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Judicial Independence

Judicial independence; “the ability of courts and judges to perform their duties free of influence or control by other actors, whether governmental or private. The term is also used in a normative sense to refer to the kind of independence that courts and judges ought to possess”.¹

The principle of judicial independence is one of the most important principles in the protection of human rights; it is the most secure and guaranteed way for the realization of these rights. The judiciary is the most effective and impartial branch of government at overseeing the investigative procedures; including arrest, detention and humane treatment, thereby ensuring fair trial rights without discrimination, as determined by the International Bill of Rights.

No state of law exists unless the judiciary is the only reference for interpreting and applying the law in full accordance with objective standards and criteria.

¹ (Law)

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I. Applicable Laws

1. International Legislation

International Covenant on Civil and Political Rights

Legislation has been issued on an international level; several conventions, declarations and recommendations were aimed at dedicating the basic principles of judicial independence and procedures for its effective implementation, as well as defining the role of lawyers and prosecutors in this regard.

In this area, we mention the International Covenant on Civil and Political Rights who set the standards to achieve the independence of the judiciary being the body responsible for ensuring those rights. Adding the two conferences held in Beirut in 1999 and Cairo in 2003 applied to support and strengthen the independence of the judiciary.

2. Internal Legislation

Lebanese Constitution

The paragraph (e) of the introduction as well as articles 19, 20 and 80 of the constitution contains provisions concerning the principle of separation of powers, their balance and cooperation, the preservation of necessary guarantees for judges and litigants, and finally the independence of judges, and the issuance of decisions and rulings by the courts in the name of the Lebanese People.

Preamble

“E) The political system is established on the principle of separation of powers, their balance and cooperation.”

Article 19

As amended by the Constitutional Law of October 17, 1927 and the Constitutional Law of September 21, 1990.

“A Constitutional Council shall be established to supervise the constitutionality of laws and to arbitrate conflicts that arise from parliamentary and presidential elections. The President of the republic, the speaker of Parliament, the Prime Minister, along with any ten

Members of Parliament, have the right to refer to this Council matters that relate to the constitutionality of laws. The officially recognized heads of religious communities have the right to refer to this Council laws relating to personal status, the freedom of belief and religious practice, and the freedom of religious education. The rules governing the organization, operation, composition of the Council and referral thereto shall be decided by a special law.”

Article 20

Abrogated by the Constitutional Law of October 17, 1927 and introduced by the Constitutional Law of September 21 1990.

“The judicial power shall be exercised by courts of various degrees and jurisdictions. It shall function within the limits of an order established by the law and offering accordingly the necessary guarantees to judges and litigants. The law shall determine the conditions and limits of the judicial guarantees. The judges shall be independent in the exercise of their functions. The decisions and judgments of all courts shall be rendered and executed in the name of the Lebanese People.”

Article 80

As amended by the Constitutional Law of October 17, 1927 and as amended by the constitutional law of September 21, 1990.

“The Supreme Council, whose function is to try Presidents and Ministers shall, consist of seven deputies elected by the Chamber of Deputies and of eight of the highest Lebanese judges, according to their rank in the judicial hierarchy, or, in case of equal ranks, in the order of seniority. They shall meet under the presidency of the judge of the highest rank. The Decisions of condemnation by the Supreme Council shall be rendered by a majority of ten votes. A special law shall be issued to determine the procedure to be followed by this Council.”²

Laws and Regulations

- Decision No. 1905, 12 May 1923: the establishment of the Judicial Council.
- Decision No. 186/L.R. of 15 March 1926: procedure of the appointment of a real estate judge.
- Customs Law.
- The Judicial Regulation Act issued by Decree No. 7855 of 1961.
- The law issued by Decree 7855 dated 16/10/1961.
- The Military Justice Act of April 13, 1968 and its amendments.
- Law No. 10434 on the organization of the State Council on June 14, 1975 and its amendments.
- The Judicial Justice Act issued by Decree No. 150 dated 16/9/1983.
- Decree No. 1937 dated 16/11/1991 related to determining the authority of the Financial Prosecutor's Office.

We can realize after showing the applicable laws that there are no specific laws in Lebanon that regulate or determine the concept of the judicial independence, therefore the

² Constitution

lack of specific laws has caused for the judiciary to become a tool for both the legislative and executive authorities.

"The three scenarios that a court may encounter are:

1. Disputes between private actors,
2. Disputes between government actors, and
3. Disputes between private actors and government actors".³

Therefore the "independence of the judiciary" is translated throughout the actions taken by judges among these three scenarios. As a result independence is defined away from any sort of activities pointing at influencing courts, such as intimidation and bribery.

Independence is considered a means to an end rather than an end in itself. The ultimate objective can be described as the fair and impartial judging of disputes in harmony with law.

³ (Law)

II. Role of Judges in Different Councils

The difficulties at the level of the courts show that the courts and councils in Lebanon, regardless of their powers, fail to assume the responsibility they have due to different influences of the executive power, as follows:

A. The Judicial Council

It acquires its jurisdiction from the referral decree issued by the **government**, and the judicial investigator is appointed by the **Minister of Justice**.

The practical reality has shown that the political authorities intervene in its work in terms of opening its files or referring them to the Council.

B. The Supreme Council for the Trial of Presidents and Ministers

Despite the organization of this council and the determination of its trial procedures, it has not yet undertaken any operational initiative by virtue of its composition and political reference, leaving the impression that the judiciary has failed to fight corruption in governance.

C. The Constitutional Council

Creation

The Constitutional Council was created under Law 250 of 7/14/1993, including Art. 2 that provides that the Council is composed of ten members: five appointed by the Parliament

by an absolute majority, and five appointed by the Council of Ministers by a two-thirds majority of the members of the Government.

Members

By virtue of Art. 3 of Law 250/1993 of 7/14/1993, the members of the Council are chosen from among the former magistrates or those in office and who have exercised judicial or administrative magistracy for at least twenty years, or among the professors of the higher education who have taught a subject in the legal discipline for at least twenty years with the current grade of professor, or among lawyers who have practiced the profession for at least twenty years.

Duration of the Mandate

Art. 4 of the aforementioned law fixes the term of office of members at six non-renewable years. It stipulates that, exceptionally, the mandate of half of the members of the first Council ends after three years by lot and that the five substitute members are appointed for six years by the body which has chosen the titular members.”⁴

After the first Council commission issued a number of decisions about the annulment of electoral laws and processes, the second commission of the Council has shown more "politicized" decisions.

The Council's encirclement was increased by making it abolish transparency from its work; the Council's laws were amended to prevent the registration and dissemination of violations.

The procedures of the appointment of council members have also been amended in a way that it is possible for Parliament to interfere with the nomination of its members.

⁴ (Meshleb)

D. Audit Bureau

“The Audit Bureau is an administrative court that handles the financial judiciary, and its mission is to oversee public funds and funds deposited in the treasury:

- By monitoring the use of these funds and the extent of their application to the laws and regulations in force.

- To decide on the validity and legality of its transactions and accounts.

Prosecuting those responsible for violating the laws and regulations related thereto.

The Audit Bureau is administratively linked to the Prime Minister, based in Beirut.

The Court of Auditors is composed of judges, observers and auditors. It is joined by administrative staff and has an independent public prosecution.”⁵

Its directives, recommendations and important reports on managing irregularities have not been taken into account.

⁵ (Definition)

III. Suggestions

1. True Judicial Independence

Making the judiciary the only reference for the organization of the internal judicial affairs; appointments, transfers, promotions and discipline, and having these procedures carried out on the basis of objective and clear criteria, while preventing the transfer of some senior judges such as the First President of the Court of Cassation, the President of the State Council and the Attorney General of the Court of Cassation and the Government Commissioner to the State Council and the Head of the Judicial Inspectorate, except at their request or after the approval of a special committee of the Ministry of Justice in order to strengthen their positions and independence from the authority that named them.

2. Constitutional Amendment

Amending the Article 19 of the constitution:

“The President of the republic, the speaker of Parliament, the Prime Minister, along with any ten Members of Parliament, have the right to refer to this Council matters that relate to the constitutionality of laws. The officially recognized heads of religious communities have the right to refer to this Council laws relating to personal status, the freedom of belief and religious practice, and the freedom of religious education,”²

To expand the right to review before the constitutional council regarding the constitutionality of laws, as well as insuring publicity, transparency, and the dissemination of the irregularities in his decisions and finally launching the right to argue the unconstitutionality of law before the ordinary judiciary.

3. Move towards Meritocracy

Last but not least, having in Lebanon a sectarian system has increased the dependence of the judiciary on the legislative and executive branches of government, meaning the judiciary is dependent on political parties that generally take on a sectarian character. Some parties are behind naming and appointing the judges here and there, which compromises the integrity of the judge and judiciary and marks the judge off as a tool in the hand of the authorities that had appointed him. Therefore he is made not only dependent but also partial.

This has historically been the main cause of partiality among judges.

The solution may lie in the amendments of the laws responsible of the possibility to have the government by decree name and appoint the judges. The standards and assets used to manage the judiciary, particularly in terms of formations, transfers and promotions, do not protect judges from the interventions of the executive branch and does not give them the necessary conditions for their immunity. While the normal laws governing the organization of the judiciary enshrine the independence of the judiciary in theory, they are subject to the executive authority, particularly in terms of the formation of its bodies, the appointment of its members and its transfers. These formations do not take effect until the approval of the Minister of Justice.

What if judges were to be elected? Might we fall in the same dependence that we are facing on daily basis? Or might it be a way for abolishing dependency of the judiciary that is something undeniably important to the existence of a state of law.

While we may never know whether or not the proposed changes in the above text would completely overhaul our judiciary, or whether there would still be many miles on a long hard road to true justice, one thing remains certain. We cannot stay where we are while the rest of the world moves forward, and any step at the present time would be a step in the right direction – no matter how small and timid.

4. Government Authority

Separate the administrative financial court from the government's authority.

Practical solution: Law proposition on the judicial independence and transparency by MP Georges Okais.

This law proposition can be adopted by the parliament being extremely specific regarding the procedures of establishing the judicial independence throughout a judicial organization and the establishment of a supervision comity of the judicial work.

In conclusion, prominent Lebanese & International Figures have called out for an independent Judiciary.

For example, Melhem Khalaf, President of the bar, talked about its importance: “The biggest obstacle to justice in Lebanon is that our Judiciary is not independent.”⁶

⁶ Translated from the interview with Mr. Kanaan and Mr. Amro, which remained unpublished at the time of writing, but the contents of which were made known to the author of this article. The exact words, in Arabic, are:

العائق الأكبر أمام العدالة في لبنان، هو عدم إستقلالية القضاء

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