

Fordham International Law Journal

Volume 26, Issue 3

2002

Article 8

The Role of the Judiciary in the Protection of Human Rights and Development: A Middle Eastern Perspective

Fahed Abul-Ethem*

*

Copyright ©2002 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

The Role of the Judiciary in the Protection of Human Rights and Development: A Middle Eastern Perspective

Fahed Abul-Ethem

Abstract

One of the vital ways to keep human rights safe is by preserving the prevailing role of the judiciary. Standards developed by the judiciary have a significant beneficial effect of making the lives of people better and the accomplishment of the government's goals easier. In addition, these standards may ensure a better understanding of the relationship between the people and their government, on the one hand, and among the members of the international community, on the other. Moreover, major countries, such as the United States, have a great responsibility, by virtue of their international weight and technological advancement, to help promote human rights. The major countries should play an active role, especially in situations where the people of the Middle East are willing to contribute to the development of human rights and to show that they have serious intentions to spread peace and stability.

ESSAYS

THE ROLE OF THE JUDICIARY IN THE PROTECTION OF HUMAN RIGHTS AND DEVELOPMENT: A MIDDLE EASTERN PERSPECTIVE

*Fahed Abul-Ethem**

INTRODUCTION

The greatest value of human life is best represented in the recognition of fundamental rights, and in fully enabling people to enjoy and exercise these rights to the extent that preserves their humanity and respects their civility. Life would be meaningless if individuals were not able to practice their natural rights or to adopt the political opinions they believed in. Moreover, life would be unendurable if individuals were unable to enjoy security in their communities. The rights of individuals would be without value if no legal system were able to play an active role in their protection.

The executive branches of Middle Eastern countries enjoy extensive governing privileges, and may possibly misuse these privileges or abuse their powers. Therefore, each system of government should be based on a separation of powers, the independence of those powers, and specifically, the prevailing power of the judiciary. The judicial branch should, therefore, institute limitations and preventions to restrain the powers of the branches in their own domains so as to ensure that the acts of governments remain as lawful as possible.

It is essential that there exist laws outlining the rights of the people and the duties of the State. For this reason, legislators have often carefully drafted rules of civil and criminal procedure so that a particular State could avoid legal pitfalls. These rules should ideally include safeguards so that the State does not abuse its powers or exceed its authority to an extent that negatively affects human rights.

* Formerly Supreme Court Justice in Jordan and currently Attorney-at-Law in Amman, Jordan.

Nevertheless, these rules would be lifeless if there were no other authority that would effectuate the provisions of law. This authority is vested in the judicial branch, which undertakes the substantial responsibility of enforcing the safeguards, thereby protecting human rights. As a result of the influence of the judiciary, individuals may enjoy equality, and the other branches of government may function efficiently.

When the judiciary makes equitable decisions, those decisions set a valuable precedent for the future resolution of disputes between individuals or between the State and individuals. The judicial process emanating therefrom provides for the effective implementation of the law, the protection of the rights of individuals and groups, and sets a standard for the subsequent equitable enforcement of the law. Consequently, human rights receive effective protection in the courts.

Under such a system, parties to a dispute can present evidence in an endeavor to make the court correctly understand the facts of the dispute, and consequently rule in a just manner, reinstating their rights. Similarly, in the penal field, protection of human rights is evident when the accused appears before the court and is permitted to give statements to the judge freely and without any restrictions. If the accused claims to have been subjected to pressure, he or she may present evidence thereon for the purposes of excluding any admissions made while under such pressure. Also, information taken under duress is considered void. Justice necessitates that trials be subject to appeal before higher courts, whereby human rights are solidified.¹

I. *GLOBALIZATION OF HUMAN RIGHTS THROUGH AN EFFECTIVE JUDICIARY: A CASE STUDY OF JORDAN*

The international community has recently witnessed the globalization of human rights to the extent that provisions protecting those rights have been incorporated into many constitutions. In relation to other countries in the region, Jordan has

1. For example, what if an Administration unjustly hinders one's promotion, imposes a disciplinary action against him or her, places him or her in a position below his grade or level, or pensions him or her contrary to the intentions of the legislation? What if an Administration obstructs the licensing of a newspaper that fulfills all the conditions of the license? *See, e.g.*, High Court of Justice of Jordan, Dec. No. 349/96 (Feb. 15, 1997) (author's trans.) (on file with author). The Court ruled in favor of the petitioners to license a newspaper that fulfilled all the licensing requirements.

been at the forefront of human rights protection. For example, Article 6 in the Jordanian Constitution reads as follows:

- (i) Jordanians shall be equal before the law. There shall be no discrimination between them as regards to their rights and duties on grounds of race, language or religion.
- (ii) The Government shall ensure work and education within the limits of its possibilities, and it shall ensure a state of tranquility and equal opportunities to all Jordanians.²

The Jordanian judiciary has been entrusted with the responsibility of ensuring that this provision of its Constitution is fully enforced in order to protect the rights of Jordan's citizens. Article 97 of the Jordanian Constitution grants the judiciary the authority to implement that provision, stating:

Judges are independent, and in the exercise of their judicial functions they are subject to no authority other than that of the law.³

A. *The Judicial System of Jordan*

Chapter 6 of the Jordanian Constitution outlines the role, structure, and function of the Jordanian judiciary.⁴ Article 99 of the Constitution divides the courts into three categories: Special Courts, Religious Courts, and Civil Courts.⁵ In all courts, defendants are entitled to legal counsel, may challenge witness testimony, and have the right of appeal. Defendants facing the death penalty or life imprisonment must be represented by legal counsel. Public defenders are provided at no cost whenever defendants in such cases are financially unable to hire legal counsel.

Cases involving sedition, armed insurrection, financial crimes, drug trafficking, and offenses against the Royal Family are tried in the State Security Court, which is part of the Special Courts. The Religious Courts include the *Shar'ia* (Islamic law) Courts, which have jurisdiction over marriage and divorce among Muslims and inheritance cases involving both, Muslims

2. JORD. CONST., ch. 2, art. 6. Text of the CONSTITUTION is available at <http://kinghussein.gov.jo/documents.html>.

3. *Id.* ch. 6, art. 97.

4. *See generally id.* ch. 6.

5. *See id.* ch. 6, art. 99.

and non-Muslims.⁶ Christian Courts have jurisdiction over marriage and divorce cases among Christians, but apply *Shari'a* laws in inheritance cases.⁷ The Civil Courts, on the other hand, have jurisdiction over civil and criminal cases.⁸ These Courts include the Magistrate Courts, the Courts of First Instance, the Courts of Appeal, the Court of Cassation (Supreme Court), and the High Court of Justice, familiarly known as "the Administrative Judiciary."

1. The Administrative Judiciary and its Functions

As it is unreasonable to leave the affairs of individuals solely to the authority and discretion of the State without imposing limitations on the State, the role of the Administrative Judiciary is to monitor administrative decisions of any public official, in-

6. *See generally id.* ch. 6, art. 104. Article 104 states:

The Religious Courts shall be divided into:

- (i) The *Shar'ia* Courts
- (ii) The Tribunals of other Religious Communities

Id. *See also id.* ch. 6, art. 105. Article 105 states:

The *Shar'ia* Courts shall in accordance with their own laws have exclusive jurisdiction in respect of the following matters:

- (i) Matters of personal status of Moslems.
- (ii) Cases concerning blood money (*Diya*) where the two parties are Moslems or where one of the parties is not a Moslem and the two parties consent to the jurisdiction of the *Shari'a* Courts.
- (iii) Matters pertaining to Islamic *Waqfs*.

Id.

7. *See id.* ch. 6, art. 105.

8. *See id.* ch. 6, art. 102. Article 102 states:

The Civil Courts in the Hashemite Kingdom of Jordan shall have jurisdiction over all persons in all matters, civil and criminal, including cases brought by or against the Government, except those matters in respect of which jurisdiction is vested in Religious or Special Courts in accordance with the provisions of the present Constitution or any other legislation in force.

Id. (as amended in the OFFICIAL GAZETTE No. 1380 of May 5, 1958 and the OFFICIAL GAZETTE No. 1396 of Sept. 1, 1958); *see also id.* ch. 6, art. 103. Article 103 states:

- (i) The Civil Courts shall exercise their jurisdiction in respect of civil and criminal matters in accordance with the law for the time being in force in the Kingdom, provided that in matters affecting the personal status of foreigners or in matters of a civil or commercial nature which in accordance with international usage are governed by the law of another country, such law shall be applied in the manner designated by the law.
- (ii) Matters of personal status are those which are defined by law and in accordance therewith fall within the exclusive jurisdiction of the *Shari'a* Courts where the parties are Moslems.

Id. (as amended in the OFFICIAL GAZETTE No. 1380 of May 4, 1958 and the OFFICIAL GAZETTE No. 1396 of Sept. 1, 1958).

cluding, but not limited to, a Prime Minister or a Cabinet member. This power of review of administrative decisions is exercised by the Administrative Judiciary in order to establish executive legitimacy and to show that the Administration does not have a free hand in wielding authority, but rather, its function is limited to compliance with the prerequisite of observance of the legal rules.

The Administrative Judiciary in its independent capacity provides a shelter for the legally aggrieved. The Administrative Judiciary is the body within the judicial branch of the Jordanian government, therefore, that implements human rights protections and guards against the abuses by the Executive. It ensures justice by combining public interest on the one hand, and the protection of fundamental rights on the other, as guaranteed by the Jordanian Constitution.⁹

In the course of maintaining human rights, the Administrative Judiciary does not totally depend on rigid provisions or precedents. The Administrative Judge attempts to make his or her judgment as equitably as possible, while taking into account all relevant circumstances. In addition, the Administrative Judge strikes a balance between the various interests where he or she is not confined to theoretical principles or abstract ideas, but seeks, with his or her delicate sense, the most appropriate solution to the issue. Oftentimes, the Judge must formulate a judgment on the issue in question where there is no statute on point or no precedent to be followed.

In the scope of such a system, the Jordanian High Court of Justice¹⁰ handed down a number of decisions, which have confirmed the right of equality between individuals with similar positions under the law, such as university students, professors, and public employees. These decisions have been considered monumental in fighting injustice. Particularly, the right of equality has been confirmed with respect to cases involving public employees, including those who had been subjected to unjust disciplinary penalties. Any public employee in Jordan now views the High Court of Justice as a place to which he or she may turn.¹¹

9. See *supra* n.2 and accompanying text.

10. The administrative chamber of the Supreme Court of Jordan is called "the High Court of Justice."

11. See, e.g., High Court of Justice of Jordan, Dec. No. 257/96 (Jan. 29, 1997) (author's trans.) (on file with author). In this case, retirement was imposed on a public

Consequently, with regard to public employees, the Jordanian Administrative Judiciary spreads employment security and allows people to enjoy a feeling of security, stability, and assurance. In a larger sense, the Administrative Judiciary supports the people of Jordan by preserving their rights and effectuating equality. The Administrative Judiciary is the body that restores the rights of citizens and reinstates citizens who have been wronged, or whose freedoms have been restricted, to their previous positions, as required by justice.¹² The role of the Administrative Judiciary is, therefore, significant in keeping the balance of justice: it is the guardian of human rights, and its achievements and the ability to support human rights and freedoms are significant.

II. AN INDEPENDENT JUDICIARY AND HUMAN RIGHTS ORGANIZATIONS AS VEHICLES FOR DEVELOPMENT AND EXPANSION OF A HUMAN RIGHTS LEGACY

The independence of the judiciary of any State striving to protect human rights, is the only guarantee of fairness in the State, and is the main building block of justice. The independence of the judiciary is the key factor that allows the members of the judiciary to be outspoken. Further, the effectiveness of judiciary is an important indicator of the advancement and civilization of a Nation.

The Jordanian Administrative Judiciary, for instance, is not a judiciary that seeks tyrannical authority. Nor does it believe in the subordination of the executive authority. Rather, it is impregnable and independent. This independence strengthens the effectiveness of the courts and enhances the Judiciary's role in the realization of justice and in the restoration of human rights. Without this independence, the possibility of despotism increases and the suspicion of the power of the Judiciary ex-

employee while the employee had not yet reached the age of retirement and was functioning at the highest level of performance. In its decision, the Court ruled in favor of the employee and against the Public Minister, accusing the Minister of abusing his powers and stating that "... the Minister had misled the Cabinet of Ministers by his recommendations . . ." *Id.*

12. *See, e.g.*, High Court of Justice of Jordan, Dec. No. 47/98 (July 30, 1998) (author's trans.) (on file with author). In this case, the High Court Of Justice of Jordan ruled in favor of the petitioner, Dr. Thokan Obeidet, the Secretary General of the Ministry of Youth. The Court overturned the decision of the Council of Ministers to dismiss Dr. Obeidet, because this dismissal was based on personal considerations.

pands. The confidence of citizens in justice would vanish, and citizens' freedoms would have no meaning if the Judiciary did not judge with equity. Consequently, the balance of equality between the citizens would be meaningless if the principles of human rights were diminished.

It is imperative, therefore, that the independence of the courts of law among the Middle Eastern Nations be upheld, maintained, and safeguarded. The international, regional, and local organizations ought to be recognized for their powerful contribution toward the advancement of human rights and the promotion of democracy. Consequently, human rights organizations are an important source for the advancement of the communities. Therefore, the judiciary should exist to keep those organizations active and influential. If the judiciary does not undertake its duties to support human rights activities, the human rights organizations may become an easy target for unfair restrictions made by the government.

We must not shut our eyes to the fact that the Middle Eastern countries, to a variable degree, are still below the required level of cooperation with the civil community organizations which safeguard human rights. For human rights in this region to be translated into a practical reality, there must be an increase in cooperation with organizations that support those rights.

In light of these facts, it is appropriate to examine the relationship between human rights and economic growth. Globalization and free trade have had a far-reaching impact on the Middle East. This impact ought to be comprehended and appreciated since the need for cooperation with Nations outside the region has become inevitable due to the proliferation of the global economy. Since cooperation with other Nations has become almost a necessity, there will be no opportunity for the development of the Middle Eastern economy or investment if the regional "gates" are not opened to attract investors and worldwide business associations.

It is essential for Nations — all Nations — to understand that this will not be possible unless investors ascertain that they are placing their investments where the supremacy of the law provides a stable environment, which allows for the security of the investors' funds. It is also important that, in defining a good

investment, an investor is able to enjoy his rights in the simplest way and at minimum cost.

III. *AN ASSESSMENT OF THE HUMAN RIGHTS RECOGNITION IN THE MIDDLE EAST*

Despite the fact that human rights has been an increasingly recognized and discussed issue throughout the world, recognition of human rights in the Middle East falls far below the required standard. The spread of the concepts of justice and equality, as well as enlightenment regarding fundamental rights of the citizenry so as to stop the threat of injustice, have fallen short. Pursuant to international human rights standards, Middle Eastern governments have an obligation to grant similar positions under the law to all people, regardless of their nationality, race, or religion.

The universality of human rights has always been a cultural, philosophical, and moral issue. In today's world, unfortunately, it has become a political, economic, and development-related issue.¹³ Countries in the Middle East are required to address human rights in this new context despite the fact that each Nation already has its own methods of doing so. Notably, to date, twenty-two international conventions have come into force,¹⁴ creating specific obligations for signatory countries. A number of Middle Eastern countries have joined these conventions.¹⁵ As

13. See Dr. Mohammed Hamleeshi, 6 *ARAB MAGAZINE FOR HUMAN RIGHTS*, (Aug. 1999) (author's trans.) (on file with author).

14. These conventions include the International Covenant on Civil and Political Rights ("ICCPR"); the International Covenant on Economic, Social and Cultural Rights ("ICESCR"); the Convention Against Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination Against Women; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention relating to the Status of Refugees. Text of these conventions may be found at Office of the High Commissioner for Human Rights, *International Human Rights Instruments*, available at <http://www.unhchr.ch/html/intinst.htm>.

15. For status of particular conventions, see United Nations, *Multilateral Treaties Deposited with the Secretary General*, at <http://untreaty.un.org/English/sample/EnglishInternetBible/bible.asp>. For instance, the Convention on the Rights of the Child was signed by a number of Middle Eastern countries, including Jordan, Kuwait, Tunisia, and Morocco. Many Middle Eastern countries entered reservations due to conflicts with religious tenets. The Convention on the Elimination of All Forms of Discrimination Against Women was signed by thirteen Middle Eastern countries. No Middle Eastern countries signed the International Convention relating to the Status of Refugees.

noted earlier, the application of the provisions of human rights conventions in the Middle East is still in its developing stage.

Jordan, as distinguished from other Middle Eastern countries, is a place that provides "better" human rights protections. This is due to the influential role that domestic institutions play in the country, such as the organizations or the foundations of the civil community. The influence of these organizations is due, in large part, to the security that the law provides through the vehicle of an independent judiciary, which protects the people by guarding against an abusive Administration, thereby creating an Executive who functions under an umbrella of legitimacy. Jordanians look forward to the Parliamentary elections, which, they hope, will bring an Assembly that represents the various spectrums of the Jordanian community, in order to undertake the screening of the provisional laws for potential shortcomings and drawbacks.

From an international perspective, Jordan's understanding of the human rights issues and its involvement in the current events, may lead many to view Jordan as an active and important participant in the development of human rights in the Middle East. From this point, the solidarity of Jordan's internal front and its stability are mediums that may contribute to the larger stability in the area and help ward off wars. Of course, the Jordanian judiciary remains an important factor in the realization of justice, stability, security, and safety in Jordan, as well as an essential example of how to formulate a suitable environment for development and prosperity in the Middle East.

The Nations of the world should neither overlook the role of Jordan, nor look at Jordan as simply a moderate regional Nation. Jordan should be recognized for its achievement with respect to human rights thus far, as well as for its ability to have great influence in the entire Middle East region in that regard. Among the Middle Eastern countries, Jordan's location on the global map is a strategic link between the continents. Moreover, like other Middle Eastern States, Jordan is an economic force due to its oil supply, allowing it to be not just a consumer, but an economic player on the global stage.

The innovative and creative minds that exist in the Middle Eastern countries have the potential to play an important role in the development of the region's movement and progress. Thus,

it is important to establish understanding, cooperation, and respectful relations with Middle Eastern countries. This would aid in establishing human rights as a larger interest of the international community and not just an interest unique to a specific country or countries. Therefore, it is not enough to simply speak about human rights and profess theories, but there must also be international cooperation to safeguard, maintain, and ensure human rights throughout the world.

CONCLUSION

One of the vital ways to keep human rights safe is by preserving the prevailing role of the judiciary. Standards developed by the judiciary have a significant beneficial effect of making the lives of people better and the accomplishment of the government's goals easier. In addition, these standards may ensure a better understanding of the relationship between the people and their government, on the one hand, and among the members of the international community, on the other.

Moreover, major countries, such as the United States, have a great responsibility, by virtue of their international weight and technological advancement, to help promote human rights. The major countries should play an active role, especially in situations where the people of the Middle East are willing to contribute to the development of human rights and to show that they have serious intentions to spread peace and stability.