Report of the State of Egypt Concerning the Implementation of the UN Convention Against Torture and Other Cruel Inhuman or Degrading Treatment, November 2002.

<sup>328</sup> Al-Haq, *The Palestinian Judiciary: Impediments to its Development*, 2<sup>nd</sup> Edition, Al-Haq, September 2003.

<sup>329</sup> Information gathered from interviews with lawyers, Vienna, March 2004.

<sup>330</sup> Article 13 of the Emergency Law No 162 of 1958.

<sup>331</sup> Temporary Law of 8 August 2001, amending the State Security Court Law.

**Occupied Territories** In the Occupied Territories, there are two types of military court: one comprising a single judge, whose jurisdiction is restricted to crimes whose penalties do not exceed 5 years, and one comprising three judges.<sup>332</sup> A right of appeal exists only with respect to the three-judge military courts. A person convicted of a crime before the single-judge court may, in accordance with the military orders, appeal to the Military Commander. S/he is entitled to approve the execution of the sentence, revoke it, or order a re-trial before another military court.<sup>333</sup> The right of appeal against the judgements of the single-judge court seems to be theoretical, at least from the point of view of those convicted. NGOs have reported that the courts of appeal tend to increase sentences that were originally imposed;<sup>334</sup> they do not therefore afford an effective appeal to most persons.

**Israel** The Israeli High Court of Justice has authority to consider certain appeals from military courts; however, this authority is controversial since it appears to contravene the provisions of the Fourth Geneva Convention.<sup>335</sup>

### 5.3. Ordinary versus exceptional justice

Although, under international standards of justice the abolition of the courts with exceptional jurisdiction is a necessity, it should be noted that this in and of itself does not necessarily signify a positive change, and, paradoxically, it might even be said that it is not necessarily without a negative impact.

In countries without such courts, the ordinary criminal courts have often and widely operated as courts with exceptional jurisdiction, among other things owing to the restrictions on the rights of defence favoured by various procedural legislations. The recent incorporation in a number of the countries of 'anti-terrorist' legislation has resulted even further in the true 'exceptional state' of ordinary justice.

In other cases, such as Tunisia, the abolition of the State Security Court has resulted in the exploitation of the ordinary courts by the political authorities. The abolition has generally led to a worsening of the corruption of the judicial system. The eminent Tunisian jurist, Mohamed Charfi, who called for the abolition of these courts in the past, has contended, paradoxically but logically, that under their dictatorial political system, retaining the State Security Court is preferable to abolishing it, as it enables ordinary justice not to be brought into proximity to political power.<sup>336</sup>

### 5.4. Action Points

- Campaign for the abolition of courts with exceptional jurisdiction, including military courts with jurisdiction over civilians and state security courts, drawing upon statements of UN bodies which have found that they tend to violate the right to a fair hearing.

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<sup>332</sup> Military Courts of Appeal were formed in accordance with Military Order No 1265 Concerning Security Regulations (Amendment No 58 to Military Order 378) of 1989.

<sup>333</sup> See Al-Haq, *The Palestinian Judiciary: Impediments to its Development*, 2<sup>nd</sup> Edition, Al-Haq, September 2003.

<sup>334</sup> B'Tselem, *The Military Judicial System in the West Bank*, November 1989, p. 42.

<sup>335</sup> See Al-Haq, *The Palestinian Judiciary: Impediments to its Development*, 2<sup>nd</sup> Edition, Al-Haq, September 2003, Chapter 2, *Israel and the Occupied Territories*.

<sup>336</sup> In an interview.

- In addition, campaign for greater protection of the independence of ordinary criminal courts to prevent them from being subject to the influence of the executive in political trials
- Alternatively, campaign to improve the quality of justice, thereby affording accused persons, the right to a fair trial.

## **6. JUSTICE AND THE PROTECTION OF RIGHTS**

The state of justice and the protection of rights in the countries considered here are not exclusively linked to the situation of the subordination of legal systems to the executive. While the problems of access to justice and of the enforcement of legal decisions are linked to the question of the independence of justice, they are also problems that refer to the wider legal environment. Access to justice, for example, depends on the economic resources of the defendants, as well as the availability of publicly funded legal aid. A properly funded system of legal aid requires both an enormous capital expenditure as well as the political will to implement and resource. Thus, poverty and long distances to the courts are obstacles to access to justice. Nevertheless, the lack of an independent system of justice underlies all other problems, and is a major obstacle to the protection of rights in the countries under consideration.

### **6.1. Access to Justice**

International standards relating to the issue of access to justice include:

- The right of equal access to a court without discrimination.
- The right to effective access to a court of law (may require the provision of legal aid for example).
- The right to access to a judge to determine the legality of her/his detention.
- The requirement that states do not place obstacles in the way of potential litigants.
- The right to a lawyer at an early stage of a criminal investigation.

The problems of access to justice relate to the broader legal environment. The countries discussed in this report are characterised by opaque legal systems, which have become far too complex in the eyes of often illiterate litigants. There appears to be an over reliance on hermetic legal language, resulting in a bureaucratic and overly complicated justice system. This is beyond the reach of a poor and destitute population, and subject to the corruption of judges and other legal personnel trying to offset their low salaries by means of private payments.<sup>337</sup>

#### **6.1.1 Personal Status Matters**

In all countries subject to the Muslim personal status laws discussed in this report, the problem of access to justice is in part linked to the inherent inequalities imposed by 'family law.' The trend in these countries is moving towards the limitation of political power, notably by offering possibility for citizens to appeal against abuses by the authorities. However, family law in most countries perpetuates the power of the husband over his wife by conferring rights of repudiation upon him – to determine the fate of the family outside any supervision by the court.

Litigation on personal matters, namely divorce, custody of children, and inheritance are dealt with by religious courts. The problems associated with enforcement of personal status laws, which are dependent upon the religion or denomination to which an individual belongs, stem from the lack of independence of courts, and the multiplicity of courts. Different denominations inevitably treat individual matters differently from one another,

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<sup>337</sup> On this score, the report did not have the necessary information to make the analysis specific to each case, but certain aspects of the problem are fairly similar from one country to another.

depending in the beliefs of the faiths concerned. There is therefore also a problem of inconsistency in matters of personal status, something that is particularly problematic in countries such as Lebanon and Jordan.

**Lebanon** In Lebanon, where there are 17 recognised religious denominations, and 17 types of religious courts with jurisdiction over issues of personal status. In Jordan, in addition to the Muslim *Sharia*' courts, nine non-Muslim faiths and denominations are recognised by law, each with its own denominational court. Questions arise concerning equality before the law where numerous religions and denominations exist.

In some countries, the Ministry of Justice exerts its influence on some religious courts and not others. For example, in Lebanon, a judge is appointed by the Ministry to inspect the Muslim courts. However, the Christian courts are not subject to such inspection.<sup>338</sup>

Throughout the region under consideration women experience particular difficulties in obtaining access to justice. In some countries, such as Jordan and Egypt, punishment for so-called honour crimes are very low. By contrast, a woman who kills a male relative in similar circumstances is much more likely than a man who kills a female relative to be punished harshly.

In a number of countries under examination women have problems in giving evidence before the *sharia*' courts. In Syria, in all contested personal status issues, the testimony of a woman is worth nothing without the corroborating testimony of at least one man. In Lebanon, inequality with regards to the production of evidence is ever-present before the Muslim religious courts. The Bill on optional unified personal status for all communities has been resisted by certain religious bodies and completely blocked by those of the Sunni community, who have seen it as an attack on religion.

The recent development of family law in *Morocco* should be welcomed. Following Tunisia's experiences since independence in this field, Morocco has incorporated the prerogatives of the husband - previously exercised without any intervention by the court - into judicial procedure and supervision. The wife's ability to defend her conjugal rights in court has thereby been enhanced.

#### *6.1.2 Other problems and issues in the region relating to access to justice*

It is not only women who face obstacles in the proper enforcement of their rights, in both civil and criminal proceedings. Groups such as refugees, national minorities, those living in poverty and others, all face greater difficulties than the rest of the populations.

**Lebanon** Palestinians in Lebanon have particular difficulties in gaining access to justice.<sup>339</sup> Most Palestinians living there are recognised as refugees, however, they are treated for all practical purposes as foreigners. Lebanon has laws entitling all foreigners to the rights that are afforded by their home state. As Palestinians do not have a state of their own, these reciprocity clauses operate to deny them of their rights.

**Israel** Similarly, Palestinians in Israel have great difficulties in obtaining justice. For them, access to justice is undermined by a justice system that systematically discriminates

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<sup>338</sup> Information gathered during interviews in Lebanon.

<sup>339</sup> See Palestinian Human Rights Organisation, Shadow Report of the Fourteenth, Fifteenth and Sixteenth Periodic Report of State Parties due in 2002: Lebanon, February 2004.

against them.<sup>340</sup> The Basic Law does not contain a right to be equal treatment, or a prohibition against discrimination.

Problems with the justice systems in the region are frequently seen through the prism of the fight against extremist terrorist violence, and the instability of the PA and Israel.

Many NGOs have, understandably, focussed on the extreme excesses of power, such as extra-judicial killings, the use of exceptional courts with their lack of independence and due process guarantees, torture of suspected terrorists or political opponents, and the use of administrative detention. However, it is also of crucial importance that the administration of 'ordinary' criminal justice and questions relating to access to justice, remain in focus.

**Egypt** When asked questions about access to justice by women, minorities and those living in poverty, most Egyptian respondents stated either that they are unaware that there were any problems, or reported that there were no problems in this domain. However, when specialist organisations were asked, quite a different picture emerged.

For example, refugees are particularly vulnerable in Egypt. According to the law, they can never become Egyptian nationals, and can never work in Egypt legally. Children born to refugees do not acquire Egyptian nationality if their mother cannot provide her marriage certificate indicating marriage to an Egyptian; indeed, they acquire no documents at all, and thus are not regarded as legal persons. Clearly, this poses numerous problems when refugees or their children seek to enforce legal rights. Lack of recognition as a legal person means many refugee children can never enforce any of their rights, including their economic rights.<sup>341</sup> The lack of a legal ability to work often means that refugees are forced to maintain themselves and their families through low-paid, black-market work.

**Lebanon** It is not only in the context of the fight against terrorism that large differences of opinion emerge among lawyers and NGOs in the region, concerning the question of access to justice. In Lebanon, for example, the opinion of lawyers and NGOs alike is that the judiciary lacks the necessary guarantees to ensure its independence and that the prosecution carries too much power in criminal proceedings. Yet, when questioned about the particular problems faced by Palestinians, mainstream lawyers reported there were no particular problems. However, an NGO specialising in the rights of Palestinians, reported that Palestinians rarely received any or any effective legal representation in particular in criminal proceedings.<sup>342</sup>

The problem of access to justice is also linked to the geographical distribution of the courthouses. In Lebanon, the distribution of courthouses (2002) shows an imbalance between the capital, where 34% of the premises housing the courts are situated, but where 22% of trials are held, and the other Lebanese regions (most notably Mount Lebanon, where 23% of all courts are located, but where 37% of the total number of pending cases). Such geographic imbalances can also be applied to the case of registry officials (322 in Beirut compared to 249 in Mount Lebanon).

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<sup>340</sup> See, for example, reports of the Arab Organisation of Human Rights and reports of Adalah, and The UN Committee on Economic Social And Cultural Rights Concluding Observations on Israel, 23 May 2003.

<sup>341</sup> Information obtained during interviews in Cairo, October 2003.

<sup>342</sup> Palestinian Human Rights Organisation, Shadow Report to the UN Committee on the Elimination of Racial Discrimination, February 2004.

### 6.1.3 Access to a lawyer in criminal proceedings

Many states considered in this study do not in practice permit early access to a lawyer; in many states, not only is a lawyer prevented from meeting with his/her client for several days or even weeks, but the accused is also not brought before a judge for a similar period.

It is generally recognised that a person detained in such circumstances, is at great risk of being subjected to torture or other forms of ill-treatment, prohibited in international law. Such prohibition can never be the subject of derogation,<sup>343</sup> further, the use of torture (etc.) has a detrimental effect on the fairness of any trial that follows.

**Lebanon** Access to legal assistance in criminal proceedings is problematic for anyone in Lebanon who is unable to pay legal fees. The law provides for the granting of legal aid according to certain outmoded criteria. Legal aid is granted by decision of the Court of Appeal and exempts the applicant from payment of legal fees, but does not solve the problem of the other legal costs. There is no publicly funded legal aid, and the Government has always refused to fund the legal aid provided by the Bar Association, alleging lack of funds.

The Bar Association has established a fund for representation of those unable to pay, paid for from the annual subscriptions of its members. Sources disagree about the quality of legal assistance offered, but with fees in the order of \$100 US per case payable to lawyers who agree to take on cases funded in this way, it is unlikely that the quality of legal defence will be high. Some sources suggested that where a defendant was unable to afford legal representation the court simply appoints any lawyer who happens to be in the court building. Such representation is, it was asserted, merely a formality, for ensuring that court records show that each accused is legally represented.

**Syria** In Syria, members of the Bar Association are reluctant to involve themselves in any cases concerned with human rights; the Bar Association actually does not assist its members who represent persons in human rights cases. This leaves lawyers who do undertake such legal representation in a vulnerable position.

**Egypt and Jordan** Access to lawyers is frequently impeded in Egypt and Jordan. In Egypt, persons detained for offences related to national security, are seldom if ever permitted access to a lawyer during the investigation stage. In Jordan access to a lawyer in the context of crimes tried by the regular criminal courts does not appear to be problematic. However, access to a lawyer by persons held by security forces is, as in the case of Egypt, rare. In Jordan, while the Code of Criminal Procedure guarantees the right to a lawyer,<sup>344</sup> security force investigations are conducted without any of the necessary safeguards of the individual. Indeed, the offices of the State Security Prosecutors are located in the same buildings as the security forces, and are therefore under pressure to co-operate with them. This in turn poses problems for an accused person who wishes to pursue a complaint of torture.

**Israel** In Israel, persons arrested for 'security offences' (usually Palestinians), can be prevented by the police from meeting their lawyers for periods of up to 15 days, on grounds of national security. A lawyer may be contacted by the accused, as everyone has the right upon arrest to inform someone of the arrest. But, in order to resist legal

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<sup>343</sup> See, e.g. Article 4(3) ICCPR, and Article 15 ECHR.

<sup>344</sup> Article 63(1) Jordanian Code of Criminal Procedure.

challenges, the practice seems to be that refusal of access to lawyers is fragmented into successive orders of a few days at a time.<sup>345</sup> After the first 15 days of refusal, a district court may approve requests by the Attorney General to further delay access to a lawyer for 15 more days. Furthermore, Palestinians arrested and detained in Israel, are not entitled to be legally represented by (non-Israeli) Palestinian lawyers.

Problems relating to legal access to Palestinians living in the Occupied Territories are extreme and not mirrored elsewhere in the region. Huge problems exist relating to physical access to Palestinian courts and lawyers, caused by closures imposed by the Israelis. Indeed, it is often difficult or impossible for judges, court clerks and other court personnel to attend court sessions due to the closures.<sup>346</sup>

Where legal representation is either absent or inadequate, a lack of the right to appeal is of particular significance. As we have seen, frequently the right to appeal is not available in courts of exception (e.g. Egypt, Jordan, and Lebanon). Where the right of appeal is restricted to questions of law, as is the case in countries where the right of appeal is limited to the Court of Cassation, lack of legal representation (or inadequate legal representation) is also problematic.

#### 6.1.4 Access to a Judge in criminal proceedings

Persons arrested and detained by police or security forces are often deprived of access to a judge who can determine the lawfulness of the detention. This potentially deprives people of their rights to liberty and security. Laws may permit this, or the investigating authority may, as a matter of practice, prevent a detainee from exercising his legal right to attend a court.

**Jordan** As described earlier, Jordan's public prosecutor undertakes the role of deciding whether to order the continued detention of an accused.<sup>347</sup> This role is inconsistent with international law requirements of independence, inherent in the notion 'judge or other officer authorised by law.'<sup>348</sup> Both the Human Rights Committee and the European Court of Human Rights have held that a prosecutor possessing the power to make a decision to continue the detention of an accused lacks the necessary independence<sup>349</sup> in circumstances where it can be shown that: 1. the prosecutor is subordinate to a senior prosecutors; 2. the prosecutor is subordinate to the ministry of justice; 3. the prosecutor may also perform an investigative role; or, 4. the prosecutor may later participate as a party to the proceedings. With respect to the latter point, the prosecutor does not have to end up participating in the proceedings; what is important is that the possibility exists.<sup>350</sup> In Jordan, prosecutors have an investigative function, and when they make decisions as to whether or not to detain an accused person, such decisions are subject to the supervision of the Attorney General.<sup>351</sup> Furthermore, they have power to question the accused prior to making the decision to detain. In all these ways, the prosecutor falls short of the

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<sup>345</sup> Experience of lawyers at Adalah.

<sup>346</sup> See also 'Tightening spaces for Human Rights' Discussion paper by EMHRN, 2003.

<sup>347</sup> Article 114 Jordanian Code of Criminal Procedure.

<sup>348</sup> See for example, the European Court of Human Rights case, *Niedbala –v- Poland*, Application No. 27915/95, Judgment of 4 July 2000.

<sup>349</sup> *Kulomin –v- Hungary*, (521/1992), ICCPR, A/51/40 vol. II (22 March 1996) 73 (CCPR/C/56/D/521/1992) at paragraphs. 11.3.

<sup>350</sup> *Niedbala –v- Poland*.

<sup>351</sup> Article 113 of the Jordanian Code of Criminal Procedure.



requirements of independence, and cannot therefore be regarded as an 'other officer authorised by law to exercise judicial power.'<sup>352</sup>

#### 6.1.5 Access to a judge and administrative detention

One of the most egregious violations of the right to access to a court concerns persons who are detained under administrative detention orders. Apart from Israel, where the law provides that a person detained for security reasons<sup>353</sup> must be brought before the President of a District Court within 48 hours and every three months thereafter,<sup>354</sup> most countries under examination make no provision for access to a court.

**Israel** Even in the case of Israel, it is almost impossible to challenge a detention, since the decisions are based on security information, and such information is never revealed to the detainee's lawyer. The law provides that the Minister of Defence may order the detention of a person if he has reasonable cause to believe that state security or public security require the person be detained.<sup>355</sup> The same law provides puts the burden of proof on the detainee.<sup>356</sup> The burden of proof is becomes impossibly difficult to make, given the fact that the detainee will not have had a chance to speak to his lawyer, and that the security information will not be revealed to him.

Indeed, if the arresting authorities forbid access to a lawyer for more than 48 hours, the right to be represented in court by counsel becomes meaningless. Adalah reports that lawyers find themselves representing clients they have been forbidden to meet, and they may not be in the court room at the same time as their clients. The initial hearing before the President of the District Court is held *in camera*, thus violating the right to a public hearing.<sup>357</sup> Administrative detention orders can be renewed indefinitely. While there is a right of appeal to a single Judge of the Supreme Court, one NGO reported that not one such appeal has been successful.

**Egypt** In Egypt, the Emergency Law permits the use of administrative detention with respect to persons who endanger public safety or public order.<sup>358</sup> A challenge of a detention order can only be made 30 days after the detention order was made. Interestingly, a survey conducted by an Egyptian NGO found that challenges lodged with the Emergency State Security Court resulted in 75 per cent of detention orders being revoked on the grounds of lack of evidence against the detainees.<sup>359</sup> Such a result serves to illustrate that these courts, while lacking all necessary safeguards for their independence, do have the capacity to issue judgements that demonstrate a degree of independence. However, the reality, as has already been indicated, is that orders requiring the release of such persons are often ignored, particularly by the Minister of the

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<sup>352</sup> See Article 9 (3) International Covenant on Civil and Political Rights.

<sup>353</sup> Emergency Powers (Detention) Law 5939-1979, gives the Minister of Defense and the Chief of General Headquarters of the Israel Defense Forces, the power to order the detention of a person if the Minister has reasonable grounds to presume that such detention is necessary for reasons of state security or public safety.

<sup>354</sup> In accordance with Section 4(a) of the Emergency Powers (Detention) law 5939-1979, the judge may annul the order, or extend or reduce the period of detention.

<sup>355</sup> Israel: Article 2, Emergency Powers (Detention) Law 1979. The standard of review provided by law is that the judge 'shall set aside the detention order if it has been proven to him that the reasons for which the order was made were not objective reasons of state security or public security or that it was made in bad faith or from irrelevant considerations' (Israel: Article 4 Emergency Powers (Detention) Law 1979).

<sup>356</sup> Israel: Article 6, Emergency Powers (Detention) Law 1979.

<sup>357</sup> See Adalah, UN Human Rights Committee Information Sheet No 1, State of Emergency, 22 July 2003.

<sup>358</sup> Egypt: Article 3(1) Emergency Law 1958, as amended.

<sup>359</sup> Human Rights Centre for the Assistance of Prisoners: The Truth. 2002.

Interior who often issues fresh orders for detention.<sup>360</sup> The same NGO has evidence that many persons have been held in administrative detention for more than 5 years, despite obtaining several release orders. In 2002, all cases of administrative detention referred to this NGO were repeatedly detained.<sup>361</sup> The right to a court hearing is rendered meaningless in circumstances where judgments are not enforced.<sup>362</sup>

## 6.2. The role of the prosecutor in the criminal process

### 6.2.1 Pre-eminence of the Public Prosecutor's Office and the judicial police

International Standards include the following requirements:

- The state should ensure that the independence and impartiality of prosecutors is legally guaranteed.
- Prosecutors should perform their duties with due regard to respect for human rights and human dignity.
- The role of prosecutors to be separate from judicial functions.
- The duty to protect the public interest.
- That prosecutors refrain from offering as evidence statements extracted under torture or similar treatments, in criminal trials
- That any instructions or guidelines directed at the Prosecution should be made public.
- That the prosecution should be publicly accountable for their actions, and particularly in the exercise of any discretionary power

In most countries under examination, the prosecution is subordinate to the executive.

**Egypt** For example, in Egypt, the law states that the members of the prosecution are under the authority of their superiors and the public prosecutor who is under the Minister of Justice.<sup>363</sup>

**Jordan** Likewise, in Jordan the law provides that the Attorney General and his assistant are administratively attached to the Minister of Justice.<sup>364</sup> The same law provides that the Minister of Justice and the president of the public prosecution have the right to exercise administrative supervision over all members of the public prosecution,<sup>365</sup> and to supervise the performance of the attorney general and his assistants. The law goes on to state that all members of the prosecution at the Court of Appeal and Court of First Instance level are in charge of executing the Minister of Justice's instructions concerning the administrative affairs and the institution and follow-up of proceedings.<sup>366</sup> This means that if the Jordanian Minister of Justice requires that criminal proceedings should be taken against a particular individual, the prosecution is legally bound to institute such proceedings. Since this leaves the prosecution with no discretion over the issue, it may mean that proceedings are instituted where there is insufficient evidence against the individual concerned. This leaves the way open for the police or other investigators to force confessions through the

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<sup>360</sup> For more information on administrative detention in Egypt, see Political Detention, Closed Door Policy and Criminal Detention, Revolving Door Policy, 9 October 2003; see also, Egyptian Organisation for Human Rights, Summary of 2002 Annual Report.

<sup>361</sup> Human Rights Centre for the Assistance of Prisoners: Detention and Detainees in Egypt, 2002.

<sup>362</sup> See Chapter 1 above concerning international standards.

<sup>363</sup> Egypt: Article 125 Law No 46 of 1972 on Judicial Authority.

<sup>364</sup> Jordan: Article 6 of the No 17 of 2001, Establishment of the Regular Courts Law; this law is a provisional law.

<sup>365</sup> Jordan: Article 27 (b) of the Law, Establishment of the Regular Courts Law.

<sup>366</sup> Jordan, Article 17 of Law on 17 of 2001, the Establishment of the regular Courts Law.

use of torture or other similar treatment, to ensure a successful prosecution. It also enables the Minister of Justice to use his power to prevent the prosecution of certain persons, such as political allies.

**Palestinian Territories** In the Palestinian Territories, as elsewhere in the region, the law requires that the Attorney General be appointed by the President of the Palestinian National Authority based on a recommendation of the High Judicial Council.<sup>367</sup> In fact, in December 2002, the President appointed the Attorney General without such a recommendation. The appointed Attorney General had previously been removed from the ordinary prosecution and made the head of the state security prosecution. At the same time as making this appointment, the President merged the ordinary and state security prosecutions.<sup>368</sup> It can be seen that the Palestinian prosecution has been subjected to significant interference by the executive, despite existing provisions to prevent this in the law. At the same time, it is hard to make an assessment of the performance of the Palestinian prosecution, since both its operation, and that of the law enforcement officers, have been severely hampered by the security situation in the Palestinian Territories.<sup>369</sup>

**Lebanon** In Lebanon, it seems that the public views the role of the prosecutor as the single largest obstacle to the right to a fair trial.<sup>370</sup>

#### *6.2.2 The Prosecutors' subordination to Executive Power*

The application of international standards leaves some leeway with respect to the status of the Public Prosecutor's Office, and the configuration of the legal system.

The question of the status of Prosecutors in the region is certainly a matter ripe for debate; in eight of the countries<sup>371</sup> examined, the prosecution lacks independence and is greatly influenced by the executive. The ninth country, Israel, has an independent prosecution that operates, as far as the Jewish population is concerned, justly. However, where Arab Israelis and Arab inhabitants of the Occupied Territories are concerned, the situation is quite different. For instance, in the Occupied Territories, where Palestinians are tried by Israeli Military Courts in all cases deemed to be a threat to Israel's security, prosecutors are drawn from officers serving in the Israeli army or its reserves. They tend to have very close links with Judges, who are also drawn from army ranks.

Therefore, all the countries discussed in this report have a fundamental shortcoming in their criminal justice systems, most notably the lack of a truly independent body of prosecutors. This fact alone has a significant impact on the quality of criminal justice in the region. Since this is a factor that is common to all countries,<sup>372</sup> it will be the focus of our enquiry in the remaining part of this chapter.

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<sup>367</sup> Palestinian Territories, Article 98 Palestinian Basic Law.

<sup>368</sup> In June 2003, a new Attorney General was appointed, in accordance with the law.

<sup>369</sup> See, for example, Palestinian Independent Commission for Citizens' Rights Annual Report 2002.

<sup>370</sup> Views expressed during interviews of lawyers in Lebanon, March 2004. A recently elected MP and human rights activist states: The function of the Attorney General's Department is perhaps one of the most politicised in the entire judicial system, simply because the law entrusts to it the task of presenting and defending the interests of society through criminal proceedings. The Attorney General's Department thus plays an essential role, becoming the favoured institution of the political authorities for monitoring and influencing the course of criminal proceedings in all phases, the decision to investigate offences, the decision to bring proceedings and refer cases to the criminal courts concerned, even to the point of monitoring trials at all stages and levels of court Ghassan Moukheiber, "La justice, instrument du pouvoir politique"

<sup>371</sup> Included in the eight, is the Palestinian National Authority.

<sup>372</sup> With regard to Israel, this holds true in the Occupied Territories.

We have already examined the role of the prosecutor in the context of crimes tried before courts with exceptional jurisdiction, and drawn attention to powers of the prosecutor in that regard. We now examine the role of the prosecutor in the context of ordinary criminal proceedings.

The role assigned by legislation to the public prosecutor's office and to the criminal police in the countries considered by this report weighs heavily upon the conduct of criminal justice and the outcome of proceedings. The preparatory stages leading up to criminal trials often completely escape justice. The criminal police frequently determine the fate of trials by the reports they draw up, sometimes even conferring upon themselves the right to initiate investigations – in other words, acting without the prior authorisation of the public prosecutor's office.

**Lebanon** In Lebanon, loopholes in the legislation and the small number of judges in the Public Prosecutor's Office faced with the large volume of cases and complaints, has encouraged the criminal police to act outside any control. This, amongst other problems, is a situation that the recent Law No. 328 of 2/8/2001 sought to remedy.

Amendments have also recently been introduced into the criminal legislation of the countries discussed in this report to curb the exorbitant powers of the Public Prosecutor's Office and the criminal police, but these are still inadequate and are frequently offset by anti-terrorist legislation prejudicing individual security and the rights of defence.

The right of the public prosecutor's office to charge and prosecute is combined with the right of investigation, which it activity supervises through the criminal police, operating under its authority, and also with its right to deprive liberty in the performance of its duties. The right of the 'General Prosecutor' to charge and prosecute, taken together with the right of investigation (preliminary and final), leaves the system open to the abuse of justice and unfair trials.

When the investigation in a criminal case is assigned to an investigating judge, the Public Prosecutor's Office continues to play an important role.

**Lebanon** In Lebanon for example, under the new Code of Criminal Procedure<sup>373</sup> the right of investigation of the 'General Prosecutor' takes precedence over that of the investigating judge as regards serious crimes or offences, while in less serious ones, the investigating judge cannot officiate unless specifically requested to do so by the Prosecutor.

**Egypt** In Egypt, there used to be investigating judges, however, recently the exclusive right of investigation of crimes has been in the hands of the prosecutor. This is despite the fact that the investigating judge is still mentioned in the law.<sup>374</sup>

**Morocco** In Morocco, the Code of Criminal Procedure, promulgated on 10 February 1959 and revised in 1974, enshrines the pre-eminence of the Public Prosecutor's Office and also curtails the sphere of investigation and the rights of the defence. It grants the officers of the criminal police and those in authority privileges, which usually means that numerous violations of fundamental rights and freedoms go unpunished. It is also an obstacle to the right of appeal against illegal actions by officials.

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<sup>373</sup> Law No. 328 du 2/8/2001.

<sup>374</sup> Egypt: The Code of Criminal Procedure, Law No 150 of 1950, for example, Article 142.

However, a new Code of Procedure was recently published in the Official Bulletin of 30 January 2003, which reduces the pre-eminence of the Public Prosecutor's Office. The most important, and novel features relate to the conditions under which cases are investigated and tried, redressing the balance of relations between judges, criminal police and defence. Thus, in addition to the reaffirmation of the principle of the presumption of innocence, the new Code of Procedure specifies in greater detail the procedures relating to custody on remand and judicial supervision, which may be decided upon for a person implicated in a criminal case.<sup>375</sup>

**Algeria** In Algeria, Law No. 86-05 (4/3/1986) amended the Code of Criminal Procedure (CCP), to limit the use of preventive detention, reduce its duration and, where appropriate, replace it with judicial supervision. It allowed the defendant to enjoy some degree of freedom, and stipulated that the details of the procedures for compensation for legal error. However, the issue of criminal procedure was not raised. The executive continued to occupy a decisive place in justice through the Public Prosecutor's Office, particularly as regards preventive detention and temporary release. The committal orders were issued by the investigating judge at the request of the Attorney General's Department, which could request temporary release at any time.

In June 2001, the authorities announced several legislative amendments as an important step towards bringing Algerian legislation into line with national standards. They highlighted the changes aimed at underpinning the presumption of innocence, and increasing the supervision by the judiciary of those responsible for implementing the laws. Further changes were aimed at protecting the rights of persons detained by the security forces, and at limiting the use of preventive detention and establishing the right of all individuals wrongly placed in preventive detention to compensation. Article 51 bis lays down, in particular, that any person held in custody must be informed of her/his rights to immediately inform the family, to receive visits from their next of kin, and to be examined by a medical practitioner of their choosing at the end of their period of custody.

However, some of the amendments to the Code of Criminal Procedure greatly increased the legal duration of custody on remand. Previously, persons accused of a crime, of whatever kind, and whose case was placed in the hands of an investigating judge, could not be held for longer than sixteen months. Now, persons accused of crimes carrying prison sentences of over twenty years may be detained for up to twenty months consecutively. Persons charged with 'crimes characterised as acts of terrorism or subversion' or of a 'trans-border crime' may be held in custody for up to thirty-six or sixty months respectively before trial.

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<sup>375</sup> The new text considers these two procedures as exceptional measures. The length of police custody is now stipulated and reduced to 48 hours, which may be extended once by 24 hours, 'on the authorisation of the 'General Prosecutor' for the needs of the investigation' (Article 66). The exception to this rule concerns crimes prejudicing the internal or external security of the State, permitting detention of 96 hours, renewable once, also by authorisation of the 'General Prosecutor.' The conditions of detention have also been improved, in that the accused may ask to see his lawyer and in that the criminal police are obliged to inform the detainee's family immediately. However, the right to contact a lawyer is only permitted when the period of detention is extended. Another important novel feature is the redefinition of judges' duties giving them greater supervision of the proceedings, which are still conducted under their authority and supervision by the officers of the court. The 'General Prosecutors' must thus periodically check the detention registers, which are checked and initialled at least once per month. The prosecutors of the King must make a weekly check of the place of detention. Applications for temporary release are now permitted at any point in the proceedings. Such applications may, under this Article, be renewed, notably when the cassation procedure has been initiated, but not yet dealt with, or in the event of a declaration by a court that it lacks jurisdiction. However, the absence of any specific charge of torture in the Penal Code should be noted.

**Lebanon and Egypt** In a number of countries, such as Lebanon, and Egypt, the executive can insist that particular cases be tried before courts with exceptional jurisdiction, and these decisions bind the prosecution.

Thus, as we have seen, in Egypt, the President can intervene in a criminal investigation and order the case to be transferred to the emergency state security courts or the military courts.<sup>376</sup> In such cases, the prosecutor must hand over the case to either the military or state security prosecutors.

Further, the executive sometimes has the power pardon an individual, prior to trial (such as was recently the case in Morocco), or to halt proceedings prior to trial (as is the case under the Emergency law in Egypt<sup>377</sup>). Such a degree of interference not only endangers the right to a fair trial, but undermines the independence of the prosecution and its ability to investigate certain types of allegations, such as allegations of official corruption.

**Israel** A case apart is Israel, where basic law or specific legislation does not govern the attorney general's office.<sup>378</sup> Instead, a series of guidelines exist, to ensure that the office of the attorney general is a non-political one. S/he is a civil servant, appointed by the government, on recommendation of the Minister of Justice. In practice, candidates for the post are chosen from among persons who meet the qualification criteria for membership of the Supreme Court of Justice. While the Attorney General is a government appointment therefore, he is held out by the government to be independent

### *6.2.3 The prosecution and the appearance of independence*

The maxim that 'justice must not only be done but must also be seen to be done' is one that is particularly apposite with regard to the prosecution. Prosecutors, as has already been pointed out, belong to the judiciary in most of the countries under consideration in this report.

In theory, this is intended to accord prosecutors with the same degree of independence in their work as judges. However, not only is their independence severely compromised by their legal relationship with the executive, but also by the fact that in some instances, the prosecution and the judiciary are interchangeable.

**Lebanon** For example, in Lebanon, there is a great deal of flexibility between the prosecution and the judiciary; so much so that an individual may be a prosecutor one week, and a judge the next, or vice versa.

These problems are consolidated and exacerbated in some countries, where the prosecutor and the judge appear to be on the same side during the conduct of criminal proceedings.

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<sup>376</sup> The situation is similar in Jordan and the PA, where members of the executive can have cases transferred to the security courts.

<sup>377</sup> Egypt: Article 13 of the Emergency Law, and see the Egyptian Organisation of Human Rights, Annual report 1999-2000, Section 1.

<sup>378</sup> See Israel Ministry of Foreign Affairs, The Attorney General, 25 September 2000.

**Lebanon** Thus, in Lebanon, the prosecution wear the same gowns as judges, sit on the same bench, and share information. In such cases, it is hard for the public to be able to differentiate between the two officers.

**Tunisia** Further, there have been instances where the judge in criminal proceedings has retired to his chambers, with the Prosecutor. International trial observers in Tunisia, witnessed this during the hearing of Dr Moncef Marzouki in December 2000,<sup>379</sup> and also during the hearing of Hama Hammami, in March 2002.<sup>380</sup> Whether or not the prosecutors actually have any influence on the deliberations during these proceedings was unclear. What was clear, however, was that justice could not have been witnessed under these circumstances.

#### *6.2.4 The Prosecution and lack of accountability*

Another issue of concern is the degree to which prosecution services are accountable for their decisions.

In many countries under examination, prosecutors have a degree of discretion in the exercise of their powers. In order for the public to have confidence in the prosecution, and for the prosecution to function within the rule of law, it is imperative that the exercise of their powers is subject to tight regulation.

Prosecutors must be accountable to the public and to parliament for the way in which they exercise their discretion. Where regulation and accountability are absent, there is a real risk that prosecutors will act in arbitrary or partisan manner. They may, for example, be persuaded by the executive not to prosecute certain persons, or may be reluctant to investigate allegations of torture, made by detainees, for fear of exposing their colleagues, or the police, to criminal prosecution.

In most of the countries considered in this report, the prosecution is not required by law to give reasoned decisions for its actions. Nor is there a code for prosecutors available to the public. In other words, prosecutors are not publicly accountable.

#### *6.2.5 Prosecutors' powers of detention*

**Tunisia** In Tunisia, since 1987, amendments have restructured the provisions of the Code of Criminal Procedure. Under the Law of the 26<sup>th</sup> of November 1987, custody on remand could not exceed a period of 10 days maximum. Article 90 of 2/8/1999<sup>381</sup> fixed the period at 6 days. Law No. 89 of 2/8/1999 introduced the crime of torture into the Criminal Code. This Law states that any person found guilty of having engaged in torture is subject to 8 years' prison. The same law states that officers of the criminal police cannot hold a suspect for more than three days; they must inform the Attorney General who, by written decision, may extend the length of the custody once only, for the same period, after a total period of custody of ten days.

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<sup>379</sup> Trial Observation: Freedom of Expression Freedom of Association and Unfair trials in Tunisia, report published by the Euro-Mediterranean Human Rights Network, the Kurdish Human Rights Project, the FIDH, OMCT, Bar Human Rights Committee of England and Wales and the Union Internationale des Avocats.

<sup>380</sup> Details about the trial were reported by the BBC on their website, on Sunday, 3 February, 2002, 08:20 GMT.

<sup>381</sup> Amending Article 13 bis of the Code of Criminal Procedure and stipulating the conditions of custody on remand.

This Law also strengthened the guarantees relating to custody on remand, including the obligation to inform a member of the family in the event of her/his being placed in custody, the obligation to inform the suspect of the reason for the measure taken against her/him and of the guarantees offered to her/him by that law and the stipulation of what details the detention registers must contain in the light of these guarantees.<sup>382</sup>

**Lebanon** In Lebanon, the role of the criminal police and of the public prosecutor's office also weighs heavily on the workings of justice. Under the pressure of the volume of complaints reaching the public prosecutor's office, it often entrusts the task of conducting a preliminary investigation to the criminal police even before assessing the seriousness of the complaint and whether there is any basis for it.

The judges in the public prosecutor's office do not really supervise the investigation on the ground, and then make the decision to arrest or release on the basis of a simple telephone call by members of the criminal police. Persons detained are not entitled to be assisted by a lawyer at this stage in the preliminary investigation.

The new Code of Criminal Procedure sought to remedy this situation. Now, any person arrested for the purposes of the investigation is authorised to contact any person of her/his choosing, to have an interview with a chosen lawyer without there being any need to officially grant that lawyer authority to act, to call upon the services of an interpreter if need be, and to request the Public Prosecutor's Office to designate a medical practitioner to examine her/him in private. All these rights must be read out to the person concerned when arrested. Any arrest that does not comply with these conditions is treated by the Code of Criminal Procedure as a violation of the liberty of the person, and carries a prison sentence (Art. 367 of the Penal Code) and disciplinary sanctions for the violator(s). Where the investigating judge is concerned, he or she has the power to arrest a person on the basis of a reasoned decision, and for a period determined by the nature of the crime or offence.

The maximum period of remand in custody is 48 hours on the orders of the Public Prosecutor's Office. This is renewable once by reasoned decision, though this changes to two months renewable once the event is classified as a misdemeanour, and changes again to 6 months renewable in the event of a crime (Articles 107 and 108 of the Criminal Code). In cases of detention with respect to a misdemeanour carrying a prison sentence of less than two years, the person in custody may request her/his release after five days detention. For all other crimes, the investigating judge may decide to grant a request for release on bail or release without bail as determined by the particular case (Articles 113 and 114 of the Code of Criminal Procedure). The investigating judge cannot order the detention of a person accused of a misdemeanour carrying a prison sentence of less than one year.

**Jordan** In Jordan, the law provides that prosecutors have the power to act as examining magistrates and in this capacity can issue a number of judicial decisions, such as issuing summonses, and warrants.<sup>383</sup> The powers do not stop here: once the accused has presented him/herself to the prosecutor in response to a summons or warrant, and the latter has heard what the accused has to say, the law also permits the prosecutor to

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<sup>382</sup> Law 2000-43 of 17 April 2000 instituted two levels of courts for criminal cases, while maintaining the two levels in the investigation system. Law No. 2000-77 of 31 July 2000 created the office of '*Juge d'application des peines*.'

<sup>383</sup> Jordan: Article 11 Code of Criminal Procedure and see Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Jordan, 1994, CAT/C/16/Add.5.



detain him/her for a period of up to 15 days.<sup>384</sup> He may then extend the orders detaining such a person in custody for successive periods of up to 15 days at a time, as long as the charge involves an offence in which remand in custody is permissible.<sup>385</sup> If a prosecutor wishes to release the accused from custody, he may only do so with regard to misdemeanors.<sup>386</sup> In the case of persons accused of committing felonies, the prosecutor must apply to the court to which the case has been referred, who alone has power to order release a suspect.<sup>387</sup> The exception to this rule involves those accused of certain very serious felonies, for which there is no entitlement to be released on bail.<sup>388</sup>

### *6.2.6 Expansion of prosecutorial powers in the wake of anti-terrorism laws*

The unfairness of criminal procedure is at its worst in legislation relating to terrorism. Even before the events of September 11<sup>th</sup>, which were to serve as the pretext for the promulgation of specific laws on terrorism, there was an obsession with security in Arab States. This was exacerbated by a domestic political context of violence and conflict between established power and dissident groups (as in Egypt and Algeria), and was symbolised by the adoption of a Convention on Terrorism.

Adopted on 22 April 1998 in Cairo by the Council of Ministers of Justice of the League of Arab States, this Convention entered into force on 7 May 1999 after its ratification by seven countries. This was a very short time considering that the Arab Charter of Human Rights, adopted on 15 September 1994, has been ratified by just one country: Iraq. The Convention was preceded or followed by the adoption of national anti-terrorist legislation. This reversed the processes of strengthening an individual's protection of freedom and security, and of the rights of defence, promoted by some recent laws.

**Algeria** In Algeria, Executive Decree 92-03 of 30/9/1992, referred to as the Anti-terrorist Law, reversed what little progress had previously been achieved with regards the rights of defence. This text has established special courts for acts relating to 'terrorism and subversion,' and increased the sentences laid down by the Criminal Code. Custody, which was forty-eight hours, has been increased to twelve days; searches may be made at any time or in any place, and exorbitant powers have been granted to the security forces. Articles 24 and 31 of the text gave the court the right to expel lawyers from hearings, as well as the power to prosecute them. In early 1995, these courts were abolished, and ordinary courts have since dealt with terrorism cases. The bulk of the provisions of the Anti-Terrorist Law were incorporated into the Criminal Code and the Code of Criminal Procedure on their revision in 1995.

**Morocco** In Morocco, an anti-terrorist law, the draft of which generated strong opposition prior to the events of 16 May, was promulgated on 29 May 2003. Among other things, the new legislation increased the powers of the police by, for example, extending the maximum period of custody from 3 to 12 days.

**Tunisia** Likewise, in Tunisia, an anti-terrorist law was adopted in December 2003.

**Jordan** In a Royal Ordinance, bypassing parliament, Jordan promulgated a law amending the Criminal Code. This law significantly extends the meaning of terrorism and creates

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<sup>384</sup> *idem.*

<sup>385</sup> Article 114 of the Code of Criminal Procedure, only where the penalty for the offence in question is two years or more imprisonment.

<sup>386</sup> Jordan: Article 121 of the Code of Criminal Procedure.

<sup>387</sup> Jordan: Article 123 of the Code of criminal Procedure.

<sup>388</sup> Jordan: Article 123 (1) of the Code of Criminal Procedure.

new offences. The same text defines crimes against the State as all acts « directed to destruction against the political system of the Kingdom or act of encouragement to the resistance » and « a person is guilty of a crime where he/she takes part of individual or collective action for changing the economic and social nature of the State or the society foundations »<sup>389</sup>

### **6.3. Action Points**

- Campaign for amendments to Constitutions and laws, to ensure the independence of the prosecution.
- Campaign for a clear separation of functions of prosecutors and judges.
- Campaign for a legal requirement that ensures accountability for all work of prosecutors, and in particular, relating to decisions whether or not to prosecute in any given case.
- Campaign for legal changes to ensure complete transparency and public accountability of the offices of the prosecutor.

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<sup>389</sup> The Arab World: From the opportunistic use of terrorism. Press release from organizational members of the FIDH.

## **Conclusion**<sup>390</sup>

### **Standard norms**

International law, which demands a fair system of justice (i.e. independent, fair and efficient justice), requires states to apply the human rights dispositions of international treaties they have ratified.

The Universal Declaration of Human Rights of 10 December 1948 (articles 8 - 11), and the International Pact on Civil and Political Rights of 19 December 1966 (article 14), lays down the fundamental principles of an independent and fair justice and judicial system.

Numerous international declarations emanating from professional bodies such as the International Association of Prosecutors and Plaintiffs (IAPP) and the International Union of Lawyers, have outlined an international consensus on the 'standard norms' of a fair system of justice.<sup>391</sup>

### **Justice, the Rule of Law and Democracy**

The state of Justice is closely linked to the state of democracy. The smooth running of justice does not come before the smooth running of democracy, any more than the smooth running of democracy precedes a legal system operating in compliance with the rule of law. Compliance with democratic standards in itself implies an independent, credible legal system that can only meet these criteria by virtue of a healthy democracy.

Democracy cannot simply be reduced to voting, although this is a key component of democratic systems. Other processes are equally important, such as the presence of alternative powers – be they the media or civil society – that are respected and listened to, and that monitor the authorities.

It should be stressed that the legitimacy of the judiciary is based on the laws it is called upon to apply. Should these laws be seriously flawed or lead to the subordination of the judiciary, it will be unable to operate in accordance with international standards.

While this in no way detracts from the responsibility of those involved in the legal system, it highlights the responsibility of states which first and foremost are obliged to guarantee that their societies, and their legal systems, operate democratically.

This should not make readers think that one should wait for the countries considered by this report to have developed democracies before thinking of how to embark upon the task of improving the legal institutions.

Exactly because there is a close correlation and interaction between democracy and a legal system conforming to customary international standards, improving that system is an essential condition for the development of democracy and for the lasting protection of rights and fundamental freedoms.

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<sup>390</sup> The concluding pages of this report are based on the discussions of the seminar from the regional seminar in Rabat, from the 18<sup>th</sup> to the 20<sup>th</sup> of June, 2004, on Justice in the South and East Mediterranean organised by EMHRN in collaboration with Espace Associatif, ADFM, AMDH and OMDH with the support of the European Commission and SIDA. A preliminary draft was prepared by Michel Tubiana (President of the French Human Rights League, and Executive Committee member of EMHRN in charge of justice, and Abdelaziz Bennani (former President of EMHRN).

<sup>391</sup> Basic Principles of the Independence of the Judiciary (1985); Basic Principles on the Role of the Bar (1990); Basic Principles on the Role of Lawyers (1990), adopted by the United Nations Organisation; the Beijing Statement of Principles of the independence of the Judiciary in the LAWASIA region (1995).

Indeed, the role of the judiciary extends far beyond simply resolving conflicts through criminal proceedings. It is the role of justice in settling conflicts, even the most innocuous ones, which is at stake.

Lack of trust in this institution, which is too often subject to intervention by the political powers or simply by a greater power, taints all economic and social relations and prohibits democracy from developing at all.

In short: the existence of justice is an essential condition for the development of the countries considered.

### **Evaluation**

In the light of information gathered in the process of finalising this report, one should conclude that the judicial systems in the majority of East and South Mediterranean States are dependent upon political powers, and they suffer from serious dysfunctions affecting their impartiality; they are unfair, and frequently associated with courts and laws which do not conform to international laws.

### **Recommendations for establishing justice and the rule of law'**

The participants in the Seminar on Justice in the Mediterranean have adopted various recommendations aimed at promoting a form of justice that will conform to international legal standards.

#### **Ensuring the rule of law and legal security**

As legal systems are dependent on the legal norms they are called upon to apply, the norms of reference and methods for monitoring them need to be precisely defined.

Accordingly, it is essential for states to:

- Sign and ratify all international conventions relating to civil and political rights and other relevant conventions in the field of Justice.
- Ensure, in their constitutions, that international undertakings by states take precedence over domestic law and also that domestic law complies with the norms laid down by those conventions.
- Organise a system for monitoring domestic legislation by an appropriate national court, whose members' independence must be guaranteed with effect from their appointment/election. Not only the legislator and the executive but also citizens themselves should be able to initiate such monitoring procedure in accordance with the conditions and limits laid down by law.

Moreover, it is equally essential for Mediterranean States not yet party to a regional convention such as the European Convention for the Protection of Human Rights to adopt a regional instrument guaranteeing rights and individual freedoms and the criteria for proper justice. This instrument must entail the creation of an independent court able to hear individual complaints.

Finally, the commitments made by non-EU Mediterranean States under the Barcelona Declaration and bi-lateral association agreements with the European Union in relation the promotion and protection of human rights and the reform of justice - the essential basis of the rule of law - need to be implemented.

### **Ensuring the independence of justice**

The independence of the judicial system vis-à-vis the political system, religious denominations and all powers must be expressly stated and recognised in the constitution. The status of judges must form the object of an organic law to guarantee that it complies with the constitution.

Over and above this institutional recognition, members of the judiciary must enjoy specific guarantees:

- Judges must be recruited in conditions of equal access to posts by competitive examinations and exclusively on the basis of their competence. They must be remunerated by the state at a satisfactory level.
- Their careers must be managed by an independent body consisting of judges, but also of persons not from the judiciary and without any interference by the legislature or the executive.
- Judges must enjoy the right to form or join trade unions and the right to further training.
- Ordinary judges must be irremovable, except in the event of disciplinary measures taken by an independent body.
- The judges in the public prosecutor's office must have an independent status in the same way as ordinary judges, subject, however, to the rules necessary for the proper application of the criminal procedures adopted by the executive power.

Conscious of the fact that proper justice cannot exist without an effective and independent defence, it is recommended that:

- The training of lawyers should at least be identical to that of judges.
- The independence of lawyers and of their professional associations should be legally recognised and proclaimed.

### **Ensuring respect for a fair trial**

Rules permitting a fair trial in all fields are the corollary of an independent judiciary and its representatives. It is therefore recommended that:

- The creation of legal machinery permitting access to justice for all citizens and guaranteeing its use through state funding.
- A precise definition of the powers of the police, who may be officially engaged in the work of the judiciary.
- Strict regulation of police custody by the laws of criminal procedure, protecting the rights, dignity, and physical integrity of the suspect.
- Strict observance of equality of arms as between accusation and defence, both in terms of legal powers and material resources. This means drawing up binding rules of procedure whose violation must be punished.
- Equally strict observance of defence rights at the stages of custody, preliminary inquiry, and trial.
- The exercise of effective remedies.
- Reform of the legal aid systems to facilitate access to justice for all.

These requirements entail the abolition of all courts with exceptional jurisdiction, either by virtue of their composition or the rules applicable to them.

Finally, the participants at the seminar wish to underline that justice is developed under the scrutiny of civil society. Hence, the role of civil society in defending a fair system of justice should be recognised and promoted.

### **The Role of Civil Society**

*Activities proposed to pursue the process initiated by the present report:*

It is recommended that civil society strengthen the development of a regional synergy, in particular by cooperating in the following fields:

- a. Setting up constitutional justice and control the constitutionality of laws from top to bottom;
- b. Setting up administrative courts and expanding their field of exercise to include the decrees of Heads of State;
- c. Campaigning for recognition in the constitutions of the pre-eminence of ratified conventions over domestic law;
- d. Rejecting any cultural or religious specificity running contrary to international human rights norms and the fundamental principles of the rule of law;
- e. Promoting the independence and impartiality of justice;
- f. Promoting the abolition of all exceptional state systems;
- g. Promoting for the abolition of exceptional jurisdictions and abolition of the ability of military courts to try civil cases;
- h. Recognition that lawyers rights recognised by international texts and instruments, notably their right of association and social position;
- i. Training of judges and lawyers to implement human rights international pacts and conventions;
- j. Promoting conditions for fair trial as defined by international norms;
- k. Observing of trials;
- l. Training in trial observation;
- m. Promoting reform of the legal aid system;
- n. Promoting civil society action in the matter of legal aid;
- o. The implementation of conventional and unconventional UN protection mechanisms;
- p. Stepping up co-ordination and the exchange of information;
- q. Creating more and larger spaces for a free debate on justice with all parties concerned: human rights NGOs, lawyers, judges, universities, representatives from all walks of civil society, political and union activists;
- r. Developing advocacy within the national parliaments, partner governments, European institutions, international NGOs.
- s. Disseminating the final report and its recommendations;
- t. Promoting the compiling of national reports on the legal systems.
- u. Instituting a mechanism for observing legal systems.
- v. Setting up a library comprising works and studies on justice in the region.

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### Annex 1: List of participants for Justice Seminar, June 2004

| <b>Surname</b> | <b>Name</b>        | <b>Organization</b>  | <b>Country</b> |
|----------------|--------------------|--|----------------|
| Abdallah       | Ghassan            | Palestinian Human Rights Organisation  | Lebanon        |
| Abdelhamide    | Amine              | Président de l'Association Marocaine des Droits Humains                          | Morocco        |
| Akdime         | Mohamed            | Syndicat des Barreaux de Rabat   | Morocco        |
| Al Kilani      | Farouq             | Ex. Président de la Haute Cour de Justice  | Jordan         |
| Al Majali      | Zaha               | Amman Centre for Human Rights Studies  | Jordan         |
| Ali Kebous     | Mhamed             | Organisation Marocaine des Droits Humains  | Morocco        |
| Al-Taher       | Khaled             | Lawyer/avocat  | Jordan         |
| Amar           | Ali                | Vice Président de l'Association Marocaine des Droits Humains                     | Morocco        |
| Ameur          | Abderrahmane Ben   | Ex. President des associations des bareaux Maroc                                 | Morocco        |
| Arrehmouch     | Ahmed              | Membre du Bureau Exécutif de l'EA  | Morocco        |
| Assaf          | Georges            | Lawyer/avocat, Beirut Bar Association,   | Lebanon        |
| Azziman        | Omar               | Centre de Defense des Droits de l'Homme  | Morocco        |
| Benjelloun     | M'hamed            | Interpreter/interprète   | Morocco        |
| Bennani        | Abdelaziz          | Former President of the Moroccan Human Rights League                             | Morocco        |
| Bennis         | Mohammed           | Interpreter/interprète   | Morocco        |
| Benouna        | Fouad              | Organisation Marocaine des Droits Humains  | Morocco        |
| Benzekri       | Driss              | Comission Equite et Réconciliation   | Morocco        |
| Bikri          | Said               | Avocat, Organisation Marocaine des Droits Humains                                | Morocco        |
| Bouchachi      | Mostefa            | University of Algiers and Algerian Human Rights League                           | Algeria        |
| Bouzoubaa      | Mohamed            | Ministre de la Justice   | Morocco        |
| Bozzo          | Anna               | University of Rome III   | Italy          |
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| Chammari       | Khémiais           | Consultant, Comité pour le Respect des Libertés et des Droits de l'Homme Tunisie | Tunisia        |
| Chater         | Driss              | L'Association des Barreaux du Maroc  | Morocco        |
| Chraibi        | Farouk             | Interpreter/interprète   | Morocco        |
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| El-Bastawisy   | Hesham             | Judge/Juge, Vice President, Constitutional Court                                 | Egypt          |
| Elmrabet       | Aziz               | Interpreter/interprète   | Morocco        |
| El-Yazami      | Driss              | Ligue des Droits de l'Homme, la Federation Internationale des Droits de l'Homme  | France/Morocco |
| Emam           | Nour               | Lawyer/avocat  | Jordan         |
| Fadle          | Mohamed Abou el    | Président de l'Association Marocaine des Bareaux                                 | Morocco        |

|                |                    |  |                     |
|----------------|--------------------|--|---------------------|
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| Hatimy         | Abdeltif           | President, L'Association Marocaine pour la Defense de l'Independance de la Justice   | Morocco             |
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| Jamai          | Abderrahim         | Lawyer/avocat  | Morocco             |
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| Mantakiozidis  | Stavros            | Greek Association of Judges, Magistrats Européens pour la Démocratie et les Libertés   | Greece              |
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| Mkoun          | Abdallah           | Interpreter/interprète   | Morocco             |
| Mouaqit        | Mohammed           | Professor, University of Casablanca  | Morocco             |
| Moukheiber     | Ghassan            | Lawyer/avocat, Adl   | Lebanon             |
| Moustafa       | Yousry             | Ford Foundation  | Egypt               |
| Mugraby        | Muhamad            | Lawyer/avocat, Mirsad  | Lebanon             |
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| Naoui          | Mustapha           | Lawyer/avocat  | Morocco             |
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| Sahraoui       | Hassiba            | Juriste, Cour Internationale de Justice  | Switzerland/Algeria |
| Schade-Poulsen | Marc               | Executive Director, Euro-Mediterranean Human Rights Network  | Denmark             |
| Scolart        | Deborah            | Juriste, Docteur de recherche en Droit Musulman  | Italy               |
| Sebbar         | Mohamed            | President, Forum Verité et Justice   | Morocco             |
| Seghir         | Azzedine Ben       |  | Morocco             |
| Shaial         | Aziz Jabur         | The Bar Human Rights Committee   | Iraq                |
| Shayan         | Aziz               | Director of Baghdad Center for Human Rights Studies  | Iraq                |
| Shakhli        | Akil               | Interpreter/interprète   | Morocco             |
| Stainier       | Caroline           | Lawyer/avocat, Avocat sans Frontières  | Belgium             |
| Swartenbroekx  | Marie Anne         | Magistrats Européens pour la Démocratie et les Libertés  | Belgium             |
| Zarea          | Yasser Ali Mohamed | Human Rights Centre for the Assistance of Prisoners  | Egypt               |

## Annex 2: Programme for Justice Seminar, June 2004

### Programme - Seminar on Justice in the Euromed Region

Organized by EMHRN in collaboration with l'Espace Associatif, l'ADFM, l'AMDH and l'OMDH  
supported by the European Commission and SIDA

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#### Friday 18 June

15.00–16.00

Official opening

- M. Kamel Jendoubi, President of the EMHRN
- Speech by the Moroccan Minister of Justice Mohammed Bouzoubaa
- Ms Birgitta Danielson, Regional advisor, SIDA
- Introductory intervention on the preparation of the seminar and what is at stake: A. Bennani, former president of the EMHRN and the OMDH

16.00-17.00

Reception

17.00-19.00

General presentation of the report:

- Justice, the rule of law and democracy
- International standards on justice and a fair trial
- Methodology and structure of the report and of the seminar
- Moderator: George Assaf, Beirut Bar Association
- General rapporteurs: Mohamed Mouaqit, Professor at the University of Casablanca and Sian Lewis-Anthony, lawyer and Human Rights Consultant
- Discussants: Algeria, Mustapha Bouchachi, Professor, the Faculty of Law, Alger  
Geneva, Mrs. Hassiba Sahraoui, ICJ  
France, Roland Kessous, Deputy Director of the Public Prosecution (*Avocat Général*)

20.00

Departure by bus to Dinner

20.30

Dinner Restaurant Borjdar

## **Saturday 19 June**

*9.30-11.00*

Discussion of the report: Dependence and approaches to independence by the judiciary

- Moderator: Juan Ignazio Patrone, President of the MEDEL
- Presentation: Mohammed Mouaqit and Sian Lewis-Anthony
- Discussant: Hisham al Bastawisy, Judge, Egypt
- Rapporteur: Nour El Emam, Lawyer, Jordan

*11.00–11.30*

Coffee break

*11.30–13.00*

Independence of the judiciary, constitutional law and the rule of law:

- Moderator: Mr. Driss El Yazami, General Secretary of the FIDH
- Presentation: Mohammed Mouaqit and Sian Lewis Anthony
- Discussant: Farouq Al Kilani, former President of the High Constitutional Court , Jordan
- Rapporteur: Caroline Stainier, Lawyer, Belgium

*13.30 –15.00*

Lunch

*15.00 -16.30*

Workshops:

Exceptional justice

- Moderator: Ahmed Othmani, President, Penal Reform International
- Presentation: Mohammed Mouaqit
- Discussant: Merwat Rishmawi, Amnesty International
- Rapporteur: Marie Anne Swartenbroex, MEDEL

Fair trial

- Moderator: Mr Stavros Mantakiozidis, Greek Association of Judges
- Presentation: Sian Lewis Anthony
- Discussant: Muhamad Mugarby, Lawyer, Mirsad, Lebanon
- Rapporteur: Claudia Marinaro, Researcher, Amnesty International

Status and role of actors in the judicial process and in civil society:

- Moderator: Alya Chammari, Lawyer Maghreb Égalité
- Presentation: Abdelaziz Bennani
- Discussant: Ali Amar, Lawyer, Vice president of l'AMDH
- Rapporteur: Anna Bozzo, Professor, University of Rome III, Italy

*16.30-17.00*

Coffee Break

*17.00-18.30*

Workshops (continued)

## **Sunday 20 June**

9.30 - 12.30

Reports from the workshops and discussion

- Moderator: Ahmed Arrehmouch, Lawyer, l'Espace Associatif and Kamel Jendoubi, EMHRN

11.00 -11.30

Break

11.30- 12.45

Discussion of workshop reports continued

12.45 -14.15

Lunch

14.15 -15.45

Presentation of the recommendations and action plans:

- Moderator: Yousri Moustafa, Programme coordinator, Ford Foundation and Marc Schade-Poulsen (EMHRN)
- Rapporteur: Abdelaziz Bennani

15.45 -16.15

Official closure

Representatives of the organizers: EMHRN, ADFM, AMDH, Espace Associatif and OMDH

# JUSTICE IN THE SOUTH - EAST MEDITERRANEAN REGION

Justice lies at the heart of all human rights concerns. It is central to peoples' well being and dignity. Justice is crucial to the development of the rule of law, and to fostering general human rights culture and good governance.

This report addresses one of the most important aspects of human rights in the South and East Mediterranean region: the issue of the legal system and people's access to an independent, impartial, and fair system of justice.

The state of justice is closely linked to the state of democracy. The smooth running of justice does not come before the smooth running of democracy, any more than the smooth running of democracy precedes a legal system operating in compliance with the rule of law. Compliance with democratic standards in itself implies an independent, credible legal system that can only meet these criteria by virtue of a healthy democracy.

The report seeks to address these issues in a comprehensive manner with the goal of recommending measures to the EU and the Euro-Mediterranean Partnership (EMP) and civil society actors, in order to promote the independence of the judiciary in the Euro-Mediterranean region.

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The report is published by the Euro-Mediterranean Human Rights Network (EMHRN) – a network of human rights organizations based in more than twenty countries in the Euro-Mediterranean region. EMHRN was established in 1997 with the main objective to support, protect and promote human rights within the framework of the Barcelona process.

## EMHRN

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